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COMMON INTEREST DOCTRINE IN IP TRANSACTIONS

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I. INTRODUCTION

Courts in most jurisdictions have widely recognized the common interest doctrine to permit coordination of efforts by parties' counsel during judicial procedures, such as disclosure of communications protected by either the attorney/client privilege or the work-product doctrine.[3] In a litigation context, the common interest doctrine allows parties to refuse to disclose or to prevent other parties from disclosing confidential communications that were shared to enable parties' counsel to render legal services.[4]

Application of the common interest doctrine has gradually extended from protection in the judicial context to also guarding a wider range of communications occurring in a business context.[5] This trend seems inevitable because the purpose of facilitating the parties' sharing of legal opinions by their counsel would also apply to a transactional context. Parties in negotiations for business transactions, such as a merger or an asset purchase, should frequently share information to assess the financial and legal risks of doing business. This information typically includes communications protected by the attorney/client privilege, such as a patent opinion letter or a memorandum assessing litigation risks or the magnitude of contingent liabilities. However, not all jurisdictions apply the common interest doctrine to disclosures of

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[3] *See, e.g.*, MobileMedia Ideas LLC v. Apple Inc., 890 F. Supp. 2d 508, 514 (D. Del. 2012).
[4] *See, e.g.*, Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 38 (E.D.N.Y. 1973).
[5] *See, e.g.*, Paula Cotter and Stephen Nevius, The Common Interest Doctrine's Development and Expansion, NAAGazette, Vol. 6, no. 11 Nov. 27, 2012).

privileged communications made during transactional negotiations, and even the jurisdictions that recognize the application of the doctrine in a transactional context do not agree upon the requirements for applying the doctrine.

The following examples illustrate the applicability of the common interest doctrine in a transactional context. First, Buyer Co. and Seller Co. are in the business of printing books. Seller Co. developed manufacturing technology for the production of books and had manufacturing facilities utilizing the technology. Seller Co. was aware of Competitor Co. and its patents regarding the similar technology in the market. Buyer Co. recently acquired Seller Co.'s assets including the manufacturing facilities under Asset Purchase Agreement. Buyer Co. also entered into Licensing Agreement to obtain a limited, exclusive license to certain properties of Seller Co. while Seller retains the exclusive rights for the properties. During negotiations, Seller Co. disclosed to Buyer Co. a patent opinion prepared by Seller Co.'s counsel regarding the validity. The parties agreed to an escrow agreement to set aside escrow funds to cover certain claims and procedures related to potential accusations of patent infringement. As the transaction is closed, the common interest agreement is to be prepared in anticipation of such matters as invalidity, non-infringement, and/or unenforceability of the patents including Competitor Co.'s patents found in opinion. Later on, Competitor Co. thought that Seller and Buyer's business had infringed its patents, and first sued Seller Co. for infringement of Competitor's patent and moved to compel disclosure of the patent opinion.

In the other transaction, ABC Co. sought companies to buy shares of its subsidiary company, and DEF Co. was one of the potential buyers. During an early stage of negotiations, ABC Co. disclosed a litigation abstract, which had been prepared by ABC's counsel for its management. ABC shared the litigation abstract with DEF to help persuade it to buy the shares.

A few years later, GHI Co. filed a suit against ABC for patent infringement, and, during discovery, requested to produce the litigation abstract shared between ABC and DEF.

This article discusses how jurisdictions apply the common interest doctrine when parties share privileged communications in the course of business transaction, and summarizes practical guidelines to protect privileged communications when parties share them to further their transaction. Comments on the two hypotheticals are followed by practical practice tips.

II. APPLICABLE CASE LAW

The common interest doctrine is an exception to the attorney/client privilege or the work-product privilege.[6] Therefore, an underlying attorney/client privilege or work-product privilege is a prerequisite for the doctrine to apply.[7]

To apply the common interest doctrine, all circuits generally require that the parties have an identical, legal interest when common in exchanging privileged communications; they share the communications in furtherance of that common interest; and they have not waived the privilege.[8] The burden of showing these requirements is on the party seeking to rely on the common interest doctrine.[9] However, practitioners cannot expect uniformity among jurisdictions in applying the common interest doctrine. Such lack of uniformity is amplified in transactional contexts, and practitioners should be well aware of particularities in how each jurisdiction applies the doctrine.

Among other things, jurisdictions around the country, even different districts within the same circuit, do not have a consistent interpretation regarding the legal standard for applying the common legal interest doctrine. Jurisdictions vary on requirements such as whether the parties

[6] Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002).
[7] *Id*. at 249.
[8] Hunton & Williams v. United States Dept. of Justice, 590 F.3d 272, 285 (4th Cir. 2010).
[9] *Id*. at 284.

need identical legal interests and whether there must be pending or anticipated litigation at the time the privileged information is disclosed. Such inconsistency in the legal standard for applying the common interest doctrine is explored as follows:

A. First Circuit

The common interest doctrine in the First Circuit requires that the nature of a common interest be "an identical, or nearly identical, legal interest as opposed to a merely similar interest."[10] However, a mere possibility of a future dispute between parties would not destroy the common legal interest of the parties sharing privileged information.[11] The common interest doctrine applies to communications made in the course of the attorney's joint representation of two or more clients having a common interest.[12] If first and second parties have a common interest, the First Circuit has ruled that the doctrine also applies to communications between the first party or the lawyer representing the first party and a lawyer representing the second party.[13]

Although there has been no case applying the common interest doctrine to an IP transactional context, the court in *Cavallaro v. United States* appeared to imply that the doctrine is applicable to a merger of unaffiliated companies.[14] What the *Cavallaro* case also shows is that, to be protected under the common interest doctrine, every party sharing privileged communications must be covered by the attorney/client privilege.[15] Specifically, in *Cavallaro*, one company hired a law firm to obtain legal advice about a tax payment, and another separate

