NOS. 113107 & 113128

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

Center Partners, Ltd., Urban-Water Tower Associates, Miami Associates, L.P. and Old Orchard Limited Partnership, all Illinois limited partnerships, individually and derivatively on behalf of Urban Shopping Centers, L.P.,	
Plaintiffs / Appellees,	**On Appeal from the Illinois Appellate Court, First District, No. 1-11-0381**
v.	
Growth Head GP, LLC, Westfield America Limited Partnership, Westfield America, Inc., Westfield America Trust, Rouse-Urban, LLC, TRCGP, Inc., The Rouse Company, L.P., The Rouse Company, Rouse LLC, GGP L.P. and General Growth Properties, Inc.,	**There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division**
Defendants / Appellants,	**No. 04 L 012194**
Urban Shopping Centers, L.P., Head Acquisition L.P., SPG Head GP, LLC, Simon Property Group, LP, and Simon Property Group, Inc.,	**Hon. Charles R. Winkler, Judge Presiding**
Defendants.	

BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Andrew Kopon Jr.
Mollie E. Werwas
Stacy M. Kramer
KOPON AIRDO, LLC
233 S. Wacker Dr.
Suite 4450
Chicago, IL 60606
312/506-4450
312/506-4460 FAX

Mary-Christine Sungaila
SNELL & WILMER L.L.P.
600 Anton Blvd.
Suite 1400
Costa Mesa, CA 92626
714/427-7000
714/427-7799 FAX
Pro Hac Vice Admission Pending

Michael Resis
SMITHAMUNDSEN LLC
150 N. Michigan Ave.
Suite 3300
Chicago, IL 60601
312/894-3200
312/894-3210 FAX

TABLE OF CONTENTS

STATEMENT OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

TO THE HONORABLE ILLINOIS SUPREME COURT:

Amici curiae International Association of Defense Counsel and Illinois Association of Defense Trial Counsel file this brief in support of the Defendants-Appellants, GROWTH HEAD GP, LLC, WESTFIELD AMERICA LIMITED PARTNERSHIP, WESTFIELD AMERICA, INC., WESTFIELD AMERICA TRUST, ROUSE-URBAN, LLC, TRCGP, INC., THE ROUSE COMPANY, L.P., THE ROUSE COMPANY, ROUSE, LLC, GGP L.P., and GENERAL GROWTH PROPERTIES, INC. (referred to herein collectively as "the Defendants" or "Westfield").

A. Interest of *Amici Curiae*[1]

Amicus curiae International Association of Defense Counsel ("IADC") is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC has an interest in protecting the attorney-client relationship and the privileges provided for and assumed to be a part of that relationship. IADC members represent clients in a variety of settings, including those who seek counsel outside of

[1] This brief was authored by *amici* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel has made any monetary contribution to the preparation or submission of this brief.

pending litigation. Thus, the IADC has a particular interest in the scope of the subject-matter waiver doctrine, and, in particular, the need to establish pragmatic and workable limits on the potential waiver of otherwise privileged communications, which are critical to preserving candor between clients and their counsel and protecting the attorney-client relationship.

Amicus curiae Illinois Association of Defense Trial Counsel ("IDC") is a voluntary organization of independent lawyers whose experience includes substantial tort practice generally for the defense. The IDC is a not-for-profit organization with approximately one thousand members drawn from every county in Illinois. It and its many members believe that they have a constructive role to play in the development of the law. Members of the IDC regularly rely on and assert the attorney-client privilege on behalf of their clients in their practice and they have an interest in how this Court addresses the important issues surrounding the scope of the subject-matter waiver doctrine in this case.

B. Issue Presented

In this *amicus* brief, we focus on two discrete aspects of the issues identified by the Defendants: whether the subject-matter waiver doctrine extends to undisclosed portions of an attorney-client communication that was partially disclosed outside of litigation, and, if so, how broad the term "subject matter" should be defined in enforcing a waiver.

C. Statement of Facts

Amici curiae incorporate by reference the facts set forth in the Petitions for Leave to Appeal. In preparing this brief, *amici curiae* have relied upon the facts as set forth in

the parties' briefs before this Court and the Opinion of the Appellate Court for the First District, *Center Partners, Ltd. v. Growth Head GP, LLC*, 2011 IL App (1st) 110381. Because the Record in this matter is currently under seal, *amici curiae* have not been able to independently review it.

ARGUMENT

The Illinois Appellate Court held, for the first time in this state, that there is "no reason to distinguish between a waiver occurring during the course of litigation or during a business negotiation," and ordered the disclosure of all attorney-client communications concerning the Defendants' "purchase of Rodamco," even though the Defendants had shared only a portion of that information with each other during negotiations. *Center Partners, Ltd.*, 2011 IL App (1st) 110381, ¶16. In affirming the trial court's order that the Defendants produce these documents, the appellate court engaged in no specific analysis of the particular documents at issue, but relied instead on the circuit court's *in camera* review of some of the documents to determine that the privilege was impliedly waived as to all of them.

In conducting its *de novo* review (*see Ill. Emcasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 393 Ill. App. 3d 782, 785 (1st Dist. 2009)), this Court should reject the broad waiver rule embraced by the appellate court. The rule and approach adopted by the appellate court threatens the breadth and viability of the attorney-client privilege, provides no bright-line guidance concerning the scope and circumstances of potential waiver, permits the subject-matter waiver doctrine to swallow the privilege, and disregards the fundamental differences between business transactions and litigation. For these reasons, the IADC and IDC ask this Court to reverse the appellate court's ruling

and to expressly limit the application of the subject-matter waiver doctrine to judicial disclosures. Alternatively, if the Court does extend subject-matter waiver to communications outside the litigation context, the IADC and IDC urge the Court to narrowly construe the subject matter to which waiver might apply, and provide guidelines for the scope of the subject matter that might be waived.

I. EXTRAJUDICIAL DISCLOSURE OF AN ATTORNEY-CLIENT COMMUNICATION SHOULD NOT WAIVE THE PRIVILEGE AS TO OTHER UNDISCLOSED PORTIONS OF THAT COMMUNICATION.

A. The Scope and Purpose of the Attorney-Client Privilege

The attorney-client privilege is one of the oldest privileges known to the common law. *In re Marriage of Decker*, 153 Ill. 2d 298, 312 (1992). The privilege ensures that a client may provide information to his or her attorney, in confidence, with the knowledge that such information is protected, and neither the client nor the attorney may be forced to disclose the information that has been shared to their judicial adversaries. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 584 (2000). As Illinois courts have recognized, an attorney's ability to advise a client is directly dependent upon that client's willingness to engage in full and frank discussions with the attorney. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 190 (1991); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 117–18 (1982). It is the attorney-client privilege that enables a person to consult freely and openly with his or her attorney without fear of compelled disclosure of the information communicated. *Fischel & Kahn*, 189 Ill. 2d at 584–85; *see also Decker*, 153 Ill. 2d at 312. Further, the attorney-client privilege serves both the immediate needs of the individual client and public ends by ensuring sound and fully-informed legal advice and advocacy. *Fischel & Kahn*, 189 Ill.

