# Case No. 13-30830

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EXXON MOBIL CORPORATION

Plaintiff – Appellant

v.

CLARENCE HILL; TIMOTHY J. FALCON;
JEREMIAH A. SPRAGUE; FRANK M. BUCK, JR.

Defendants – Appellees

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Appeal
from the United States District Court, Eastern District of Louisiana
Civil Action No. 13-236, Section L
District Judge Eldon E. Fallon

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# Brief of Appellant, Exxon Mobil Corporation

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## Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Exxon Mobil Corporation
   Plaintiff-appellant
2. Clarence Hill
   Defendant-appellee
3. Timothy J. Falcon
   Defendant-appellee and counsel for Clarence Hill
4. Jeremiah A. Sprague
   Defendant-appellee and counsel for Clarence Hill

5. Frank M. Buck, Jr.
Defendant-appellee and counsel for Clarence Hill

6. Adams and Reese LLP
Counsel for Exxon Mobil Corp., plaintiff-appellant

7. Martin A. Stern
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10. Donald C. Massey
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11. Valeria M. Sercovich
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12. Diana C. Surprenant
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/s/ Raymond P. Ward

*Attorney of Record for Plaintiff-Appellant*
*Exxon Mobil Corporation*

## Request for Oral Argument

Exxon Mobil Corporation, appellant, requests oral argument. This case involves an issue on which there is little guidance from this Court: the application of the attorney-client privilege to communications with in-house counsel.

# Table of Contents

# Table of Authorities

## Cases

**Statutes**



**Court Rules**

# Jurisdictional Statement

## 1. Basis of the district court's jurisdiction.

This is an appeal from a final judgment in an intervention that was severed from the main demand. The main demand (Civil Action No. 11-2786) was a civil action by Clarence Hill against Exxon Mobil Corporation and several other defendants. The suit was filed in state court and removed to federal court under diversity jurisdiction, 28 U.S.C. § 1332. Plaintiff, Hill, is a citizen of Louisiana. Defendants are corporations formed under the laws of states other than Louisiana, with their principal places of business in states other than Louisiana.[1] ROA.449 – ROA.451. The amount in controversy exceeds $75,000. ROA.451.

After Exxon was dismissed from the main demand, Hill filed into the record a document over which Exxon asserts the attorney-client privilege. In response, Exxon re-entered the case as an intervenor to assert its privilege over the document. Its intervention was severed from the main demand, assigned a new docket number (Civil Action No. 13-236), and transferred to

[1] Defendants Exxon Mobil Corporation and Exxon Mobil Oil Corporation are organized under the laws of New Jersey with their principal places of business in Texas. Defendants Humble Incorporated, Shell Oil Company, Marathon Oil Company, OXY USA Inc., and BP America Production Company are organized under the laws of Delaware with their principal places of business in Texas. Defendant Chevron U.S.A., Inc., is organized under the laws of Pennsylvania with its principal place of business in California. ROA.449 – ROA.451.

District Judge Eldon Fallon. ROA.8. The district court had original jurisdiction over the intervention under 28 U.S.C. 1367(a) (supplemental jurisdiction). Moreover, federal caselaw recognizes a non-party's right to intervene in federal proceedings to assert a privilege. *See*, *e.g.*, *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001); *cf. U.S. v. AT&T*, 642 F.2d 1285, 1292–93 (D.C. Cir. 1980) (assertion of work-product privilege sufficient to support right to intervene).

**2. Basis of this Court's appellate jurisdiction.**

On June 28, 2013, the district court entered an order denying Exxon's motion to enforce its attorney-client privilege. ROA.315. Exxon believed that this order was, in substance, a final judgment because it disposed of all issues raised in its intervention. Exxon therefore filed a notice of appeal from the June 28 order on Monday, July 29, 2013. ROA.353. This notice was timely under Fed. R. App. P. 4(a)(1)(A) and Fed. R. App. P. 26(a)(1)(C).[2] Later, on August 28, 2013, the district court entered a formal final judgment dismissing Exxon's intervention. ROA.356. Exxon filed a notice of appeal from the August

[2] The 30th day after June 28 was July 28, 2013, which fell on a Sunday. Because the notice of appeal was filed on the immediately following Monday, it was timely under Fed. R. App. P. 26(a)(1)(C).

28 judgment on September 9, 2013. ROA.357. This notice was timely under Fed. R. Civ. P. 4(a)(1)(A).

## Issues Presented for Review

1. The law establishing the attorney-client privilege in a corporate setting makes no distinction between in-house counsel and outside counsel. Yet in assessing Exxon's claim of attorney-client privilege, the district court imposed a heightened burden of proof on Exxon because the communication in question was by in-house counsel rather than outside counsel. Was this a legal error?

2. Confidential communications between counsel and a corporate client seeking legal advice are protected by the attorney-client privilege. The communication at issue here was confidential, was between Exxon's counsel and an Exxon employee, and pertained to ongoing contractual negotiations between Exxon and another party represented by counsel. Is this communication privileged?

## Statement of the Case

This is an appeal from an order denying Exxon Mobil Corporation's assertion of the attorney-client privilege over a document filed in the record

of a civil case by Clarence Hill through his attorneys: Timothy Falcon, Jeremiah Sprague, and Frank Buck.

The litigation began as a civil action by Hill against Exxon and several other defendants in state court. Hill alleged damages caused by exposure to naturally occurring radioactive material ("NORM"). With the other defendants' consent, Exxon removed the case to the district court under the court's diversity jurisdiction. The matter was docketed as *Hill v. Exxon Mobil Corp. et al.*, No. 11-2786 (E.D. La.) (the *Hill* case) and assigned to Judge Vance. ROA.406. About 11 months after the removal, Hill voluntarily dismissed Exxon with prejudice, and the *Hill* case continued against other defendants. ROA.1812 (motion to dismiss); ROA.1842 (order granting dismissal with prejudice).

About six weeks later, on December 12, 2012, Hill's counsel filed into the record of the *Hill* case a document over which Exxon claims the attorney-client privilege. This document, dubbed the "Stein Memo," was written by Rosemary Stein, in-house counsel for Exxon, documenting advice she had given to Exxon employee John Guidry. Hill's counsel attached it as an exhibit supporting a motion in limine against a defense expert witness. ROA.8265 – ROA.8267; ROA.9180 – ROA.9182. The memorandum in support of the motion in limine further violated the attorney-client privilege by discussing the content of the Stein Memo. ROA.8068 – ROA.8069; ROA.8982 – ROA.8983.

Soon after learning of this filing, Exxon demanded that Hill's attorneys retract the Stein Memo from the *Hill* record. When they failed to respond, Exxon moved for and was granted leave to intervene in *Hill* to assert the attorney-client privilege over the Stein Memo. In granting Exxon's motion to intervene, the magistrate judge found that Exxon would suffer prejudice if it were not permitted to have the Stein Memo and references to its contents removed from the record:

> Since the document has now actually been filed in this court's public record, the potential prejudice to Exxon is substantial if it is precluded from attempting to remove it. [ROA.10740.]

After consultation with District Judges Vance and Fallon, the magistrate judge severed Exxon's intervention from the *Hill* action and transferred it to Judge Fallon. ROA.8. The reason for the severance and transfer was that Exxon's intervention in *Hill* raised the same privilege issue that had been raised in a prior civil action allotted to and still pending before Judge Fallon.[3] Exxon's intervention was given a new caption (*Exxon Mobil Corp. v. Hill*) and a new docket number (Civil Action No. 13-236). ROA.9.

After the transfer, Exxon filed a motion to enforce its attorney-client privilege over the Stein Memo, to have the Stein Memo stricken from the

[3] *Exxon Mobil Corp. v. Falcon*, Civil Action No. 12-454 (E.D. La.).

record, and to compel Hill's attorneys to destroy or return to Exxon all copies of it. In an order dated June 28, 2013, the district court denied this motion. ROA.315. Exxon, believing that this order effectively determined all issues in its intervention, filed a notice of appeal from this order. ROA.353. Later, on August 28, 2013, the district court entered a formal, final judgment dismissing Exxon's intervention. ROA.356. Exxon filed a notice of appeal from this judgment too. ROA.357.

## Statement of Facts

The story of the Stein Memo begins in the late 1980s. At the time, Exxon was negotiating with Intracoastal Pipe Repair and Supply Company ("ITCO") over a proposed contract under which ITCO would clean and store oilfield production tubulars for Exxon. In conducting these negotiations, ITCO was represented by Daniel Lund, Esq., of the New Orleans law firm Montgomery, Barnett, Brown, Read, Hammond & Mintz; and Exxon was represented by its in-house lawyers.

The parties to the proposed contract knew that some used tubulars had accumulated scale, and some of the scale was contaminated with naturally occurring radioactive material ("NORM"). To clean the NORM-contaminated tubulars, ITCO had created an experimental pipe-cleaning unit, the purpose of

which was to contain any dust generated by cleaning NORM-contaminated scale from the tubulars. As part of their due diligence in negotiating with ITCO, Exxon's in-house lawyers wanted to know whether this device would work as intended. To do so, they sent an industrial hygienist, Lindsey Booher, to conduct air-sampling tests around the device while it was being tested. Following these instructions, Booher visited ITCO's premises on three separate occasions to take air samples. He wrote a confidential report to Exxon employee John Guidry conveying the results of his tests. Included in the report were four tables, numbered I through IV, containing the air-sampling data.