[10] FDIC. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000).
[11] *Id.* at 463.
[12] *Id.* at 462-64.
[13] *Cavallaro*, 284 F.3d at 249 (citing WEINSTEIN'S FEDERAL EVIDENCE, J.M. McLaughlin § 503.21 at 1, 2 (2d ed. 2002).
[14] *Id.* at 236 (holding that the doctrine did not apply to a third-party accountant who participated in communication among the unaffiliated companies and their lawyers).
[15] *See, e.g., id.* at 246-248.

company received tax-planning advice from an accounting firm.[16] To strategically minimize tax liability, the two companies combined the services of the law firm and the accounting firm.[17] The court held that the record did not show that either company hired the accounting firm to assist the law firm in providing legal advice, and thus the attorney/client privilege did not extend to the accounting firm.[18] There was no underlying privilege associated with the accounting firm because the accounting firm is not hired to be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."[19] Implicit in this case is that third-party accounting firms and other non-lawyers hired specifically to help an attorney provide advice to a client will be privileged and potentially covered under the common interest doctrine.[20]

B. Second Circuit

Courts in the Second Circuit also have extended the common interest doctrine to parties sharing joint legal strategies in non-litigation settings.[21] To apply the common interest doctrine, courts in this circuit employ a two-prong test: "(1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is sought [must have been] designed to further that interest."[22]

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[16] *Id.* at 241-42.
[17] *Id.* at 242.
[18] *Id.* at 247-48.
[19] *Id. (*quoting United States v. Kovel¸ 296 F.2d 918, 922 (2d Cir. 1961)).
[20] *Id.* The *Kovel* doctrine provides that the presence of a third party that is "necessary, or at least highly useful," to facilitate attorney/client communication does not destroy the privilege. *Kovel*, 296 F.2d at 918. This doctrine has been adopted by many circuits. *See, e.g.*, United States v. Bornstein, 977 F.2d 112, 116-17 (4th Cir. 1992); United States v. El Paso Co., 682 F.2d 530, 541 (5th Cir. 1982); *In re* Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000); United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972); United States v. Judson, 322 F.2d 460, 462-63 (9th Cir. 1963); Fed. Trade Comm'n v. TRW, Inc., 628 F.2d 207, 212 (D.C. Cir. 1980).
[21] *See* Fox News Network, LLC v. U.S. Dep't of the Treasury, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010).
[22] Allied I. Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. 163, 171 (S.D.N.Y. 2008). The United States District Court for the Southern District of New York has applied the common interest doctrine in the context of litigation where "(a) the communications were made in the course of a joint defense effort or that the clients share a common

The common interest recited in the test should be "identical, not similar, and be legal, but not commercial."[23] Although it is preferable for parties to elect joint representation to enjoy the common interest doctrine,[24] parties are not required to be joint clients and can retain separate counsel.[25]

The Second Circuit appears to have a strict requirement for applying the common interest doctrine.[26] The Second Circuit does not apply it to purely business communications regarding business matters even where litigation is pending or imminent.[27] Depending on the circumstance, however, the doctrine may apply to legal advice contained in business communications shared between parties having a common legal interest.[28] In *JA Apparel Corp. v. Abboud*, for example, the court held that certain trademark opinion letters shared between parties having a formal legal relationship were privileged and protected under the common interest doctrine.[29] In *dictum*, however, the same court reasoned that there was a "colorable argument" that other opinion letters were not protected by the common interest doctrine even though they contained legal advice.[30] The reason was that these other opinion letters were prepared before the parties had a

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legal interest; (b) the statements were designed to further the common effort; and (c) the privilege has not been waived." *See Fox News Network*, 739 F. Supp.2d at 563.

[23] Bank of Am., N.A. v. Terra Nova Ins. Co., 211 F. Supp. 2d 493, 496 (S.D.N.Y. 2002).

[24] Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 211, n.4 (S.D.N.Y. 2009) (holding joint inventors are considered to be joint clients); *see also* Jordan Inv. Co. v. Hunter Green Invs. Ltd., No. 00 Civ. 9214 (RWS), 2005 U.S. Dist. LEXIS 3424, at *3 (S.D.N.Y Mar. 2, 2005). The court in *Merck* cites multiple examples of clients that have a common legal interest that protects privilege when they are jointly represented by the same counsel. *Merck*, 670 F. Supp. 2d at 211.

[25] *Allied Ir. Banks*, 252 F.R.D. at 170-71.

[26] *Id. (citing* United States v. Weissman, 195 F.3d 96, 100 (2nd Cir. 1999)).

[27] *Id.*

[28] JA Apparel Corp. v. Abboud, No. 07-CV-7787 (THK), 2008 U.S. Dist. LEXIS 1825, at *4 (S.D.N.Y. Jan. 10, 2008 ("Business transactions inevitably involve legal matters on which privileged advice is sought.").

[29] *Id.*

[30] *Id.* at *14.

legal relationship and for the purpose of valuing a company, which is a purely business purpose.[31]

Meanwhile, the Second Circuit has long considered pending litigation to be strong evidence showing the common legal interest between parties sharing privileged information.[32] In *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, the defendant sought to discover communications involving a patent validity opinion regarding the defendant's patent provided by a non-party's counsel.[33] The court held that any privilege that could be asserted by the non-party as to that opinion was not waived when the non-party made the opinion available to the plaintiff's lawyers.[34] The court found a common legal interest between the non-party and the plaintiff where the defendant had threatened the non-party with litigation regarding the same patent that was at issue in the existing litigation.[35]

C. Third Circuit

The Third Circuit is one of a few jurisdictions that have a lenient stance in the application of the common interest doctrine in a transactional context because the natures of the parties' interests do not need to be completely identical for the doctrine to apply.[36] Specifically, the court has acknowledged the common interest doctrine in "purely transactional contexts," and