2d at 585 (citing *United States v. Zolin*, 491 U.S. 554 (1989); *Upjohn v. United States*, 449 U.S. 383, 389 (1981)).

This Court has defined the attorney-client privilege as follows: "[W]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by himself or the legal adviser," provided the privilege has not been waived. *Fischel & Kahn*, 189 Ill. 2d at 584. The privilege extends both to information relayed by the client to the attorney, and to advice and communications from the attorney to the client. *Flagstar Bank, FSB v. Freestar Bank, N.A.*, No. 09 C 1941, 2009 WL 2706965, at *2 (N.D. Ill. Aug. 25, 2009) (Keys, Mag. J.) (citing *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990)).

The attorney-client privilege is also an evidentiary rule that protects a party from being forced to disclose protected information when requested or compelled to do so in court. *Decker*, 153 Ill. 2d at 312. The privilege attaches to material shared between the attorney and client both inside and outside of litigation. *Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.*, No. 95 C 1303, 1995 WL 360590, at *8 (N.D. Ill. June 14, 1995). Thus, when an individual seeks legal counsel from an attorney in any context, the communications between the two are protected, provided all of the elements of the privilege are satisfied. If the information or material shared is later deemed to be relevant to a legal proceeding, is sought in discovery, or is the subject of a subpoena or other judicial inquiry, the privilege may be invoked to avoid disclosure. *See, e.g.*, *Waste Mgmt.*, 144 Ill. 2d at 190.

Once a communication is shared outside the attorney-client relationship, however, the disclosed communication loses the protection of the privilege. The client may no longer invoke the privilege as a defense to the production of that disclosed document or as a basis for withholding the disclosed communication in litigation. Courts are reluctant, however, to deny a person the protection of the privilege unless it is clear the privilege has, in fact, been waived. *See Fischel & Kahn*, 189 Ill. 2d at 585. As explained by the U.S. District Court for the Northern District of Illinois, "a person should be seldom found to waive his privilege because the very nature of the privilege presumes confidentiality and intention to keep the matter from public disclosure." *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974); *see also Blue Ridge Ins. Co. v. Superior Court (Kippen)*, 202 Cal. App. 3d 339, 345 (Ct. App. 1988) (stressing that the attorney-client privilege "is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege.") (internal quotation marks omitted).

Illinois has carefully preserved the privilege by circumscribing the scope and circumstances under which it may be waived. First, because the privilege belongs to the client, not the attorney, only the client may waive the privilege. *Decker*, 153 Ill. 2d at 313. Inadvertent disclosure during discovery to an adversary in litigation does not waive the privilege. *Baxter Travenol Labs. v. Abbot Labs.*, 117 F.R.D. 119, 121 (N.D. Ill. 1987). Similarly, a party cannot be found to have waived the privilege merely because its attorney, bargaining on the party's behalf, made disclosures about the client's position on the law or facts. *Sylgab Steel*, 62 F.R.D. at 457–58. In addition, where parties are

engaged in a joint or common defense, any information shared amongst those parties remains protected by the attorney-client privilege with respect to third parties. *Graco Children's Prods.*, 1995 WL 360590, at *8. Parties to that relationship may waive the privilege unilaterally, without consent of the others, only by voluntarily sharing privileged information with third parties *after* the formerly aligned parties become adversaries. *Id.* Moreover, the fact that another party may need the privileged information to prove his or her case is insufficient to force waiver of the privilege. *Id.* Mere convenience to the opposing party cannot justify waiver either. *Fischel & Kahn*, 189 Ill. 2d at 585.

The subject-matter waiver doctrine at issue in this case functions as a restraint on both the protection offered by the privilege and the scope of waiver if otherwise privileged information is disclosed. *Flagstar Bank*, 2009 WL 2706965, at *5. Illinois first recognized the subject-matter waiver doctrine in *People v. Gerold*, 265 Ill. 448 (1914). In *Gerold*, the defendant was prosecuted for embezzling money while in corporate office. *Id.* at 450. The defendant happened to be a former client of the attorney retained by the State to direct the prosecution. *Id.* at 470. In his defense, the defendant testified that the prosecutor had used their prior relationship to gain information that was later used in the prosecution of the criminal case. *Id.* at 472. The prosecutor then testified as a witness, disputing the testimony of the defendant. *Id.* at 473. The defendant objected to the prosecutor's testimony, asserting that the attorney-client privilege barred the prosecutor from testifying about confidential communications. *Id.* at 481. The Court, however, ruled that, by testifying to the conversations himself, the defendant had waived the attorney-client privilege not only as to the matters that the

defendant chose to disclose, but also as to any other conversations with the attorney concerning the same subject matter. *Id.*

As *Gerold* shows, the doctrine is intended to prevent a party to a lawsuit from transforming the privilege from a defensive protection into an offensive weapon by using it to reveal only portions of confidential matters favorable to its case, while hiding portions which might be harmful. *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, Nos. 81 C 7076, 82 C 6895, 85 C 3521, 1987 WL 20408, at *3 (N.D. Ill. Nov. 20, 1987). Following *Gerold*, Illinois courts have invoked the subject-matter waiver doctrine as a means of preventing parties from partially disclosing otherwise privileged communications with their attorneys to gain a tactical or strategic advantage in litigation. *In re Estate of Hoover*, 226 Ill. App. 3d 422, 431 (1st Dist. 1992); *see also Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286, 288 (N.D. Ill. 1976) (noting that the privilege "is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former"). Thus, where a party voluntarily discloses some privileged information during litigation, he is deemed to have waived his ability to invoke the privilege if he is compelled to produce or testify about undisclosed communications concerning the same subject matter. *Int'l Harvester's*, 1987 WL 20408, at *3.

