Docket No. 14-15916

In the

United States Court of Appeals

For the

Ninth Circuit

SONY ELECTRONICS, INC. AND
SONY COMPUTER ENTERTAINMENT AMERICA, LLC,

Plaintiffs-Appellants,

v.

HANNSTAR DISPLAY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California, No. 3:12-cv-2214-SI, Honorable Susan Illston

APPELLEE'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

On September 1, 2016, a divided panel held that federal—not state—privilege law applies to a standalone state law claim in federal court solely on the basis of diversity jurisdiction. This holding creates an unprecedented and unjustifiable exception to Federal Rule of Evidence 501's straightforward requirement that "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." The panel majority ignored a material point of law by basing its decision on inapposite case law, disregarded decisions of this Circuit compelling a different result, and put this Circuit in conflict with its sister circuits on a matter of exceptional importance that goes to the heart of the relationship between federal judicial power and the states.

This case arises from Appellant's effort to convert acceptance of a mediator's proposal to settle threatened, but unasserted, claims into an enforceable agreement. The majority—reversing the court below—held that in determining whether to admit evidence of such an acceptance, the district court must apply federal privilege law because the alleged settlement would have resolved *potential* claims under both federal and state law. However, when the district court was deciding to admit or exclude the evidence, the only claim before it was a state law contract claim. By holding that the type of claims under discussion "at the time the parties engaged in mediation" determines whether state or federal privilege law

applies in a later-filed action, rather than looking to the claims actually before the court, the panel majority created a new and erroneous rule.

This new rule ignores the plain mandate of Federal Rule of Evidence 501. The decision also contradicts a line of cases from this Circuit and others dating to the 1975 adoption of the Federal Rules of Evidence and applying state privilege law when state law supplies the rule of decision. Not only was the decision of the panel majority, the Hon. Susan P. Graber[1] and the Hon. J. Clifford Wallace, contrary to settled law, but it also has profound implications on long-established principles of federalism. The decision upends the balance between state and federal law that Congress directed in Rule 501 following serious deliberation in light of *Erie Railroad v. Tompkins* and its progeny.

The Ninth Circuit can correct this misstep now, without remand, by promptly bringing its law back in line with its past precedent. The dissent, which recognized the majority's error without qualification or question, provides a clear framework for correction.

[1] Replaced by the Hon. Carlos T. Bea on October 5, 2016, pursuant to Ninth Circuit General Order 3.2.h.

STATEMENT OF THE CASE

In connection with alleged price-fixing in the liquid crystal display industry, Appellants Sony Electronics, Inc. and Sony Computer Entertainment America, LLC (collectively, "Sony") believed that they might have claims against Appellee HannStar Display Corp. ("HannStar"), a small supplier to Sony. Before filing suit against HannStar, Sony pursued private mediation. Addendum (*Sony Electronics Inc., et al. v. HannStar Display Corporation*, No. 14-15916 (9th Cir. Sept. 1, 2016)) at 3, 8. During that pre-lawsuit mediation, the mediator made a "mediator's proposal" and noted that the proposal, which contained only the proposed payment amount, remained "subject to the execution of an appropriate Settlement Agreement, MOU, or Agreement in Principle." *Id.* at 5. Both Sony and HannStar emailed the mediator to accept, and he reiterated that the deal was "subject to agreement on terms and conditions in a written settlement document." *Id.* at 6. Ultimately, HannStar did not pay, and the parties never executed a settlement agreement. *Id.*

After the mediation failed, Sony sued HannStar, alleging federal and state antitrust claims and other state law claims, including a claim for breach of contract. *Id.* Sony subsequently voluntarily dismissed all claims except one: its state law contract claim for HannStar's refusal to pay the amount in the mediator's proposal. *Id.* at 6, 8. Once Sony's state law contract claim was the only claim

remaining in the case, the jurisdiction of the district court below was based solely on diversity. *Id.* at 7, 8.

