IN THE SUPREME COURT OF THE STATE OF OREGON

CRIMSON TRACE CORPORATION, an Oregon corporation, Plaintiff-Adverse Party, v. DAVIS WRIGHT TREMAINE LLP, a Washington limited liability partnership, FREDERICK ROSS BOUNDY, an individual, and WILLIAM BIRDWELL, an individual, Defendants-Relators.	Multnomah County Circuit Court Case No. 1108-10810 Supreme Court No. S061086 **MANDAMUS PROCEEDING**

DEFENDANTS-RELATORS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND SECOND SUPPLEMENTAL EXCERPT OF RECORD

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Filed: August 2013

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I. INTRODUCTION

Plaintiff and its amici side-step the fundamental issue before this Court—whether the Circuit Court erred by engrafting an exception onto OEC 503 for otherwise privileged communications between lawyers and their firm's in-house counsel.[1] But their proposed *ad hoc* and unpredictable "exception" violates Oregon law requiring textual analyses of statutes.

Plaintiff and its amici also seek to reframe the issue by claiming that "DWT" was a monolith that "represent[ed] itself" and that there was no attorney-client relationship between Defendants DWT, Boundy, and Birdwell, on the one hand, and the firm's in-house counsel on the QAC, on the other. But that argument contradicts the Circuit Court's factual findings, which Plaintiff concedes are binding here. It also is premised on mischaracterizations of facts, most notably Plaintiff's baseless accusation that Defendants breached their duty of loyalty by "secretly plotting" against it and then billing for it. Plaintiff ignores that except for a single consultation about how to handle the remote possibility of Birdwell being called as a witness—something that Defendants *disclosed*—all of the privileged conversations between Defendants and their in-house counsel concerned an ambush *by Plaintiff*.

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[1] Abbreviations herein correspond to Defendants' Opening Brief ("Br."). "Ans." represents Plaintiff's Answering Brief.

Moreover, Plaintiff's assertions about billing are incorrect. The only billing at issue by DWT relates to *reimbursement* for 0.5 hours in connection with handling a subpoena to the firm, which the engagement letter that Plaintiff relies upon expressly permitted. DWT has not claimed a privilege over these communications. As for the documents actually at issue, DWT did not bill for *any* of those privileged communications.

Plaintiff's (and amici's) rhetoric about "secretly plotting" actually applies only to Plaintiff. After all, it was Plaintiff's Christmas Eve bombshell that it intentionally had been withholding payments for months in order to create leverage in a fee dispute, all-the-while retaining shadow counsel and maneuvering for this malpractice action, that precipitated the vast majority of the communications at issue. Defendants naturally sought advice about what to do under the circumstances—in privileged conversations concerning a scenario that Plaintiff indisputably knew about and set in motion.

Significantly, Plaintiff concedes that "[b]y communicating amongst themselves about their duties to Crimson, [Defendants and the QAC] actually acted as ethical lawyers should." Ans. at 22 n.8. Equally important, Plaintiff's amici concede that communications with outside counsel are privileged, OTLA Br. at 10, while Plaintiff concedes that "[l]aw firms may have in-house counsel like any other corporation . . . ." Ans. at 23. These concessions defeat any notion of a conflict or breach of loyalty by asserting privilege, and they confirm

the ethical propriety of seeking privileged advice and asserting that privilege. Moreover, Plaintiff and amici offer no principled explanation of why it makes any difference whether the privileged advice came from in-house or outside counsel. Indeed, not only do Plaintiff and amici ignore their illogical distinction between in-house and outside counsel, they also ignore:

(1) this Court's jurisprudence governing textual analysis of privilege statutes and statutory interpretation;

(2) the rejection of any such in-house/outside counsel distinction (and Plaintiff's and amici's entire argument) by the only high courts of any state (Massachusetts and Georgia) to consider it; and

(3) the ABA's nearly unanimous resolution in 2013 squarely rejecting Plaintiff's argument that the ABA-based ORPC preclude the privilege here.

All of this is just a sideshow, though. Even if Plaintiff were right about whether in-house counsel had a conflict (they did not), they offer no Oregon authority or reasonable argument for the proposition that an alleged violation of an *ethics rule*, which carries its own potential sanctions and consequences, necessarily vitiates an *evidentiary statute*. In fact, the only authority that addresses this crucial distinction rejects their argument. *State v. Miller*, 300 Or 203, 215-16 (1985).