The doctrine has not, however, been extended to include a waiver of all communications between the disclosing party and his attorney. *Hoover*, 226 Ill. App. 3d at 431. Rather, the doctrine is limited to waiving communications that concern the same subject matter as the disclosed material. *In re Grand Jury Jan. 246*, 272 Ill. App. 3d 991, 996 (1st Dist. 1995). As at least one Illinois court has recognized, an overly broad

interpretation of any attorney-client waiver doctrine risks eliminating the entire scope of protection afforded by the privilege. *In re Estate of Wright*, 377 Ill. App. 3d 800, 806 (2d Dist. 2007). *Wright* involved a dispute concerning a will and application of the "at issue" waiver doctrine, which is similar to the subject-matter waiver doctrine and provides that a client waives the attorney-client privilege in cases where the attorney places attorney-client communications "at issue." *Id.* at 805. The petitioner sought to invalidate an amendment to his mother's will, which classified what he contended was a gift as money that had been loaned to him by his mother. *Id.* The amendment specifically referenced conversations between the deceased mother and her attorney as the basis for the amendment. *Id.* The petitioner argued that, because the executor bank placed the amendment at issue, it had waived the attorney-client privilege as to all communications between the decedent and her attorney. *Id.* The court rejected this argument, however, noting that such a broad waiver doctrine "would quickly swallow the attorney-client privilege and frustrate the important policy considerations it exists to protect." *Id.* at 806. As an example, the court noted that if a party had placed a contract "at issue," it could not be held to have waived the attorney-client privilege as to all communications concerning the drafting of that contract. *Id.*

B. The Subject-Matter Waiver Doctrine Should Be Limited to Disclosures that Occur During Litigation.

The Illinois cases that analyze the logical underpinnings of the subject-matter waiver doctrine focus on the need to prevent the simultaneous use of the privilege as both a "sword" and "shield" in litigation. *See, e.g.*, *Grand Jury Jan. 246*, 272 Ill. App. at 997 (applying the subject-matter waiver doctrine after the client testified in her deposition regarding communications with her attorneys); *People v. O'Banner*, 215 Ill. App. 3d 778,

793 (1st Dist. 1991) ("[W]here a defendant has taken the stand and testified as to portions of conversations with her attorney, this conduct amounts to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject."); *Newton v. Meissner*, 76 Ill. App. 3d 479, 499 (1st Dist. 1979) ("By voluntarily testifying as plaintiff did, that she told her attorney sometime after the deposition that she had no independent recollection of the accident, she waived the privilege and opened the way for [the attorney] to testify concerning this particular matter."); *People v. O'Connor*, 37 Ill. App. 3d 310, 314 (3d Dist. 1976) ("In holding defendant has waived the attorney-client privilege by testifying to part of the conversation, the further testimony of the attorney is relevant where the client has questioned the attorney's representation and handling of his case.").

Indeed, extending the subject-matter waiver doctrine to non-judicial disclosures, as the appellate court did here, ignores significant differences between the litigation process and all other circumstances under which clients seek the assistance and advice of counsel. When a client approaches an attorney for assistance within the litigation context, the client is already aware of a known adversary. The adversarial nature of litigation creates a heightened sense of awareness of the need to protect confidential information from disclosure to an opponent. The client likely has an expectation that disclosure of any privileged information relevant to the litigation may result in waiver of the privilege. Parties to litigation are also aware that their conduct is governed by specific procedural and evidentiary rules. The attorney and client can make informed decisions regarding the way in which they conduct their communications to avoid inadvertent or unintentional disclosure to their opponents. Alternatively, if the client and

attorney determine that some disclosure of confidential information may be to the client's advantage, they can make strategic choices regarding that disclosure, while remaining cognizant of the fact that disclosure could waive the privilege as to the entire subject matter of that disclosure. *See Gerold*, 265 Ill. at 481.

By contrast, outside the adversarial setting of litigation, clients are less likely to anticipate the risk associated with disclosure of otherwise privileged information, particularly when disclosure serves the client's immediate needs and litigation is not anticipated. Clients seek the counsel and advice of their attorneys in a myriad of contexts outside of litigation, often in an effort to avoid future litigation. For instance, the client may seek the advice of an attorney while working collaboratively with a business associate on a deal, as in the case at bar. In business transactions, the participants try to work toward a common resolution. As part of that process, a participant may need to discuss his lawyer's concerns related to a term in the deal. Disclosure of the otherwise privileged communication allows the participants to work together and alleviate that concern and facilitate the transaction.

The client may also need the attorney's advice in a variety of other business contexts: for example, in developing employment policies, in obtaining a patent, in registering a trademark, in providing information to a public or private regulatory entity, in buying or selling property, in drafting a will or other estate planning, in determining whether the assistance of counsel is needed on a particular issue, or in acting as a representative or spokesperson for the client.

The matters discussed by the attorney and client in these extrajudicial situations may be different from those involved in litigation, but are no less sensitive. Yet, without

the specter of pending or anticipated litigation, the client may be less cognizant of the need to vigilantly preserve the attorney-client privilege. The client also may have strategic reasons to make certain limited disclosures to the parties with whom it is working, or to others. In light of the obvious differences between a client's purpose in working with counsel during litigation, as compared to outside the litigation context, a distinction should be made between the application of the subject-matter waiver doctrine to judicial and non-judicial disclosures.

The purpose of the subject-matter waiver doctrine is not furthered by extending waiver to the non-judicial context, particularly when the disclosures have not been made for any tactical gain. Unlike disclosures made in litigation, non-judicial disclosures do not have the effect of manipulating the judicial process, and there is no need for the disclosure to result in waiver of the entire subject matter to protect the integrity of that process. Instead, disclosures made in the context of a business negotiation, as in this case, are more akin to the circumstances considered by the Northern District of Illinois in *Sylgab Steel & Wire Corporation v. IMOCO-Gateway Corporation*, in which the court held that a party cannot be found to have waived its privilege based merely on a bargaining position asserted by the client's attorney. 62 F.R.D at 458. In *Sylgab Steel*, a patent dispute, the plaintiff argued that the defendant waived the privilege when the defendant's counsel wrote a letter to the plaintiff stating that the plaintiff's patent was invalid, unenforceable, and not infringed upon by the defendant. *Id.* at 457. The plaintiff contended that this communication disclosed opinions rendered by defense counsel to the plaintiff, and should result in waiver of the subject matter of defense counsel's opinions and information supplied by the defendant upon which such opinions were based. *Id.*

The court disagreed, noting that "clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that the confidential facts communicated to the attorney and the private opinions and reports drafted by an attorney for his client become discoverable." *Id.* at 458.

The subject-matter waiver doctrine should be limited to judicial disclosures. A client who chooses to disclose advice he has received from counsel in a non-judicial setting for purposes of negotiating a business deal like the one here should be able to do so without fear that he has waived the attorney-client privilege as to all communication concerning the same subject matter if that information is later sought in connection with litigation.

C. Adopting a Distinction between Judicial and Non-judicial Disclosures Is Consistent with the Approach Taken by Other Jurisdictions.