Sony moved for summary judgment on its state law contract claim and sought to admit the mediation materials. The district court sitting in diversity applied California privilege law and ruled that the pre-lawsuit mediation communications were not admissible under the California Evidence Code, which prohibits the admission of mediation materials absent certain exceptions not met here. Addendum at 6-7; *see* Cal. Evid. Code §§ 1119, 1123(b). Because Sony could not establish breach without relying on the mediation materials, the parties stipulated to judgment for HannStar. Addendum at 7.

On appeal, Sony argued for the first time in briefing and at oral argument that federal privilege law should govern the admission of the mediation materials. Sony based its argument on *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014). Addendum at 7-8. The panel ruled for Sony on September 1, 2016, with the Hon. Barbara M.G. Lynn, chief judge of the U.S. District Court for the Northern District of Texas sitting by designation, dissenting. *Id.* at 8-9.

REASONS WHY PANEL REHEARING AND REHEARING EN BANC SHOULD BE GRANTED

I. THE PANEL MAJORITY'S NEW RULE RELIES ON INAPPOSITE LAW AND CONFLICTS WITH DECISIONS OF THIS AND OTHER CIRCUITS HOLDING THAT STATE PRIVILEGE LAW GOVERNS STATE LAW CLAIMS IN DIVERSITY ACTIONS

A. The Panel Majority Used Flawed Reasoning To Create A New Exception To Federal Rule Of Evidence 501

Federal Rule of Evidence 501 states that federal common law governs claims of privilege asserted in federal court, except in certain instances. The last of these, known as the "state law proviso," dictates: "[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. The rule applies when the issue (1) arises in a civil case, (2) relates to a claim or defense, and (3) state law supplies the rule of decision for that claim or defense. 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5432, at 846. When these three elements are met, "the court must apply the state law of privilege." *Id.* All three elements were met here: (1) this is a civil case; (2) the issue (whether to admit the mediation materials) relates to Appellant's breach of contract claim, the only claim before the district court; and (3) state law supplied the rule of decision for that claim. State privilege law therefore should have governed.

But that is not what the panel majority decided. Instead, it created a new rule that the type of claims under discussion "at the time the parties engaged

in mediation" determines whether state or federal privilege law applies when a court is later asked to admit evidence for a different claim. Addendum at 8. Applying this rule, the panel majority held that federal privilege law applied. *Id.* at 8-9.

1. *Wilcox*, the case relied on by the panel majority, was neither applicable to this case nor new law.

The panel majority's decision starkly repudiated Rule 501. HannStar has found no other case undertaking a similar analysis. That includes *Wilcox*, which the panel majority mistakenly relied on in reaching its decision. In *Wilcox*, plaintiffs asserted federal claims under 42 U.S.C. § 1983 and also brought pendent state law claims of civil rights violations. 753 F.3d at 874. While those federal and pendent state claims were still pending, the parties conducted a successful mediation and the district court granted plaintiffs' motion to enforce the settlement agreement. *Id.* at 875. On appeal, this Circuit held that federal privilege law applied to the question of whether the evidence should be admitted because "Plaintiffs *allege* both federal and state law claims" and "the same evidence *relates* to both federal and state law claims." *Id.* at 876 (emphases added).

The panel majority here was wrong to rely on *Wilcox* for several reasons. First, *Wilcox* was a federal question case, with pendent state law claims. *Id.* at 874-75. Here, by contrast, there was a single state law claim and the court's

jurisdiction was based solely on 28 U.S.C. § 1332—diversity jurisdiction. The panel majority failed to address the gravity of this difference.

Second, in *Wilcox*, both federal and pendent state law claims were being actively litigated before the district court *at the time* it was making the decision to admit or exclude evidence. 753 F.3d at 876. The court in *Wilcox* therefore appropriately looked to both the federal and state claims when choosing between federal and state privilege law. Here, meanwhile, all federal claims had been dismissed by the Plaintiffs. Therefore, only the state law breach of contract claim was before the district court when it was asked to decide whether to admit the mediation materials.