Plaintiff even tries to escape the Circuit Court's rationale that OEC 503 contains an unwritten "fiduciary exception" for communications with in-house

counsel—a concession that the Circuit Court's reasoning (and Plaintiff's non-Oregon authorities)[2] cannot be squared with Oregon law. But Plaintiff offers no alternative textual (or rational) interpretation under which it can carry *its burden of proof* to compel production of Defendants' privileged communications. Plaintiff simply cannot connect its notion of a supposed ethical violation with OEC 503. Plaintiff's argument boils down to advocating the concededly flawed fiduciary exception under another name, or, at best, urging that the privilege be wiped out as a sanction.

The attorney-client privilege and work-product protection remain fully intact; the Petition for Mandamus should be granted.

II. ARGUMENT

A. Plaintiff's Construction Of The OEC Is Untenable

1. Plaintiff Ignores OEC 503's Statutory Text

Plaintiff conspicuously avoids identifying an applicable privilege exception in the statutory text of OEC 503. Plaintiff's premise is that OEC 503 is little more than a vessel for some free-floating "common law attorney-client privilege" encouraging judges to carve out unpredictable, *ad hoc* exceptions based on subjective notions of its "purpose." Ans. at 27-28. (Of course, each

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[2] *E.g.*, ER-49 (finding a "'fiduciary exception' to the attorney-client privilege"); *Koen Books Distribs. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 FRD 283, 285 (ED Pa 2002), cited in Ans. at 40.

subjective, contextual notion will require appellate review.) Plaintiff's premise rests on its misinterpretation of antiquated case law construing ORS 44.040 (1862), the predecessor to the modern statute at issue: OEC 503 (ORS 40.225). Ans. at 27-28.

Oregon law is different today. For example, this Court has rejected arguments based on a privilege's supposed "historical purpose" where "[t]he issue is easily resolved by examining the text of [the] OEC." *State v. Serrano*, 346 Or 311, 320 (2009).[3] Since OEC 503 was codified, no published decision from *any* court in Oregon has applied a judicially created exception absent from the face of the statute. Br. at 1.

Any privilege analysis must begin with the "text and context" of OEC 503; this Court will not "insert what has been omitted, or . . . omit what has been inserted." *OHSU*, 325 Or at 503; *State v. Gaines*, 346 Or 160, 171 (2009); *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 611 (1993); ORS 174.010; *State v. Sandoval*, 342 Or 506, 511-12 (2007) (rejecting contrary caselaw as "distinctly odd"). Here, OEC 503's exceptions appear on the face of the statute. OEC 503(4). Accordingly, courts have no discretion to craft additional exceptions like the Circuit Court did. *Serrano*, 346 Or at 320-21. This Court

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[3] Besides, allowing lawyers to seek confidential legal advice indisputably furthers the "historical purpose" of the attorney-client privilege. *State ex rel. Oregon Health Services University ("OHSU") v. Haas*, 325 Or 492, 500 n.6 (1997); *infra* part II.C.2.

has never held that the codified attorney-client privilege must be "strictly confined." Ans. at 28, 38. Instead, it has held that privilege statutes must be construed according to "the text of each phrase." *OHSU*, 325 Or at 503.

This Court has squarely rejected Plaintiff's argument that engrafting new exceptions onto a privilege statute is permissible. "[T]he omission of a[n] . . . exception" in the OEC "*is decisive*." *Serrano*, 346 Or at 320-21 (emphasis added). Plaintiff cannot brush aside *Serrano* in a footnote on the facile ground that *Serrano* dealt with the marital privilege (OEC 505). Ans. at 37 n.12. There is no meaningful difference between the text of OEC 503 and 505; neither contains the exception at issue.

Equally misplaced is Plaintiff's attempt to distinguish *Serrano* based on "legislative history." *Id.* Aside from misconstruing that history, *see infra* n.5, Plaintiff forgets that statutory analysis must begin with the "text and context" of a statute, and only *after* doing so can a court consider legislative history "for what it's worth." *Gaines*, 346 Or at 171. The text and context of OEC 503 thus remains "decisive" here. *Serrano*, 346 Or at 320-21.

2. Plaintiff Misstates The Statutory Context

Plaintiff also never rebuts Defendants' point that OEC 503 does not state that its codified exceptions are "non-exclusive," in contrast to the related provisions in OEC 504 and OEC 504-1. Br. at 20. It is irrelevant that the "non-exclusivity" provisions in OEC 504 and 504-1 were enacted after OEC 503.

Ans. at 36. These later provisions demonstrate that when the Legislature wanted to make a "non-exclusive" list of exceptions, it knew how to do so. The rule that related statutes can be consulted as part of the "text or context" analysis has never turned on the timing of the related enactments—later-enacted statutes can be "strong evidence" of a prior statute's meaning. *Gladhart v. Or. Vineyard Supply Co.*, 332 Or 226, 233-34 (2001).[4] The Legislature knew the law regarding OEC 503 and did not enact "mere surplusage" regarding OEC 504 and 504-1. *Quintero v. Bd. of Parole*, 329 Or 319, 324 (1999).