[31] *Id.*
[32] Stix Prods., Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334, 338 (S.D.N.Y. 1969); Connecticut Mutual Life Insurance Company v. Shields, 16 F.R.D. 5, 8 (S.D.N.Y.1954) (citing Hickman v. Taylor, 329 U.S. at page 508, 510, 67 S.Ct. 385. 393 (1946).
[33] 47 F.R.D. 334, 338 (S.D.N.Y. 1969).
[34] *Id.*
[35] *Id.*
[36] La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 309-10 (D.N.J. 2008) ("Although the most common statement of the degree of interest required is that 'the interest be identical, not similar, and be legal, not solely commercial,' the Third Circuit has not specifically adopted such a stringent approach." (internal citations omitted)).

protected information shared by attorneys representing different clients with "substantially similar legal interests."[37]

For example, in *Xerox Corp. v. Google Inc.*, the United States District Court for the District of Delaware held that a common legal interest exists between a patentee and a patent licensing company, and that documents the patentee exchanged with the company were excluded from discovery because they were created after the company was retained by, and working for, the patentee.[38] The court distinguished *Xerox* from another case, *Leader Technologies, Inc. v. Facebook, Inc.*, in which the court found no common interest existed between a patentee and potential inventors because the documents at issue were created when the patentee and the inventors were still in the course of negotiation at arms-length.[39]

The court also has applied the doctrine to documents including email exchanges between a defendant and its third party supplier at least a year before a suit for patent infringement was filed, reasoning that the same counsel was employed to address their joint concerns regarding possible patent liability which could arise from their business relationship.[40]

Another example of Third Circuit leniency is found in *ArgoFresh Inc. v. Essentiv LLC*.[41] In this case, the Court held that the parties established an enforceable common legal interest upon entering into a letter of intent even though the letter required additional negotiation

[37] *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 364-65 (3d Cir. 2007).
[38] Xerox Corp. v. Google, Inc., 801 F. Supp. 2d 293, 303-04 (D. Del. 2011).
[39] Leader Technologies, Inc. v. Facebook, Inc., 719 F. Supp.2d 373, 376-77 (D. Del. 2010). *See also* Katz v. AT&T Corp., 191 F.R.D. 433, 438 (E.D. Pa. 2000) (holding that documents exchanged between a patentee and its licensee before signing their licensing agreement were not protected from discovery under the common interest agreement because they did not share a common legal interest when they were negotiating their agreement at arm's length).
[40] Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 149-50 (D. Del. 2009).
[41] No. 16-662, 2019 U.S. Dist. LEXIS 172423 (D. Del. Oct. 4, 2019).

between the parties.[42] This holding was based at least in part on the fact the letter was signed, contained an obligation of confidentiality, and an exchange of money as consideration.[43]

D. Fourth Circuit

The Fourth Circuit has not yet had a chance to address the application of the common interest doctrine in a transactional context in a written opinion. However, the common interest doctrine has been applied where the parties shared an identical legal interest in seeking legal advice with respect to any anticipated or pending litigation, and the nature of the interest must have been "identical, not similar, and be legal, not solely commercial."[44] The doctrine is still applicable even where a commercial interest of a third party receiving the privileged information overlaps a legal interest in establishing a common interest.[45] Although the courts in the Fourth Circuit have not required litigation to be in progress,[46] the litigation must be pending or contemplated against a common adversary for there to be a sufficient common interest between parties.[47]

In a more recent case, *Hanson v. United States Agency for International Development*, the Fourth Circuit applied the doctrine where parties consult the same counsel regarding a legal

[42] *Id.* at *7-*8.
[43] *Id.* at *8.
[44] DuPlan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974) (holding that the common interest doctrine did not apply to communications between counsel for the plaintiff, the owner of a patent, and counsel for a non-party, the exclusive U.S. sales-licensee under the patent, because the interest of the non-party was purely commercial, and not legal, in that the patent-owner's legal success would benefit the patent-licensee only financially, and the licensee had no legal interest in common with the patent-owner).
[45] *Id.*
[46] Hanson v. United States Agency for Int'l Development, 372 F.3d 286, 292 (4th Cir. 2004); United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) (*citing* United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).
[47] Beyond Sys., Inc. v. Kraft Foods, Inc., No. PJM-08-409, 2010 U.S. Dist. LEXIS 40423, at *5 (D. Md. Apr. 23, 2010).

matter in which the parties share a common interest.[48] The court recognized that actual litigation between the parties was not required for the doctrine to apply.[49]

Furthermore, the court stated that, a written agreement helps the parties meet the burden of showing their shared common legal interest, whether it is a confidentiality agreement, a joint defense agreement, or a common interest agreement.[50]

E. Fifth Circuit

Among other things, the Fifth Circuit generally requires a "palpable threat of litigation at the time of the communication."[51] In a patent infringement suit, the court applied the common interest doctrine to a non-infringement opinion prepared by counsel who represented the defendant, an alleged patent infringer, and a non-party corporation that acquired the alleged infringer in a merger.[52] The court reasoned that, although the corporation was not a party to the ongoing suit, the alleged infringer and the corporation were potential co-defendants in the plaintiff's lawsuit and acted under a threat of imminent litigation by the plaintiff.[53] In this regard, the non-infringement opinion prepared during negotiation dealt with "common legal issues that were intended to facilitate representation in possible subsequent patent infringement litigation," and the alleged infringer and the corporation "had a natural and common interest in consulting about a potential infringement suit because the suit might impact the merger of the companies."[54] The court distinguished this case from *In re Santa Fe International Corp.*, where the common interest doctrine was not applied to documents prepared between the defendant and a potential

[48] *Hanson*, 372 F.3d at 292.
[49] *Id.*
[50] *Hunton & Williams*, 590 F.3d at 286-87.
[51] *See, e.g.*, Power-One, Inc. v. Artesyn Technologies, Inc., No. 2:05-cv-463, 2007 U.S. Dist. LEXIS 28630, at *5 (E.D. Tex. Apr. 18, 2007) (citing *In re* Santa Fe Int'l Corp., 272 F.3d 705, 710 (5th Cir. 2001)).
[52] Autobytel, Inc. v. Dealix Corp., 455 F. Supp. 2d 569, 576 (E.D. Tex. 2006).
[53] *Id.*
[54] *Id.*

co-defendant years prior to filing of suit against the defendant because the documents were not prepared in the anticipation of litigation, but rather to comply with the antitrust laws.[55]