By limiting the subject-matter waiver doctrine to judicial disclosures, this Court would bring Illinois into conformity with other jurisdictions that have similarly refused to extend the subject-matter waiver doctrine to non-judicial disclosures. Indeed, federal and state courts across the country have drawn a distinction between extrajudicial disclosures and those that occur during litigation. For example, in *In re von Bulow*, the Second Circuit considered disclosures made by the attorney who had represented von Bulow in a celebrated criminal action in which von Bulow was accused of killing his wife. 828 F.2d 94, 96 (2d Cir. 1987). Following the conclusion of the criminal case, which ultimately resulted in von Bulow's acquittal, von Bulow consented to his attorney writing a book which contained several conversations between the two of them. *Id.* At the same time, the family of von Bulow's wife pursued a civil claim against von Bulow, and argued that the disclosure of certain conversations in the attorney's book should result in a waiver of

attorney-client privilege as to all other communications concerning the same subjects as the disclosed conversations. *Id.* The Second Circuit, however, refused to extend the subject-matter waiver doctrine to the disclosures made by von Bulow's counsel in the book. *Id.* at 102. The court held that "the extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary's prejudice—does not waive the privilege as to the undisclosed portions of the communication." *Id.*

The *von Bulow* doctrine has gained traction in other circuits as well, and courts have been reluctant to extend the waiver doctrine to extrajudicial disclosures, particularly when those disclosures are not made for the purpose of gaining any strategic advantage in litigation. *See, e.g., In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24 (1st Cir. 2003). As the First Circuit has explained, limiting the waiver to judicial disclosures "makes eminently good sense," because:

> When an attorney participates in an extrajudicial meeting or negotiation, his participation alone does not justify implying a broad subject matter wavier of the attorney-client privilege. There is a qualitative difference between offering testimony at trial or asserting an advice of counsel defense in litigation, on the one hand, and engaging in negotiations with business associates, on the other hand. In the former setting, the likelihood of prejudice looms: once a litigant chooses to put privileged communications at issue, only the revelation of all related exchanges will allow the truth-seeking process to function unimpeded. In the latter scenario, however, such concerns are absent.

Id. As acknowledged by the First Circuit, it is the absence of *legal* prejudice to a later, and often unforeseen, litigation adversary, which limits the waiver of an extrajudicial disclosure to the communication actually disclosed. Where a party has not "thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the attorney-client privilege." *Id.* at 25. Moreover, as the First

Circuit recognized, limited disclosures are often needed in a business negotiation to further the negotiation and/or make informed, strategic decisions going forward. *See, e.g., id.* ("The call took place entirely outside the judicial context. The parties to it were co-venturers bent on ironing out wrinkles and reaching a joint business decision.").

The First and Second Circuits are not alone in limiting the subject-matter waiver doctrine to judicial disclosures. The same approach has been applied, for example, by federal and state courts in California, Connecticut, Florida, and Pennsylvania as well. *See, e.g., Pensacola Firefighters' Relief & Pension Fund Bd. of Dirs. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:09CV53/MCR/MD, 2010 WL 4683935, at *7 (N.D. Fla. Nov. 10, 2010) (holding that statements made years prior to the commencement of litigation were no longer privileged, though they did not justify a subject-matter waiver of other, undisclosed communications); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, No. 00-CV-737, 2004 WL 1950318, at *4 (E.D. Pa. Aug. 31, 2004) (Scuderi, Mag. J.) ("Where, as here, the alleged waiver occurs in a corporate conference call, such extrajudicial disclosure does not give rise, by implication, to a broad subject-matter waiver unless the confidential information so revealed is later reused in a judicial setting.") (internal quotation marks omitted); *Transamerica Title Ins. Co. v. Superior Court (Bank of the West)*, 188 Cal. App. 3d 1047, 1053 (Ct. App. 1987) (disclosing an attorney's opinion letter as justification for filing a declaratory relief action did not justify a subject-matter waiver of the privilege beyond the letter disclosed); *Kowalonek v. Bryant Lane, Inc.*, No. CV 960324942S, 2000 WL 486961, at *9 (Conn. Super. Ct. Apr. 11, 2000) (limiting the scope of waiver to the communications actually disclosed at an extrajudicial grievance hearing).

Moreover, in states where the attorney-client privilege and waivers are statutorily defined, courts are reluctant to unilaterally broaden the circumstances of waiver where the legislature or other rule-making body articulated a much narrower standard. *See* H. Thomas Watson, *No "Implied Waiver" of the Attorney-Client Privilege*, VERDICT, 1st Quarter 2009, at 15, 15–16 (citing *Wells Fargo Bank v. Superior Court (Boltwood)*, 22 Cal. 4th 201, 206 (2000)). For instance, Rule 502 of the Federal Rules of Evidence applies the subject-matter waiver doctrine only to disclosures made within the context of a federal court proceeding or to a federal office or agency, and implicitly refuses to extend waiver to extrajudicial proceedings. FED. R. EVID. 502. Illinois appears to be moving toward this federal approach. Currently, the Illinois Rules of Evidence provide for interpretation of the privileges, generally, in a manner that is consistent with the common law. ILL. R. EVID. 501. As discussed herein, with the exception of the appellate court's ruling in this case, Illinois common law has applied the subject-matter waiver doctrine only in cases of judicial disclosures, and does not support extension of the doctrine to extrajudicial disclosures. Indeed, the Special Supreme Court Committee on Illinois Evidence is currently proposing the adoption of an Illinois Rule of Evidence that would mirror Federal Rule of Evidence 502 in applying the subject-matter waiver doctrine only to disclosures made in an Illinois proceeding or to an Illinois office or agency. Special Sup. Ct. Comm. on Ill. Evidence, Proposal 11-01 (2011).

In the context of business negotiations, specifically, courts in other jurisdictions have expressly acknowledged the need to differentiate between a party attempting to make tactical use of the disclosure in litigation, and an extrajudicial disclosure in business negotiations, which imposes no legal prejudice on the party's subsequent litigation

adversary. *See, e.g.*, *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 210 (S.D.N.Y. 2000); *Fed. Election Comm'n v. Christian Coal.*, 178 F.R.D. 61, 74 (E.D. Va. 1998) ("[S]ubject matter waiver is appropriate only when the party seeking the privilege previously waived the attorney-client privilege to make some tactical use of the documentation.").