Accordingly, the panel majority erred when it asserted that this case was governed by *Wilcox*. As set forth above, it is clear that *Wilcox* did not involve a "state suit to enforce a settlement of both federal and state claims," as the panel majority mischaracterized it. Addendum at 7. To the contrary, *Wilcox* was a starkly different case that in no way justifies, much less compels, the panel majority's decision, especially when it overlooked other, applicable decisions. *See* Section I.B, *infra*.

Not only did the majority misapply *Wilcox*, it compounded its error by relying on *Wilcox* to ignore Rule 501's requirement to apply state law to a pure diversity claim. The majority's error is exacerbated by the fact that the *Wilcox*

holding was expressly limited to its procedural posture—federal question jurisdiction with pendent state law claims where the evidence relates to both types of claims. The *Wilcox* court made this clear: "We do not decide whether, in federal question cases, state or federal privilege law governs the admissibility of evidence that relates exclusively to state law claims." 753 F.3d at 877 n.3. Because the court in *Wilcox* so carefully limited its holding to only certain types of *federal question* cases, it was misguided for the panel majority to view *Wilcox* as controlling a *diversity* case where the evidence exclusively went to a state law claim. Indeed, neither "diversity" nor "1332" appears in the *Wilcox* opinion.

Wilcox was instead following the holding in *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005). *Agster* held that where both federal and state law claims are present before the court in federal question and pendent jurisdiction, federal privilege law applies. *Id.* at 839. Indeed, the committee notes to Rule 501 suggest that outcome: it is "intended that the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case." Fed. R. Evid. 501 advisory committee notes to 1974 enactment. This standard is grounded in the workability challenge presented when evidence would be admissible under one regime of law but not the other, making it difficult, if not impossible, for a jury to properly weigh the evidence. *See, e.g.*, *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982)

("Obviously applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable."); *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992) (holding it "impractical to apply two different rules of privilege to the same evidence before a single jury" and collecting cases). The panel majority was wrong, therefore, in its implied conclusion that *Wilcox* is new law, Addendum at 8 n.1, and mistaken in ignoring HannStar's waiver argument. Because Sony never contended below that federal privilege law governs a single state law claim standing alone in diversity, it waived the right to do so here.

The panel majority thus wrongly used the rule in *Agster* and *Wilcox* to extend the reach of federal privilege law to this case, which presented no workability problem and no federal issue, only a diversity claim. According to the majority, the deciding factor was that "[a]t the time of mediation, both parties *would have expected* to litigate both federal and state law issues." Addendum at 8 (emphasis added). By letting the type of claims under discussion "at the time the parties engaged in mediation" control whether state or federal privilege law later applies, the panel majority's new rule means that federal privilege law will apply even where federal claims are never brought to court, so long as there was the *mere expectation* that federal claims would be litigated.

The breadth of this new rule is sweeping, and may have bizarre results. Imagine a variant of this case, where a purely state law claim is subject to

pre-lawsuit mediation, but a purely federal law claim arises out of that mediation. Plaintiff sues on the federal claim only, but defendant cites to the panel majority's new rule to convince the court that because only a state law claim was under discussion "at the time the parties engaged in mediation," state privilege law applies to the purely federal claim. This absurd result, a mirror image of the situation here, is surely not what the panel majority intended but is a natural consequence of its decision.

2. The panel majority ignored the rationale underlying Rule 501.

Even if the majority's ruling applies solely to mediations where both federal and state law claims are discussed (though there is no indication that it was intended to be so limited), the holding that courts must look to the pre-lawsuit claims finds no justification either in the decisions addressing workability or Rule 501. The notes to Rule 501, which the panel failed to heed, state that the "rationale underlying the [state law] proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason." Fed. R. Evid. 501 advisory committee notes to 1974 enactment. And, critically, where there is no "element of a claim or defense . . . grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy." *Id.* Here, there was no element of Sony's contract claim grounded on a federal

question, and therefore "no federal interest strong enough to justify departure from" California law.