Similarly, in *Power-One, Inc. v. Artesyn Technologies, Inc.*, the defendant company, and non-party companies discussed the plaintiff's pending patent application in the course of their joint development of technology prior to the lawsuit in the case.[56] The defendant company and the non-parties entered into a common interest agreement before exchanging privileged legal analysis, and the agreement showed that the signatories were engaging in activities that could potentially result in litigation.[57] The court held that the defendant and non-party companies shared a common legal interest because the negotiating companies were concerned about the plaintiff's pending patent and its effect on their joint technology development.[58]

More recently, the Eastern District of Texas held that the common interest doctrine did not apply to communications shared by parties whose interest was purely commercial and adverse in nature.[59] In *Mondis Technology, Ltd. v. LG Electronics, Inc.*, the defendant sought to compel discovery of privileged communications regarding the plaintiff patent holder's dispute with a former potential patent buyer regarding the value of the patent sale.[60] The court held that the patent holder and the potential buyer did not have a common legal interest because the core

[55] *Id.* at 713.
[56] Power-One, 2007 U.S. Dist. LEXIS 28630 at *5-6.
[57] *Id.* at *2-*3, *6, *8. (Paragraph two of the agreement provides that the parties were jointly involved in developing a protocol which enables open architectures that facilitate product development. In developing this protocol, the parties expressed a "joint interest in evaluating (i) patents, (ii) published patent applications, (iii) other intellectual property, (iv) prior art and similar materials/information that could provide a legal hindrance to the development or practice of the Standard Digital PM Protocol." Paragraph five describes the parties' common interests "relating to the evaluation of alleged intellectual property that could provide a legal hindrance to the development or practice of Standard Digital PM Protocol" and that "facts and information known or developed by each of them . . . may assist each Party in pursuing their common interests." For that reason, the parties acknowledged and agreed "that their interests will best be served if the Parties and their Counsel can exchange information subject to the continued protection of the attorney-client, attorney work-product, and other privileges.").
[58] *Id.*at *8-*9.
[59] Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-CV-565-TJW-CE, 2011 U.S. Dist. LEXIS 47807, at *19-*20 (E.D. Tex. May 4, 2011).
[60] *Id.* at *18..

communications were not related to the validity of the patent.[61] Rather, their interest was held purely commercial and directly adverse to each other because they were negotiating a potential adjustment to the contract price of the patent sale and there was no anticipation of litigation.[62]

F. Sixth Circuit

Courts in the Sixth Circuit have applied the common interest doctrine regardless of whether parties are represented by the same party, or whether they are individually represented but have the same goal in mind.[63] There does not have to be an actual suit pending for the application of the doctrine.[64] However, the parties' shared interest must be identical as well as legal in nature.[65]

The Sixth Circuit requires parties' counsel to take affirmative steps to safeguard the privilege.[66] In *Dura Global,* the court held the privilege applied to opinion letters prepared by counsel concerning potential patent infringement when the parties had taken steps to preserve the confidentiality of the letters with confidentiality markings and instructed the receiving party to not further disclose the confidential information.[67] In this case, information was shared only between the parties' attorneys.[68]

Notably, the court in one example gave significant weight to a common interest agreement. In *In re Smirman,* a defendant in a patent infringement suit purchased and resold allegedly infringing products, which were manufactured by a non-party company.[69] The

[61] *Id.* at *20.
[62] *Id.*
[63] Cooey v. Strickland, 269 F.R.D. 643, 652-53 (S.D. Ohio 2010).
[64] Broessel v. Triad Guaranty Insurance Corp., 238 F.R.D. 215, 220 (W.D. Kentucky 2006).
[65] Dura Global Techs., Inc. v. Magna Donnelly Corp., No. 07-CV-10945-DT, 2008 U.S. Dist. LEXIS 41432, 2008 WL 2217682, at *1 (E.D. Mich. May 27, 2008).
[66] *Id.* at *8.
[67] *Id.*
[68] *Id.*
[69] 267 F.R.D. 221, 222 (E.D. Mich. 2010).

defendant and the manufacturer had agreed to a "Common Interest and Information Sharing Agreement" due to their business relationship, and under this agreement, the manufacturer provided the defendant with an opinion prepared by a patent attorney retained by the manufacturer.[70] The opinion letter evaluated whether the manufacturer's products infringed the plaintiff's patents.[71] The court held that any communication or disclosures between the defendant and the non-party manufacturer were privileged because of the valid common interest agreement.[72]

G. Seventh Circuit

In the Seventh Circuit, the attorney/client privilege is not waived under the common interest doctrine where the communicating parties have "an identical, not merely similar, legal interest" in communications that are "made in the course of furthering the ongoing, common enterprise."[73] But, such legal interest need not relate to a pending litigation.[74] The doctrine is applicable even where parties are represented by separate attorneys, and even where parties are not anticipating of future litigation.[75]

For example, in *Tenneco Packaging Specialty & Consumer Products, Inc. v. S.C. Johnson & Son, Inc.*, the court held that the attorney/client privilege was not waived when a non-party showed a patent opinion to the defendant in due diligence for the asset purchase agreement that gave the defendant rights to the patents at issue.[76] In this case, the opinion was disclosed "when the asset purchase deal was largely locked up" and to only a limited number of the

[70] *Id.*
[71] *Id.*
[72] *Id.* at 223.
[73] Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 964 (N.D. Ill. 2010).
[74] *Id.*
[75] *Id.*
[76] No. 98 C 2679, 1999 U.S. Dist. LEXIS 15433, at *7 (N.D. Ill. Sep. 14, 1999).

defendant's employees who had "acknowledge[d] that the disclosure was subject to a confidentiality agreement."[77]

