No. 08-

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

NORMAN CARPENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RANDALL L. ALLEN
Counsel of Record
DANIEL F. DIFFLEY
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Attorneys for Petitioner

219182

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a party has an immediate appeal under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), of a district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Mohawk Industries, Inc. ("Mohawk") states that it is a publicly-traded corporation incorporated under the laws of Delaware. Mohawk has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

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Petitioner, Mohawk Industries, Inc. respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in *Carpenter v. Mohawk Industries*, No. 07-5208-G; 07-15691-G.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit that gives rise to this Petition is reported as *Carpenter v. Mohawk Industries, Inc.*, 541 F.3d 1048 (11th Cir. 2008). The opinion of the Northern District of Georgia at issue in the appeal to the Eleventh Circuit was an October 1, 2007 opinion in the case of *Carpenter v. Mohawk Industries, Inc.*, 4:07-CV-0049-HLM.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and judgment in this matter on August 26, 2008. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1291, provides in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This case involves the District Court's finding of waiver of the attorney-client privilege based on three sentences contained in a brief filed in a separate case, and in particular for this Petition, whether such an order is immediately appealable under the collateral order doctrine. Petitioner Mohawk Industries, Inc. ("Mohawk") seeks a writ of certiorari so that the Court can resolve the conflict among the United States courts of appeals regarding the applicability of collateral order jurisdiction in cases compelling the disclosure of information protected by the attorney-client privilege.

Mohawk conducted an internal investigation through outside counsel following an allegation by an employee that Mohawk was violating federal immigration laws. The District Court's order at issue here requires Mohawk to divulge written and oral communications—found by the District Court to be properly privileged—between the company and the outside counsel that conducted the internal investigation. After the District Court found that Mohawk had waived the attorney-client privilege with respect to information and attorney-client communications that would otherwise be protected from disclosure by the privilege and ordered the disclosure of the privileged information, Mohawk immediately appealed. The Eleventh Circuit, however, dismissed the appeal for lack of jurisdiction, refusing to apply the collateral order doctrine under *Cohen*, joining six other circuits that have declined collateral order jurisdiction in this context. The Eleventh Circuit's ruling was in direct conflict with three other circuits that have permitted immediate appeals in this context under the collateral order doctrine.

This Court has never addressed the issue of collateral order jurisdiction in the context of waiver of the attorney-client privilege.

I. Basis for Federal Jurisdiction in District Court.

Respondent, Norman Carpenter, filed this lawsuit on March 15, 2007, and filed an Amended Complaint on May 2, 2007. Jurisdiction was appropriate under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a), based on Respondent's allegation that Mohawk conspired to deter him from testifying in another federal case, in violation of 42 U.S.C. § 1985(2).

II. Respondent's Conduct During his Employment at Mohawk.

Mohawk is a leading producer and distributor of residential and commercial flooring products. Headquartered in Calhoun, Georgia, Mohawk employs over 36,000 people worldwide. Respondent is a former shift supervisor at a Mohawk manufacturing facility in Calhoun. During his employment at Mohawk, Respondent requested that Mohawk have a temporary agency hire an individual, even though Respondent believed "[h]er [work authorization] papers . . . are not good." [R: 37-2, Ex. A, p. 5.] Mohawk's Human Resources division rejected Respondent's request. Respondent then sent an e-mail to Human Resources on November 28, 2006 stating that

> 90% of the people that come through the temp do not have good papers. That's why they come to us that way. I can tell you that most of the people working here today here

> through a temp do not have one of two things, either a Georgia I.D. or good papers through the I.N.S.

[R: 12, ¶ 32.]

III. Mohawk's Investigation of Respondent.

In response to this e-mail, Mohawk conducted an immediate investigation of Respondent's conduct and his assertions that Mohawk employed undocumented workers. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo (then a partner in the Washington D.C. office of Sidley Austin LLP), interviewed Respondent and other individuals. Mr. Morillo is counsel for Mohawk in a pending class action lawsuit, *Shirley Williams v. Mohawk Industries, Inc.*, Civil Action No. 4:04-CV-03-HLM (N.D. Ga. filed July 28, 2004).[1]

Mohawk ultimately terminated Respondent's employment. A few months later, Respondent filed this lawsuit. Respondent claims that Mohawk, some of its employees, and its in-house and outside counsel engaged in a conspiracy and threatened Mr. Carpenter (during the Morillo interview) and terminated his employment to keep him from testifying in the *Williams* case. [R: 12, ¶ 39.]

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1. The *Williams* case has also been before this Court. *See Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). The *Williams* case is currently on appeal with the Eleventh Circuit from the District Court's denial of class certification. *Williams v. Mohawk Indus., Inc.*, No. 08-13446-GG.

IV. Motion for an Evidentiary Hearing in *Williams*.

Less than a week after Respondent filed this lawsuit, the *Williams* plaintiffs filed (in the *Williams* case) an Emergency Motion for an Evidentiary Hearing to address Respondent's unverified allegations. [R: 43, p. 3-4.] The *Williams* plaintiffs sought, among other things, to compel the testimony of Mr. Morillo. Mohawk opposed the motion and in its brief stated:

> After receiving [the e-mail], Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, interviewed Mr. Carpenter.

[R: 43, p. 5.] The district court in *Williams* determined that the Emergency Motion for an Evidentiary Hearing was premature, and no hearing ever took place in the *Williams* class action. [R: 43, p. 8.]

V. The District Court Opinion.

In the District Court, Respondent sought discovery related to Mohawk's internal investigation. Mohawk objected on the grounds of attorney-client privilege to several of the discovery requests related to the privileged Morillo interview and the decision to terminate Respondent's employment. [R: 43, p. 1.]

Respondent argued first, that there was no privilege over the communications at issue and second, that if a privilege existed, that it had been waived.

On October 1, 2007, the District Court ruled that an attorney-client privilege attached to the communications in question. Appendix B, p. 42a. The District Court, however, found that Mohawk waived the privilege with respect to the communications relating to (1) Mr. Morillo's interview of Respondent and (2) the decision to terminate Respondent's employment. *Id.* at 51a. Notably, the record did not contain any evidence or testimony concerning the alleged waiver of privileged communications before the Court. No depositions had taken place in the case. Rather, the District Court found waiver of the attorney-client privilege based on these three sentences cited in Mohawk's brief opposing the emergency hearing in the *Williams* case where Mohawk stated:

> After receiving [the e-mail], Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, interviewed Mr. Carpenter.

Id.

The District Court reasoned that:

> By making these representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that the Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of the Plaintiff and the decision to terminate the Plaintiff's employment.

Id.

The District Court recognized that Mohawk "understandably, likely will wish to appeal from this Order." *Id.* at 52a. The District Court observed that appealing the Order as interlocutory under 28 U.S.C. § 1292(b) would not necessarily be appropriate, but suggested that Mohawk may have other avenues to appeal, such as a petition for mandamus or appealing under the collateral order doctrine. *Id.* The District Court stayed the deadline for Mohawk to produce documents and supplement discovery responses in the event that Mohawk chose to appeal. *Id.*

VI. Appeal.

Mohawk appealed to the United States Court of Appeals for the Eleventh Circuit, challenging the District Court's order finding waiver of the attorney-client privilege. Mohawk also filed a Petition for Writ of Mandamus. In its appeal, Mohawk argued that the Eleventh Circuit should exercise collateral order jurisdiction to review the District Court's finding of waiver, as the Eleventh Circuit had never addressed whether collateral order jurisdiction was appropriate in this context. Appendix A, p. 9a.

Without addressing the merits of Mohawk's privilege argument, the Eleventh Circuit dismissed Mohawk's appeal on August 26, 2008 holding that "the challenged discovery order is not an appealable order under *Cohen*." *Id.* at 10a. The Eleventh Circuit further denied Mohawk's petition for mandamus because it found that Mohawk did not demonstrate that "its right to issuance of the writ is 'clear and indisputable.'" *Id.* at 2a. On October 8, 2008, the Eleventh Circuit granted Mohawk's motion to stay the issuance of the mandate pending this Petition.

REASONS FOR GRANTING THE PETITION

I. This Case Presents a True and Irreconcilable Conflict Among the Circuit Courts of Appeals.

The Eleventh Circuit's decision not to exercise collateral order jurisdiction under *Cohen* to review an otherwise interlocutory order finding waiver of the attorney-client privilege and compelling disclosure of privileged information directly conflicts with decisions of other circuits. This is a circuit conflict openly acknowledged by the Respondent and readily acknowledged by the Eleventh Circuit in its opinion, stating that "[a] number of circuits have addressed the issue, and there are decisions on both sides." *Id.* at 9a.

Three circuit courts of appeals have found that review under the collateral order doctrine is appropriate in cases implicating the attorney-client privilege. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.)*, 479 F.3d 1078, 1087-88 (9th Cir. 2007) (holding that appellate jurisdiction was appropriate under the collateral order doctrine to review whether attorney-client privilege was lost under the crime-fraud exception); *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003) (exercising jurisdiction under the collateral order doctrine to review the district court's order to produce a document protected by the attorney-client privilege); *Kelly v. Ford Motor Co., (In re Ford Motor Co.)*, 110 F.3d 954 (3rd Cir. 1997) (exercising jurisdiction under the collateral order doctrine of a district court's order to produce attorney-client privileged documents).

In *Ford*, a products liability action, the Third Circuit examined the district court's order requiring defendant Ford Motor Company to produce documents that Ford claimed were protected by the attorney-client privilege and work product doctrine. Ford, like Mohawk in this case, filed a notice of appeal and also a separate petition for writ of mandamus in response to the order. On appeal, the Third Circuit went through an extensive and thorough analysis of this Court's collateral order cases and the basis for appellate jurisdiction under the collateral order doctrine. *Ford*, 110 F.3d at 957-964. The court ultimately determined that discovery orders requiring disclosure of privileged information were appropriate for appellate review under the collateral order doctrine. *Id.* at 963.