Calvin Klein, for example, involved an asset purchase in which the plaintiff's management began exploring the possibility of selling Calvin Klein, Inc. to prospective purchasers. 124 F. Supp. 2d at 208. As part of that process, the plaintiff's attorneys drafted various offering memoranda and other disclosure documents to be given to prospective purchasers. *Id.* The defendant sought disclosure of those documents, and sought further discovery of undisclosed communications that formed the basis for, and accuracy of, such disclosures. *Id.* at 208–09. In denying the defendant's request of the undisclosed communications, the court reasoned,

> [T]he Court is cognizant that some authority suggests that a party's voluntary disclosure to a third party waives privilege not only with respect to the details underlying the data which was to be published, including *inter alia*, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the disclosure. If read as defendants would read them, such cases would render it virtually impossible for a corporate client to have a candid and full discussion with its counsel as to what should be disclosed to a prospective purchaser or customer, since any disclosure would waive privilege as to those discussions. On closer reading, however, it is clear that the aforementioned cases, and other cases relying upon them, in addition to involving very different factual scenarios from the one present here, typically involve situations in which the party making the disclosure was seeking to use it affirmatively in the controversy at issue without permitting its adversary to inquire about the basis or accuracy of the disclosure: in other words, the classic sword instead of shield.

Id. at 210 (internal quotation marks and citations omitted).

This precedent further supports this Court adopting a similar distinction between judicial and non-judicial disclosures.

D. If the Subject-Matter Waiver Doctrine Is Held to Apply to Disclosures Made Outside the Context of Litigation, It Could Threaten the Privilege in a Variety of Contexts Beyond Real Estate Transactions.

Applying the subject-matter waiver doctrine outside the adversarial setting of litigation would threaten to swallow the entire privilege with respect to communications between clients and attorneys in a myriad of extrajudicial contexts. Below, we provide some examples of situations in which clients may be called upon to make limited or partial disclosures of privileged information for purposes other than to gain a tactical advantage in litigation. These examples demonstrate the potential broad impact failing to limit the subject-matter waiver doctrine to judicial disclosures might have.

1. Settlement Negotiations

Parties often rely on the presumption that matters discussed during settlement negotiations are, generally speaking, not available for use as evidence in a case and, as such, may make limited disclosure of privileged information that supports their settlement position. For example, in *AMCA International Corporation v. Phipard*, which involved a dispute over the defendant's assignment of certain patent rights to the plaintiff, a memorandum/opinion letter prepared by the plaintiff's corporate counsel was disclosed to the defendant during settlement negotiations. 107 F.R.D. 39, 40 (D. Mass. 1985). Based on this disclosure, the defendant sought to discover all prior and subsequent communications between the plaintiff and its counsel concerning the interpretation of the contracts at issue, without regard to whether those communications were prepared during or prior to the pending litigation. *Id.* The District Court of Massachusetts denied the

defendant's request, limiting the scope of the waiver to the disclosed letter and communications relating to the writing of that letter. *Id.* at 44. Had the court not limited the scope of the waiver, the plaintiff could have been forced to produce all communications with its client relating to the drafting of the contract, the counsel's recommendation of terms to include, confidential business information relevant to the contracts, and other similar matters. Faced with that type of result, the client may have opted to forego use of the memorandum during settlement negotiations.

2. Business and Other Negotiations

As noted briefly above, parties to various types of negotiations may be called upon, or may decide for strategic purposes, to disclose otherwise privileged communications for negotiation purposes. An overly-broad application of the subject-matter waiver doctrine may have an even more significant effect on parties in these negotiations than in settlement negotiations. For instance, returning to *AMCA*, had the Massachusetts court required disclosure of communications generated during the contract negotiations that presumably preceded the litigation, the client may have elected to limit the involvement of counsel in the drafting of future contracts, or refrained from providing highly sensitive information to counsel during contract drafting, out of fear that this information may be subject to waiver in future litigation if it were ever disclosed to a third party. *See also Sylgab Steel*, 62 F.R.D. at 485. Parties to negotiations should not be forced to exclude their counsel from involvement in business transactions, or be placed in a position where they cannot refer to advice received from their counsel, in order to preserve the attorney-client privilege. Unlike with judicial disclosures, the limited disclosure of privileged communications in business and other negotiations imposes no

legal prejudice upon parties, so the protection of the subject-matter waiver doctrine is unnecessary. There is no recognized duty amongst parties to a business negotiation concerning the matters disclosed in those negotiations; instead, parties are encouraged to conduct their own due-diligence investigations to protect their interests. *See Moorman Mfg. v. Nat'l Tank*, 91 Ill. 2d 69 (1982); *Freeman v. Ernst & Young*, 516 N.W.2d 835 (Iowa 1994); *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867 (Minn. Ct. App. 1995); *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or. 149 (1992). The subject-matter waiver doctrine should not, therefore, be broadly applied to partial disclosures in negotiations. To do so would effectively impose a previously unheard of duty to fully disclose otherwise privileged information.

3. Grand Jury Investigations/Testimony

In connection with a grand jury investigation, clients may receive subpoenas compelling them to testify on matters or produce documents which would otherwise be shielded by the attorney-client privilege. *See, e.g.*, *John Doe Co. v. United States*, 350 F.3d 299 (2d Cir. 2003); *In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000). In preparing for grand jury testimony or a production response pursuant to a subpoena, clients consult with their counsel. Due to the compelled nature of grand jury testimony and document production, courts have expressed reluctance in applying a subject-matter waiver to undisclosed communications in subsequent litigation proceedings. *See, e.g.*, *John Doe Co.*, 350 F.3d 299; *Grand Jury Proceedings*, 219 F.3d 175.

The Second Circuit addressed this issue in a pair of cases concerning a grand jury investigation into a company's allegedly illegal sale of firearms and other contraband. *See, e.g.*, *John Doe Co.*, 350 F.3d at 300; *Grand Jury Proceedings*, 219 F.3d at 179.

After learning of its involvement in facilitating firearms transactions and sales, John Doe Co. reported the information to the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). *Grand Jury Proceedings*, 219 F.3d at 179. A grand jury investigation commenced. *Id.* As part of that investigation, the grand jury subpoenaed four John Doe Co. employees to testify in the proceedings. *Id.* at 180. During one witness's testimony, he repeatedly asserted that the Company had invoked its attorney-client privilege and he was unauthorized to divulge the contents of any privileged communications. *Id.* However, he made several statements during his testimony that included generalized references to his counsel's advice, which the government argued constituted a waiver of the attorney-client privilege. *Id.* Based on the witness's statements before the grand jury, the government sought production of other withheld documents in the subsequent district court proceeding. *Id.* at 181.