In disregarding the state law proviso of Rule 501 and issuing a results-oriented decision, the majority identified no federal interest justifying its departure from state law. As a result, the panel majority's rule will lead to unintended consequences. Beyond the example above, the decision will promote the very forum shopping that Rule 501 was expressly intended to prevent. *Id.* (state law proviso "removes the incentive to 'shop'"). Litigants will now know that the type of claims under discussion in a pre-lawsuit mediation will dictate one privilege rule in federal court, and a different one in state court, for the exact same claim.

If, as the panel majority contends, *Wilcox* can be so loosely read to extend the application of federal privilege law to evidence relating exclusively to a single state law claim sounding in diversity, rehearing is proper to clarify the limited holding of *Wilcox*, correct the panel majority's mistakes, and reaffirm the language of Rule 501, which unequivocally holds that where state law supplies the rule of decision state privilege law applies.

B. The Panel Majority Did Not Address Decisions From The Ninth And Other Circuits That Have Consistently Applied Rule 501's State Law Proviso So That State Privileges Govern State Claims

The panel majority compounded its mistake in not following Rule 501 by failing to address or follow precedent from this Circuit that has, as noted in

HannStar's Answering Brief, consistently held over decades that the state law of privilege applies in diversity actions where state law supplies the rule of decision. *See, e.g.*, *In re Cal. Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989) ("In diversity actions, questions of privilege are controlled by state law."); *Star Editorial, Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 7 F.3d 856, 859 (9th Cir. 1993) (holding that in diversity action for defamation where state law "clearly provide[d] the rule of decision . . . it is clear that the existence and the extent of the claimed privilege is controlled by California law"); *see also Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981) (citing Fed. R. Evid. 501 and holding that "[q]uestions of privilege in diversity actions are controlled by the governing state law"); *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1328 (9th Cir. 1995) (holding Alaska privilege rules applied in diversity action for malpractice where state law supplied the rule of decision). The panel majority's decision conflicts with these cases, which it did not address or even mention because it gave no weight to the fact that the district court was sitting in diversity.

Moreover, every other circuit to address the issue has stated that state privilege law applies when state law supplies the rule of decision. For example, in *Doe v. Archdiocese of Milwaukee*, 772 F.3d 437 (7th Cir. 2014), a fraudulent inducement claim was before a federal court because the Archdiocese of Milwaukee had declared bankruptcy. The Seventh Circuit followed the mandate of

Rule 501 and affirmed the lower court's decision that Wisconsin's mediation privilege applied to a mediation between a victim of sexual abuse and the Archdiocese because "Wisconsin law provides the rule of decision governing" the fraudulent inducement claim. *Id.* at 440. *See also, e.g.*, *Gill v. Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 401 & n.6 (1st Cir. 2005) ("Since this case is a diversity suit involving only state-law claims, [the] claim that the documents here are protected by an evidentiary privilege is governed by state law under Fed. R. Evid. 501."); *DiBella v. Hopkins*, 403 F.3d 102, 120 (2d Cir. 2005) (citing Rule 501 to apply New York attorney-client privilege law while sitting in diversity); *Samuelson v. Susen*, 576 F.2d 546, 549-50 & n.3 (3d Cir. 1978) (holding that "Rule 501 provides that with respect to state issues in 'civil actions and proceedings' any privilege 'shall be determined in accordance with State law'" and detailing legislative history); *Smith v. Scottsdale Ins. Co.*, 621 F. App'x 743, 745 (4th Cir. 2015) (unpublished) ("Because this is a diversity action, the elements of the attorney-client privilege are governed by West Virginia law."); *In re Avantel, S.A.*, 343 F.3d 311, 323 (5th Cir. 2003) ("Rule 501, Fed. R. Evid., provides that in cases where state law supplies the rule of the decision, such as this diversity-jurisdiction matter" state privilege law controls.); *Jewell v. Holzer Hosp. Found., Inc.*, 899 F.2d 1507, 1513 (6th Cir. 1990) ("In a civil case involving claims based on state law, the existence of a privilege is to be determined in accordance with