The D.C. Circuit took up the issue presented in *Philip Morris*, 314 F.3d 612. There, the district court issued a discovery order requiring defendant British American Tobacco Ltd. ("BATCo") to produce a memorandum prepared by its attorney. BATCo argued that the memorandum was protected by the attorney-client privilege, but the district court found that the privilege had been waived by BATCo's failure to list the memorandum in its privilege log. *Id.* at 616. In response to the district court's order, BATCo filed a notice of appeal and, alternatively, petitioned for a writ of mandamus. *Id.* at 614. The government argued that this case was distinguishable from *Ford* because the issue here concerned waiver of the privilege, whereas *Ford* involved the appropriateness of a claim of privilege.

Id. at 618. This argument was rejected by the D.C. Circuit, stating:

> A decision defining the contours of a waiver of privilege is no less 'important' for *Cohen* purposes than a ruling on the contours of the privilege itself. An erroneous finding of waiver, like an erroneous ruling denying a claim of privilege, eviscerates the same important institutional interests in preserving privileged information, and derivatively, full and frank communication between client and attorney.

Id. After considering the conflict among the circuits regarding the proper method of review of an "adverse privilege order," the D.C. Circuit held that appellate review under the collateral order doctrine was appropriate. *Id.* at 619-21.

Most recently, the Ninth Circuit examined the collateral order issue in the copyright infringement case of *In re Napster*, 479 F.3d 1078. There, defendant Bertelsmann appealed the district court's order compelling disclosure of privileged attorney-client communications relating to a loan Bertelsmann had given to Napster. The district court ordered production because it found that, though the communications were privileged, plaintiffs had made a "prima facie" showing of the crime-fraud exception to the attorney-client privilege. *Id.* at 1087. Defendant Bertelsman filed a notice of appeal and petitioned for a writ of mandamus. *Id.* at 1087. The Ninth Circuit found that it had jurisdiction to review the district court's order because

all elements of the collateral order test were satisfied, specifically finding that "once privileged materials are ordered disclosed, the practical effect of the order is often 'irreparable by any subsequent appeal.'" *Id.* at 1088, 1089 (quoting *United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir. 2006)).

Six circuit courts of appeals (prior to this case) are in conflict with the three circuit courts cited above, and have held that a discovery order implicating the attorney-client privilege is not appealable under the collateral order doctrine. *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 458, 459 n. 2 (1st Cir. 2000)("discovery orders generally are not thought to come within [the collateral order doctrine]"; a "perfect example of a discovery order that is not immediately appealable" under the collateral order doctrine is one involving a party's claim of attorney-client privilege); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993) (declining jurisdiction); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993)(order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not immediately appealable under the collateral order doctrine); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992) (holding that discovery orders are not appealable under the collateral order doctrine); *Reise v. Bd. of Regents of Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992) ("orders to produce information over strong objections based on privilege are not appealable"); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991) (order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine).

In *Boughton*, defendants sought to appeal the district court's order to produce documents relating to state and federal uranium mill licensing issues, claiming that the district court had erred in determining that the documents were not protected from discovery by the attorney-client privilege, the work product doctrine, and/or the non-testifying expert privilege. *Boughton*, 10 F.3d at 748. The Tenth Circuit held that the *Cohen* exception did not apply to defendants' appeal, based on its finding that the discovery order was not effectively unreviewable on appeal. *Id.* at 750. In its analysis, the court stated that "if this court determines that privileged documents were wrongly turned over to the plaintiffs and were used to the detriment of defendants at trial, we can reverse any adverse judgment and require a new trial." *Id.* at 749.

In *Quantum*, 940 F.2d 642, the Federal Circuit similarly concluded that a district court's order requiring the production of allegedly privileged documents was not reviewable under the collateral order doctrine because the order was effectively reviewable on appeal from a final judgment. *Id.* at 644. The documents in question in this patent infringement suit were pre-litigation opinion letters of counsel.

In a cursory analysis, the Fifth Circuit looked at the issue presented in *Texaco*, 995 F.2d 43. In *Texaco*, the magistrate judge issued an order requiring Texaco to produce documents that it claimed were protected by the attorney-client privilege. *Id.* at 43. Texaco filed a notice of appeal and petitioned for a writ of mandamus. *Id.* The petition for writ of mandamus was denied. *Id.*

The Fifth Circuit declined to exercise jurisdiction under the collateral order doctrine and dismissed Texaco's appeal. The Fifth Circuit's decision in *Texaco* did not, however, contain any analysis of *Cohen*. Instead, the court simply applied Fifth Circuit precedent and stated that "we make no comment as to the correctness of the rule . . . [that a discovery order is not subject to appeal], but merely apply circuit precedent by which we are bound." *Id.* at 44.

Notably, two of the courts of appeals that reject the application of the collateral order doctrine in cases involving privilege have suggested that a party should, in absence of direct appeal, refuse to comply with the order and then seek review of the resulting sanctions. In *Reise*, 957 F.2d 293, the Seventh Circuit explained the potential review process, stating that "[a] party aggrieved by the order assures eventual review by refusing to comply. The district judge then imposes sanctions." *Id.* at 295. The First Circuit has similarly suggested that a party may "refuse to comply with the order and thus invite a finding of contempt." *Ogden*, 202 F.3d at 459 n. 2. The ineffectiveness of this as an alternative to appeal is addressed below.

The Court should grant certiorari to resolve this conflict among the courts of appeals. This conflict continues to percolate, has been litigated across the courts of appeals, and will not resolve itself absent consideration by this Court. In the nine cases prior to this one that have ruled on the issue, notably, none of the losing parties ever petitioned for certiorari.

Therefore, this Court has not had the opportunity to decide whether it is appropriate for a court of appeals to exercise collateral order jurisdiction to review an order finding waiver of the attorney-client privilege and compelling the production of privileged information. This case presents the issue unencumbered and provides a needed opportunity for the Court to finally settle this conflict. Finally, resolution of the question presented in this case will provide consistent guidance to the courts of appeals.

II. This Case Raises an Important Question Concerning a Party's Ability to Challenge Erroneous Findings of Waiver of the Attorney-Client Privilege in the Federal Courts.

A. The application of *Cohen*'s collateral order doctrine is an important matter, which this Court regularly addresses.

Collateral order is a practical construction of the final judgment rule (28 U.S.C. § 1291), applied in a myriad of contexts. The Court frequently grants certiorari on questions regarding *Cohen*'s application to various classes of orders. *E.g.*, *Johnson v. Jones*, 515 U.S. 304, 307 (1995) ("This case concerns government officials . . . who seek an immediate appeal of a district court order denying their motions for summary judgment."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) ("This case raises the question whether an order vacating a dismissal predicated on the parties' settlement agreement is final as a collateral order even without a district court's

resolution of the underlying cause of action."). Indeed, the Court has even raised the issue *sua sponte*. *Will v. Hallock*, 545 U.S. 1103 (2005) (granting certiorari; "[i]n addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: 'Did the Court of Appeals have jurisdiction over the interlocutory appeal of the District Court's order. . . .'") *vacated by* 546 U.S. 345 (2006). These grants illustrate the importance of *Cohen* questions per se—importance that is multiplied when the decisions of the courts of appeals are in conflict.

B. The critical importance of the attorney-client privilege to the legal system warrants consideration of this issue by the Court.

The Court should also grant this Petition because of the essential role the attorney-client privilege plays in the American legal system. Every jurisdiction in the country recognizes the attorney-client privilege as a means to advance "the broader public interests in the observance of law and administration of justice." *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Court has repeatedly recognized the importance of the attorney-client privilege in our judicial system. *See id; Commodity Futures Trading Comm'n. v. Weintraub*, 471 U.S. 343, 348 (1985) (attorney-client privilege "encourages observance of the law and aids in the administration of justice"). In our representational system, fostering open and frank communication between attorney and client is paramount not only to the vigorous and effective representation of the client's interest, but also to the administration of our system of public justice. *See Upjohn*, 449 U.S. at 389.

Further, it is important that the Court continue to protect privileged communications that arise during the course of an internal investigation. In *Upjohn*, the Court held that a narrowly defined attorney-client privilege would "threate[n] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392. In so holding, the Court rejected the Government's argument that "civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege." *Id.* at 393 n.2. Instead, the Court reasoned that the Government's argument "ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken." *Id.*

In the context of waiver of the attorney-client privilege, the issue has recently come to the forefront. Congress has been actively legislating to correct perceived overreaching by Government prosecutors pressuring companies to waive attorney-client privilege—overreaching damaging to voluntary compliance with the law. *See* Attorney-Client Privilege Act of 2007, H.R. 3013, 110th Cong. § 2(a)(2) (as referred to Senate Comm. on the Judiciary Nov. 14, 2007) ("Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law."); *see also* Thompson Memorandum to United States Attorneys, Jan. 20, 2003 (considering "waiver of corporate attorney-client and work product protection" a "factor[] in reaching a decision as to the proper treatment of a corporate target"); McNulty Memorandum to United States Attorneys, Dec. 12, 2006 (superseding Thompson Memorandum; noting that "our

practices may be discouraging full and candid communications between corporate employees and legal counsel," so the Department of Justice must "adjust certain aspects of [its] policy"); Filip letter to Sens. Leahy and Specter, July 9, 2008 (describing alterations in Department of Justice practices, including that "[c]ooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges"; urging Senate not to "pursu[e] legislation in this area").

Thus, the waiver issues present in this case, and the ability to challenge erroneous findings of waiver through collateral jurisdiction expand beyond the facts and parties to this case. The inability to challenge erroneous findings of waiver hinders the desired voluntary compliance by chilling internal investigations. The District Court's finding of waiver here based on three sentences in another case undermines the efforts of this Court, Congress, and the Department of Justice to protect privileged communications in an internal investigation.

Further, the direct conflict among the courts of appeals on the applicability of *Cohen* compounds the importance of the question presented. And the importance of this issue goes beyond the parties to this case, and beyond the desired voluntary compliance in internal investigations, but instead expands to every litigant faced with an adverse finding of waiver or ordered to produce privileged information. The attorney-client privilege and a party's right to correct erroneous findings of waiver of that privilege demands the same protection in all federal courts.

C. Other avenues of review are insufficient to protect the attorney-client privilege.

Without a direct appeal under the collateral order doctrine there are no adequate means available to correct an erroneous finding of waiver of privilege.