The Second Circuit expressed reluctance about recognizing a waiver of the attorney-client privilege in compelled testimony before the grand jury, and in applying the subject-matter waiver doctrine to such a disclosure. *Id.* at 188. The court explained that fairness principles must dictate the analysis. *Id.* at 183, 185. As part of this fairness analysis, the court noted that grand jury investigations, specifically, are not restrained by the procedural and evidentiary rules that govern criminal and civil trials. *Id.* at 189. Rather, they are more akin to other "extrajudicial" contexts. *Id.* Therefore, in remanding the case, the Second Circuit suggested "that it would be unfair to impute a waiver to Doe Corp. on the basis of Witness's mention of his reliance on the advice received from Doe Corp.'s attorneys." *Id.*

As a further part of the grand jury investigation, John Doe Co. submitted a letter to the U.S. Attorney's Office, asserting an intention "to promote an expeditious resolution" of the investigation. *John Doe Co.*, 350 F.3d at 301. The letter advised that John Doe Co. had proceeded in the good faith belief that its actions in connection with the firearms transactions conformed with the law, based in part on discussions with ATF personnel and counsel. *Id.* Upon receipt of the letter, the government requested that a grand jury subpoena be issued for notes taken by John Doe Co. attorneys during their meetings with ATF personnel. *Id.*

Relying again on fairness principles, the Second Circuit vacated the district court's order of disclosure. *Id.* at 306. In so holding, the Second Circuit reasoned that the "unfairness and distortion of process" identified by the *von Bulow* court as justification for a finding of forfeiture "has been found when one party advanced a contention to a decisionmaker, such as a court or jury, while denying its adversary access to privileged materials which might have been used to rebut the privilege holders contention." *Id.* The court found no such unfairness to be present in the case at bar. *Id.*

4. Public/Media Disclosures

Courts have also distinguished disclosures made in public or other media contexts from disclosures made during litigation, finding the subject-matter waiver doctrine to be inapplicable in the former situation because no *legal* prejudice has been imposed on the party's adversary. As the Second Circuit explained in rejecting application of the doctrine to disclosures made by counsel for former defendant, von Bulow, in a book about the case:

> [W]here, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no

> reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of legal prejudice until put at issue in the litigation by the privilege-holder.

von Bulow, 828 F.2d at 103; *see also Brown & Williamson Tobacco Corp. v. Wigand*, No. 101678/96, 1996 WL 350827 (N.Y. Sup. Ct. Feb. 28, 1996) (television interview).

Courts have also refused to apply the doctrine to public statements made about a pending investigation. *Sullivan v. Warminster Township*, 274 F.R.D. 147 (E.D. Pa. 2011), involved a civil action brought against a police department, arising out of the shooting death of the plaintiffs' son. Following the shooting, counsel for the police department performed an internal investigation and issued a report with its conclusions. *Id.* Upon conclusion of the investigation, the police department publicly announced that the investigation had revealed no improprieties in the officers' behavior or department policies. *Id.* at 149. Specifically, the chief of police was quoted as saying, "We've gotten a clean bill of health of everything." *Id.* Plaintiffs learned of the existence of the attorney's report during subsequent discovery in a later litigation proceeding and sought its production, arguing, in part, that any privilege had been waived by the police chief's statement to the press. *Id.*

The court, however, denied the plaintiffs' request, holding that the police chief's disclosure, made before the plaintiffs filed the lawsuit, did not effect a waiver of the attorney-client privilege concerning the remainder of the attorney's report. *Id.* at 154. The court recognized the sound distinction between waivers that occur within the context

of judicial proceedings, and extrajudicial waivers. *Id.* ("Courts generally hold that disclosures that occur outside the context of a judicial proceeding do not implicitly waive the privilege as to all communications on the same subject matter."). Applying that distinction, the court reasoned that no prejudice or unfairness resulted to the plaintiffs on account of the extrajudicial disclosure, as they were entitled to cross-examine witnesses at trial regarding the underlying facts of the action. *Id.*

5. Patent Disputes

Clients may also need to make limited disclosures of otherwise privileged information during ongoing patent disputes, particularly concerning the validity and potential infringement of the patent at issue. Courts have found that disclosure of these communications does not give rise to a broader waiver of the privilege either. *See, e.g.*, *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, No. CIV.A.3:98-CV-2996-D, 2002 WL 1592606 (N.D. Tex. July 17, 2002). In *Aspex Eyewear*, the defendant sent a letter to its customers, stating that its patent lawyers had concluded that it was not infringing on the plaintiff's patent and that a patent was pending for its own design. *Id.* at *1. Attached to the letter was the opinion letter regarding the infringement allegation, written by the defendant's litigation counsel. *Id.* The court held that the distribution of the letter did not constitute a waiver of the attorney-client privilege as to the subject matter of the letter, because "the disclosure of the communication is extrajudicial and poses no risk of truth garbling." *Id.* at *4.

6. Compliance with SEC Filing Requirements

Companies subject to regulation by the Securities and Exchange Commission ("SEC") are compelled to file periodic statements with the agency. *See, e.g., In re BP*

Prods. N. Am., Inc., 263 S.W.3d 106, 115 (Tex. Ct. App. 2006). When a "material event" occurs that could potentially impact a company's financial standing, the company must file additional reports. *Id.* In preparing those reports, companies are often aided by their attorneys, who, in turn, create or rely on otherwise privileged documents in making the required disclosures. Julie Hardin et al., *Complying with SEC Filing Requirements: Do you risk waiving the privilege?*, 74 DEF. COUNS. J. 2 (Apr. 2007); *see, e.g.*, *BP Prods.*, 263 S.W.3d 106 (declining to find subject-matter waiver of BP's disclosure of its reserve figure to the SEC).

To avoid a result in which an attorney and his client cannot freely and frankly discuss all facts relating to non-judicial matters, for fear that any non-judicial disclosure may result in waiver of the entire privilege, the subject-matter waiver doctrine must be limited to judicial disclosures only. Any waiver of the attorney-client privilege in a non-judicial context should waive the privilege only as to the matter disclosed, and should not extend to the entire subject matter of the disclosure.

II. IF THIS COURT NONETHELESS APPLIES THE SUBJECT-MATTER WAIVER DOCTRINE TO THIS CASE, IT SHOULD PLACE CLEAR LIMITS ON THE SCOPE OF THAT WAIVER IN ORDER TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND RELATIONSHIP.