Equally unavailing is Plaintiff's suggestion that the exceptions in OEC 503 are non-exclusive because they do not account for ORPC 1.6 (allowing attorneys to reveal client confidences when consulting about compliance with the ORPC). Br. at 35. Plaintiff and amici conflate two distinct concepts—rules of ethics and rules of evidence—a fatal flaw in their entire argument. ORPC 1.6 may allow lawyers to reveal privileged communications in limited situations where the privilege belongs to their *clients*, but it does not create "exceptions" to the privilege *as an evidentiary matter* where the privilege belongs to the *lawyer*. (The ORPC does not purport to abrogate any privilege either.)

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[4] *See also Halperin v. Pitts*, 352 Or 482, 490 (2012) ("this court not infrequently refers to later-enacted statutes" in interpreting the text of earlier enactments); *Serrano*, 346 Or at 323 (considering various privilege statutes during contextual analysis of OEC 505, without regard to timing).

Significantly, Plaintiff and its amici ignore *State v. Miller*, 300 Or 203, 215-16 (1985). Again, *Miller* held that "[i]t is important to distinguish between the evidentiary privilege . . . to prevent disclosure of confidential information at trial, and . . . any ethical obligation" of confidentiality." Br. at 38 & n.15. As *Miller* confirms, ORPC 1.6 does not suggest that the Legislature "specifically contemplated" OEC 503 to have hidden exceptions. Ans. at 34-35.[5] More generally, *Miller* defeats Plaintiff's and amici's assumption that alleged violations of ethics rules automatically vitiate evidentiary privilege rules.

Plaintiff cannot escape the fact that in Oregon—as in California, Texas, and other states—courts lack authority to create *ad hoc* exceptions to statutorily codified privileges. Br. at 18-26.[6] Nor can Plaintiff dispute that such *ad hoc* exceptions would significantly undermine the ability of clients and lawyers to

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[5] Nor do the two so-called "exceptions" in OEC 503's commentary trump the statute itself. Ans. at 34 & n.11. These "exceptions" are merely familiar examples of *facts* that do not constitute "confidential communications" (client identity and the act of giving property to an attorney). *OHSU*, 325 Or at 507 n.9; Br. at 17.

[6] OEC 514's statutory floor is not limited to preserving "privileges other than those codified." Ans. at 38-39. Rather, OEC 514's "rule of inclusion" applies to "*all privileges.*" *John Deere Co. v. Epstein*, 307 Or 348, 353 (1989) (emphasis added). Plaintiff resorts to word games by suggesting that OEC 514 somehow leaves courts free to constrain privileges' "scope" through judicial carve-outs untethered to statutory text. Ans. at 38-39. *John Deere* demanded "convincing" evidence before it would construe OEC 514's broad language to leave a court free to abandon a privilege and found none. 307 Or at 354. Thus, contrary to Plaintiff's suggestion, the lack of any such "convincing" evidence allowing judicially created exceptions likewise is dispositive.

predict whether particular discussions will be protected, contrary to the Legislature's direction. OEC 503(1)(d), cmt.; *OHSU*, 325 Or at 500 n.6.

Accordingly, Plaintiff has failed to satisfy its burden of demonstrating that the attorney's duty of loyalty or an alleged conflict precludes his/her ability to invoke an evidentiary privilege—a straightforward reading of OEC 503 that is not remotely "absurd." Ans. at 31.[7]

B. Plaintiff Cannot Distinguish The Recent Rulings Of The Georgia And Massachusetts Supreme Courts, With Which The ABA Agrees

1. The Georgia Supreme Court Disagrees With Plaintiff And Its Amici

The Georgia Supreme Court's opinion in *St. Simons Waterfront, LLC v. Hunter Maclean, Exley & Dunn, P.C.*, --- SE2d ----, No. S12G1924, 2013 WL 3475328, 2013 Ga. LEXIS 614 (Ga. July 11, 2013), is highly significant. Aside from its persuasive reasoning, it vacated the *only* case that the Circuit Court cited to support its decision, and it rejected Plaintiff's out-of-state authorities from lower courts. *See* ER-48 n.1, 50 n.5; 2013 WL 3475328, at *4. Consistent with this Court's jurisprudence, the Georgia Supreme Court "d[id] not believe that potential ethics violations are relevant to the attorney-client

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[7] Although this Court sometimes has consulted the ORPC as a guide to interpreting pliable common-law duties or ambiguous statutory language, Ans. at 57, it has never endorsed them as a pen for rewriting unambiguous statutory text on entirely different topics. Plaintiff's *deus ex machina* resort to the ORPC merely asks for an improper sanction by another name. *Kidney Ass'n v. Ferguson*, 315 Or 135, 141 (1992); ORS 9.529; Br. at 51-54.

privilege determination." 2013 WL 3475328, at *5; *id.* at *9 n.2 ("[C]ases such as this are governed by the laws of privilege set forth in our statutes and precedent.").[8] It squarely held that the attorney-client privilege applies to consultations between lawyers and their firm's in-house counsel, without regard to any supposed conflict of interest or breach of loyalty (again, here, there was none). 2013 WL 3475328, at *8.