1. Mandamus is not an effective means of review.

As some circuits have noted, one possible method of obtaining review is to petition for writ of mandamus. This is an inadequate alternative, however, because the standard of review under a writ of mandamus is heavily weighted against the moving party and does not permit the appellate court to correct error by the lower court except in highly unique and extraordinary circumstances. Mandamus jurisdiction affords an appellate court less opportunity to correct district court error in the case before it and less opportunity to produce guidance for future cases. *Ford*, 110 F.3d at 904.

Unquestionably, mandamus presents a significantly limited standard of review. This Court "ha[s] held that only 'exceptional circumstances amounting to a judicial "usurpation of power" will justify issuance of the writ' " and that "the party seeking mandamus has the 'burden of showing that its right to issuance of the writ is "clear and indisputable".' " *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967) and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). Thus, even erroneous findings that a party waived the attorney-client privilege will be routinely affirmed with

a cursory analysis based on mandamus's "stringent standard." *Id.* at 289; *see Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 (1978) (plurality opinion) ("Although the District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, we are convinced that it ought not to be overridden by a writ of mandamus." (citation omitted)); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983) (noting that *Calvert* plurality "concluded that the movant . . . had failed to meet [the mandamus] burden" but "that the movant might have succeeded on a proper appeal").

While the standard of review on a direct appeal varies depending on the issue presented for review, it is in any case less stringent than mandamus. Given the important distinction between mandamus and direct appeal, this Court often takes collateral order cases even though mandamus is proposed as an alternative. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996); *Moses H. Cone*, 460 U.S. at 8-11; *see also Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (holding that denial of motion to dismiss on Speech and Debate Clause grounds can be directly appealed).

2. Failing to comply with the order and obtaining a contempt citation is not a valid means of review.

Another possible method of review is for a party to refuse to comply with the order and then await a contempt citation. This is the preferred method in some circuits, as noted above.

Contempt, however, is not always an available avenue to appeal. In the Eleventh Circuit, for example, a party may seek an immediate appeal of an order of contempt only if the sanction is criminal in nature. *See, e.g., Combs v. Ryan's Coal Co.*, 785 F.2d 970, 976 (11th Cir. 1986) (noting that "[g]enerally a finding of civil contempt is not reviewable on interlocutory appeal"). Setting aside the inherent public policy implications of encouraging contempt as a means to proper appellate review, there is no reasonable manner to predict that a party will receive a criminal contempt citation. To the contrary, a district court is free to sanction defiance of its orders by civil contempt, by the striking of pleadings, or by other means that cannot be appealed until a final judgment is entered. Thus, forcing a party to gamble that a court will impose the "right" kind of sanction fails to afford the party a reliable means of appeal:

> The disobedience and contempt route to appeal cannot be labeled an adequate means of relief for a party-litigant. . . . Petitioner cannot know, ex ante, whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order. The uncertainty of this means to relief bespeaks its inadequacy in this case.

In re Sealed Case No. 98-3077, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (quoting 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3914.23 at 146 (2d ed. 1992)). Awaiting a contempt citation is therefore an unrealistic, impractical, and unnecessarily risky method of obtaining appellate review, particularly to protect attorney-client privileged communications.

III. The District Court's Order Is Appealable Under the Collateral Order Doctrine.

Under *Cohen*, a district court's order is appealable absent final judgment if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As multiple courts of appeals have held, a district court order implicating attorney-client privilege, such as the challenged order in this case, meets the *Cohen* test. *Ford*, 110 F.3d 954; *Philip Morris*, 314 F.3d 612; *In re Napster*, 479 F.3d 1078. The Eleventh Circuit erroneously declined to permit Mohawk's appeal under *Cohen*.

A. The District Court's October 1, 2007 Order Conclusively Determined the Privilege Question.

The first *Cohen* prong is whether the order from which the appellant appeals conclusively determines the disputed question. *See Sell v. United States*, 539 U.S. 166, 176 (2003). The Eleventh Circuit correctly agreed that the first prong is satisfied in this case. In so holding, the Eleventh Circuit stated that the challenged discovery order "leaves no room for the district court to further consider whether the information at issue is protected." Appendix A, p. 8a.

B. The District Court's October 1, 2007 Order Resolved an Important Issue that is Separate from the Merits.

The second *Cohen* prong is whether the order resolves an important issue that is completely separate from the merits of the dispute. *See Sell*, 539 U.S. at 176. This breaks into two components: importance and separateness. The Eleventh Circuit acknowledged that this prong is satisfied in this case, stating "we agree that the attorney-client privilege is important and that the district court can resolve the privilege issues (i.e., whether Appellant must produce the disputed documents and communications) without deciding the merits of the case." Appendix A, p. 8a.

1. The Attorney-Client Privilege is Important under the *Cohen* test.

Focusing first on the element of importance, there is no question that issues involving waiver of the attorney-client privilege are important under *Cohen*. The *Ford* court, after a thorough analysis of the case law tracing this Court's treatment of the "importance" factor of the *Cohen* test, determined that the attorney-client privilege satisfied that factor. It held that:

> The interests protected by the privilege are significant relative to the interests advanced by adherence to the final judgment rule. It is often stated that the attorney-client privilege is at the heart of the adversary system; its purpose is to support that system by

> promoting loyalty and trust between an attorney and a client.

110 F.3d. at 961. Thus, the Third Circuit held that the attorney-client privilege is "important" under the *Cohen* test, further stating:

> . . . the attorney-client privilege is thus important in the *Cohen* sense; the status or relationship, deeply embedded in our legal culture, is of sufficient importance that the danger of denying justice by delay in appellate adjudication (which would result in irremediable disclosure of privileged material) outweighs the inefficiencies introduced by immediate appeal.

Id. at 962. Given its fundamental significance to the judicial process, the issue of attorney-client privilege easily satisfies the "importance" element of the *Cohen* test.

2. The Privilege Issues are Separate from the Merits.

The second element of this prong also requires that the issue on appeal be separate from the merits. *See Sell*, 539 U.S. at 176. In this case, the privilege issues are separate from the merits. For example, Respondent alleges primarily that he was threatened in violation of 42 U.S.C. § 1985(2). He contends Mohawk conspired to and threatened him, and ultimately terminated him to deter him from testifying in the *Williams* case. Indeed, the court can resolve the underlying privilege issues

(i.e., whether documents and communications should be produced) without even discussing the merits of the case (i.e., whether Mohawk's alleged conduct constitutes a violation of the statute). The Eleventh Circuit agreed. Appendix A, p. 8a.

C. The October 1, 2007 Order is Effectively Unreviewable after Final Judgment.

Finally, the third prong of the *Cohen* test is satisfied here and the Eleventh Circuit reached an erroneous conclusion in holding Mohawk's claim of privilege was otherwise "reviewable." This prong requires that the order from the District Court be "'effectively unreviewable on appeal from a final judgment.'" *See Sell*, 539 U.S. at 176. This Court has held that an order is "effectively unreviewable" when the order affects "rights that will be *irretrievably lost* in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (emphasis added).

An appeal at the end of this case cannot remedy the breach of confidentiality that will unavoidably occur as a result of the mandated disclosure of privileged materials and communications. The disclosure would cause Mohawk irreparable harm as the information protected by the privilege could be lost forever if Mohawk was forced to wait until the end of the case to seek appellate review. If Mohawk is forced to wait for appellate review, Respondent, his lawyers, and perhaps others will already have had access to the privileged information, negating any protection that could be put back in place by a later appeal. Respondent seeks to

uncover the legal advice of both Mohawk's General Counsel and its outside litigation counsel. Once these privileged communications are disclosed, they can never be fully retrieved. At that point in time, any issue of privilege would effectively be moot. *See Philip Morris*, 314 F.3d at 619.

The Eleventh Circuit's flawed analysis of *Cohen*'s third prong stems from an erroneous view that privileged communications between attorney and client merely contain facts to be used at trial. On that view, any erroneous finding of waiver can be cured by appeal after final judgment; the appellate court can reverse the judgment and remand for retrial without use of the privileged material. *See* Appendix A, pp. 8a-9a. ("we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information"). The view is erroneous because, while privileged communications often contain facts – facts the opposing party has alternative avenues to discover – attorney-client communications also contain the attorney's legal conclusions and litigation strategies. It is these mental impressions that cannot be recovered after final appeal. Without interlocutory appeal, an erroneous finding of waiver will allow opposing counsel to proceed "on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J. concurring).

Further, the Eleventh Circuit inappropriately treated the privileged information like any ordinarily discoverable information. While information may be discoverable, its wrongful admission in evidence can be corrected through an appeal and new trial, if appropriate. But this is not of great concern because the parties were entitled to that information in the first instance through lawful discovery under Rule 26. Privileged information, however, is not discoverable and opposing counsel and parties never had any entitlement to the privileged information in the first place. The unfair advantage gained from their access to that information cannot be avoided absent an immediate appeal.

The District Court's Order is final, the attorney-client privilege issues are both important and separate from the merits of the case, and Mohawk has no effective way to appeal later. Once the privileged documents and communications are produced to Respondent, the benefit of the attorney-client privilege is irretrievably lost. Given these circumstances, collateral order jurisdiction is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this Petition. This Court should grant the Petition to resolve the conflict among the courts of appeals as to whether a district court's discovery order finding waiver of the attorney-client privilege and compelling production of privileged information is immediately appealable under the collateral order doctrine.

Respectfully submitted,

RANDALL L. ALLEN
Counsel of Record
DANIEL F. DIFFLEY
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 26, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-15208-GG

D.C. Docket No. 07-00049-CV-HLM-4

NORMAN CARPENTER,

Plaintiff-Appellee,

versus

MOHAWK INDUSTRIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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No. 07-15691-GG

IN RE:

MOHAWK INDUSTRIES, INC.,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia.

Appendix A

Before CARNES and MARCUS, Circuit Judges, and BUCKLEW,* District Judge.