state, not federal, law."); *Union Cty., Iowa v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008) ("Because this is a diversity case, the determination of whether attorney-client privilege applies is governed by state law."); *Seneca Ins. Co. v. W. Claims, Inc.*, 774 F.3d 1272, 1275 (10th Cir. 2014) ("Because this diversity suit arises under Oklahoma law, Oklahoma law governs the contours of the attorney-client privilege."); *Somer v. Johnson*, 704 F.2d 1473, 1478 (11th Cir. 1983) ("State law . . . controls the privileged nature of material sought in discovery in a diversity action."); *In re Sealed Case (Med. Records)*, 381 F.3d 1205, 1212 (D.C. Cir. 2004) ("It is thus clear that when a plaintiff . . . asserts state claims, state privilege law applies.").[2] Finally, the United States Supreme Court has noted that where "only a state law claim" is before a federal court, "the second sentence in Rule 501," meaning the state law proviso, requires applying state privilege law. *Jaffee v. Redmond*, 518 U.S. 1, 15 n.15 (1996).

The consensus is clear. The panel majority's decision now creates conflict both within this Circuit and with the other circuits, a diversion from precedent that must be corrected.

[2] The Federal Circuit has not addressed whether Rule 501 applies in diversity cases because the court has jurisdiction only over certain federal matters. *See* 28 U.S.C. §§ 1292(c)-(d), 1295, and 1296. Even so, the court has recognized Rule 501's state law proviso. *See In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1294 (Fed. Cir. 2016).

II. THE DECISION CONTRADICTS THE *ERIE* DOCTRINE, RAISING EXCEPTIONALLY IMPORTANT QUESTIONS ABOUT FEDERALISM THAT CONGRESS ALREADY SETTLED

The long-followed rule that state privilege law applies where state law supplies the rule of decision stems from the balance between state and federal interests inherent in the formation of our government. The Supreme Court articulated its vision for this balance in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) by requiring federal courts sitting in diversity to apply state substantive law. And Congress declared that, under this federalism framework, federal courts must apply state privilege law where state law supplies the rule of decision. In enacting Rule 501, Congress recognized the importance of state privilege laws and ensured they would continue to apply in diversity cases. The panel majority's decision ignores this bedrock of American jurisprudence.

A. State Privilege Laws Serve Substantive Aims That Federal Courts Must Respect Under The *Erie* Doctrine

For over two hundred years, federal courts have applied substantive state law in civil actions not governed by federal law. *See* 28 U.S.C. § 1652 (corresponds to the Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 73, 92) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."). In *Erie*, the Supreme Court clarified that federal courts sitting in

diversity must apply substantive state law in these cases whether that law is statutory or judge-made. 304 U.S. at 77-79.

Because privilege law serves important social goals, it was largely regarded as substantive under *Erie*. *See, e.g.*, Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 Seton Hall L. Rev. 667, 683-84 & n.87 (1974) (collecting authorities). As such, even before Rule 501, courts regularly applied state privilege laws in diversity cases. *See, e.g.*, *Krizak v. W. C. Brooks & Sons, Inc.*, 320 F.2d 37, 43 (4th Cir. 1963) ("[P]robably the majority of federal courts have applied state statutorily created privileges, at least in diversity cases.").

B. Congress Decided That Federal Courts Must Defer To State Privilege Laws In Diversity

In developing Rule 501, Congress sided with the weight of authority finding privilege law substantive under *Erie* and declared that federal courts must apply state privilege law in diversity. This was not pre-ordained. In 1972, the Supreme Court presented Congress with proposed rules of evidence, including privilege rules meant to apply in federal courts regardless of the basis for jurisdiction. *See* Supreme Court of the United States, *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 232-33 (Nov. 20, 1972). The Supreme Court's advisory committee argued that a federal privilege rule should trump all state rules.