Should this Court nonetheless decide to apply the subject-matter waiver doctrine here, outside the litigation context, it should place clear limits on such a waiver and any waiver "must be narrowly construed and limited to matters 'as to which, based upon [the client's] disclosures, it can reasonably be said [the client] no longer retains a privacy interest.'" *San Diego Trolley, Inc. v. Superior Court (Kinder)*, 87 Cal. App. 4th 1083, 1092 (Ct. App. 2001). There is currently little guidance under Illinois law as to how

broadly to define the "subject matter" that is considered waived under the doctrine. As the case at bar demonstrates, however, absent such guidance, the scope of the subject-matter waiver may be broadly defined to encompass all documents relating to a particular transaction, effectively swallowing the privilege in its entirety. *See also Hoover*, 226 Ill. App. 3d at 431. As has been expressed by Illinois courts, this is not the intent of the subject-matter waiver doctrine. *Id.* Moreover, in the absence of clear criteria for determining the scope of the waived subject matter, clients and their attorneys will be unable to predict how broadly a limited disclosure may be construed. *See von Bulow*, 828 F.2d at 100. As stated by the *von Bulow* court, both clients and attorneys must be able to predict, with some degree of certainty, which of their discussions are privileged, as "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." *Id.*, *cited in Grand Jury Proceedings*, 219 F.3d at 182. Consequently, in order to properly effectuate the subject-matter waiver doctrine, while preserving the attorney-client privilege, the scope of the subject matter to which waiver might apply must be narrowly defined and guidelines should be established to help parties predict, with some degree of certainty, the types of information that will be subject to disclosure if other limited disclosures are made on the same subject matter.

A. If the Subject Matter of Undisclosed, Privileged Communications Is Defined Too Broadly, It Could Subject the Entirety of the Attorney-Client Relationship to Disclosure.

As we previously discussed, and the Defendants in this case have asserted, the subject-matter waiver doctrine is intended to prevent parties from "unfairly seeking to use privileged communications as a 'sword' in litigation by revealing those communications

that suit their purposes, while simultaneously invoking the privilege as a 'shield' against discovery regarding other less favorable communications on the same subject." (Westfield Pet. at 9); *see Int'l Harvester's*, 1987 WL 20408, at *3 ("A court cannot permit a party to a lawsuit to turn a privilege from a defensive protection into an offensive weapon, by using it to reveal only those portions of confidential matters favorable to its case while hiding portions which might be harmful."); *Smith v. Alyeska Pipeline Serv. Co.*, 538 F. Supp. 977, 979 (D. Del. 1982) ("It would be unfair to allow a client to assert the attorney-client privilege and prevent disclosure of damaging communications while allowing the client to disclose other selected communications solely for self-serving purposes.").

Even within the context of testimonial or other judicial disclosures, the doctrine was *not* intended to deprive clients of the protections afforded by the attorney-client privilege in their entirety. *Hoover*, 226 Ill. App. 3d at 431. As the court in *Gerold* stated when first discussing the issue of subject-matter waiver in this state, "such waiver extends no further than the subject-matter concerning which testimony had been given by the client." *Gerold*, 265 Ill. at 481. Voluntary disclosure of confidential information does not effectively waive the attorney-client privilege as to all other undisclosed communications which may have taken place. *Hoover*, 226 Ill. App. 3d at 431. In other words, the waiver must be limited to the narrow subject matter of the voluntary disclosure, and not applied as a blanket waiver. *Id.*

In re Estate of Hoover concerned a will contest action in which the plaintiffs, a son and grandchildren of the testator, alleged that other family members had asserted undue influence to cause the testator to disinherit the plaintiffs. *Id.* at 424. One of the

family members alleged to have asserted such influence was the disinherited son's wife, Nancy. *Id.* at 425. Nancy produced documents and testified regarding the content of specific conversations between herself and the attorney who represented her in her divorce from the testator's son. *Id.* at 430–31. When her attorney was subpoenaed for deposition, Nancy's current counsel objected to questions related to Nancy's conversations with her attorney on the grounds of attorney-client privilege. *Id.* In considering the scope of the subject matter over which Nancy waived the privilege, the court ruled that the privilege had been waived only with respect to the specific conversations disclosed by Nancy. *Id.* at 431. The privilege remained intact as to all other conversations between Nancy and her attorney. *Id.*

Similarly, the U.S. District Court for the Northern District of Illinois recognized the need to narrowly construe the scope of the subject-matter waiver doctrine in a case involving a combination of judicial and non-judicial disclosures. *Graco Children's Prods.*, 1995 WL 360590, at *8. In *Graco*, the plaintiff, Graco, filed a patent infringement action against Draco, a competitor. *Id.* at *1. In its defense, Draco argued that Graco's patent was invalid because the subject matter at issue was actually invented by a third-party, Louis Kohus. *Id.* Graco issued a subpoena to Kohus's counsel, Dressler, and to Kohus's former business partners. *Id.* at *2. Dressler produced a handful of documents, and issued a privilege log with respect to 300 additional documents. *Id.* By contrast, Kohus's former business partners produced numerous documents over which they asserted no privilege, including fifty-two documents identified in Dressler's privilege log. *Id.* at *3. Graco argued that Dressler should be compelled to produce all documents identified in its privilege log because they concerned

the same subject matter as those disclosed to Kohus's former business partners and produced by those individuals in response to litigation subpoenas. *Id.*

The court held that the privilege was waived with respect to the fifty-two documents shared with Kohus's former business partners. *Id.* at *8. The disclosure did not, however, result in a waiver of the privilege as to all of the other documents included in Dressler's privilege log. *Id.* The court noted that partial disclosure leads to subject-matter waiver only when the party disclosing some documents provides no reason to narrow the scope of the waiver. *Id.* As a result, the court held that the privilege had been waived only as to the fifty-two shared documents, and did not extend to include any of the other documents included in the privilege log. *Id.*

Even the case of *Flagstar Bank, FSB v. Freestar Bank, N.A.*, which the Plaintiffs rely upon, demonstrates the need to narrowly define the scope of the subject matter for which the attorney-client privilege may be deemed waived. *Flagstar Bank*, 2009 WL 2706965, at *5. The disclosure at issue in *Flagstar Bank* concerned a letter, written by the attorney, which was shared by the client, Flagstar, with a company it had retained for purposes of marketing its newly adopted name and trademark. *Id.* at *1. The plaintiff, who claimed that the new name infringed upon its mark, argued that the disclosure of that document should result in a waiver of privilege as to fifty-eight other privileged documents. *Id.* at *4. While the court agreed that the privilege had been waived with respect to the disclosed document, the waiver was not extended to all documents concerning the same subject matter. *Id.* Only notes that had been prepared by the attorney in conjunction with the drafting of the disclosed letter were also required to be disclosed. *Id.* at *5.