PER CURIAM:

Before the Court are the following: (1) Appellant's appeal of a district court's order granting Appellee's motion to compel responses and produce documents Appellant contends are protected by the attorney-client privilege; (2) Appellant's companion petition for writ of mandamus seeking to compel the district court judge to vacate the order as it relates to the motion to compel; and (3) Appellee's motion to dismiss the appeal for lack of jurisdiction. After review and oral argument, we conclude that this Court should decline to extend the "collateral order" doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to the exercise of this Court's jurisdiction over an interlocutory appeal of a discovery order implicating the attorney-client privilege. Additionally, with respect to Appellant's companion petition for writ of mandamus, we conclude that Appellant has not shown that its "right to issuance of the writ is 'clear and indisputable.' " *In re Lopez-Lukis*, 113 F.3d 1187, 1188 (11th Cir.1997) (citing *Kerr v. U.S. Dist. Court for the Northern Dist. of California*, 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). Accordingly, we dismiss Appellant's appeal for lack of jurisdiction and deny Appellant's petition for writ of mandamus.

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* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix A

I. Background

Plaintiff/Appellee Norman Carpenter ("Appellee") initiated this action on March 15, 2007 in the United States District Court for the Northern District of Georgia against Defendant/Appellant Mohawk Industries, Inc. ("Mohawk" or "Appellant"), and also against various employees of Mohawk Industries, Inc., alleging that he was terminated in violation of 42 U.S.C. § 1985(2) and various Georgia laws. Specifically, Appellee contends in his complaint that he reported to Mohawk's human resources department that several temporary employees, hired by Mohawk through a temporary employment agency, were illegal aliens. After making his report, Appellee was required to meet with attorney Juan P. Morillo, who represents Mohawk in a separate lawsuit, *Williams v. Mohawk Industries, Inc.*, Civil Action File No. 4:04-cv-0003-HLM.[1]

Appellee alleges that the meeting between him and attorney Juan P. Morillo was designed to coerce him into recanting his report, which Appellant knew would be damaging to its defense in the *Williams* action. Appellee refused to recant his report, and he was terminated the day after the meeting. Appellant's stated reason for terminating Appellee was because it had discovered that

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1. In the *Williams* lawsuit, a group of current and former Mohawk employees filed a class action lawsuit against Mohawk in the District Court for the Northern District of Georgia, alleging that Mohawk conspired to place illegal aliens to work, in violation of federal and state RICO laws.

Appellee was committing immigration crimes by harboring illegal aliens.

After learning about Appellee's complaint, the plaintiffs in the *Williams* action filed an emergency motion for an evidentiary hearing, to which Mohawk's counsel in the *Williams* action filed a response. The response stated, in relevant part:

> Plaintiffs admit that the only basis for their Motion are the allegations in the complaint filed two weeks ago in *Carpenter v. Mohawk Industries.* Plaintiffs have never spoken to Mr. Carpenter, and they have not produced any other evidence corroborating his allegations. Nor could they. As his own statements demonstrate, Mr. Carpenter's wild allegations that he was fired because of some conspiracy to influence his testimony are pure fantasy. The true facts are these. On June 1, 2006, Mohawk hired Mr. Carpenter as a Shift Supervisor at Mohawk's Union Grove manufacturing facility. Mr. Carpenter was hired as a salaried employee, and his responsibilities included the supervision of hourly Mohawk employees. Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct . . . . Mr. Carpenter's attempt to have Mohawk send a worker that Mr. Carpenter believed to be unauthorized to a temporary agency was a clear violation of Mohawk's Code of Ethics

> and an attempt to circumvent federal immigration law.
>
> . . .
>
> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.[2]

After engaging in some initial discovery exchanges in the instant case, Appellee filed a motion to compel responses to both his interrogatories and document requests, seeking information Appellant contended was protected by the attorney-client privilege. Specifically,

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2. *Williams v. Mohawk Indus., Inc.*, Civil Action File No. 4:04-cv-0003-HLM, Docket Entry No. 94, at 4-5 (citations omitted).

Appendix A

Appellee sought information related to his communications with Attorney Juan P. Morillo and information related to Appellant's decision to terminate Appellee. The district court found that the communications at issue were protected by the attorney-client privilege, but it went on to conclude that Appellant had implicitly waived the attorney-client privilege due to the response Appellant filed in the *Williams* action. The district court stated that:

> By making those representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment.

The district court then ordered Appellant to respond to Appellee's interrogatories and document production requests, but it stayed that portion of its order if Appellant chose to appeal.

Appellant, believing that it had not waived the attorney-client privilege and not wanting to turn over

the information at issue, challenges the district court's order in this appeal. Appellee has moved to dismiss the appeal on the basis that this Court lacks jurisdiction to consider the appeal of a non-final discovery order. Appellant has also filed a petition for a writ of mandamus, seeking to compel the district court judge to vacate the order as it relates to Appellee's motion to compel. We consolidated the appeal, motion to dismiss, and petition for a writ of mandamus and will, therefore, consider them together.

II. Motion to Dismiss–Jurisdiction

As an initial matter, we must address this Court's jurisdiction to review Appellant's claims by way of interlocutory appeal. Generally, discovery orders are not final orders of the district court for purposes of obtaining appellate jurisdiction under 28 U.S.C. § 1291. A final decision is one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338 (11th Cir.2007) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)). Therefore, discovery orders are normally not immediately appealable. *See Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 745 (11th Cir.1982). However, the collateral order doctrine, established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), provides an exception to the finality requirement of 28 U.S.C. § 1291. Under *Cohen*, an order is appealable if it

(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

Appellant argues that the challenged discovery order is an appealable "collateral order" under *Cohen*, because all three prongs of the *Cohen* test are met. We conclude that the challenged discovery order meets the first and second prongs of the relevant test. The district court's order requiring Appellant to produce the disputed information leaves no room for the district court to further consider whether the information at issue is protected. As for the second prong, we agree that the attorney-client privilege is important and that the district court can resolve the privilege issues (*i.e.*, whether Appellant must produce the disputed documents and communications) without deciding the merits of the case.

As for the third prong, however, we do not find that a discovery order that implicates the attorney-client privilege is effectively unreviewable on appeal from a final judgment. If this Court were to determine on appeal from a final judgment that privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or

other evidence obtained as a consequence of the improperly disclosed information.

This circuit has previously held that discovery orders are not appealable. *See In re Int'l Horizons, Inc.*, 689 F.2d 996, 1000-01 (11th Cir.1982); *Rouse Constr. Int'l, Inc.*, 680 F.2d at 743 (11th Cir.1982). "Ordinarily, a litigant seeking to overturn a discovery order has (only) two choices. Either he can comply with the order and challenge it at the conclusion of the case or he can refuse to comply with the order and contest its validity if subsequently cited for contempt for his refusal to obey." *Rouse Constr. Int'l Inc.*, 680 F.2d at 745. Indeed, in *International Horizons* we found that the defendant could not appeal the district court's order requiring the defendant to disclose documents that the defendant argued were protected by the accountant-client privilege. *In re Int'l Horizons, Inc.*, 689 F.2d at 1001.

This circuit has not, however, directly addressed the question of whether a discovery order compelling the disclosure of information claimed to be protected by the attorney-client privilege can be appealed before final judgment under *Cohen*. A number of circuits have addressed the issue, and there are decisions on both sides. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-89 (9th Cir.2007) (finding jurisdiction under the collateral order doctrine to review the district court's order compelling production of attorney-client communication); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C.Cir.2003) (same); *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 458 & n. 2 (1st Cir.2000)

("[D]iscovery orders generally are not thought to come within [the collateral order doctrine]"; the "perfect example" of a discovery order that is not appealable under the collateral order doctrine is one involving a party's claim of attorney-client privilege.); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir.1997) ("[T]he strictures of the collateral order doctrine have been met in this case, and we have jurisdiction over the appeal."); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir.1993) (declining to accept jurisdiction, and stating that "in virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take jurisdiction."); *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43, 44 (5th Cir.1993) (order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not appealable under the collateral order doctrine); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir.1992) (pretrial discovery orders are not appealable under the collateral order doctrine); *Reise v. Bd. of Regents of Univ. of Wisconsin Sys.*, 957 F.2d 293, 295 (7th Cir.1992) ("[O]rders to produce information over strong objections based on privilege are not appealable."); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed.Cir.1991) (order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine).

We conclude that the challenged discovery order is not an appealable collateral order under *Cohen.* There appears to this Court to be no clear distinction between

the interlocutory appeal of a discovery order implicating the attorney-client privilege and an interlocutory appeal of a discovery order implicating the accountant-client privilege, and this Court has previously held that the latter is not appealable. *See In re Int'l Horizons, Inc.* 689 F.2d 996 (11th Cir.1982). Further, we are not persuaded by Appellant's argument that once the privileged material is turned over, the "cat is out of the bag" and the damage is done.

This Court has never exercised jurisdiction under the collateral order doctrine to review any discovery order involving any privilege. Rather, "mandamus is often an appropriate method of review of orders compelling discovery." *In re Fink*, 876 F.2d 84, 84 (11th Cir.1989). We have explained:

> In the context of discovery orders which will compromise a claim of privilege or invasion of privacy rights, mandamus has been found appropriate due to the importance of the privilege, the seriousness of the injury if discovery is obtained, and the difficulty of obtaining effective review once the privileged information has been made public.

In re Ford Motor Co., 345 F.3d 1315, 1316 (11th Cir.2003) (quoting *In re Fink*, 876 F.2d at 84). Similarly, other Circuits have denied collateral order review of discovery orders denying a claim of privilege, and instead, those Circuits state that mandamus review is the appropriate avenue for immediate review, although mandamus relief

is an extraordinary remedy. *See In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir.2006) (stating that "[m]andamus is appropriate if the district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal"); *Simmons v. City of Racine, PFC*, 37 F.3d 325, 327, 328-29 (7th Cir.1994) (explaining that the court lacked jurisdiction over an appeal of a discovery order compelling the production of documents allegedly protected by privilege, but stating that the appellants could "obtain immediate review of an adverse discovery order by other means[,]" including petitioning the court for a writ of mandamus); *Boughton*, 10 F.3d at 750-51 (holding that an order compelling production of information allegedly protected by the attorney-client privilege was not appealable under the collateral order doctrine and, instead, analyzing whether the order could be vacated under a writ of mandamus); *Chase Manhattan Bank*, 964 F.2d at 163 (rejecting the application of the collateral order doctrine in an appeal from a discovery order that required disclosure of documents allegedly protected by the attorney-client privilege, and instead, overturning the discovery order through a writ of mandamus); *see also United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 444 F.3d 462, 473 (6th Cir.2006) (refusing to determine the applicability of the collateral order doctrine to a challenge of a discovery order's finding relating to the attorney-client privilege, in part, because the court had "traditionally viewed mandamus as the sole method by which [an appellate court] might review a discovery order involving a claim of privilege").