Congress rejected this reasoning. The House held multiple hearings and heard widespread testimony that privilege law was both substantive and crucially important. *See, e.g.*, *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the Comm. of the Judiciary*, 93rd Cong., 1st Sess., ser. 2, (1973) at 142-47 (Arthur Goldberg), 168-73 (Washington Council of Lawyers), 246-50 (Henry J. Friendly, Chief Judge of the Second Circuit). Congress then gutted the Supreme Court's proposed privilege rules and, citing *Erie*, created the state law proviso mandating that state privilege law govern where state law supplies the rule of decision. H.R. Rep. No. 93-650 at 7082-83 (1973); *see also Federal Rules of Evidence*, Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1975) (rules as enacted). Congress even passed a law allowing the Supreme Court to directly amend all of the Federal Rules of Evidence—except for the privilege rules, over which Congress retained approval power. *See* 28 U.S.C. § 2074(b) (original version at 28 U.S.C. § 2076 (1975)).

The plain language of Rule 501 is abundantly clear, but the history of the rule's development is further evidence of Congress's deliberate decision under federalism principles to ensure state laws of privilege control in cases like this one, where state law supplies the rule of decision. Decisions in this Circuit and others follow this straightforward rule, but the panel majority here did not. In direct contradiction of Congress's mandate in Rule 501, the panel majority determined

that federal privilege law governs a sole state law claim in diversity. This decision ignores Congress's determination about the importance of state privilege law and destroys the *Erie* doctrine's respect for substantive state interests. By getting Rule 501 and its underlying federalism principles so wrong, the decision raises issues of exceptional importance and must be corrected.

CONCLUSION

For the foregoing reasons, this Court should grant HannStar's petition for panel rehearing and rehearing en banc and find that the district court correctly determined that state privilege law governs, and consequently affirm the ruling below that the mediation communications were not admissible under California Evidence Code Section 1123(b).

Dated: October 6, 2016

Respectfully submitted,

By: */s/Harrison J. Frahn IV*

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Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer

(signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more and contains 4,199 words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Harrison J. Frahn IV
_____
Signature of Attorney or
Unrepresented Litigant

(New Form 7/1/2000)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Harrison J. Frahn IV
Harrison J. Frahn IV

ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION, _____ SONY ELECTRONICS, INC.; SONY COMPUTER ENTERTAINMENT AMERICA, LLC, *Plaintiffs-Appellants*, v. HANNSTAR DISPLAY CORPORATION, *Defendant-Appellee*.	No. 14-15916 D.C. Nos. 3:12-cv-02214-SI 3:07-md-10827-SI OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted August 8, 2016
San Francisco, California

Filed September 1, 2016

Before: J. Clifford Wallace and Susan P. Graber, Circuit Judges, and Barbara M. G. Lynn,[*] Chief District Judge.

Opinion by Judge Graber
Dissent by Chief Judge Lynn

SUMMARY[**]

Law of Privilege

The panel reversed the district court's order denying plaintiff's motion for summary judgment in plaintiff's action to enforce a settlement agreement, and remanded.

The parties engaged a mediator to resolve a price-fixing dispute, and the mediator proposed settlement in an email exchange. Both parties accepted by email, but defendant refused to comply and plaintiff sued to enforce the settlement agreement. The district court denied plaintiff's motion for summary judgment, holding that the California Evidence Code's mediation privilege barred introduction of settlement emails. The parties stipulated to a final judgment.

The panel held that because, at the time the parties engaged in mediation, their negotiations concerned (and the mediated agreement settled) both federal and state law

[*] The Honorable Barbara M. G. Lynn, United States Chief District Judge for the Northern District of Texas, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

claims, the federal law of privilege applied. The panel therefore concluded that the district court erred in applying California privilege law to resolve the dispute.

Dissenting, Chief District Judge Lynn would hold that the district court correctly determined that state privilege law governed and that California Evidence Code § 1123(b) precluded admission of the email exchange and the resulting settlement contract.

COUNSEL

Stephen V. Bomse (argued), David M. Goldstein, and Shannon C. Leong, Orrick Herrington & Sutcliffe LLP, San Francisco, California; Brian D. Ginsburg, Orrick Herrington Sutcliffe LLP, New York, New York; for Plaintiffs-Appellants.

Harrison J. Frahn IV (argued) and James G. Kriessman, Simpson Thacher & Bartlett LLP, Palo Alto, California, for Defendant-Appellee.

OPINION

GRABER, Circuit Judge:

Plaintiffs Sony Electronics, Inc., and Sony Computer Entertainment America, LLC (collectively "Sony"), and Defendant HannStar Display Corporation engaged a mediator to resolve a price-fixing dispute. The mediator proposed settlement in an email exchange. Both parties accepted by email. But HannStar refused to comply, and Sony sued to

enforce the agreement. The district court denied Sony's motion for summary judgment, holding that the California Evidence Code's mediation privilege bars introduction of the settlement emails. The parties stipulated to a final judgment, and this appeal followed. We review de novo, *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002), and reverse and remand. We hold that federal, rather than California, privilege law applies.

This case stems from a major price-fixing scheme and long-running litigation. *E.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 637 F. App'x 981 (9th Cir. 2016) (unpublished) (consolidating appeals of price-fixing suits). HannStar Display Corporation is a Taiwanese company in the business of manufacturing and selling LCD panels and products. Sony is an electronics company, offering a broad range of consumer electronic products throughout the United States and elsewhere. In 2010, HannStar entered into a plea agreement in which it admitted that, for more than four years, it participated in a conspiracy to fix the prices of LCDs sold in the United States and elsewhere. Sony purchased many price-fixed HannStar products and contemplated bringing its own suit against HannStar for antitrust damages.

In December 2010, Sony entered into a tolling agreement with HannStar and began investigating the damage that the price-fixing cartel had caused it. Sony and HannStar agreed to mediate their dispute. They turned to Professor Eric Green for mediation assistance. Both HannStar and Sony authorized counsel to make an agreement. At first, Professor Green was unable to secure an agreement between the parties. Sony informed HannStar and Professor Green that it would file a complaint against HannStar on March 28, 2012, if the parties could not reach an agreement before that date.

On March 25, 2012, Professor Green sent an email to counsel for both HannStar and Sony. His email stated that he had been authorized to make a Mediator's Proposal. He proposed that the matter be settled for "$4.1 million, to be paid on March 30, 2012, subject to the execution of an appropriate Settlement Agreement, MOU, or Agreement in Principle." Professor Green also wrote:

> I ask that each of you inform me privately and confidentially by close of business (5:00 pm PDT) Tuesday, March 27, 2012 whether you "ACCEPT" or "REJECT" the Mediator's Proposal. These double-blind responses will be kept confidential by me so that if one side accepts the Mediator's Proposal but the other side does not, the side not accepting the Mediator's Proposal will never know what the other side responded. This protects both the parties from being leveraged. Of course, if both sides accept the Mediator's Proposal, I will inform you immediately that the matter is settled.

The next day Professor Green wrote to both parties: "I would like to remind you that it is in the nature of a Mediator's Proposal that your response can only be 'ACCEPT' or 'REJECT.' No negotiation is permitted." Both counsel responded "Understood."

On March 27, counsel for HannStar wrote to Professor Green:

> Pursuant to your emails of March 25th and 26th, HannStar authorizes acceptance by

> HannStar of the Mediator's Proposal for settlement as set forth in your March 25th email to Sony counsel and me. If the proposal is accepted by Sony, would also appreciate a brief call with you about a couple of logistical matters arising out of the enunciated proposal.

That same day, counsel for Sony wrote to Professor Green: "Thanks much for your efforts. Sony accepts." After Sony accepted, Professor Green wrote to both parties:

> I am pleased to be able to inform you that I have received written confirmation from each of you that both Sony and HannStar have accepted the Mediator's Proposal pursuant to my email of March 25. This case is now settled subject to agreement on terms and conditions in a written settlement document.