In July 1988, during the course of contract negotiations, ITCO asked Guidry for Booher's test results. Not knowing how to respond to ITCO's request, Guidry sought legal advice from Rosemary Stein, an in-house lawyer for Exxon. Stein suggested that Guidry disclose only Table IV to ITCO, as it contained the only data that ITCO specifically requested. She advised Guidry to remove the "Table IV" caption so as not to flag the existence of the other tables. She also drafted a suggested written response to accompany the table, stating that the data was created solely for Exxon's internal use and disclaiming any warranty of the data's accuracy. She memorialized her advice

in a memorandum dated July 22, 1988—the document now dubbed the "Stein Memo."[4]

Ultimately, Exxon did not limit its response as Stein advised. In letters to Exxon's in-house counsel dated November 8, 1988, and March 1, 1989, ITCO's counsel repeated ITCO's request for Booher's test data. ROA.263 – ROA.264. On March 14, 1989, another Exxon in-house lawyer, Judith Beaumont, complied with Lund's request, sending him copies of all four tables from Booher's report. ROA.44 – ROA.48.

In the ensuing years, numerous lawsuits were filed by various persons alleging exposure to NORM. These included several lawsuits against Exxon or ITCO or both, alleging exposure to NORM at ITCO's pipeyard in Harvey, Louisiana. Responding to numerous discovery requests in these suits, Exxon has repeatedly produced all four tables from Booher's report.

In many of these lawsuits, plaintiffs are represented by the same lawyers representing Hill in this litigation: Messrs. Falcon, Sprague, and Buck. On August 28, 2008, in the course of discovery in one of these lawsuits,

[4] In discussing the substance of the communication, Exxon is not disclosing anything that defendants have not already improperly disclosed by filing the Stein Memo in the *Hill* record. *See* ROA.8265 – ROA.8267; ROA.9180 – ROA.9182. The fact that defendants have already made this improper disclosure does not diminish Exxon's desire to protect its evidentiary privilege, particularly because, as set forth at pp. 9-10 below, defendants repeatedly seek to introduce the Stein Memo in new cases.

Exxon's counsel produced thousands of documents on CDs and sent the CDs to Falcon. Unknown to Exxon's counsel at the time, the CDs included a number of privileged documents, including the Stein Memo.

In December 2009, Exxon discovered its inadvertent production of the Stein Memo and other privileged documents. Following La. Code Civ. P. art. 1424(D), Exxon's counsel sent a letter to Falcon on December 8, 2009, informing him of the inadvertent production, demanding return of the CDs and all copies, furnishing substitute CDs omitting the privileged documents, and furnishing a privilege log identifying the privileged documents, including the Stein Memo.

One week after Exxon notified Falcon of its inadvertent production, Falcon returned the original CDs containing the privileged documents, making no objection to Exxon's assertion of privilege. Because of Falcon's apparent acquiescence, Exxon believed that was the end of the matter.

But it wasn't. It later became apparent that, unknown to Exxon, Falcon had kept a copy of the Stein Memo and distributed it to Sprague and Buck, who in turn attempted to introduce it into evidence in several state-court cases. Their purpose was to create the false impression that Exxon was trying to hide Booher's test results—never mind that Exxon had provided all four

tables of results to ITCO in 1989 and had since repeatedly produced the same four tables in its discovery responses.

Each time Falcon or his colleagues attempted to introduce the Stein Memo, Exxon objected, asserting the attorney-client privilege. In two cases, the state-court judges sustained Exxon's objection; in two others, the state-court judges overruled the objection.

Attempting to prevent these repeated violations of the attorney-client privilege, Exxon filed an action in the district court entitled *Exxon Mobil Corp. v. Falcon*, No. 12-454 (E.D. La.), seeking an injunction to prevent Falcon and his colleagues from using the Stein Memo in state court. ROA.18. The matter was allotted to Judge Fallon. Judge Fallon made no ruling on the merits of Exxon's claim; instead he stayed the case indefinitely out of federalism concerns: he thought it inappropriate to render a judgment purporting to govern state-court proceedings.

Eventually, in the *Hill* case, Falcon and his colleagues again attempted to use the Stein Memo, this time in federal court. Exxon had been a defendant in *Hill*, but was voluntarily dismissed with prejudice before plaintiff's counsel attempted to use the Stein Memo there. Exxon promptly re-entered the case as intervenor to claim the attorney-client privilege. The intervention was severed from *Hill* and transferred to Judge Fallon because of its relation to

*Exxon v. Falcon*, still pending before him. Judge Fallon eventually rendered judgment denying Exxon's privilege claim and dismissing its intervention. Exxon now appeals that judgment.

## Summary of the Argument

The district court's findings are not entitled to any deference on appeal because its findings are predicated on a legal error. Specifically, the district court imposed a heightened burden of proof on Exxon, the party invoking the attorney-client privilege, on grounds that the attorney-client communication in question was made by in-house counsel rather than outside counsel. Imposition of this heightened burden was legal error because the law governing attorney-client privilege makes no distinction between in-house counsel and outside counsel.

But under any standard of review, the district court committed clear error in denying Exxon's claim of privilege. The communication in question—the Stein Memo—was between Exxon's in-house counsel and another Exxon employee, was intended to be confidential, and pertained to ongoing contractual negotiations being conducted by Exxon with another party represented by counsel. Based on these undisputed facts, the attorney-client privilege applies to the Stein Memo.

# Argument

## 1. The standard of review is *de novo* because the district court's factual findings were based on legal error regarding the burden of proof.

Ordinarily, this Court reviews factual findings made in the application of the attorney-client privilege for clear error and reviews the controlling law *de novo. United States v. Austin*, 42 F.3d 642 (5th Cir. 1994); *see also United States v. Seale*, 600 F.3d 473, 492 (5th Cir. 2010). But findings of fact influenced by an erroneous view of the law are entitled to no deference. *U.S. v. McFerrin*, 570 F.3d 672, 675 (5th Cir. 2009); *G.M. Trading Corp. v. Commissioner of Internal Revenue*, 121 F.3d 977, 980 (5th Cir. 1997).

Here, the district court's factual findings were influenced by legal error: the court imposed a heightened burden of proof on Exxon because Rosemary Stein, the lawyer involved in the attorney-client communication at issue, was in-house counsel rather than outside counsel:

> Although there may be an "unstated operating presumption" that communications with outside counsel constitute legal advice, this presumption does not apply to communications with in-house counsel "because of the many nonlegal responsibilities in-house counsel assumes." … Thus, communications to and from in-house counsel are privileged "only upon a clear showing that [in-house counsel] gave [advice] in a professional legal capacity."

ROA.324 (citations omitted; brackets by district court). In fact, the applicable law is contrary to the district court's reasoning, making no distinction between in-house counsel and outside counsel when assessing a claim of attorney-client privilege. Because this legal error bore directly on the district court's factual findings, those findings are entitled to no deference on appeal.

### A. Louisiana law on the attorney-client privilege does not distinguish between in-house counsel and outside counsel.

In a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision. Fed. R. Evid. 501. The *Hill* action, in which defendants introduced the Stein Memo, is a diversity action governed by Louisiana law. Thus, Exxon's claim of attorney-client privilege is governed by Louisiana law.

Contrary to the district court's reasoning, Louisiana law governing the attorney-client privilege does not impose a higher burden of proof when the attorney is in-house counsel. Louisiana Code of Evidence article 506, which defines the attorney-client privilege in Louisiana, does not distinguish between in-house and outside counsel. Instead, according to art. 506's official comments, the principles established by art. 506 apply equally to in-house and outside counsel:

> By not specifically excluding 'house counsel' from the definition, this Article does not automatically preclude the application of the attorney-client privilege to communications between an attorney and the attorney's employer. The availability of the privilege in this context will depend upon the general principles set forth in this Article….

La. Code Evid. art. 506, Comments–1992, comment (d). Thus, under Louisiana law, communications with in-house counsel are governed by the same rules applicable to communications with outside counsel.

Here, the district court erred by imposing a higher burden of proof for communications with in-house counsel. Under Louisiana law, the district court should have assessed Exxon's claim of attorney-client privilege without regard to Ms. Stein's status as in-house counsel as opposed to outside counsel.

### B. Federal law on the attorney-client privilege likewise does not distinguish between in-house counsel and outside counsel.

Although Louisiana law governs the application of the attorney-client privilege here, federal law likewise militates against applying different sets of rules to in-house counsel and outside counsel. This conclusion necessarily follows from the Supreme Court's decision in *Upjohn v. United States*, 449 U.S. 383 (1981).

In *Upjohn*, the Supreme Court enforced the attorney-client privilege over communications between a corporation's employees and in-house counsel. *Id.* at 397. The Supreme Court did not impose a greater burden of proof for establishing that communications with in-house counsel were privileged. *See id.* at 389-90. Instead, the Supreme Court recognized the need for clear and consistent standards governing attorney-client communications:

> [I]f 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.

*Id.* at 393.

This Court has interpreted *Upjohn* as requiring the attorney-client privilege to be construed broadly in the corporate context. "[T]he corporate attorney-client privilege is designed to encourage full and frank communication between a corporation and its attorneys to facilitate fully informed legal advice and … the only way to ensure such communication is to construe the privilege broadly." *Rush v. Columbus Mun. Sch. Dist.*, No. 99-60910, slip op. at 4 (5th Cir. Sept. 28, 2000), 234 F.3d 706, *2 (unpublished table opinion available on Westlaw).

Consistent with *Upjohn* and *Rush*, the district courts in this circuit have applied the same standards for assessing claims of attorney-client privilege regardless of whether the lawyer was in-house counsel or outside counsel. *See, e.g., Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 133, 139 n.13 (E.D. Tex. 2003) ("The privilege applies whether an attorney works at a law firm or works as in-house counsel for a corporation. . . . [A]n attorney's status as in-house counsel neither dilutes nor waives the privilege."); *United States v. Mobil Corp.*, 149 F.R.D. 533, 537 (N.D. Tex. 1993) ("It is undisputed that communications between a corporation and its inside counsel are protected in the same manner and to the same degree as communications with outside counsel."); *In re LTV Securities Litig.*, 89 F.R.D. 595, 601 (N.D. Tex. 1981) ("The privilege attaches equally to LTV's General Counsel Smith and his staff who were also performing services of a legal nature and furnishing legal advice during the course of the SEC investigation.").

Indeed, in the *Hill* case itself, Judge Vance upheld the attorney-client privilege invoked by co-defendant Chevron, over a document written by in-house counsel. *See Hill v. Exxon Mobil Corp.*, No. 11-2786 (E.D. La. Apr. 30, 2013), 2013 WL 1856055, ROA.10856. The district judge agreed with the magistrate judge's findings that the document was authored by in-house

counsel, that its intended recipient was an executive of Chevron's predecessor, and that it was intended to provide legal advice.

Under these authorities, the district court should have assessed Exxon's claim of attorney-client privilege without regard to whether Stein was in-house counsel or outside counsel. Its failure to do so constituted legal error influencing its factual findings. Therefore, those findings are entitled to no deference on appeal.

### 2. The Stein Memo conveyed legal advice related to ongoing contractual negotiations.

Exxon wishes to make the scope of its claim clear. Exxon does not claim a privilege on Booher's report or on Tables I through IV contained in that report. The tables were provided to ITCO decades ago and have since been produced multiple times in discovery. The only document discussed in this brief over which Exxon claims a privilege is the Stein Memo, reflecting Stein's advice to Guidry concerning disclosure of the tables during contract negotiations in 1988. Regardless of which standard of review is applied, that document is privileged. The district court's failure to uphold that privilege constitutes clear error.

The general rules governing application of the attorney-client privilege under Louisiana law and federal law are similar. Under Louisiana law, the

privilege applies to "a confidential communication … made for the purpose of facilitating the rendition of professional legal services to the client … when the communication is … [b]etween … a representative of the client and the client's lawyer …." La. Code Evid. art. 506(B). Similarly, under federal law, the general rule is that confidential communications between employees and corporate counsel are protected by the attorney-client privilege when made for the purpose of counsel's rendering legal advice to the corporation through its employees. *Giardina v. Ruth U. Fertel, Inc.*, 2001 WL 1658183, at *1 (E.D. La. Dec. 21, 2001) (citing *Upjohn Co.*, 449 U.S. at 395).

The author of the Stein Memo was Rosemary Stein, Exxon's in-house counsel. ROA.34 (Stein decl. ¶ 2). There is no serious question that the Stein Memo was intended to be a confidential communication between Ms. Stein and an Exxon employee, John Guidry. ROA.35 (Stein decl. ¶ 5); ROA.37 (Guidry decl. ¶ 6).

Despite these undisputed facts, the district court—applying an erroneously heightened burden of proof—concluded that the Stein Memo constituted "business advice" rather than "legal advice." ROA.325. This conclusion is clear error, especially considering the context in which the communication occurred: negotiation of a contract in which both negotiating parties—Exxon and ITCO—were assisted by legal counsel.

In 1987, Exxon was contemplating entering into a contract with ITCO to clean NORM from Exxon tubulars using an experimental pipe-cleaning unit developed by ITCO. ROA.34 (Stein decl. ¶ 3); ROA.37 (Guidry decl. ¶ 3); ROA.41 (Gettys decl. ¶ 9). Exxon was represented in these negotiations by its in-house counsel; ITCO was represented by Daniel Lund, Esq., and other attorneys at his New Orleans law firm, Montgomery, Barnett, Brown, Read, Hammond & Mintz. *See* ROA.263, ROA.264, and ROA.44 (correspondence between counsel). The negotiations involved much more than haggling over price; they involved several complex legal issues, included storage and handling of NORM residue, indemnity for strict-liability claims, license, trade secrets, and applicable law. *See* ROA.264 (Lund's letter to Exxon counsel Judith Beaumont mentioning these issues).

To assist Exxon in its due diligence and consideration of the proposed contract with ITCO, Exxon's in-house counsel directed Lindsey E. Booher, an industrial hygienist for Exxon, to perform air-sampling tests on the experimental pipe-cleaning unit to see if it effectively contained NORM dust. ROA.34 – ROA.35 (Stein decl. ¶ 3). Booher conducted his air-sampling tests on April 7–8, June 30, and October 5, 1987. *See* ROA.236. On February 25, 1988, Booher completed a confidential report of his tests and transmitted it to John Guidry, an Exxon employee. *See* ROA.235. The results of the air-sampling tests

were reflected in four tables included in Booher's report: Table I (April 7), Table II (June 30), Table III (October 5), and Table IV (also October 5). *See* ROA.245 – ROA.248.

As negotiations progressed, ITCO asked Exxon for results of Booher's tests. ROA.37 (Guidry decl. ¶ 4). Guidry consulted with Exxon's in-house lawyer Rosemary Stein on how to respond to ITCO's request. Stein determined that the only test results specifically requested by ITCO were those reflected in Table IV. She advised Guidry to produce only that table and recommended deleting the heading "Table IV" so as to avoid flagging the existence of other tables. She also drafted a proposed response to ITCO's request, stating that the table was prepared for Exxon's own internal use and disclaiming any warranty as to the accuracy of the test results. ROA.35 (Stein decl. ¶ 5); ROA.37 – ROA.38 (Guidry decl. ¶ 6). She documented her advice in a memorandum to Guidry dated July 22, 1988—the "Stein Memo" that is the subject of this appeal.

Over the next few months, contract negotiations continued through Exxon's and ITCO's respective counsel. These negotiations are documented in correspondence between ITCO's counsel (Lund) and Exxon's in-house counsel. This correspondence includes two additional requests by ITCO, through counsel, for Booher's test results. *See* ROA.263 – ROA.264. In March 1989,

Exxon's in-house counsel responded to Lund's requests by producing all four tables of Booher's test results. ROA.44 – ROA.48.

When seen in context, the legal nature of Guidry's consultation with Stein becomes crystal clear. It occurred in the context of complex, lengthy contractual negotiations between ITCO and Exxon, conducted through each party's respective counsel. The purpose of Booher's tests was to provide Exxon's counsel with information necessary to advise Exxon concerning the proposed contract. Thus, when Guidry received ITCO's request for the test results, he naturally turned to Exxon's counsel for legal advice on how to respond. Exxon's counsel advised him on which data to provide in response to the request and drafted a warranty disclaimer to accompany the response. That consultation was part and parcel of in-house counsel's legal representation of Exxon in negotiating the proposed contract with ITCO. It was legal advice, protected by the attorney-client privilege. The warranty disclaimer drafted by Exxon's counsel was intended to protect Exxon from any legal claim alleging inaccuracy of Booher's data.

The legal nature of the advice is specifically confirmed by the declarations of both Guidry and Stein. Stein testified that she "provided legal advice to Mr. Guidry as to whether and how he should respond to ITCO's request." ROA.35. She further testified that she "drafted a memorandum to Mr.

Guidry, reflecting [her] legal advice to him and providing a draft response to ITCO's request." ROA.35. Her draft response "reflected [her] earlier legal advice to Mr. Guidry that the test results were prepared by Exxon for its own internal use and no warranty or representation should be made as to their accuracy." ROA.35.

Guidry confirmed in his declaration that he "discussed with Rosemary Stein, Exxon's in-house legal counsel, how to respond to ITCO's request," and that "Ms. Stein provided [him] legal advice on that issue." ROA.37. He confirmed that the Stein Memo "reflected her legal advice to me," and that it included "her legal advice to me that the test results were taken and prepared for Exxon's internal use and that no warranty or representation should be made as [to] their accuracy." ROA.37 – ROA.38.

This testimony is uncontradicted. Considering this uncontroverted testimony, and the context of complex contractual negotiations , there can be no doubt but that the communication constituted legal advice.

Indeed, other courts have recognized the privileged nature of attorney-client communications related to negotiation of contracts. For example, in *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2001 WL 1286727 (N.D. Ill. Oct. 24, 2001), the court upheld the attorney-client privileged claimed by a corporation on hand-written notes made by one of its executives concerning

his meeting with in-house counsel over possible changes to the corporation's marketing contracts. The court recognized that "[c]ommunications by a client to a lawyer for advice on the legal implications of proposed contract terms are protected, as well as the advice that the lawyer gives regarding those terms." *Id.* at *5.

And in *Southeastern Pennsylvania Transportation Authority v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008), the court upheld the attorney-client privilege claimed on several e-mails between in-house counsel and various corporate employees concerning ongoing contractual negotiations. The e-mails touched on an array of topics related to the negotiations, including advice from in-house counsel about proposed contract language and communications to in-house counsel concerning negotiation strategy. *See id.* at 261. "The primary purpose" of one of the e-mails "was to keep [in-house counsel] informed on the contract terms at issue and the status of contract negotiations so that she could render effective legal advice." *Id.* at 264. The court did not draw a false dichotomy between business concerns and legal concerns. "Even if business concerns were at issue in the communications," the court reasoned, "it is clear that any business decisions were only being made after securing legal advice from [in-house counsel] concerning the contract language." *Id.* at 260.

The same reasoning applies here. As demonstrated by the record, the negotiations between Exxon and ITCO were conducted by each side's respective attorneys. ITCO's request for Booher's test results was part and parcel of those ongoing negotiations; so was Guidry's response. Regardless of whether Exxon's response to ITCO's request was a "business decision," the decision was made only after Guidry sought and received legal advice from Stein.

Any doubt about the privileged nature of this advice is erased by viewing the negotiations from ITCO's perspective. In these negotiations, ITCO had its own counsel advising it. Undoubtedly, ITCO consulted with its counsel many times in the course of these same negotiations. Those consultations are undoubtedly privileged. The corresponding consultations between Exxon's in-house counsel and Exxon's personnel are no less privileged.

The district court's contrary conclusion appears to have resulted from an unduly narrow view of how lawyers serve clients. The district court concluded "that the primary purpose of Stein's advice to Guidry was to help secure more favorable contract terms," and thus "contribute toward Exxon's business interests rather than protect it from potential litigation by ITCO or provide other legal advice." ROA.326. This litigation-oriented view, while

understandable, fails to consider that the "favorable contract terms" being sought through counsel would be legal obligations—either ITCO's or Exxon's.

This view also fails to consider the role of transactional attorneys in negotiating these legal obligations—a role aptly illustrated by *Southestern Pennsylvania Transportation Authority*, discussed above. Their role is precisely to serve their clients' business interests by helping their clients obtain favorable contract terms—i.e. favorable legal obligations. This is exactly what Lund and his firm were doing for their client, ITCO. Stein and other Exxon in-house lawyers were doing the same thing for their client, Exxon.

### 3. Defendants failed to raise any valid argument against Exxon's claim of attorney-client privilege.

Defendants in no way refuted any of the facts set forth above, including the sworn testimony of Stein and Guidry. Instead, seeking to avoid a decision on the merits of Exxon's claim of attorney-client privilege, they raised several baseless legal arguments. Anticipating that they may raise some of the same arguments on appeal, Exxon will respond briefly to them.

First, defendants Falcon, Sprague, and Buck (Hill's attorneys of record) argued that the district court had no personal jurisdiction over them personally, because they personally were not served with Exxon's intervention. Their argument seemed to be that the electronic service they

undoubtedly did receive was effective only in their capacity as Hill's attorneys. *See* ROA.214 – ROA.216. Unsurprisingly, the district court found it difficult to take this argument seriously:

> [T]he Court is puzzled by Defendants' suggestion that this Court might lack personal jurisdiction over the attorneys of record in another case before the Court in an intervention arising out of their conduct in that case. The Court finds it difficult to imagine that it might lack personal jurisdiction in these circumstances. [ROA.322 n. 3.]

Should a legal counter-argument be necessary, it can be stated succinctly: Under Fed. R. Civ. P. 24(c), a motion to intervene may be served according to Fed. R. Civ. P. 5. And Rule 5(b)(3) states that service may be effected through the Court's electronic-filing system if allowed by local rule. The Eastern District of Louisiana's local rules allow for electronic filing and service of all documents after the initial pleading. *See* E.D. La. R. 5.1 and 5.4. And as the district court observed, "an attorney's registration as a [CM/ECF] Filing User constitutes consent to electronic service of all documents as permitted by local rules and the Federal Rules of Civil Procedure." ROA.321.

Next, defendants sought to stay Exxon's intervention indefinitely, by any means necessary. First, they filed a separate motion to stay, arguing that a final judgment of dismissal had been entered in the *Hill* case, and that Hill had

previously dismissed his claims against Exxon with prejudice. *See* ROA.179 et seq. (motion to stay and supporting papers). They argued that the dismissal of *Hill* mooted Exxon's privilege claim, and that the privilege claim need not be decided unless and until the *Hill* dismissal is reversed on appeal. The response to this argument is simple: Dismissal of Hill's civil action does not undo the continuing harm to Exxon caused by breach of Exxon's attorney-client privilege. As long as the Stein Memo remains unsealed in the *Hill* record, it remains open to anyone with a PACER account.

In further quest of a stay by any means necessary, defendants argued in their opposition to Exxon's motion that the prior civil action involving similar issues was still stayed (i.e. *Exxon v. Falcon*, No. 12-454). They argued that the only proper procedure was for Exxon to re-open that case and move to consolidate it with its intervention in *Hill*. But they cited no law to support this argument; nor could the district court find any law to support it. *See* ROA.322. In fact, there was and is no need for consolidation because *Exxon v. Falcon* arose out of different actions by Falcon and his colleagues. *Exxon v. Falcon* arose out of their attempts to use the Stein Memo in various state-court proceedings. Exxon's intervention in *Hill* arose out of their use of the Stein Memo in federal court, in the *Hill* case itself. The district court in *Exxon v. Falcon* was reticent to interfere in state-court proceedings, hence the stay of

that case. But no such federalism-related problem prevented the district court from enforcing Exxon's attorney-client privilege in federal court.

After running out of procedural arguments, defendants purported to address the merits of Exxon's claim, but even then, they avoided addressing the Stein Memo itself. Instead, they accused Exxon of a grand scheme of fraud spanning several decades. Their "substantive" argument featured a three-and-a-half page single-spaced block quotation from *Grefer v. Alpha Technical*, 965 So. 2d 511, 518–21 (La. App. 4 Cir. 2007), in which the court affirmed an award of punitive damages against Exxon after drastically reducing the amount. *See* ROA.225 – ROA.228. Nowhere in the block quotation can one find any mention of the Stein Memo. The reason is that the Stein Memo had nothing to do with the judgment in *Grefer*.

Defendants spent the next two and a half pages of their opposition arguing about Exxon's supposed misdeeds in 2001 and 2002, some 13 years after the Stein Memo was written. *See* ROA.228 – ROA.230. Exxon will not waste this Court's time responding to these allegations because they have nothing to do with whether, 13 years prior, Rosemary Stein gave legal advice to John Guidry.

Finally, disregarding this 13-year gap, defendants suggest that the Stein Memo was "directed to a future fraud, " thus suggesting application of the

crime-fraud exception to the attorney-client privilege. *See* ROA.232. But this argument, like their others, lacks any legal or factual support.

To invoke the crime-fraud exception, the party challenging the privilege must first establish a *prima facie* case that a crime or fraud has been committed, and then demonstrate that the privileged information bears a relationship to the alleged crime or fraud. *Arabie v. CITGO Petroleum Corp*., 8 So. 3d 558, 559 (La. 2009); *see also Indus. Clearing House, Inc. v. Browning Mfg. Div. of Emerson Electric Co.*, 953 F.2d 1004, 1008 (5th Cir. 1992) (citing *Ward v. Succession of Freeman,* 854 F.2d 780, 789-90 (5th Cir. 1988)).

Defendants cannot establish the first element of the crime-fraud exception, i.e. a crime or a fraud. Exxon had no duty to disclose any of Booher's test results to ITCO. Those test results were confidential proprietary documents of Exxon prepared at the direction of Exxon's attorneys, which Exxon could elect to disclose or not disclose. ROA.35 (Stein decl. ¶ 5).

ITCO was not misled by anything Exxon did. Through counsel, ITCO continued asking for Booher's test results—and Exxon, through counsel, responded by providing all four tables. ROA.263 – ROA.264 (ITCO request); ROA.44 et seq. (Exxon response). Years later, in the *Hill* civil action, Exxon produced the same results in discovery. ROA.41 (Gettys decl. ¶ 9). Exxon

never altered the information contained in those test results, and Stein never instructed anyone to do so. ROA.35 (Stein decl. ¶ 5).

Perhaps the oddest thing about defendants' invocation of the crime-fraud exception is its inconsistency with their own actions. Before filing the Stein Memo in the *Hill* record, Hill *voluntarily* dismissed his claims against Exxon *with prejudice*. This voluntary dismissal was not the result of a settlement; it happened because Hill has insufficient evidence to support a tort claim against Exxon. How, then, can his counsel now seriously accuse Exxon of a crime or fraud? The answer is that they cannot.

Since Exxon never committed a crime or fraud, Stein's legal advice could not have furthered a crime or fraud. Therefore, the crime-fraud exception cannot apply.

## Conclusion

When Exxon first discovered its inadvertent production of the Stein Memo, it did what Louisiana law required it to do to preserve its attorney-client privilege. Opposing counsel appeared to acquiesce, returning the original CD containing the document and raising no objection to Exxon's claim of privilege. Only later did it become apparent that opposing counsel

had kept a copy of the Stein Memo. Their use of it in federal court is the reason for this appeal.

Regardless of the other side's actions, Exxon has never done anything to waive the attorney-client privilege over the Stein Memo. Exxon prays that the Court uphold the privilege, reverse the district court's judgment, order the Stein Memo and references to it stricken from the *Hill* record, and order defendants to return to Exxon or destroy all paper and electronic copies of the Stein Memo.

Respectfully submitted:

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## Certificate of Service

On November 22, 2013, I caused this brief to be filed electronically with the Clerk of the 5th Circuit Court of Appeal through ECF, which sent an e-mail notice of the electronic filing to the persons listed below.

According to written consent by the parties and Fed. R. App. P. 25(c)(1)(D), I served a copy of the foregoing document to the persons listed below by e-mail.

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## Certificate of Compliance

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,494 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 2010 Version 14.0.7106.5003 (32 bit) in 14-point Cambria typeface (12-point for footnotes).

/s/ Raymond P. Ward

Raymond P. Ward