Further, utilizing the writ of mandamus, which places a higher burden on the challenging party than a direct appeal, as the appropriate vehicle to hear challenges to discovery disputes grounded in the attorney-client privilege is desirable. A potentially large volume of appeals may arise out of such discovery orders, and thus, there are powerful prudential reasons to avoid commonplace interlocutory appeals. Utilizing the writ of mandamus, as opposed to the collateral order doctrine, as the appropriate avenue to seek review of discovery orders involving claims of privilege strikes an appropriate balance between the concerns of furthering the important policies of full and frank communication sought to be furthered by the privilege and the concerns of judicial efficiency.

Furthermore, another avenue of review *may* exist if the party challenging the discovery order refuses to comply with the order and contests its validity after being cited for contempt. However, we note that contempt orders resulting from discovery disputes are not appealable final orders unless the contempt order imposes "a fine or penalty . . . that may not be avoided by some other form of compliance." *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 976 (11th Cir.1986). Thus, in order for the contempt order to be immediately appealable, "[t]here must be *both* a finding of contempt and a *noncontingent* order of sanction." *Id.* at 977; *see also William J. Doyle v. London Guar. & Accident Co. Ltd.*, 204 U.S. 599, 604-05, 27 S.Ct. 313, 51 L.Ed. 641 (1907); *S.E.C. v. Kirkland*, 533 F.3d 1323, 1324 (11th Cir.2008).

Accordingly, we hold that the instant appeal is not permissible under the *Cohen* exception and note that there are other possible avenues for immediate review. Therefore, we grant Appellee's motion to dismiss the appeal.

III. Mandamus

Having granted Appellee's motion to dismiss the appeal, the Court turns to Mohawk's petition for writ of mandamus. Mandamus is an extraordinary remedy, and it is appropriate only when "no other adequate means are available to remedy a clear usurpation of power or abuse of discretion by the district court." *In re Loudermilch*, 158 F.3d 1143, 1144 (11th Cir.1998). The petitioner seeking the writ carries the burden of showing that its "right to the issuance of the writ is 'clear and indisputable.' " *In re Lopez-Lukis*, 113 F.3d at 1188. A writ will not issue "merely because [the petitioner] shows evidence that, on appeal, would warrant reversal of the district court." *In re Bellsouth Corp.*, 334 F.3d at 953. A district court's discovery orders are reviewed for an abuse of discretion. *See In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir.2003). A clear error of judgment or application of an incorrect legal standard is an abuse of discretion. *See Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1326 (11th Cir.2000).

Here, Mohawk seeks a writ of mandamus directing the district judge to vacate the part of his order finding that Mohawk implicitly waived its attorney-client privilege, and directing the district court not to compel

Mohawk to produce the disputed information. Even if we were to conclude that the district court had erred in finding that Mohawk waived the attorney-client privilege, Mohawk still has not shown that its right to the issuance of the writ is clear and indisputable. *In re Lopez-Lukis*, 113 F.3d at 1188. Mandamus is appropriate only when there has been a clear usurpation of power or abuse of discretion, and Mohawk has not shown that either occurred here. *In re Loudermilch*, 158 F.3d at 1144.

This appeal is DISMISSED for lack of jurisdiction, and Mohawk's petition for writ of mandamus is DENIED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION FILED OCTOBER 1, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-0049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVERS,
JEFFREY BRIGGS, and
SCOTT HIGGINS,

Defendants.

ORDER

This case is before the Court on Plaintiff's Motion to Compel Responses to Plaintiff's First Interrogatories and Request to Produce Documents that Mohawk Contends Are Protected By the Attorney-Client Privilege [31], and on Defendant Mohawk Industries, Inc.'s ("Defendant Mohawk's") Motion for Protective Order [32].

Appendix B

I. Background

On March 15, 2007, Plaintiff filed this lawsuit. Plaintiff alleges that Defendant Mohawk fired him after he sent an email to one of its Human Resources ("HR") representatives advising that a large percentage of the individuals sent by a temporary agency to work for Defendant Mohawk lacked either a valid Georgia ID or proper INS papers. According to Plaintiff, the HR representative passed on the message to top officials with Defendant Mohawk, including the head of Defendant Mohawk's HR and Defendant Mohawk's general counsel, Salvatore J. Perillo.

Plaintiff alleges that Defendant Mohawk's litigation counsel in *Williams v. Mohawk Industries, Inc.*, Civil Action File No. 4:04-CV-0003-HLM (the "*Williams* Action") met with him and attempted to intimidate him into changing his story because it would damage Defendant Mohawk in the *Williams* Action. According to Plaintiff, when Attorney Morillo and Defendant Mohawk learned that he would not change his story, Defendant Mohawk fired Plaintiff.

Plaintiff has sued Defendant Mohawk and several of its top executives, including Defendant Patricia Silvers, the highest-ranking HR executive in Defendant Mohawk's Calhoun, Georgia, division, Defendant Scott Higgins, a plant manager and Plaintiff's direct supervisor, and Defendant Jeffrey Briggs, a vice president of Defendant Mohawk and Defendant Higgins' direct supervisor, alleging a claim of conspiracy under 42 U.S.C.A. § 1985(2).

Appendix B

On March 21, 2007, the plaintiffs in the *Williams* Action filed an Emergency Motion for Evidentiary Hearing Regarding Mohawk's Contact With Witnesses ("Motion for Evidentiary Hearing"). On March 30, 2007, counsel for Defendant Mohawk and counsel for Plaintiff filed responses to the Motion for Evidentiary Hearing in the *Williams* Action. The response filed on behalf of Defendant Mohawk stated, in relevant part:

> Plaintiffs admit that the only basis for their Motion are the allegations in the complaint filed two weeks ago in [the instant action]. Plaintiffs have never spoken to Mr. Carpenter, and they have not produced any other evidence corroborating his allegations. Nor could they. As his own statements demonstrate, Mr. Carpenter's wild allegations that he was fired because of some conspiracy to influence his testimony are pure fantasy. The true facts are these. On June 1, 2006, Mohawk hired Mr. Carpenter as a Shift Supervisor at Mohawk's Union Grove manufacturing facility. Mr. Carpenter was hired as a salaried employee, and his responsibilities included the supervision of hourly Mohawk employees. Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct. . . . Mr. Carpenter's attempt to have Mohawk send a worker that Mr. Carpenter believed to be unauthorized to a temporary agency was a

> clear violation of Mohawk's Code of Ethics and an attempt to circumvent federal immigration law.

Williams Action, Docket Entry No. 94, at 4-5 (citations omitted). The response further stated:

> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.

Id. at 6-7. Counsel for Defendants in the instant case also filed a response to the Motion for Evidentiary Hearing in the *Williams* Action. *Williams* Action, Docket Entry No. 91.

Appendix B

Plaintiff later filed a supplemental response to the Motion for Evidentiary Hearing in the *Williams* action. In support of that response, Plaintiff submitted a declaration from Christina Martinez, who was an hourly employee with Defendant Mohawk. In her declaration, Ms. Martinez stated that she was instructed to speak with Attorney Morillo. (Decl. of Christina Martinez ¶ 7.) According to Ms. Martinez, Attorney Morillo asked her whether she had information about certain employees and their work status, and Ms. Martinez confirmed her understanding that the employees did not have correct paperwork. (*Id.*) Shortly after the meeting, according to Ms. Martinez, Defendant Silver, Becky Hale, an HR employee for Defendant Mohawk and Kirk Prather, another HR representative for Defendant Mohawk, approached Ms. Martinez and instructed her to go into a conference room. (*Id.* ¶ 8.) According to Ms. Martinez, Defendant Silver told Ms. Martinez that she should not be seeking information about the work status of employees, as that was HR's job, and that, if she did so again, it could cost her her job. (*Id.*)

Further, Ms. Martinez stated that in March 2007, a co-worker showed her a news report about this action. (Martinez Decl. ¶ 9.) According to Ms. Martinez, when her Team Leader saw her with the article, she was instructed to put the article away and was told that if she was caught talking about this case, she could lose her job. (*Id.*) Ms. Martinez further alleged that since the filing of this action, Mohawk's management had followed her and intimidated her, which caused her to

fear that she would be terminated if she shared her knowledge about the allegations in the *Williams* Action and in this action. (*Id.* ¶¶ 10-11.)

On April 9, 2007, the Court entered an Order denying the Motion for Evidentiary Hearing. *Williams v. Mohawk Indus., Inc.*, Civil Action File No. 4:04-CV-0003-HLM (N.D. Ga. Apr. 9, 2007) (unpublished). The Court found, among other things, that the Motion was premature and that the plaintiffs in the *Williams* Action had not fulfilled their obligations to obtain the extraordinary remedy that they requested. *Id.*, slip op. at 29-30. The Court further stated:

> Instead, Plaintiffs should attempt to obtain more information to support their allegations, and Plaintiffs can do so through the normal discovery process. Indeed, if necessary, Plaintiffs can subpoena Mr. Carpenter and Ms. Martinez for depositions in this action. After obtaining those depositions, Plaintiffs may, if necessary, re-submit their Motion for Evidentiary Hearing, along with the deposition transcripts. At that point, Plaintiffs should have developed the record enough to allow the Court to determine whether holding an evidentiary hearing[] is appropriate. Alternatively, Plaintiffs may choose to allow the discovery process in the *Carpenter* case to proceed normally, and to request that the Court take action after that discovery uncovers relevant

> information. For those reasons, the Court denies without prejudice Plaintiff[s'] Motion for Evidentiary Hearing.