In the case at bar, limited information was disclosed amongst the Defendants for purposes of negotiating a business transaction. The scope of any waiver should narrowly correspond to this extrajudicial disclosure, and should not extend to the entire business negotiation at issue. *See Int'l Harvester's*, 1987 WL 20408, at *4 ("[T]he scope of a subject matter waiver which is imposed for selective disclosure depends on the use the party has made of the otherwise confidential material. That use defines the injury which the opponent might suffer unless the waiver is imposed. . . . [I]t also defines the area in which the opponent is entitled to pierce the confidentiality in order to balance the scales. . . . Thus the scope of the subject matter waived can be no wider than that use.").

B. In Order to Determine the Scope of Subject-Matter Waiver, a Trial Court Should Be Required to Carefully Analyze the Individual Documents at Issue to Delineate those Materials to which Waiver Applies.

Application of the subject-matter waiver doctrine should require consideration of whether the specific information contained in each document, or category of similar documents, covers the same subject matter as that which was voluntarily disclosed. *See Flagstar Bank*, 2009 WL 2706965, at *5 (citing *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992)). In some cases, this analysis may require a document-by-document review by the court. If a document-by-document review is not feasible, the court should analyze groupings of substantially similar documents and clearly define the documents subject to waiver, rather than simply adopting the subject matter proposed by the party seeking disclosure. This type of review is an integral part of ensuring that the subject-matter waiver doctrine is not applied in an overly-broad fashion.

Over 1,500 documents concerning the transaction have been identified by the Defendants as privileged in this case. Without providing analysis to support their

conclusions, both the trial court and appellate court elected to broadly define the subject matter of the defendants' limited disclosures as the business transaction as a whole, and ruled that the attorney-client privilege had been waived as to all 1,500 documents. Should this Court decide that the subject-matter waiver doctrine applies in this case, it should require the trial court on remand to conduct an *in camera* consideration of each of the requested documents (or representative documents of each category) to determine whether that document or group of documents covers the same subject matter as the already-disclosed material, and therefore should be disclosed.

C. Illinois Should Adopt a Multi-Factor Test to Help Determine the Particular Attorney-Client Communications that Are Deemed Waived Following the Limited Disclosure of Privileged Material.

Without guidance as to how the subject matter of a waiver will be defined, parties are left with a level of uncertainty that is little better than having no privilege at all. Clients and attorneys will be encouraged to share nothing—even if sharing information would help complete a transaction—in order to avoid having been found to waive the attorney-client privilege in its entirety. As this case demonstrates, it is unrealistic and unfair—and would impede commerce—to expect parties to completely avoid disclosure of privileged information in negotiating business transactions and in other similar extrajudicial contexts.

In *United States v. Skeddle*, the Northern District of Ohio articulated certain factors to be considered in determining whether disclosed and undisclosed communications relate to the same subject matter:

> 1) the general nature of the lawyer's assignment; 2) the extent to which the lawyer's activities in fulfilling that assignment are undifferentiated and unitary or are distinct and severable; 3) the extent to which the disclosed and undisclosed communications share, or do not share, a common nexus

> with a distinct activity; 4) the circumstances in and purposes for which disclosure originally was made; 5) the circumstances in and purposes for which further disclosure is sought; 6) the risks to the interests protected by the privilege if further disclosure were to occur; and 7) the prejudice which might result if disclosure were not to occur.

United States v. Skeddle, 989 F. Supp. 917, 919 (N.D. Ohio 1997). As the *Skeddle* court explained, "[B]y applying these factors, and such other factors as may appear appropriate, a court may be able to comply with the mandate that it construe 'same subject matter' narrowly while accommodating fundamental fairness." *Id.*

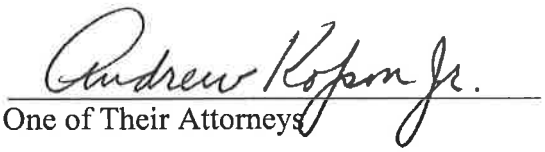
To the extent that this Court declines to specifically limit the subject-matter waiver doctrine to judicial disclosures, we respectfully request that the Court outline the factors to be considered in determining what falls into the "subject matter" for disclosure, using the *Skeddle* factors as a starting point.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Defendants' briefs, this Court should overturn the appellate court ruling. In doing so, this Court should establish a rule that the extrajudicial disclosure of an attorney-client communication, which is not subsequently used by the client in a judicial proceeding to his adversary's prejudice, does not waive the privilege as to the undisclosed portions of that communication. Alternatively, should the Court endorse the application of the subject-matter waiver doctrine outside the litigation context, the Court should provide guidance to attorneys in this state and their clients and outline the contours of the "subject matter" that might be waived.

Respectfully submitted,

International Association of Defense Counsel and
Illinois Association of Defense Trial Counsel

By: 
One of Their Attorneys

Andrew Kopon Jr.
Mollie E. Werwas
Stacy M. Kramer
KOPON AIRDO, LLC
233 S. Wacker Dr.
Suite 4450
Chicago, IL 60606
312/506-4450
312/506-4460 FAX

Mary-Christine Sungaila
SNELL & WILMER L.L.P.
600 Anton Blvd.
Suite 1400
Costa Mesa, CA 92626
714/427-7000
714/427-7799 FAX
Pro Hac Vice Admission Pending

Michael Resis
SMITHAMUNDSEN LLC
150 N. Michigan Ave.
Suite 3300
Chicago, IL 60601
312/894-3200
312/894-3210 FAX

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix pages containing the Rule 341(d) cover, the Rule 341(h)(1) Statement of Points and Authorities, the Rule 341(c) Certificate of Compliance, the Certificate of Service, and those matters to be appended to the brief under Rule 342(a), is 33 pages.

Andrew Kopon Jr.

Andrew Kopon Jr.
One of the Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS was sent to the following counsel of record by regular mail on this 25th day of January, 2012:

Jeffrey L. Willian
Alyssa A. Qualls
S. Maja Fabula
Kirkland & Ellis LLP
300 North LaSalle Street
Chicago, Illinois 60654
Counsel for Plaintiffs

Richard L. Fenton
Christopher Q. King
Michael D. Hultquist
SNR Denton
223 South Wacker Drive, Suite 7800
Chicago, Illinois 60606
Counsel for Simon Defendants

Thomas C. Koessel
Williams Montgomery & John LTD.
233 South Wacker Drive, Suite 6100
Chicago, Illinois 60606
Counsel for Defendant Head Acquisition L.P.

Laura McNally
Lynn H. Murray
Pei Chung
Grippo & Elden LLC
111 South Wacker Drive
Chicago, Illinois 60606
Counsel for GGP-Rouse Defendants

Gino L. DiVito
Brian Haussmann
Tabet DiVito & Rothstein LLC
The Rookery Building
209 South LaSalle Street, Seventh Floor
Chicago, Illinois 60604
Counsel for Westfield Defendants