In *JP Morgan Chase & Co.*, the court distinguished the nature of the parties' interests prior to and after signing a merger agreement.[78] In the case, two unaffiliated organizations shared documents during the merger negotiations.[79] The court held that the communications, which were shared by the parties prior to signing the merger agreement, were not protected by the attorney/client privilege and the common interest doctrine.[80] The court reasoned that, prior to the merger, the parties stood on opposite sides of a business transaction, and their interests were actually in conflict because each party wanted to get the best deal from the other party.[81] The parties were not involved in a pending or anticipated litigation, and were considered to have only a similar business interest at most. On the other hand, the court held that the parties had an identical legal interest after signing the merger agreement because they shared the common goal of ensuring that the merger complied with regulatory conditions and was approved by shareholders.[82]

H. Eighth Circuit

To apply the common interest doctrine, the courts have required that "the parties have a common legal interest, such as situations in which they are co-defendants or are involved in or

[77] *Id.*
[78] *In re* JP Morgan Chase & Co. Securities Litigation, MDL No. 1783, Master Docket No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *12-*13 (N.D. Ill. Aug. 13, 2007).
[79] *Id.* at *11-*12.
[80] *Id.* at *15.
[81] *Id.* at *13-*14.
[82] *Id.* at *15.

anticipate joint litigation."[83] Such legal interest must be "identical, not similar, and be legal, not solely commercial."[84]

Although not in an IP transactional context, the court has applied the common interest doctrine in a merger negotiation.[85] In *Rayman v. American Charter Federal Savings & Loan Association*, a borrower sued a lender, and moved to compel discovery of reports analyzing the pending litigation, which had been provided by the lender's counsel and were disclosed to another lender during merger negotiations between the lenders.[86] Relying on the *Hewlett-Packard* case, the court held that the reports at issue remained privileged under the common interest doctrine. [87] The court reasoned that the lenders had an identical, legal interest in the pending litigation because it was obvious at the time of the negotiations that the lenders would be defending the pending action if the merger was completed.[88]

I. Ninth Circuit

Courts in the Ninth Circuit has held that the common interest doctrine may apply in a transactional context, and appears to have a broad view in applying the common interest doctrine.[89] The courts have expressed concern that finding a waiver of privilege too freely would inhibit business transactions. As the courts have stated, "Unless it serves some significant interest courts should not create procedural doctrine that restricts communications between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of

[83] Rayman v. Am. Charter Fed. Sav. & Loan Ass'n, 148 F.R.D. 647, 654 (D. Neb. 1993) (citing Union Carbide v. Dow Chem., 619 F. Supp. 1036, 1047 (D. Del.1985); *see also* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 309 (N.D. Cal. 1987).
[84] *Id.*
[85] *Id.* at 651-660.
[86] *Id.* at 649, 653.
[87] *Id.* at 654-55.
[88] *Id.*
[89] Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308 309-10 (N.D. Cal. 1987).

the business or product they are considering buying."[90] In *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, the district court noted that the common interest doctrine protects against discovery of documents if the parties to a transaction anticipate litigation in which they would have common interest.[91] The court found that the attorney/client privilege was not waived where the defendant, Bausch & Lomb, disclosed a patent opinion letter to a non-party during negotiations for the purchase of a Bausch & Lomb division.[92] The court found that the defendant and the non-party had common legal interests in whether the defendant's patents were valid and whether the defendant's products infringed other patents, including the plaintiff's patent.[93] The court recognized that the two companies could have reasonably anticipated joint litigation with the plaintiff at the time of the negotiations, despite the fact that the non-party did not eventually purchase the division.[94] In this case, Bausch & Lomb and the potential purchaser took substantial steps to preserve the confidentiality of the opinion letter.[95] Specifically, Bausch & Lomb delivered only two hard copies of the letter to the potential purchaser, and instructed the purchaser to make no copies of the letter or distribute them, and to return the original hard copies later.[96]

The Ninth Circuit also held that a shared interest in whether an invention is patentable and non-infringing is sufficient for a common interest agreement to be valid.[97] In *Britesmile*, the

[90] *Id.* at 311 (*Quoted by* Britesmile, Inc. v. Discus Dental, Inc., No. C 02-3220 JSW (JL), 205, 2004 U.S. Dist. LEXIS 20023, at *9 (N.D. Cal. Aug. 10, 2004)).
[91] *Id.* at 309-310 (*citing* Union Carbide Corp. v. Dow Chemical Co., 619 F. Supp. 1036 (D. Del. 1985)).
[92] *Id.* at 309.
[93] *Id.* at 309-10.
[94] *Id.* at 310 ("[A]t the time defendant and [non-party] were negotiating it seemed quite likely that defendant and [nonparty] would be sued by plaintiff and that in that litigation defendant and [non-party] would be identically aligned, fighting to protect interests distinguished only by the time frame in which the marketing took place.").
[95] *Id.* at 309.
[96] *Id.* at 308-09.
[97] Britesmile, Inc. v. Discus Dental, Inc., No. C 02-3220 JSW (JL), 205, 2004 U.S. Dist. LEXIS 20023, at *9 (N.D. Cal. Aug. 10, 2004).

court agreed with the defendant's claim that it did not waive any privilege when it disclosed to a non-party several documents that the defendant's counsel had prepared the document to determine whether the technology that the defendant was purchasing from the non-party either infringed any patents or was itself patentable.[98] The court found that, although the defendant and the non-party shared a common business interest in the sale of the technology, they also shared a common legal interest regarding whether the technology was patentable and it infringed any patents.[99]