Id. at 30-31 (footnotes omitted).

On August 29, 2007, Plaintiff filed his Motion to Compel Responses to Plaintiff's First Interrogatories and Request to Produce Documents that Mohawk Contends Are Protected By the Attorney-Client Privilege. On that same day, Defendant Mohawk filed its Motion for Protective Order. The briefing process for those Motions is complete, and the Court therefore concludes that the Motions are ripe for resolution by the Court.

II. Defendant Mohawk's Motion for Protective Order

Defendant Mohawk has filed a Motion for Protective Order. In its Motion, Defendant Mohawk requests that the Court issue an Order establishing: (1) "[t]hat by asking questions of Mr. Carpenter and Ms. Martinez about their communications with Mohawk's outside counsel, Mohawk will not be deemed to have waived the attorney-client privilege;" instead, Defendant Mohawk will reserve its right to assert the privilege in the future, and Plaintiff will reserve the right to argue waiver based on Defendant Mohawk's prior acts; and (2) "[t]hat the attendance at these depositions be limited to the witnesses testifying and counsel for the parties in this case, with the parties then afforded the opportunity to designate the depositions, or portions thereof, under

the terms of a Protective Order." (Docket Entry No. 32-1 at 1-2.) The Court addresses Defendant Mohawk's requests in turn.

A. Waiver

The Court cannot determine at this point, without knowing what questions Defendant Mohawk plans to ask of Plaintiff and Ms. Martinez, whether Defendant Mohawk will waive the attorney-client privilege by inquiring into communications between those individuals and Attorney Morillo.[1] It is conceivable that some questions might put the communications in issue so that Defendant Mohawk might be considered to have waived the privilege with respect to those communications.[2] For that reason, the Court is not inclined to enter an Order providing generally that Defendant Mohawk will not waive the attorney-client privilege by inquiring into those areas during the depositions of Plaintiff and Ms. Martinez. It is incumbent upon Defendant Mohawk, not the Court, to research this issue and arrive at its own decision as to whether to move forward with those questions. Indeed, if the Court issued the Order

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1. The Court is well aware that Plaintiff and the plaintiffs in the *Williams* Action contend that Defendant Mohawk already has waived the attorney-client privilege by making prior representations. The Court addresses those contentions *infra* Part III.

2. The Court, of course, does not intend to express an opinion as to which type of questions would result in a waiver of the privilege.

requested by Defendant Mohawk, the Court effectively would be issuing an advisory opinion, which the Court cannot do. The Court therefore denies this portion of Defendant Mohawk's Motion for Protective Order.

B. Request for Entry of Protective Order Attached to Defendant Mohawk's Motion

Defendant Mohawk has attached a proposed protective order to its Motion for Protective Order that is significantly broader than the protective order requested, and discussed, in Defendant Mohawk's Motion for Protective Order. Plaintiff has objected to the entry of that protective order.

Federal Rule of Civil Procedure 26(c) governs the entry of protective orders, and provides:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, for matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in said envelopes to be opened as directed by the court.

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Fed. R. Civ. P. 26(c). "While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of 'good cause,' the federal courts have superimposed a somewhat more demanding balancing of interests approach to the Rule." *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). "This standard requires the district court to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." *Chicago Tribune Co. v. Bridgestone/ Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001).

The Court finds that Defendant Mohawk simply has not shown good cause to support the entry of the broad proposed protective order that it has attached to its Motion. Indeed, Defendant Mohawk does not even attempt to address many of the terms of that proposed protective order in its Motion. The Court therefore denies the Motion for Protective Order to the extent that Defendant Mohawk requests that the Court enter the proposed protective order attached as an exhibit to its Motion for Protective Order.

The Court recognizes, however, that Defendant Mohawk has a legitimate and significant interest in keeping the transcripts of the depositions confidential. Some of the questions and answers that will occur during the deposition likely will implicate attorney-client communications. Consequently, the Court directs the parties and counsel to file those depositions under seal with the Court, and to refrain from disclosing the depositions, or any portion thereof, until such time as

the Court has occasion to address the issue of waiver in the context of the depositions. The Court will revisit the issue of disclosure of the depositions and sealing of the depositions after the Court addresses this waiver issue.

C. Request for Entry of Protective Order Limiting Attendance at Depositions

Defendant Mohawk requests that the Court enter a protective order limiting attendance at the depositions of Plaintiff and Ms. Martinez to the parties and their counsel in the instant action. Essentially, Defendant Mohawk seeks to preclude the plaintiffs' counsel in the *Williams* Action from attending the depositions. The plaintiffs in the *Williams* Action and Plaintiff both oppose this request, arguing that the Court previously indicated an intent for discovery in both cases to overlap, and that interests of efficiency and judicial economy require that the depositions be taken only once.

The Court first observes that this case and the *Williams* Action are separate cases, and that the Court has not consolidated the cases for purposes of discovery or otherwise. Consequently, discovery in the cases ordinarily would proceed separately, unless counsel agreed to coordinate the discovery process for both cases. Counsel clearly are unable to agree to coordinate discovery in this case with discovery in the *Williams* Action.

Further, by issuing its April 9, 2007, Order in the *Williams* Action, the Court did not intend to authorize

discovery in this action to proceed together with discovery in the *Williams* Action, or to allow plaintiffs' counsel in the *Williams* Action to participate in discovery in this case. Instead, the April 9, 2007, Order simply stated:

> Plaintiffs should attempt to obtain more information to support their allegations, and Plaintiffs can do so through the normal discovery process. Indeed, if necessary, Plaintiffs can subpoena Mr. Carpenter and Ms. Martinez for depositions in this action. After obtaining those depositions, Plaintiffs may, if necessary, re-submit their Motion for Evidentiary Hearing, along with the deposition transcripts. At this point, Plaintiffs should have developed the record enough to allow the Court to determine whether holding an evidentiary hearing is appropriate. Alternatively, Plaintiffs may choose to allow the discovery process in the *Carpenter* case to proceed normally, and to request that the Court take action after that discovery uncovers relevant information.

Williams v. Mohawk Indus., Inc., Civil Action File No. 4:04 CV-0003-HLM (N.D. Ga. Apr. 9, 2007), *slip op.*. at 30-31 (footnotes omitted). By making the above statements in the April 9, 2007, Order, the Court simply indicated that the Williams Plaintiffs could choose either to: (1) take the depositions of Plaintiff Carpenter and Ms. Martinez in the *Williams* Action; or (2) allow

discovery in the instant action to proceed normally and move for an evidentiary hearing after the conclusion of the discovery period. The Court did not authorize counsel for the plaintiffs in the *Williams* Action to participate in the discovery process in this action, and did not permit counsel for Plaintiff to participate in the discovery process in the *Williams* Action. Given Defendant Mohawk's legitimate and significant interest in protecting its attorney-client communications, and given the minimal, if any, prejudice to Plaintiff and Ms. Martinez that will occur from requiring those individuals to sit for two depositions, the Court finds that good cause exists to limit attendance at the depositions of Plaintiff and Ms. Martinez to those individuals, their counsel in this action, and the parties in this action. The Court therefore grants this portion of Defendant Mohawk's Motion for Protective Order.

III. Motion to Compel

A. Discovery Requests at Issue

In his Motion to Compel, Plaintiff requests that the Court order Defendant Mohawk "to respond to Plaintiff's First Interrogatory Nos. [sic] 4 and to produce all documents responsive to Plaintiff's First Request for Production Request Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, [and] 34." (Pl.'s Mot. Compel at 1.) In its brief, however, Plaintiff also apparently requests that the Court order Defendant Mohawk to respond to Interrogatories 1 and 3 of Plaintiff's First Interrogatories. (Pl.'s Br. Supp. Mot. Compel at 9-10.)

Ordinarily, the Court would address only the discovery requests listed in Plaintiff's Motion to Compel; however, rather than revisit this issue at a later date, the Court will address all of the discovery requests at this time.[3]

1. Interrogatory No. 1

Interrogatory No. 1 provides:

> Identify all individuals by name and job title who were involved in the decision to request that Carpenter be interviewed by Juan Morillo, Esq. ("Morillo"). "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

Defendant Mohawk's response to Interrogatory No. 1 states:

> Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds

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3. It is Plaintiff's burden to identify specifically and consistently which discovery requests are at issue in his Motion to Compel.

as follows: Sal Perillo, former General Counsel to Mohawk.

2. Interrogatory No. 3

Interrogatory No. 3 states:

> Identify all individuals by name and job title who were involved in the decision to terminate Carpenter's employment with Mohawk. "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

Defendant Mohawk's response to Interrogatory No. 3 provides:

> Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds as follows: Sal Perillo, Jerry Melton, Patti Silver and Juan Morillo.[4]

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4. Defendant Mohawk's response does not provide the job title of Ms. Silver or Jerry Melton. This information clearly is not privileged. The Court directs Defendant Mohawk to supplement its response to provide this information if Defendant Mohawk has not done so already.

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3. Interrogatory No. 4

Interrogatory No. 4 provides: "For each such person identified in Mohawk's response to Interrogatory No. 3, identify the specific role that person played in the decision referenced in Interrogatory No. 3." Defendant Mohawk responded: "Mohawk incorporates its response to Interrogatory No. 1."

4. Request for Production No. 4

Request for Production No. 4 demands that Defendant Mohawk produce: "[a]ll documents that constitute, reflect, reference or relate to Mohawk's decision to request that Carpenter be interviewed by Juan Morillo, Esq. ('Morillo')." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney client privilege and the attorney work product doctrine."

5. Request for Production No. 6

Request for Production No. 6 asks Defendant Mohawk to produce "[a]ll documents constituting, reflecting or relating to any communications from Morillo regarding his planned meeting or meeting with Carpenter." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the work product doctrine."

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6. Request for Production No. 7

Request for Production No. 7 seeks "[a]ll documents that reference Morillo's meeting with Carpenter." Defendant Mohawk gave the following response:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, and subject to the entry of a Protective Order.

7. Request for Production No. 12

Request for Production No. 12 demands production of "[a]ll notes taken during Morillo's meeting with Martinez." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine."