Plaintiff tries to dismiss *Hunter Maclean* merely because the Court cited a preamble to the Georgia Rules of Professional Conduct, which stated that those Rules did not affect evidentiary privileges. Ans. at 45-47. In Oregon, as in Georgia, the ORPC cannot vitiate a privilege statute. Contrary to Plaintiff's suggestion, the Legislature has not incorporated the ORPC into OEC 503 *sub silentio*.[9] Although the ORPC has the "force of law," it is promulgated by the State Bar and this Court. ORS 9.490. Like all non-statutory enactments, the ORPC cannot contradict *statutes* (*e.g.*, the OEC) that are enacted by the Legislature. *Planned Parenthood Ass'n v. Dept. of Human Resources*, 297 Or

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[8] *Accord Miller*, 300 Or at 215-16; *TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382627, at *4 (SD Ohio Feb. 3, 2011); *Garvy v. Seyfarth Shaw LLP*, 966 NE2d 523, 538-39 (Ill App Ct 2012); Br. at 38-39.

[9] Ans. at 32 n.10. OEC 503(3)'s commentary merely refers to an attorney's obligation to claim the privilege for the client. It does not restrict application of the privilege.

562, 565 (1984); *MacPherson v. Dep't of Admin. Servs.*, 340 Or 117, 126-127 (2006).[10]

2. The Massachusetts Supreme Judicial Court Disagrees With Plaintiff And Its Amici

Plaintiff also fails to confront the core holding of *RFF Family Partnership, LP v. Burns & Levison, LLP*, 465 Mass. 702, --- NE2d ---- (2013). There, the Massachusetts Supreme Judicial Court explained why engrafting judicial exceptions onto a privilege statute would entail a "flawed interpretation of the rules of professional conduct that yields a dysfunctional result." *Id.* at 712, 722.

As the Court explained, "[t]he in-house counsel whom the law firm has designated to help its attorneys comply with all applicable ethical rules is the logical counsel to turn to for advice . . . especially where time is of the essence." *Id.* at 711. Moreover, the Court made clear that denying the privilege to communications with in-house counsel is not "necessary to protect the interests of [outside] clients," because:

> It is simply not the case that a legal malpractice plaintiff will be functionally unable to prove negligence without gaining access to intra-firm communications. The client still has access to every communication between the client and the firm and to every

[10] Plaintiff's cases have no bearing here because OEC 503 is unambiguous. Ans. at 46-47. For example, *State ex rel. Bryant v. Ellis*, 301 Or 633, 636 (1986), holds simply that courts have inherent authority to disqualify an attorney without regard to any statute, but certainly without stripping the attorney of statutory privileges.

> communication made by the lawyer, whether within the firm or outside of it, that reflects how the lawyer was carrying out the client's legal business.

Id. at 716. Moreover, numerous other sanctions besides "disclosure of otherwise privileged communications" are available for a true ethical breach. *Id.* at 721.

In addition to these practical considerations, the Court rejected Plaintiff's and amici's broadly stated but specifically uncertain notions of conflict of interest or breach of loyalty as bases to abrogate privilege statutes. It also rejected their suggestion of automatic imputation of alleged conflicts to in-house counsel (the thread upon which Plaintiff and its amici depend), confirming there is no analytical distinction between consulting in-house or outside counsel. *Id.* at 719-21. That holding completely undermines Plaintiff's and amici's position given their concessions that Defendants were ethically permitted to consult lawyers outside the firm and that Defendants acted ethically when they consulted the QAC. OTLA Br. at 10-11; Ans. at 22 n.8.

As the Massachusetts Supreme Judicial Court further explained:

> [s]oliciting . . . advice [concerning ethical obligations to a client], whether from an in-house counsel at the law firm or from an attorney at another law firm, *is not in and of itself adverse to the client* . . . . Ultimately, it is usually in the interests both of the attorney seeking advice *and of the client* that the ethical issues be examined by a competent advisor who has been fully informed of all relevant facts, with none withheld out of fear that the consultation may not remain private.

Id. at 711 (emphases added, alterations and internal quotations omitted).

Thus, "regardless of whether the legal advice is given by in-house counsel . . . imputation in such circumstances therefore would not avoid conflicting loyalties or prevent disloyalty . . . ." *Id.* at 720.[11] After all, the client (*i.e.,* Defendants) holds the privilege, and if merely asserting it supposedly constitutes a conflict or a breach of loyalty, then it is analytically irrelevant whether the provider of the advice was in-house counsel or outside counsel.

Moreover, "a client should not be deprived of the benefit of the attorney-client privilege because of its attorney's violation of [the conflicts rules], even if that 'client' is a law firm and the 'attorney' is an in-house counsel within that same law firm." *Id.* at 721; Br. at 47-48.

Plaintiff and amici ignore all of the foregoing, instead relying on the same "fundamental[ly] flaw[ed]" approach to imputation that *RFF* rejected in considering Rule 1.10(a)—a Rule that is substantially identical in Oregon and Massachusetts, as well as the ABA Model Rules. Ans. at 48-49. Plaintiff tries

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[11] *See also* Oregon Formal Ethics Opinion 2005-125 at 333 (communications between a lawyer and "the lawyer's own counsel . . . need not be produced to the client"); NY Ethics Opinion 789, 2005 WL 3046319, ¶ 16 (Oct. 26, 2005) ("[s]eeking advice from in-house ethics advisor is intended to facilitate the lawyer's proper exercise of professional judgment" and creates no imputable conflict); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721, 1748 (2005) (The automatic imputation of conflicts "make[s] little sense" because "the firm's duty of loyalty to the client does not prevent the firm from attempting to defend against client claims. This effort to defend is no more 'disloyal' when it involves inside rather than outside counsel"); Br. at 34 n.13.

to export Rule 1.10(a) beyond its ethics scheme onto the rules of evidence—an argument that is devoid of "logic[]" and unsupported by the holding *of any case*. Nor does Plaintiff demonstrate that its "draconian" interpretation is remotely necessary. *Id.* Stripped of rhetoric, Plaintiff points to no fact demonstrating that consulting the QAC—as opposed to outside counsel—somehow caused Birdwell, Boundy, and DWT to "fail[] to provide sound advice to Crimson." *Id.* at 49.

Plaintiff also misapprehends the portion of *RFF* that amounts to judge-made law, which, even if correctly read, could not be engrafted onto OEC 503. The dicta Plaintiff cites did *not* suggest that privilege could be vitiated if in-house counsel billed the client. Ans. at 49. *RFF* only considered billing arrangements to help determine whether an attorney truly was "[the firm's] in-house counsel." 465 Mass at 723. That point cannot be disputed here as to the QAC, who (as the Circuit Court's findings establish) indisputably served as in-house counsel to Defendants, and whose billing practices were appropriate in any event. *See infra* part II.C.1; ER-22-23 (QAC have served as DWT's in-house counsel for seventeen years); SER-23-26; 36-39.

Plaintiff also cannot distinguish *RFF* on the ground that Plaintiff "is seeking internal DWT communications *before* Crimson's malpractice counsel contacted DWT." Ans. at 48. Plaintiff would have this Court adopt a rule that allows clients to determine the applicability and scope of the attorney-client

privilege based on when the client opts strategically to reveal a malpractice claim. Coincidentally, Plaintiff, with shadow counsel in tow, falsely promised to pay its fees and waited five months to "communicate" its professed concerns to Defendants. Oregon privilege law cannot be manipulated by such tactics. *RFF* thus remains highly persuasive.

3. The ABA Disagrees With Plaintiff And Its Amici

On August 12, 2013, with nearly unanimous approval, the 560-member ABA House of Delegates adopted Resolution 103. *See* App-1; http://www.abajournal.com/news/article/resolution_on_lawyer-client_privilege. The Resolution reaffirmed that "any conflict of interest arising out of a law firm's consultation with its in-house counsel regarding the firm's representation of a then-current client and a potentially viable claim the client may have against the firm does not create an exception to the attorney-client privilege . . . ."[12] Resolution 103 confirms that Plaintiff and amici are asking this Court to depart from the text of OEC 503 without basis, based on a deeply mistaken view of ethical considerations and a misreading of the very ABA guidance and

[12] The ABA also rejected "the fiduciary exception" and reaffirmed the applicability of privilege to communications with law firm in-house counsel. The ABA's final resolution even dropped a proposed caveat that would have taken no position on the result if an outside client were not "appropriately and timely informed of the potentially viable claim" against the attorney—a matter that in any event is irrelevant doctrinally and particularly irrelevant on the facts here, because the communications at issue occurred after Crimson Trace already was contemplating a claim, as demonstrated by its Christmas Eve ambush of Defendants. Br. at 9; *infra* at 17-18.

model rules upon which their arguments are based. Their interpretation of ABA authorities on different points should be disregarded when the ABA disagrees with them on the precise issue at hand.