Sony refrained from filing suit against HannStar in March 2010, though it sued several other participants in the price-fixing scheme. But HannStar refused to abide by the mediated settlement agreement and informed counsel for Sony that it did not intend to pay the settlement amount contained in the Mediator's Proposal. Sony filed this action. It alleged federal and state antitrust claims and breach of contract for HannStar's alleged reneging on the settlement agreement.

After concluding its antitrust cases against other defendants, Sony dismissed its antitrust claims against HannStar. It continued to litigate its state-law breach of contract claim for HannStar's failure to abide by the settlement. HannStar filed a motion to dismiss for lack of

federal jurisdiction. The district court denied the motion; federal diversity jurisdiction allowed the case to remain in federal court. Sony moved for summary judgment on its contract claim. The district court denied the motion because, it ruled, California Evidence Code section 1123(b) precluded admission of the email exchange (and the resulting contract) without some express statement to the effect that the settlement was intended to be enforceable or binding. A final judgment, and this appeal, followed.

Pursuant to Federal Rule of Evidence 501, federal common law generally governs claims of privilege. "Where there are federal question claims and pendent state law claims present, the federal law of privilege applies." *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005). "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. In *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014), we clarified the meaning of this rule for a state suit to enforce a settlement of both federal and state claims.

In *Wilcox*, Mary and Earl Wilcox had filed an action against Maricopa County and several of its officials. *Id.* at 874. The plaintiffs filed both federal claims, under § 1983, and supplemental state claims. *Id.* They asserted that their claims had been settled through a county-established mediation program. *Id.* The plaintiffs attempted to enforce their settlement and, in support of their motion, submitted an email from the county mediator stating that the claim had been settled. *Id.* at 874. The county argued that the emails from the county mediator were inadmissible under Arizona privilege law. *Id.* at 875. The plaintiffs claimed that federal privilege law applied. *Id.*

We agreed with the plaintiffs. Although state contract law governed whether the parties had reached a settlement, the underlying action that was allegedly settled contained both federal and state claims. *Id.* at 876. We held that "federal common law generally governs claims of privilege." *Id.* at 876. Because the evidence in *Wilcox* related to a federal as well as a state claim—the plaintiffs had sued under both federal and state law—federal law applied. *Id.* "Where, as here, the same evidence relates to both federal and state law claims, we are not bound by Arizona law on privilege. Rather, federal privilege law governs." *Id.* (internal quotation marks omitted).[1]

Here, as in *Wilcox*, Sony initially filed suit under both state and federal law. The settlement negotiations concerned both issues; the evidence that Sony seeks to admit "relates" to both federal and state law claims. At the time of mediation, both parties would have expected to litigate both federal and state law issues. Counsel for HannStar conceded—as the later-filed complaint confirmed—that the settlement negotiations related to all claims, both federal and state.

Unlike in *Wilcox*, Sony ultimately dismissed the federal law claims, and the action ultimately proceeded under the court's diversity jurisdiction. But the eventual dismissal of federal claims does not govern whether the evidence related to federal law. Because, here, at the time the parties engaged in mediation, their negotiations concerned (and the mediated settlement settled) both federal and state law claims, the

[1] *Wilcox* was published approximately two months after the district court entered judgment and thus the district judge did not have the benefit of *Wilcox* when she denied Sony's summary judgment motion.

federal law of privilege applies. Accordingly, the district court erred in applying California privilege law to resolve this dispute.

REVERSED and REMANDED.

LYNN, Chief District Judge, dissenting:

I respectfully dissent.

The question of whether to apply this Court's holding in *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014), should be analyzed against the backdrop of the claims pending in a lawsuit when the admission of the evidence is sought. In this case, only state law claims remained at the time Sony sought to admit evidence of the email exchange, in support of its motion for summary judgment. Because at that time the action no longer involved any federal issue, the evidence could not relate to a federal claim.

The district court thus correctly determined that state privilege law governed and that California Evidence Code § 1123(b) precluded admission of the email exchange, and the resulting settlement contract. *Fair v. Bakhtiari*, 147 P.3d 653 (Cal. 2006). For these reasons, I dissent.