8. Request for Production No. 13

Request for Production No. 13 seeks "[a]ll documents that reference in any way Carpenter's email to Becky Hale ('Hale') sent on November 28, 2006 as identified in Paragraph 28 of Plaintiff's First Amended Complaint." Defendant Mohawk gave the following response:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

9. Request for Production No. 14

Request for Production No. 14 demands production of "[a]ll documents that constitute, reflect, reference, support or relate to Mohawk's decision to terminate Carpenter's employment." Defendant Mohawk responded:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

10. Request for Production No. 15

Request for Production No. 15 seeks "[a]ll documents constituting, reflecting or relating to any communications regarding Mohawk's decision to

terminate Carpenter's employment." Defendant Mohawk's response to this Request states:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

11. Request for Production No. 32

Request for Production No. 32 seeks to require Defendant Mohawk to produce "[a]ll documents that Mohawk claims support its conclusion(s) that formed the basis or bases for its decision to terminate Carpenter's employment." Defendant Mohawk responded: "Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, subject to the entry of a Protective Order."

12. Request for Production No. 33

Request for Production No. 33 seeks to require Defendant Mohawk to produce "[a]ll communications between a member of Mohawk's Legal Department and Morillo that reference Carpenter." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege."

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13. Request for Production No. 34

Request for Production No. 34 seeks "[a]ll communications between a member of Mohawk's Human Resources Department and Morillo that reference Carpenter." Defendant Mohawk's response states: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege."

B. Whether the Attorney-Client Privilege Applies

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Abdallah v. Coca-Cola Co.*, No. Civ. A. 1:98-CV-03679-RWS, 2000 WL 33249254, at *2 (N.D. Ga. Jan. 25, 2000). "'Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

> Stated generally, a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications with his or her attorney if:
>
> (1) the communications are between the attorney and the attorney's representative and the client or the client's representative;

> (2) the communications are strictly confidential; and
>
> (3) the communications are made in the furtherance of the rendition of legal services to the client or are reasonably necessary for the transmission of the communication.

Burlington Indus., Inc. v. Rossville Yarn, Inc., No. Civ. A. 4:95-CV-0401-HLM, 1997 WL 404319, at *1 (N.D. Ga. June 3, 1997) (quoting Supreme Court Std. 503). The party asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. *Abdallah*, 2000 WL 33249254, at *3.[5]

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5. The work product doctrine is set forth in Federal Rule of Civil Procedure 26(b)(3). That rule provides, in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing is made, the court shall protect against disclosure of the mental impressions,

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Appendix B

1. Whether Attorney Morillo Acted In His Capacity as an Attorney

Plaintiff first contends that the attorney-client privilege does not apply because Attorney Morillo was not acting in his capacity as an attorney or providing

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> conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) thus provides "absolute protection" to "opinion" work product. *Burlington Indus., Inc.*, 1997 WL 404319, at *2.

The work product privilege only applies to documents prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3). A document is prepared in anticipation of litigation if, at the time the document is prepared, "'there is a substantial possibility that litigation will occur and ... commencement of that litigation is imminent.'" *Burlington Indus., Inc.*, 1997 WL 404319, at *2 (quoting *FDIC v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 603 (M.D. Fla. 1990)).

Here, Plaintiff's Motion to Compel, on its face, seeks to compel production only of documents protected by the attorney-client privilege. The Court therefore does not, and need not, discuss whether Defendant Mohawk has waived any work product protection that might attach to the documents Plaintiff seeks. The general principles of waiver discussed *infra*, however, would apply to the work product privilege as well.

legal advice when he interviewed Plaintiff.[6] According to Plaintiff, Defendant Mohawk represented that Attorney Morillo's questioning of Plaintiff did not relate to the *Williams* Action, and Attorney Morillo thus must simply have interviewed Plaintiff to determine whether Defendant should terminate Plaintiff's employment. Plaintiff contends that the attorney-client privileges could not have attached under *Upjohn v. United States*, 449 U.S. 383 (1981), because Plaintiff, as a low-level shift supervisor with only six months of seniority, did not have a significant relationship with Defendant Mohawk. Alternatively, Plaintiff argues that Attorney Morillo provided the services at issue primarily for business purposes, because Attorney Morillo simply interviewed Plaintiff to determine whether Defendant Mohawk should terminate Plaintiff's employment. The Court addresses those contentions in turn.

In *Upjohn*, the Supreme Court rejected the control group test used by the United States Court of Appeals for the Third Circuit. 449 U.S. at 392 ("The control group test adopted by the court below thus frustrates the very purpose of the [attorney-client] privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."). Instead,

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6. The Court finds unpersuasive Plaintiff's contentions that Attorney Morillo could not possibly have been providing legal advice to Defendant Mohawk because Attorney Morillo's advice did not relate to the *Williams* case, in which he was admitted *pro hac vice*, and that Attorney Morillo consequently engaged in the unauthorized practice of law.

"*Upjohn* allows a corporation to invoke the attorney-client privilege when the information giver is 'an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services.'" *Burlington Indus., Inc.*, 1997 WL 404319, at *3 (quoting John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 487 (1982)). Here, Plaintiff contends that Mr. Carpenter cannot possibly have had a significant relationship to Defendant Mohawk, given his status as a six-month shift supervisor. This argument, however, ignores the fact that Mr. Carpenter had unique information concerning the legal issue that Defendant Mohawk contended it faced: allegations of hiring illegal workers. Mr. Carpenter thus had a significant relationship to Defendant Mohawk for purposes of the legal advice that Defendant Mohawk contends Attorney Morillo provided. Under those circumstances, the communications between Attorney Morillo and Mr. Carpenter could qualify as privileged communications under *Upjohn*.[7]

Plaintiff also contends that Attorney Morillo's communications concerning Mr. Carpenter were not privileged, because those communications occurred for the purpose of providing business advice, rather than legal advice. "Attorney-client communications concerning business matters are not within the attorney-

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7. Similarly, the communications between Attorney Morillo and Ms. Martinez could qualify as privileged under *Upjohn*.

client privilege." *BellSouth Adver. & Publ'g Corp. v. Am. Bus. Lists, Inc.*, No. Civ. 1:90-CV-149-JEC, 1992 WL 338392, at *8 (N.D. Ga. Sept. 8, 2002). "The attorney-client privilege[] is not lost, however, if business advice is simply incorporated into legal advice of counsel." *Id.* As one court noted:

> "The mere mention of business considerations is not enough to compel the disclosure of otherwise privileged material . . . Legal advice should remain protected along with 'nonlegal considerations' discussed between client and counsel that are relevant to that consultation, but when the ultimate decision then requires the exercise of business judgment and when what were relevant nonlegal considerations incidental to the formulation of legal advice emerged as the business reasons for and against a course of action, those business reasons considered among executives are not privileged."

Eglin Fed. Credit Union v. Cantor., Fitzgerald Sec. Corp., 91 F.R.D. 414, 420 (N.D. Ga. 1981) (quoting *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (N.D. Conn. 1976)). When advice given by an attorney relates to both business and legal matters, the legal advice must predominate in order for the attorney-client privilege to apply. *Marten v. Yellow Freight Sys., Inc.*, No. Civ. A. 96-2013-GTW, 1998 WL 13244, at *7 (D. Kan. Jan. 6, 1998). Once again, the party asserting the attorney-client privilege bears the burden of showing that the attorney acted in his or her capacity as a legal advisory. *Id.* at *6.

Here, Defendant Mohawk has adduced a declaration from its former general counsel, Salvatore J. Perrillo. In that declaration, Attorney Perillo simply states: "On December 4 and 5, 2006 Juan Morillo, outside counsel for Mohawk, interviewed Mohawk employees, including Norman Carpenter, for the purpose of providing legal advice to Mohawk." This conclusory statement, however, simply is not sufficient to show that Attorney Morillo acted as a lawyer, rather than a business advisor, when he interviewed Plaintiff.

In any event, however, the Court finds, for purposes of this Motion, that Defendant Mohawk has sufficiently demonstrated that Attorney Morillo provided legal services and legal advice, rather than simply providing business advice, when he interviewed Plaintiff and discussed the results of that interview with Defendant Mohawk's personnel. The record demonstrates that Attorney Morillo conducted the interview as part of a legal investigation seeking to determine whether Defendant Mohawk or Plaintiff had violated, or had attempted to violate, federal immigration law. Under those circumstances, the Court finds that the communications at issue fall under the protection of the attorney-client privilege.[8] The Court next determines

8. With one exception, the Court also rejects any contentions made by Plaintiff that the privilege log produced by Defendant Mohawk is insufficient. Federal Rule of Civil Procedure 26(b)(5)(A) provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is

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whether Defendant Mohawk has waived the attorney-client privilege.

2. Whether Defendant Mohawk Waived the Privilege

"The attorney-client privilege 'belongs solely to the client,' and the client may waive it, either expressly or by implication." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994) (quoting *In re Von Bulow*, 828 F.2d 94, 100, 101 (2d Cir. 1987)). Once a party waives the attorney-client privilege as to a communication, the waiver generally "extends to all other communications relating to the same subject matter." *BellSouth Adver. & Publ'g Corp.*, 1992 WL 338392, at *8. Further, "once waived, the attorney-client

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> privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed. R. Civ. P. 26(b)(5)(A). Defendant Mohawk's privilege log comports with those requirements. (Def. Mohawk's Resp. Pl.'s Mot. Compel Ex. B.) To the extent that Attorney Morillo's assistant took notes during the interview of Plaintiff that are not reflected on Defendant Mohawk's privilege log and that have not been produced, however, the Court directs Defendant Mohawk to update its privilege log to include those notes.

privilege cannot be reasserted." *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987).

The United States Court of Appeals for the Eleventh Circuit has observed that "the doctrine of waiver by implication reflects the position that the attorney-client privilege 'was intended as a shield, not a sword.'" *Cox*, 17 F.3d at 1417 (quoting *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987)) (internal quotation marks omitted). "In other words, '[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.'" *Id.* (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)) (alteration in original).