In *Nidec Corp. v. Victor Co. of Japan*, a defendant company involved in a patent infringement suit solicited bids from third parties to purchase shares of the defendant's company and provided one of the bidding parties with litigation abstracts.[100] Distinguishing *Hewlett-Packard*, the court held the common interest doctrine did not apply to the communication between the defendant and the potential bidders, and that the privilege attached to the litigation abstracts was waived by disclosure to the potential bidders.[101] Unlike *Hewlett-Packard*, the litigation abstracts in *Nidec Corp.* were prepared prior to the pending litigation by the defendant company for its own management.[102] The court disagreed with the proposition in *Hewlett-Packard* that "the common interest privilege extends generally to any disclosures made in connection with the prospect purchase of a business."[103] The court reasoned that a common legal interest was found in *Hewlett-Packard* because of anticipated joint litigation.[104] In contrast,

[98] *Id.* at *6-7.
[99] *Id.*
[100] 249 F.R.D. 575, 577 (N.D. Cal. 2007).
[101] *Id.* at 579.
[102] *Id.*
[103] *Id.*
[104] *Id.* ("The [*Hewlett-Packard*] court concluded that given the impending acquisition, it was 'quite likely' that both parties would be sued by the plaintiff and that the defendant would defend the marketing of the product in the years preceding the sale to the third party while the third party would defend the same product for the years following the sale.")

the *Nidec* court held there was little chance that the defendant and the potential bidder might ever engage in joint litigation, and the potential bidder was simply considering buying shares of the defendant company.[105] The litigation abstracts were provided to facilitate the potential bidder's commercial decision about whether to buy the shares of the defendant company, but not to further a common legal strategy in connection with the pending litigation.[106]

In *Morvil Tech., LLC v. Ablation Frontiers, Inc.*, a defendant and a non-party were contemplating a wholesale acquisition of the defendant by the non-party.[107] The court held that the defendant and the non-party shared common legal interests in whether the products that the two companies would market infringed third-party intellectual properties, and that the communications addressing the scope of the intellectual properties were designed to further that interest.[108] This mutual interest in valid and enforceable patents was held within the confines of the common interest doctrine.[109]

J. Tenth Circuit

The Tenth Circuit has recognized the common interest doctrine as "a shield to preclude waiver of the attorney/client privilege when a disclosure of confidential information is made to a third party who shares a community of interest with the represented party," and required that "two parties have in common an interest in securing legal advice related to the same matter and that the communications be made to advance their shared interest in securing legal advice on that common matter."[110] Although the Tenth Circuit has required that the nature of the interest be identical, the United States District Court for the District of Kansas held that the standard was

[105] *Id.*
[106] *Id.*
[107] No. 10-CV-2088-BEN (BGS), 2012 U.S. Dist. LEXIS 30815, at *9 (S.D. Cal. Mar. 8, 2012).
[108] *Id.* at *9.
[109] *Id.*
[110] Frontier Ref. v. Gorman-Rupp Co., 136 F.3d 695, 705 (10th Cir. 1998).

not as strict in patent cases.[111] Rather, for information related to patents, the standard for applying the common interest doctrine is whether there was only substantially identical legal interests.[112]

For example, in *High Point SARL v. Sprint Nextel Corp.*, a third-party negotiated with several companies about an assignment of several patents and eventually assigned them to the plaintiff.[113] The third-party shared several documents with potential assignees including patent analyses and other patent-related information.[114] After the assignment, the plaintiff eventually sought to enforce the assigned patent against the defendant.[115] The third party was not a party to this litigation.[116] The court ruled that the documents were privileged and the common legal interest doctrine applied because the third party had not waived its attorney/client privilege for the confidential material because it had a common legal interest with the plaintiff and the other parties with which it was negotiating.[117] The court reasoned that finding waiver too freely in cases involving patents, and perhaps other intellectual property, would make it appreciably more difficult to negotiate licenses and sales of businesses.[118]

The *High Point* court also focused on the third-party's effort to preserve the confidentiality of documents before their disclosure and on the involvement of the parties'

[111] High Point SARL v. Sprint Nextel Corp., No. 09-2269-CM-DJW, 2012 LEXIS 8435 at *32-33 (D. Kan. Jan. 25, 2012) (*following* Federal Circuit precedent from *In re* Regents of Univ. of Cal., 101 F.3d 1386, 1389 (Fed. Cir. 1996)).
[112] *Id.* at *33.
[113] *Id.* at *20.

[114] *Id.* at *5, *9.
[115] *Id.* at *4-*5.
[116] *Id.* at *17.
[117] *Id.*at *35.
[118] *Id.* at *28-*29 (*Relying* on Hewlett-Packard Co., 15 F.R.D. at 311).

counsel.[119] As soon as discussions commenced regarding the possibility of transferring patents, the parties entered into a non-disclosure agreement to keep the exchanged documents confidential.[120] The parties to the transfer agreements also entered into a confidentiality and common interest agreement.[121] The parties exchanged the documents to assess the legal merits of the patent-in-suit and to formulate a legal strategy regarding infringement and validity of the other patent claims. All materials exchanged were created and collected at the direction of the parties' attorneys.[122]

K. Eleventh Circuit

Although the Eleventh Circuit has not addressed the common interest doctrine in many cases, one of the district courts recently determined the nature of a common interest shared by joint ventures. In *Hope for Families & Community Service, Inc. v. Warren*, a potential licensee contracted with a company to obtain a bingo license for the company.[123] The joint venture explored the legal implications of a patent licensee and obtaining professional legal advice.[124] The court held that the parties shared a common legal interest, and that this interest was analogous to a common legal interest between parties jointly developing patents "to obtain greatest protection and in exploiting the patents."[125]

L. D.C. Circuit

[119] *Id.* at *19 ("A critical component of the privilege 'is whether the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence.'" (citing United States v. Lopez, 777 F.2d 543, 552 (10th Cir. 1985)).
[120] *Id.* at *35.

[121] *Id.* at *21.
[122] *Id.*
[123] No. 3:06-CV-1113-WKW, 2009 U.S. Dist. LEXIS 46009, at *4-*7 (M.D. Ala. Apr. 21, 2009).
[124] *Id.* at *48.
[125] *Id.* (citing Baxter Travenol Labs., Inc. v. Abbott Labs., No. 84-C-5103, 1987 U.S. Dist. LEXIS 10300, 1987 WL 12919, at *1 (N.D. Ill. June 19, 1987).

The United states District Court for the District of Columbia appears to have a strict view in applying the common interest doctrine. The court requires a party relying on the doctrine to establish an agreement between the parties to pursue a joint defense strategy, and it instructs that a written common interest agreement is the most effective method of establishing the existence of such agreement, although there may be circumstances such as an oral agreement that prove there was a common legal interest. [126] A party relying on the common interest doctrine must show that communications have been made to facilitate a common legal interest; a business or commercial interest is insufficient.[127] Furthermore, the common interest doctrine is not limited to sharing documents in actual litigation; the doctrine also applies to "an on-going and joint effort to set up a common defense strategy in connection with . . . prospective litigation."[128]

For example, in *Intex Recreation Corp. v. Team Worldwide Corp.*, the defendant and a third-party entered into an exclusive distribution agreement.[129] Both the defendant and the third party later sent virtually identical cease and desist letters to the plaintiff alleging patent infringement.[130] They entered a common interest agreement at an even later date.[131] The court found that the exclusive distribution agreement executed by the patentee and the distributor was an agreement to enter into a common business or commercial interest but it did not involve a common legal interest that would invoke the common interest doctrine.[132] They then found that the date the parties sent the cease and desist letter to the defendant provided evidence of a

[126] Minebea Co. v. Papst, 228 F.R.D. 13, 17-18 (D.D.C. 2005); Intex Recreation Corp. v. Team Worldwide Corp., 471 F. Supp. 2d 11, 16 (D.D.C. 2007).
[127] *Intex Recreation Corp.*, 471 F. Supp. 2d at 16.
[128] *Id.*
[129] *Id.* at 13.
[130] *Id.* at 14.
[131] *Id.* at 13.
[132] *Id.* at 16.

coordinated legal strategy that aligned their legal interest.[133] The common interest doctrine thus applied beginning on the date of the letters even through the defendant and third-party had not yet executed the formal common interest agreement.[134]

M. Federal Circuit

In applying the common interest doctrine to patent infringement suits, the Federal Circuit has required the parties exchanging the privileged documents to have a substantially identical legal interest, which is a less stringent standard than an "identical legal interest."[135] However, a substantially identical legal interest does not include a purely commercial interest.[136]

In *In re Regents of University of California*, the court held that application of the common interest doctrine required the inventor/patentee and a potential licensee to share a common legal interest in successfully prosecuting patent applications.[137] Although the clear purpose of the parties' joint activity was "to support commercial activity," the court held that in situations where both commercial and legal interests are intertwined, the legal interest is sufficient to establish the common interest required to preserve the attorney/client privileged.[138] The inventor/patentee and potential licensee had a "substantially identical" legal interest in the subject of the communication—valid and enforceable patents—because of the potentially and ultimately exclusive nature of their license agreement.[139]

III. GUIDELINES FOR PROTECTING PRIVILEGE

[133] *Id.* at 17; *Cf. Minebea*, 228 F.R.D. at 18-19 (Documents potentially relevant to patent dispute disclosed to multiple parties, some disclosures protected by doctrine, some disclosures not protected by doctrine).
[134] *Id.*

[135] *In re* Regents of Univ. of California, 101 F.3d at 1389
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

As discussed above, many jurisdictions now recognize the common interest doctrine in a transactional context. Most jurisdictions require that the parties' common interest be identical and legal, as opposed to being solely commercial or business-related. However, the interpretation of such requirements varies based upon the jurisdiction. Keeping in mind the lack of uniformity among the various jurisdictions, parties and their attorneys should consider the following when sharing privileged information.

A. Delay of Exchanging Privileged or Confidential Information

Several circuits have held that parties engaged in arm's length business transactions generally do not qualify for the common interest privilege because such parties can be deemed to be adverse to each other.[140] Negotiating parties can inadvertently waive a privilege by sharing communications at the early stage of negotiations. An exception to the waiver in some jurisdiction is when the parties reasonably anticipate litigation following the transaction because such transaction would require the parties to share the privileged communications to effectively conduct business. Such parties should therefore defer sharing privileged legal communications for as long as possible until they enter into a substantive agreement.

B. Representation by Counsel

Parties in business transaction should be represented by their legal counsel. The common interest doctrine is not an independent doctrine, but an exception to the attorney/client or work-product privilege. Either of these privileges is a prerequisite for the doctrine's application. Furthermore, clients should be advised not to share information with other parties outside the presence of counsel.

C. Common Interest Agreement

[140] *Nidec Corp.*, 249 F.R.D. at 579; *In re JP Morgan Chase*, 2007 U.S. Dist. LEXIS 60095 *13-15; *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976); *Bank of America*, 211 F. Supp. 2d at 497.

Parties seeking the common interest privilege should execute a written agreement evidencing their common legal interest. A common interest agreement should be drafted at the earliest stage of transactional negotiations. Such an agreement should preferably include a statement that the purpose of the information exchange is to further a community of interest between the parties, and specify that the shared interest is identical and legal in nature.[141]

(1) Recital of Legal Interest

First, a common interest agreement should identify a common *legal* interest shared among parties. As discussed above, most jurisdictions require that the common interest shared by the parties be a legal, rather than a purely commercial, interest.[142] Thus, it is important for parties to be able to explain the nature of the legal interest associated with the communications and how this interest is the basis for the business negotiations. For example, if the negotiations concerned a specific law associated with privileged communications, or a legal issue such as the validity of patents in transaction, this would improve the likelihood that the common interest doctrine applied to the negotiations.

(2) Recital of Parties' Anticipation of Litigation

A common legal interest is more easily shown if the common interest agreement indicates that parties intended to share privileged information in preparation for potential litigation against an identifiable adverse party, in connection with their business transaction.

There is no consensus among jurisdictions whether the common interest doctrine can apply in the absence of actual or anticipated litigation. Some courts have rejected the possibility

[141] *See* Martin F. Murphy, SHARING SECRETS: THINKING ABOUT JOINT DEFENSE AGREEMENTS, 46 F. B.J. 31 (Sept. - Oct. 2002).
[142] *See, e.g.*, Minebea Co., Ltd. v. Pabst, 228 F.R.D. 13, 16 (D.D.C. 2005); *In re* Megan-Racine Associates, Inc., 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1975) ("The key consideration is that the nature of the interest . . . be legal, not solely commercial.").

that parties could share a common legal interest without pending or anticipated litigation,[143] while others have determined that no actual or anticipated litigation is necessary to protect communications under the common interest doctrine.[144] Thus, parties and attorneys cannot be certain that privileged communications shared with another party or its counsel will be considered privileged under the common interest doctrine in the absence of pending or anticipated litigation. However, several jurisdictions appear to have considered anticipated litigation to suggest a legal interest between parties.[145] Therefore, demonstrating a threat of litigation may persuade courts to protect joint communications under the common interest doctrine.

(3) Recital of Identical Interest

Although jurisdictions do not agree on the definition of an *identical* legal interest, most jurisdictions require that all members in privileged communications share an identical, or, at least, substantially similar, interest. Therefore, parties must be able to prove that their communications are related to an identical interest, and include only those parties with an identical interest in the privileged communications. Reciting the parties' common legal interests in a written common interest agreement will help document these interests for the court.

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[143] *See, e.g., In re Megan-Racine*, 189 B.R. at 573 ("A common legal interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation."); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 50 (S.D.N.Y. 1989) ("Actual or potential litigation is a necessary prerequisite for application of the joint defense privilege."). In addition, some state legislatures have imposed a similar requirement. *See, e.g.*, Ark. R. Evid. 502(b); Haw. R. Evid. 503(b); Ky. R. Evid. 503(b)(3); Me. R. Evid. 502(b)(3); Miss. R. Evid. 502(b)(3); N.H. R. Evid. 502(b)(3); N.D. R. Evid. 502(b)(3); Okla. Stat. Ann. tit. 12, § 2502(B)(3) (West 1993); S.D. Codified Laws § 19-13-3(3) (Mich. 1995); Tex. R. Evid. 503(b)(1)(C); Vt. R. Evid. 502(b)(3).

[144] *See, e.g., In re* Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (applying common interest doctrine to protect communications exchanged between attorneys for a civil plaintiff and a non-party absent contemplated litigation involving non-party); United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) ("[I]t is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply ...."); *SCM Corp.*, 70 F.R.D. at 513 ("The privilege need not be limited to legal consultations between corporations in litigation situations ....").

[145] *See Power-One, Inc.*, 2007 U.S. Dist. LEXIS 28630 at *2.

(4) Additional Considerations

- The agreement should recite a specific legal issue that the parties have in common and limit references suggesting a solely commercial interest among parties.
- The agreement should not discuss or hint at the possibility that parties could have an adverse interest in future.
- The agreement should recite that the parties intend to seek legal advice from their legal counsel and may share their attorney's legal advice as necessary to further their common legal interests.[146]
- Together with a confidentiality agreement, the common interest agreement delineates the procedures by which documents are to be handled by the receiving party. For example, the agreement can recite that the receiving party can share documents only with its counsel or shared only with people in the company who have a need to know information in the document for purposes of the transaction being negotiated.
- The agreement should include a venue provision – the application of the common interest doctrine varies jurisdiction by jurisdiction. For example, the Federal District Court for the Northern District of California has a more expansive view of the common legal interest doctrine than the Federal Court for the Northern District of Ohio.

D. Confidentiality Agreement

Parties seeking protection through the common interest doctrine should execute a confidentiality agreement to evidence their affirmative steps taken to obtain such protection.[147]

[146] *Bank of America*, 211 F. Supp. 2d at 496-97.

This agreement should include limitations to show the parties' best effort in preserving the confidentiality of communications. Such limitations can include:

- The number of people who have access to confidential information.
- A designated group of entities who have access to privileged information. Such entities include accountants, investment bankers, insurers, and lenders.
- The number of copies of documents to be disclosed.
- A requirement that a party receiving confidential information return or discard the information when purported transactions are done, or in a reasonable period of time.
- A provision disallowing a receiving party to make copies of information.
- A general provision providing for protection of the confidentiality in perpetuity.
- A provision preventing the parties from disclosing any portion of the privileged material – this could result in waiving the privilege.

IV. CONCLUSION – Application of Guidelines to Hypotheticals

It is time to return to the two hypotheticals introduced at the beginning of this article. The patent opinion in the first hypothetical would likely remain privileged under the common interest doctrine because all jurisdictions would consider that Seller and Buyer share an identical, legal interest in the validity of Seller's patents and the non-infringement of its manufacturing products. Furthermore, courts would likely hold that Seller and Buyer are likely anticipating a joint litigation against Competitor Co. Given the acquisition, it is likely that Seller and Buyer could be sued by Competitor and should defend their manufacturing of the products.

[147] *Hewlett-Packard Co.*, 115 F.R.D. at 309); Libbey Glass, Inc. v. Oneida, Ltd., 197 F.R.D. 342, 348 (N.D. Ohio 1999) ("refusing to extend the common interest privilege to situations where no efforts were taken to acknowledge and protect the privileged status of the shared communications").

In contrast, the litigation abstract in the second hypothetical would probably be produced in discovery. Although ABC is now engaged in patent infringement litigation, it is less likely that DEF might ever engage in joint litigation because DEF was simply considering buying the share of ABC. Furthermore, the litigation abstract was disclosed before the parties reached a substantial agreement and was not designed to establish a joint defense in the pending litigation but rather to further a commercial transaction. Thus, the parties' interest was purely business-oriented, and in conflict since each party sought to get best deal from the other party.

Although application of the common interest doctrine varies by jurisdiction, the foregoing guidelines will clarify whether courts will apply the common interest doctrine in the context of a business transaction.

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