C. Plaintiff's And Amici's Alternative Arguments Are Equally Unavailing

Plaintiff and amici argue alternatively that there were no privileged communications in the first place. When the actual record is considered, though, not only is their argument flawed analytically, but it also rests on an inaccurate history of the relevant events and whether Defendants billed for their privileged consultations.

1. Plaintiff Impermissibly Ignores The Circuit Court's Finding That The QAC Did Not Directly Represent Crimson Trace

Plaintiff's extensive argument about billing practices is both wrong and a red herring. Ignoring its concession that "[t]his Court is bound by" the Circuit Court's factual findings, Ans. at 13, Plaintiff tries to side-step the finding that "[t]he DWT lawyers on the [QAC] were not directly involved in the firm's ongoing representation of Crimson Trace." (ER-48.) But Plaintiff cannot do so, particularly where it bears the burden of proving "there is [no] evidence in the record to support" the finding. *State v. Johnson*, 335 Or 511, 522-23 (2003). Plaintiff certainly cannot satisfy that burden by cobbling together speculative inferences based on billing entries that on their face support the Circuit Court's conclusion. *State v. Castilleja*, 345 Or 255, 266 n.6 (2008).

The communications between the trial team and the QAC occurred in two distinct periods. First, in late 2009, the extant issue was a subpoena by Lasermax *to DWT*. (SER-37.) DWT indisputably was the client seeking counsel regarding how to respond to the subpoena. (*Id.*; SER-18-22.) Because the subpoena forced DWT to incur collateral costs, it was entirely appropriate for DWT to be reimbursed for these costs (including the *de minimus* 0.5 hours of Bruce Johnson's time). Such reimbursement was specifically contemplated by the engagement letter upon which Crimson Trace has based its case.[13] Moreover, DWT's and Crimson Trace's interests were aligned regarding the LaserMax subpoena. (SER-37.)

Similarly, there was no conflict of interest in that same period when Bruce Johnson provided advice to Boundy and Birdwell concerning privilege questions that arose in the underlying representation—*e.g.*, the potential use of Birdwell's former client's file on behalf of Crimson Trace. (SER-25.) Only the trial team billed Crimson Trace for this work. (*Id.*)

Defendants generally have not claimed privilege regarding conversations in this first time period. (ER-36-43.) The only exception is a handful of communications in August 2009 concerning ethics advice from the QAC to the

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[13] SSER-1-4 ("Related Proceedings": "[I]f we are asked to testify as a result of our representation of you; or if we must defend the confidentiality of our communications in any proceeding, you agree to reimburse us for any resulting costs, including for our time . . . .").

trial team (for which Crimson Trace was *not* billed) about Birdwell's status as a potential witness—a remote possibility not implicating any conflict of interest because Birdwell's testimony would have supported the validity of Crimson Trace's patent. (ER-36.) In any event, Defendants *disclosed* this, and Crimson Trace had no concern about proceeding. (SER-32.)

Apart from refuting Plaintiff's argument, these conversations exemplify why it is desirable to have in-house counsel available to provide lawyers with advice when ethical issues arise. As with "corporations or governmental entities," the attorney-client privilege in this context "guarantees the confidentiality necessary to ensure that the firm's partners, associates, and staff employees provide the information needed to obtain sound legal advice," for the benefit of the attorney seeking advice "*and of the client*." *RFF*, 465 Mass at 710-11 (emphasis added).

These points are equally applicable to the second set (and vast majority) of the communications at issue. Those communications concerned Defendants' ethical rights and responsibilities vis-à-vis Crimson Trace when Crimson Trace finally disclosed on Christmas Eve 2010, after five months of planning with secretly-employed counsel, that it intentionally had been withholding payments for fees in order to create leverage against Defendants.[14] Before this revelation,

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[14] Again, Plaintiff concedes it was not unethical to seek advice under these circumstances. Ans. at 22 n.8. In any event, "the attorney-client privilege

and contrary to Plaintiff's and amici's unsupported contention (for which, again, Plaintiff bears the burden of proof), Plaintiff was telling Defendants that it would pay, leaving Defendants with the impression that Crimson Trace was simply a slow-paying client, not one that was maneuvering against Defendants with its shadow counsel in tow. (ER-5-6.)

Crimson Trace was *not* billed for these conversations, further confirming that they were part of a separate attorney-client relationship between Birdwell, Boundy, and DWT as clients, and Johnson and the QAC as attorneys. (SER-23-26; 36-39).[15]

Accordingly, Defendants' bills actually bolster, and in no way undermine, the existence of an attorney-client relationship between Defendants and the QAC. And even if there was some billing anomaly, which there was not, Plaintiff offers no support for vitiating the privilege as a sanction.

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applies to confidential communications between a law firm's in-house counsel and the law firm's attorneys, even where the communications are intended to defend the law firm from allegations of malpractice made by a current outside client." *RFF*, 465 Mass at 723.

[15] The Circuit Court did not hold otherwise. Ans. at 55 n.16. To the extent this Court would find it helpful to review the communications at issue, Defendants can submit them for *in camera* review.

2. Plaintiff's Argument That Defendants Had No Attorney-Client Relationship With The QAC Has Been Waived And, In Any Event, Lacks Merit

Notwithstanding its argument that this Court is "bound by the trial court's factual findings," Ans. at 13, Plaintiff ignores the Circuit Court's finding that "the DWT lawyers representing Crimson Trace could have an attorney-client relationship with the DWT lawyers on the [QAC]." (ER-49.) Because Plaintiff invited this finding,[16] it "cannot now be heard to assert [it was] error." *Shields v. Campbell*, 277 Or 71, 78 (1977); *State v. Ramirez*, 343 Or 505, 511 n.6 (2007).

Additionally, *In re Weidner*, 310 Or 757 (1990), does not stand for the proposition that an attorney-client relationship—one that all parties intended and affirmed—is somehow *nullified* by a supposed conflict of interest (nor does it suggest there was a conflict here). Ans. at 18. *Weidner* addressed a purported *client* who tried unilaterally (and unreasonably) to *create* an attorney-client relationship "by deciding to rely on a lawyer's advice to another party . . . without alerting the lawyer." 210 Or at 773. For purposes of the analysis here, by contrast, *Defendants* are the client, not Plaintiff.

Weidner defeats Plaintiff's contention for another reason—it holds that an attorney-client relationship arises where an attorney actually performs

[16] Pl. Opp'n to Pet'n, SER-38 ("Crimson will readily (if not happily) concede that DWT represented itself"), *id.* at 42 ("Mr. Johnson and Mr. Waggoner . . . apparently represented Boundy and Birdwell as well.").

services "of the kind traditionally done professionally by lawyers, *i.e.*, legal work." *Id.* at 768. Here, the QAC undisputedly performed "legal work" for Birdwell and Boundy (and DWT) when advising them of their ethical duties. (ER-18-22.) No more is required.

3. The Arguments Of Plaintiff's Amici Similarly Lack Merit

Plaintiff's amici take a slightly different but equally flawed approach. The Oregon Trial Lawyers Association ("OTLA") and Association of Corporate Counsel ("ACC") contend that DWT could not be a "client" simply because DWT obtained legal advice from in-house counsel. OTLA Br. at 9; *see also* ACC Br. at 14. But OTLA concedes that Defendants could have had "privileged communications" with their "own" "outside counsel." OTLA Br. at 10. Their argument also ignores Plaintiff's concession that "[l]aw firms may have in-house counsel like any other corporation . . . ." Ans. at 23.

Even absent these concessions, not a single case has *ever* adopted amici's view, and many of Plaintiff's own authorities conclude otherwise. *See* Ans. at 22-23 (citing multiple cases). Amici's view is inconsistent with (1) *Weidner* (holding that the provision of confidential legal advice is enough to create an attorney-client relationship), (2) Plaintiff's concession of an internal law-firm privilege as a general matter (demonstrating that lawyers and their firm can be clients) (Ans. at 22-23), and, (3) Plaintiff's concession that "[b]y communicating amongst themselves about their duties to Crimson, [Defendants

and the QAC] actually acted as ethical lawyers should." Ans. at 22 n.8, 25. Moreover, OTLA's argument is unmoored from the text of OEC 503, which contains nothing restricting lawyers from entering attorney-client relationships with counsel of their own choosing, including in-house counsel.

Finally, neither amici offers any support for their premise that a firm's retention of in-house counsel would "corrode" or "undermine" the relationship with its client any more than retention of outside counsel. ACC Br. at 3; OTLA Br. at 11-12. Rhetoric is an insufficient substitute. Amici also ignore the practicality that "by the time a matter has progressed to the point where outside counsel are called in, it may be too late to protect the client from damage." *RFF*, 465 Mass at 711 (citing *TattleTale*); Br. at 27-28, 35, 41, 43-45.[17] Timely advice often cannot wait for outside lawyers to be retained and brought up to speed.

In sum, some combination of Plaintiff and amici concede that it is ethical for lawyers to consult other lawyers when matters of professional responsibility arise. Ans. at 22 n.8; OTLA Br. at 10-11. Moreover, some combination of

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[17] The ACC's argument is not only wrong, but once again inconsistent because it endorses in-house counsel as a general matter. ACC Br. at 2. It also erroneously contends without authority (and indeed contrary to the authority that even Plaintiff concedes, Ans. at 23) that "[l]aw firm lawyers are not in-house counsel" (perhaps because the ACC "bars" them from membership). *Id.* at 2, 4. Its brief also reveals that the duty of loyalty is not the real issue. *Id.* at 12 (law firms can "obtain[] legal advice internally[;] [t]hey simply cannot keep those communications [privileged]").

Plaintiff and amici concede that it is appropriate to consult with outside counsel. OTLA Br. at 11. But there is no analytical difference between in-house and outside counsel, particularly for purposes of Plaintiff's suggestion that it is *the assertion* of the privilege that creates an ethical breach. Ans. at 58-59. And in any event, Plaintiff concedes there is a general in-firm privilege. Ans. at 22. Even under Plaintiff's own analysis, therefore, Defendants operated under no conflict of interest that could conceivably vitiate the privilege (which it could not anyway under Oregon law).

4. Plaintiff Concedes That Oregon Law Applies

Plaintiff argues that because Birdwell and Boundy are Washington lawyers, they could not have expected their communications to remain confidential given the intermediate appellate decision in *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn App 309 (2005). Aside from Plaintiff's misunderstanding of that case (Br. at 45 n.8), Plaintiff nowhere contends that Washington law applies, expressly analyzing the privilege issues under Oregon law. Assessing expectations of confidentiality under any law but Oregon's (under which, as Defendants have explained, consultation with in-house counsel does not vitiate the attorney-client privilege), is improper. *Equitable Life Assurance Society v. McKay,* 306 Or 493, 497-98 (1988) (rejecting application of Washington evidence law because "the law of the forum state"—*i.e.*, the OEC—applies to evidentiary issues in Oregon courts); OEC 101(1)-(3).

Moreover, Plaintiff is bound by the Circuit Court's finding that "[t]he DWT lawyers intended that [the relevant] communications would be confidential." (ER-48.)

D. Plaintiff's Arguments Concerning Work-Product Protection Also Are Untenable

As for the communications covered by the work-product doctrine (Ans. at 57-58), Plaintiff largely rehashes its arguments for vitiating protection based on an imagined conflict of interest, which fail for all of the reasons discussed above. Plaintiff identifies no exception in Oregon Rule of Civil Procedure 36B(3) that remotely could apply here, and has not addressed the predicate showing (for which it has the burden of proof) of a "substantial need" for Defendants' work product under the applicable test. *Id.*

Moreover, Plaintiff is wrong that the existence of an attorney-client relationship between Crimson Trace and Defendants precludes application of the work-product doctrine. Ans. at 58. This argument finds no support in law or in logic. After Crimson Trace's February 24, 2011 email that it was "hostile" and would not pay fees, (ER-24), it became clear that Plaintiff "anticipat[ed] . . . litigation" with Defendants, ORCP 36B(3). It is therefore understandable that Defendants became cognizant of that possibility at that time as well. As Plaintiff's own authority holds, even the "threat[]" of potential litigation . . . "[is] sufficient" to trigger the work-product doctrine. *Brink v. Multnomah County*, 224 Or 507, 517 (1960). As the Georgia Supreme Court

recently held, "once the relationship between the attorney and client develops into an adversarial one"—as the relationship here did by the end of the LaserMax case in February 2011—"work product protection will attach under the same principles as discussed with respect to the attorney-client privilege." *Hunter Maclean*, 2013 WL 3475328, at *9; *see also Garvy*, 966 NE2d at 539-40; *TattleTale*, 2011 WL 382627, at *10.

III. CONCLUSION

This Court should follow the OEC's plain language and its well-established precedent prohibiting *ad hoc* exceptions to privilege statutes, as well as the recent decisions of the ABA and the only two state high courts to consider this issue, and grant Defendants' Petition for Mandamus.

DATED this 29th day of August, 2013.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I HEREBY CERTIFY that (1) this brief complies with the word-count limitation as provided by this Court's Order of August 20, 2013 Granting Defendants' Motion to File an Extended Reply Brief and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,956 words.

DATED this 29th day of August, 2013.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that I filed the foregoing DEFENDANTS-RELATORS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND SECOND SUPPLEMENTAL EXCERPT OF RECORD by electronically filing to:

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