Because the attorney-client privilege is a shield and not a sword, a party may waive the privilege "if it injects into the case an issue that in fairness requires an examination of otherwise protected communications." *Cox*, 17 F.3d at 1419; *see also Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989) ("The great weight of authority holds that the attorney-client privilege is waived when a litigant 'place[s] information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.'") (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)).[9] Although this

9. A waiver of the attorney-client privilege also may occur when a party discloses otherwise privileged communications, (Cont'd)

particular type of waiver often occurs when a defendant raises an affirmative defense, the defendant need not raise an affirmative defense for this type of waiver to occur. *Id.* "To waive the attorney client privilege by voluntarily injecting an issue in the case, a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case." *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).[10]

The Eleventh Circuit found that the party had "injected the issue of its knowledge of the law into the

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or testifies as to those communications. *Outside the Box Innovations, Inc. v. Travel Caddy, Inc.*, 455 F. Supp. 2d 1374, 1376-77 (N.D. Ga. 2006) (noting that, in patent case, when party defends actions by disclosing attorney-client communication, party waives attorney-client privilege for all communications involving same subject matter); *Sperling v. City of Kennesaw Police Dep't*, 202 F.R.D. 325, 328 (N. D. Ga. 2001) (finding plaintiff waived attorney-client privilege where plaintiff testified about narrative she gave to counsel and relied on it to refresh her recollection). Simply testifying about facts, however, will not waive the attorney-client privilege. *Coleman v. Am. Broad, Cos.*, 106 F.R.D. 201, 209-10 (D.D.C. 1985). Here, there is no evidence indicating that Defendant Mohawk has disclosed an otherwise privileged communication or offered testimony concerning such a communication. The Court therefore need not, and does not, determine whether this type of waiver has occurred.

10. The Court therefore rejects the contentions made by the plaintiffs in the *Williams* Action that Defendant Mohawk waived its attorney-client privilege by denying Plaintiff's allegations in its Answer to Plaintiff's First Amended Complaint.

case and thereby waived the attorney-client privilege" where a party not only denied criminal intent but also affirmatively asserted that it believed its change in a pension fund policy was legal. *Cox*, 17 F.3d at 1419. Similarly, in *Conkling v. Turner*, 883 F.2d 431 (5th Cir. 1989), the United States Court of Appeals for the Fifth Circuit found that a plaintiff in a Racketeer Influenced Corrupt Organizations case had waived the attorney-client privilege where the plaintiff "injected into th[e] litigation the issue of when he knew or should have known of the falsity of [the defendant's] assertion regarding the stock ownership." 883 F.2d at 435.

Additionally, in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit affirmed a ruling of a federal district court finding that a criminal defendant in a securities law case would waive the attorney-client privilege by testifying as to his belief that the financing structure of the transactions at issue would allow the defendant "legally to avoid disclosure regarding other investors, and that describing the source of his funds as 'personal' was lawful." 926 F.2d at 1291. The court observed that the attorney-client privilege "may implicitly be waived when [a] defendant asserts a claim that in fairness requires examination of protected communications." *Id.* at 1292. The court found that this waiver principle applied, because the defendant's "testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his

schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent." *Id.*

Similarly, in *Baratta v. Homeland Housewares, LLC*, 242 F.R.D. 641 (S.D. Fla. 2007), the court found that the plaintiff had waived his attorney-client privilege with respect to his communications with counsel concerning settlement where the plaintiff expressly denied that he had assented to the settlement negotiated by his counsel. 242 F.R.D. at 643. The court observed:

> In this case, to allow [plaintiff] to testify that he never gave [his counsel] settlement authority, while at the same time disallowing Defendant to inquire into the subject matter of his and his litigation attorney's exchanges regarding settlement, would result in a sword/shield situation whereby [plaintiff] would be permitted to give his one-sided version of the story, while shielding himself from potentially harmful testimony of another. The Court agrees with Defendant that the law does not permit [plaintiff] to maintain such a convenient position, in frustration of Defendant's right to discovery of critical facts and information that cannot be obtained from any source other than [plaintiff's counsel].

Id.

Finally, in *Rivera v. Kmart Corp.*, 190 F.R.D. 298 (D.P.R. 2000), the court found that an implied waiver of the attorney-client privilege had occurred where the defendant in an employment discrimination case used documents pertaining to an interview of its store manager to support its position that it terminated the plaintiffs based on their involvement in destruction of merchandise to be included in an insurance claim. 190 F.R.D. at 304. Specifically, the court noted:

> Plaintiffs argue that Kmart waived its claim of attorney-client privilege concerning documents involving the interview of Elvin Gonzalez, Kmart's Rio Hondo Store Manager, by using the content of these documents to support their position that, besides Plaintiffs, Kmart investigators have been unable to confirm any wrongdoing from any of [the] other Kmart managers with regards to the intentional destruction of merchandise. In its reply to Plaintiffs' Opposition to summary judgment, Kmart cites to an unsworn statement made under penalty of perjury by Nolan Bomar, to support its position that Kmart has not been able to confirm any wrongful destruction of merchandise by managers other than Plaintiffs. In this unsworn statement, Bomar states that during the insurance audits, Elvin Gonzalez was the store manager at the Kmart Rio Hondo Store and that he was on Workers' Compensation Leave from August 14, 1999. By citing to

Bomar, who makes reference to Gonzalez's interview, Plaintiffs suggest that Kmart is using the contents of the documents pertaining to the interview as a sword to support its position pertaining to Plaintiffs' termination and the privilege of attorney client privilege [sic] as a shield to avoid their discovery.

A litigant cannot use the attorney-client privilege as both a "sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." Therefore, the Court must determine whether Kmart relied on the document pertaining to Elvin Gonzalez's interview to prove that Kmart has not been able to confirm any wrongdoing.

If Kmart is relying on the fact that Kmart investigators interviewed Elvin Gonzalez to support, at least in part, its position that no other wrongdoing related to Hurricane Georges insurance claims has been confirmed by Kmart, the contents of the interview are essential to determine whether or not Kmart's position is tenable. Defendant alleges that what dictated its decision to fire Plaintiffs was their involvement in the destruction of merchandise to be included in an insurance claim. Plaintiffs counter that what drove

> Kmart's decision to terminate them was their testimony to the authorities that they received instructions from their supervisors to damage merchandise to include in the insurance claim. Therefore, Defendant's claim requires examinations of those communications that would add or subtract credence from their position.
>
> Although the Court is not weighing its probative value, after reviewing the document which Kmart claims to be privileged and identified as Document 16, the Court finds that its contents are directly relevant and central to the issue of Kmart's reasons for dismissing its employees in connection with the Hurricane Georges insurance claim. In view of its relevance and connection with Kmart's allegations pertaining to the process of terminating its employees, the Court concludes that Kmart used the contents of the interview as a sword, albeit a dull one, to support its position and at the same time has attempted to cloak itself with the attorney-client privilege.

Id. at 303-04 (citations and footnote omitted).

Here, Defendant Mohawk stated, in response to the Motion for Evidentiary Hearing in the *Williams* Action:

> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.

By making those representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment. *Cox*, 17 F.3d at 1419.

Because the Court has determined that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment, Defendant Mohawk must update its responses to Plaintiff's discovery request to disclose

those communications. The Court therefore orders Defendant Mohawk to provide full responses to Plaintiff's First Interrogatories Nos. 1, 3, and 4 and Plaintiff's Requests for Production of Documents Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, and 34, and to produce documents one through four listed on Defendant Mohawk's privilege log, within forty-five days. The Court further orders Defendant Mohawk to produce the notes taken by Attorney Morillo's assistant during Attorney Morillo's interview of Mr. Carpenter, if such notes exist, to Plaintiff within forty-five days.

The Court recognizes the seriousness of its finding that Defendant Mohawk has waived the attorney-client privilege. Defendant Mohawk, understandably, likely will wish to appeal from this Order. Although the Court is not convinced that appealing this Order as an interlocutory order under 28 U.S.C.A. § 1292(b) would be appropriate, Defendant Mohawk may have other avenues to appeal available, such as a petition for mandamus or appealing this Order under the collateral order doctrine. *See In re Ford Motor Co.*, 110 F.3d 954, 957-964 (3d Cir. 1997) (discussing potential availability of appellate jurisdiction to appeal discovery order under collateral order doctrine and under mandamus); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607 (8th Cir. 1978) (noting "mandamus is available as a means of immediate appellate review" for discovery order). The Court will stay the deadline for producing documents and discovery responses established by this Order in the event that Defendant Mohawk chooses to appeal.

IV. Conclusion

ACCORDINGLY, the Court **GRANTS** Plaintiff's Motion to Compel Responses to Plaintiffs First Interrogatories and Request to Produce Documents that Mohawk Contends Are Protected By the Attorney-Client Privilege [31] The Court **ORDERS** Defendant Mohawk to provide full responses to Plaintiff's First Interrogatories Nos. 1, 3, and 4 and Plaintiff's Requests for Production of Documents Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, and 34, and to produce documents one through four listed on Defendant Mohawk's privilege log, within forty-five (45) days. The Court further **ORDERS** Defendant Mohawk to produce the notes taken by Attorney Morillo's assistant during Attorney Morillo's interview of Mr. Carpenter, if such notes exist, to Plaintiff within forty-five (45) days. The Court will stay the deadlines for producing the above information and responses if Defendant Mohawk chooses to appeal from this Order.

The Court **GRANTS IN PART AND DENIES IN PART** Defendant Mohawk's Motion for Protective Order [32]. The Court **DENIES** the portion of the Motion that seeks an Order stating that Defendant Mohawk will not waive its attorney-client privilege by asking questions of Plaintiff and Christina Martinez pertaining to their interviews by Attorney Juan Morillo. The Court further **DENIES** the portion of the Motion that requests the Court to enter the proposed protective order attached to the Motion. The Court **GRANTS** the portion of the Motion seeking to limit attendance at the depositions

of Plaintiff and Ms. Martinez to the parties in this case, the witnesses, and the parties' or witnesses' counsel, and **GRANTS** the portion of the Motion seeking to keep the deposition transcripts confidential until the Court can rule on any issue of waiver that may arise from the depositions.

IT IS SO ORDERED, this the 1st day of October, 2007.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE