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No. 08-678

MOHAWK INDUSTRIES, INC.,
Petitioner,
v.
NORMAN CARPENTER,
Respondent.

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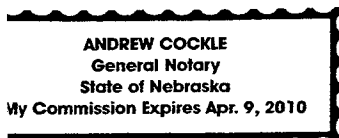
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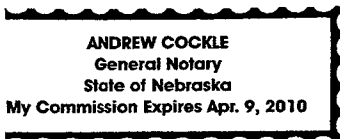
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As required by Supreme Court Rule 33.1(h), I certify that the RESPONSE TO PETITION FOR A WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 7,059 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

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I am duly authorized under the laws of the State of Nebraska
to administer oaths.

21508



Andrew Cockle
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Patricia C. Billotte
Affiant

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**

**RESPONSE TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether a party can immediately appeal, under the collateral order doctrine as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a district court's interlocutory discovery order because the party seeking the appeal unsuccessfully opposed the requested discovery under a privilege or confidentiality doctrine?

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STATEMENT OF THE CASE

Petitioner Mohawk Industries, Inc. ("Mohawk") lost a standard discovery dispute at the District Court in a federal civil rights lawsuit filed against it by a former Mohawk supervisor, Respondent Norman Carpenter ("Carpenter"). Mohawk sought to appeal that order to the United States Court of Appeals for the Eleventh Circuit, which correctly dismissed the appeal as it had no jurisdiction over an interlocutory discovery order. Mohawk filed this Petition requesting that the Court grant *certiorari* and establish new precedent that would allow parties to obtain immediate appeal of any adverse discovery order if they contend that it will require them to produce discovery that they claim is protected on the basis of a doctrine of privilege or confidentiality.

This lawsuit is based on a series of events triggered when Carpenter, while still employed, reported to Mohawk in an email that he had learned that Mohawk employed illegal aliens on his shift. Unbeknownst to Carpenter, Mohawk was defending a federal court RICO class action alleging that Mohawk conspired with its hiring agencies to employ illegal aliens.

After receiving Carpenter's email that would be so damaging to it in the class action, Mohawk required Carpenter to be confronted only by its lead class action trial lawyer. After acknowledging to Carpenter the relationship between his email and the class action, Mohawk's trial lawyer unsuccessfully

sought to pressure Carpenter to recant his email. With no further conversation with Carpenter, Mohawk fired him the very next day. Even more, when firing Carpenter, Mohawk told him that it was he and not Mohawk who had engaged in the criminal harboring of illegal aliens. By falsely accusing Carpenter of criminal conduct, Mohawk aimed to deter Carpenter from testifying in the class action about his email and knowledge of illegal aliens at Mohawk because, if he did, Mohawk would again publicly accuse him of criminal conduct. Among other claims, Carpenter alleges that the actions of Mohawk and its agents violated 42 U.S.C. §1985(2) because they conspired to seek to deter him by threat and intimidation from testifying or testifying truthfully in the federal court class action.

After Carpenter filed suit, Mohawk filed a very aggressive brief against Carpenter with the District Court. In essence, Mohawk carried forward on its previous threat to falsely accuse him of criminal conduct if he injected himself in the class action. After announcing, “the true facts are these,” Mohawk submitted 14 sentences slashing at Carpenter and his claims, asserting that Carpenter was the criminal wrongdoer and that Mohawk’s actions against him were taken solely based on an “entirely appropriate” investigation. In its “true facts,” Mohawk identified only one action it took in its “investigation” – its trial lawyer’s “interview” of Carpenter. Based on that “interview” and Mohawk’s purported findings from it, Mohawk asserted to the District Court that it would

establish that it was Carpenter and not Mohawk who had “engaged in blatant and illegal conduct.”

Carpenter requested discovery on the heralded attorney investigation on which Mohawk staked its case. But Mohawk then raised a shield claiming that Carpenter could not discover the bases for its “true facts” investigation submitted to the District Court because all communications relating to it were protected by the attorney-client privilege. The District Court applied well-settled waiver law and held that Mohawk had waived the privilege by asserting and relying on the privileged communications in its “true facts” assertions, and that Mohawk could not then seek to shield itself from discovery on those “true facts” on the basis of the privilege. Mohawk sought to appeal that discovery order, and the Eleventh Circuit correctly dismissed the appeal for lack of jurisdiction.

In its Petition, Mohawk contends that this Court should significantly expand the collateral order doctrine that this Court adopted in *Cohen* to require the appellate court to take jurisdiction over any discovery dispute where one party relied unsuccessfully on a claim of a privilege or a confidentiality doctrine. However, in the almost 60 years since *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court has never applied that extremely narrow exception to the final order doctrine to allow a party to obtain a direct appeal of a discovery order. Moreover, in 2006, this Court stated that it “has been asked many times to expand” the *Cohen* exception and has repeatedly rejected those efforts in order to keep the exception narrow.

Mohawk's Petition is another effort to get this Court to significantly expand *Cohen*. This Petition is not about the attorney-client privilege as Mohawk contends but about the importance of the final order doctrine. As the Eleventh Circuit protected that doctrine in compliance with this Court's precedent, there is no need for this Court to grant *certiorari* in this case.

◆————◆

STATEMENT OF FACTS

I. *The Williams v. Mohawk Class Action*.

In January 2004, a group of current and former Mohawk employees filed a class action lawsuit against Mohawk in the District Court. *Williams v. Mohawk, Industries, Inc.* (N.D. Ga. – Rome Division – Civil Action File No. 4:04-CV-0003-HLM). [R:1-12-2-5]. The *Williams* plaintiffs allege that Mohawk violated federal and Georgia RICO laws by engaging in an illegal conspiracy with a group of temporary staffing companies to place illegal aliens (“temporaries”) to work at Mohawk. [*Id.*].

II. *Carpenter's Allegations*.

In June 2006, Mohawk hired Carpenter as a Shift Supervisor at a Mohawk facility in Georgia. [R:1-12-7]. Carpenter's shift included “temporaries.” [*Id.*]. In November 2006, Carpenter learned for the first time that most of the temporaries on his shift were not legal to work in the United States. [R:1-12-9].

On November 28, 2006, Carpenter sent an email to Mohawk's Human Resources Manager, Becky Hale (“Hale”), stating: “Becky, 90% of the people that come through the temp do not have good papers[.] [T]hats (sic) 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 the two things either a GA I.d. (sic) or good papers through the I.N.S. Thanks, Norman.” [R:1-12-9].

Unbeknownst to Carpenter who had been at Mohawk for less than six months, his report was the exact type of evidence sought by the plaintiffs in *Williams*. [R:1-12-4-5]. Carpenter also did not know that Hale had told one of Carpenter's non-temporary employees [Christina Martinez] that she [Hale] was aware that Mohawk hired illegal aliens and that, if such illegal aliens came to Mohawk with a Social Security Number and a false identification, Hale would hire them. [R:1-12-10-11].

Mohawk's only response to Carpenter's email report was to require him to meet with Mohawk's outside, lead, trial counsel in *Williams* – Juan Morillo (“Morillo”). [R:1-12-14-15]. Carpenter alleges that this meeting was designed to coerce and intimidate him into recanting his email report of illegal aliens – such that he would not testify or testify truthfully about his knowledge of Mohawk's actions in *Williams*. [*Id.*] Carpenter did not recant. [*Id.*]

The very next day, a Mohawk Human Resources executive informed Carpenter that (1) she had been

informed of his "interview" by Morillo; and (2) Carpenter was terminated because he had committed the crime of retaining illegal aliens on his shift. [R:1-12-16-17]. Among other claims, Carpenter alleges in his lawsuit that Mohawk terminated him with a knowingly false allegation that he had committed a crime in order to deter him from testifying or testifying truthfully in *Williams* in violation of 42 U.S.C. §1985(2).

III. Mohawk's Factual Assertions Against Carpenter.

After Carpenter filed his suit, the *Williams* plaintiffs sought expedited discovery on Carpenter's allegations, and the District Court determined that *Williams* and *Carpenter* were related cases. [R:3-43-3-4]. Mohawk made the decision to oppose expedited discovery and in doing so made the strategic decision to respond to Carpenter's allegations with a brief directly attacking Carpenter to the District Court with what it called "the true facts" – its injection of substantial new factual and other allegations against Carpenter ("True Facts"). [R:2-37, Ex. A].

It was Mohawk's assertion of its True Facts in its Brief that understandably caused the District Court to later conclude that Mohawk could not evade discovery about the True Facts on the basis of the attorney-client privilege. But Mohawk's contention that the District Court found a waiver based only on three sentences of Mohawk's True Facts is not correct.

Instead, the True Facts were over three pages long and 14 (not 3) sentences of them were quoted by the District Court in the discovery order at issue.

Mohawk wrote to the District Court that it was presenting the True Facts to rebut Carpenter's allegations in his suit and indeed to prove even more that Carpenter was a "disgruntled former Mohawk employee" who had (1) asserted "ludicrous allegations"; (2) "engaged in blatant and illegal misconduct"; and (3) filed his "meritless strike suit" "to make Mohawk pay" in a "sad effort to extort Mohawk" and to engage in a "slur against Mohawk." [R:2-37, Ex. A, pp. 2, 5, 7, 13].

To prove its case, Mohawk announced, "The true facts are these" and launched into the following factual recitation:

... Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct. [After Carpenter sent Hale the email quoted above], Ms. Hale immediately forwarded the email chain to Mohawk management to report Mr. Carpenter's attempt to have an unauthorized worker hired and his assertion that some of the temporary workers under his supervision were unauthorized.

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 facility were not

authorized to work in the United States. As a part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.

As a result of Mr. Carpenter's conduct, 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.

... Mohawk and its counsel communicated with Mr. Carpenter in relation to an internal investigation of alleged misconduct by Mr. Carpenter – not about this [Williams] litigation. Nothing in the Class Communications Order requires Mohawk to turn a blind eye to unethical or illegal conduct.

[R:2-37, Ex. A, pp. 4-7, 10]

IV. Carpenter's Relevant Discovery Requests.

Early in discovery it was apparent that Mohawk had a real problem trying to back up its "True Facts." Indeed, in its Answer, Mohawk admitted that HR told Carpenter he was terminated not for trying to hire an illegal temporary employee but because he "knowingly allowed illegal employees to work on his shift."

[R:1-22-15, ¶ 15]. Mohawk HR and Morillo had not gotten their stories straight.¹

It was these contradictions at the tip of the iceberg of Mohawk's pretext that understandably lead Carpenter to serve discovery requests designed to prove that Mohawk's True Facts were not true at all but asserted to the District Court to cover up the fact that they fired him with a criminal accusation to keep him away from the deposition table and courtroom in *Williams*. Carpenter served document requests and interrogatories requesting the identity and role of the individuals involved in, any communications regarding, and any documents reflecting or referring to Mohawk's bogus "investigation" of Carpenter that it injected into the case with its True Facts. [R:3-43-23-31] Aware that its True Facts were about to implode in discovery, Mohawk objected to all of these discovery requests (while identifying four responsive documents in a privilege log) claiming that the responsive discovery was all protected by the attorney-client privilege. [*Id.*]

¹ Indeed, in its Petition, Mohawk tried another new explanation, asserting that Carpenter sent an email to Hale stating he wanted to hire an applicant for a temporary position [Tania Perez] that he believed at the time was illegal. [Petition, p. 3]. There is no such email, and Mohawk cites to none. Instead, Mohawk has conflated two different emails in order to give the false impression that Carpenter knowingly tried to give Perez hired when he knew she was illegal; he did not do so and there is no evidence that he did. [R:37-2, Ex. A, p. 5].

V. Carpenter's Motion And The District Court's Discovery Order.

Carpenter filed a Motion to Compel responses to its discovery requests regarding Mohawk's purported True Facts "investigation" of him. [R:2-31] Carpenter asserted that (1) the requested discovery was not protected by the privilege; and (2) any privilege attaching to the investigation had been waived by Mohawk by injecting its allegations of and about the investigation in its True Facts. [*Id.*].

The District Court granted Carpenter's Motion. [R:3-44]. It first held that the discovery requests did seek information and documents protected by the privilege. [R:3-31-42]. However, relying significantly on the Eleventh Circuit's decision in *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), the District Court held that, because Mohawk injected assertions about the investigation into the case, it had placed the actions of Morillo in issue in the case and Mohawk had "waived the attorney-client privilege with respect to communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment." [R:3-54].

VI. Mohawk's Unsuccessful Effort To Appeal The Discovery Order.

Had Mohawk complied with the discovery order, it would have produced the requested discovery and this case may have been tried by now. But Mohawk realized that allowing the light of discovery on its

True Facts would present real problems for it at trial. Thus, it sought to appeal the discovery order. Carpenter moved to dismiss the appeal as the Eleventh Circuit did not have jurisdiction to hear an immediate appeal of a discovery order. The Eleventh Circuit granted Carpenter's Motion and rejected Mohawk's effort to expand this Court's *Cohen* doctrine to allow immediate appeals of discovery orders just because the losing party in the order claims that the discovery in question is privileged or confidential.



REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Dismissal Of Mohawk's Appeal Is Consistent With This Court's Precedent And Does Not Present A Significant Conflict Among The Circuit Courts Of Appeals.

The federal courts of appeals have "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. §1291. Mohawk seeks to squeeze the discovery order here into the very narrow "collateral order" exception to this rule established by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). It is clear from this Court's precedent that *Cohen* cannot make a discovery order immediately appealable.

First, this Court has repeatedly made clear *Cohen* has very narrow application. The collateral order doctrine accommodates a “small class” of rulings that do not conclude the litigation, but conclusively resolve “claims of right separable from, and collateral to, rights asserted in the action.” *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (internal marks omitted). The claims that fall within the collateral order doctrine are claims that are “too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen*, 337 U.S. at 546.

In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865, 868 (1994), this Court reiterated that the collateral order doctrine was a narrow doctrine for a “small class of cases,” that this Court has “kept narrow and selective” and that the law “should stay that way.” Most recently, in *Will v. Hallock*, 546 U.S. 345 (2006), this Court emphasized the “stringent” requirements of the collateral order doctrine and made clear that, unless kept exceedingly narrow, “the underlying doctrine will overpower the substantial finality interests §1291 is meant to further: ‘judicial efficiency, for example, and the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.’” *Id.* at 350 (citations omitted). Thus, the Court explained:

We have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope.... And we have meant what we have said; although the Court has been asked many times to expand the “small class” of collaterally appealable orders, we have instead kept it narrow and selective in its membership.

Id.

True to its word, this Court has allowed the application of the doctrine only in a narrow set of cases involving the fundamental functioning of the government or our system of justice. See e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (utilizing doctrine to allow an immediate appeal of a denial of absolute public immunity based on the “compelling public ends” that are “rooted in . . . the separation of powers,” that would be compromised by failing to allow such an immediate appeal); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (utilizing doctrine to allow immediate review of a denial of qualified immunity, and specifically referencing the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service, if a full trial were threatened whenever they acted reasonably in the face of law that is not “clearly established”); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (allowing immediate appeal of an order denying a claim of Eleventh Amendment immunity by explaining the

critical need to ensure vindication of a State's dignitary interests).

Notably, in the almost 60 years since *Cohen*, this Court has never applied it to allow an immediate appeal of a discovery dispute. Even more, its statements in two cases are entirely inconsistent with a conclusion that *Cohen* can apply to a discovery order.

First, in *Church of Scientology v. United States*, 506 U.S. 9, 17 n.11 (1992), this Court stated, "A party that seeks to present an objectionable discovery order immediately to a court of appeals *must* refuse compliance, be held in contempt, and then appeal the contempt order." (Emphasis supplied).

Second, in *Cunningham v. Hamilton County*, 527 U.S. 189 (1999), this Court expressly held that an order for sanctions under Fed. R. Civ. P. 37 (not a finding of contempt) arising out of a failure to comply with a court's order to produce complete discovery responses was not immediately appealable under the collateral order doctrine. Among other things, this Court held that an examination of the sanctions order would require an examination of the discovery order and that such an examination "would differ only marginally from an inquiry into the merits and counsels against application of the collateral order doctrine." *Id.* at 206.

Nine circuits (including the Eleventh Circuit in this case) have heeded this Court's "keep *Cohen* narrow" direction and have expressly held that a discovery order is not immediately appealable

because it requires disclosure of communications that are arguably or actually (under a waiver) protected by the attorney-client privilege. First, there are such decisions from six circuits identified by Mohawk and/or the Eleventh Circuit below: *FDIC v. Ogden Corp.*, 202 F.3d 454, 458 & n.2 (1st Cir. 2000) (holding that "[d]iscovery orders generally are not thought to come within [the collateral order doctrine]" and noting that the "perfect example" of a discovery order that is not appealable under the doctrine is one involving a party's claim of attorney-client privilege) (emphasis in original); *Boughton v. Cotter Corp.*, 10 F.3d 746, 748-49 (10th Cir. 1993) (holding that there is no appellate jurisdiction over a discovery order touching on privilege); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2nd Cir. 1992) (pretrial discovery orders on privilege 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 attorney opinion letters was not immediately appealable under collateral order doctrine).

In addition, two other circuits have made statements establishing that they agree with the strong majority of circuits on this question. *United States v. In The Matter Of The Search Of 235 South Queen Street, Martinsburg, W.V.*, 2008 U.S. App. LEXIS

22902 (4th Cir. 2008) (collateral order doctrine did not allow for immediate appeal of discovery order holding attorney-client privilege did not protect documents under the crime fraud exception); *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) (“Though two of our sister circuits allow immediate review of discovery orders involving claim of privilege under the collateral order doctrine . . . , this court does not ordinarily do so.” – identifying exception as cases where privilege held by a third party and party claiming the privilege “powerless to avert mischief of the order.”); see also *In Re: Grand Jury Proceedings-Gordon*, 722 F.2d 303, 305-06 (6th Cir. 1983) (holding in case involving attorney-client privilege that “an order compelling testimony or denying a motion to quash a grand jury subpoena is not appealable”).

As Mohawk indicates in its Petition, there are three minority circuits that have applied the collateral order doctrine to allow an immediate appeal of a discovery order involving privileged communications. *UMG Recordings, Inc. v. Bertelsmann AG*, 469 F.3d 1078, 1087-88 (9th Cir. 2007); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003); *Kelly v. Ford Motor Co.*, 110 F.3d 954 (3rd Cir. 1997). There are, however, two important points to be made with respect to these three minority circuits.

First, in contrast to the majority circuit decisions, these minority circuit decisions effectively ignored this Court’s admonitions about expanding the *Cohen* doctrine. Thus, these decisions do not suggest a need

of guidance from this Court but are simply examples of decisions ignoring the clear guidance this Court has repeatedly given.

Second, the seminal minority case is the Third Circuit decision *Kelly* (which was cited by the D.C. Circuit in *Phillip Morris*), and a close examination of Third Circuit law on this question both before and after *Kelly* establishes that the Third Circuit is likely to reverse *Kelly* on its first *en banc* opportunity. The effect of such a reversal on the remaining two outlier circuits may itself end the last remnants of a split.

First, in *Smith v. BIC Corporation*, 859 F.2d 194 (3rd Cir. 1989), the court applied the collateral order doctrine to allow an immediate appeal of a discovery order allowing the production of information that allegedly revealed a party’s trade secrets. Second, in *Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co.*, 32 F.3d 851 (3rd Cir. 1994), the court held that the collateral order doctrine did not permit immediate appeal of a discovery order requiring the production of documents protected by the attorney-client and accountant-client privilege on the grounds of waiver. The court logically distinguished *Smith*, stating:

In *Smith*, we held that the public disclosure of trade secrets is not effectively reviewable. A trade secret is valuable because it allows a business to obtain an advantage over competitors who do not know or use it. The damage suffered by a business due to public disclosure of trade secrets cannot be

remedied by an appellate court because the court cannot make the information secret again. Here, however, an appellate court can remedy any damage resulting from the erroneous disclosure of documents after judgment.

Id. at 860. The court then applied the reasoning set forth by the Tenth Circuit in *Boughton*, *supra* – that there was no need to apply the collateral order doctrine to allow an immediate review because a later reversal of the discovery order regarding the privilege will prevent the obtaining party from using it at a new trial.

In *Kelly*, a Third Circuit panel was faced with the same issue the panel had faced in *Rhone-Poulenc Rorer*, but it reached a directly contrary result. The *Kelly* panel stated that *Rhone-Poulenc Rorer* was inconsistent with *Smith* and then illogically held that it was bound by *Smith* rather than by the more directly applicable *Rhone-Poulenc Rorer*. However, that was simply not the case. *Rhone-Poulenc Rorer* effectively and logically distinguished *Smith*. Under Third Circuit law, *Kelly* impermissibly reversed *Rhone-Poulenc Rorer*. See *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3rd Cir. 1981) (“[A] panel of this court cannot overrule a prior panel precedent.”). Thus, *Kelly* is not properly the law in the Third Circuit.

Not surprisingly, the Third Circuit has since decidedly backed away from *Kelly* and *Smith*. In *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 54-56 (3rd Cir.

2000), the court cited numerous cases rejecting the approach in *Kelly* and acknowledged that “[o]ther courts of appeals have rejected our approach . . . and have declined to exercise jurisdiction under the collateral order doctrine over appeals from discovery orders, even when privilege issues are involved.” Most recently, in *In Re: Carco Electronics*, 536 F.3d 211, 214 (3rd Cir. 2008), the court held that recent decisions from this Court (cited above) suggested that *Smith* was “flawed.” It stated that “a reversal of *Smith* must be left to the wise counsel of the Court *en banc*.” *Id.* And of course, as *Kelly* effectively reversed *Rhone-Poulenc Rorer* because it believed it to be bound by *Smith*, then *Kelly* is also by definition “flawed” and likely to be reversed along with *Smith* when the Third Circuit next addresses this issue *en banc*. As *Kelly* is the leading minority case on this issue, that result is likely to cause the remaining two outlying circuits to follow this Court’s narrow application of *Cohen* and thus end any split on this issue.

Accordingly, particularly because of recent decisions from this Court already setting the narrow parameters of the collateral order doctrine, the small split in the circuits relied upon by Mohawk is already crumbling and will likely die on its own. Thus, there is no split in the circuits of the type that warrants *certiorari*. See *United States v. Chandler*, 282 F.3d 448, 450 (7th Cir. 2002) (“[T]here are many cases in which the Court decides to let a conflict stand or at least to allow a good number of circuits to decide the

issue before determining whether the conflict will persist.”)

II. This Case Does Not Present An Important Question, As The Attorney-Client Privilege Is Already Appropriately Protected And The Court Of Appeals Has Preserved The Final Order Doctrine.

Carpenter does not dispute that the legal doctrine of the attorney-client privilege is important. However, the privilege is fully and completely protected by the several avenues already available for obtaining immediate appellate review of a discovery order. First, a party can file a petition for a writ of mandamus (as Mohawk unsuccessfully did in this case). Where the discovery order is so erroneous to meet the mandamus standards, appellate courts have correctly used that writ to reverse them. See *In Re: Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (reversing discovery order on mandamus); *In Re: Fink*, 876 F.2d 84 (11th Cir. 1989) (same). Second, as this Court recognized in *Church of Scientology v. United States*, 506 U.S. 9, 17 n.11 (1992), parties can also obtain immediate review of discovery orders where they believe that the order is clearly erroneous if they refuse compliance with it, are held in contempt, and then appeal the contempt finding.²

² Mohawk wrongly argues that the contempt avenue is insufficient because some contempt findings (such as a civil fine) (Continued on following page)

Mohawk argues that neither of these routes is satisfactory to it. It contends that the bar for mandamus relief is too high – and argues that there are adverse policy implications in encouraging contempt to appeal an adverse discovery order. But Mohawk has the policy implications exactly backwards as numerous Courts of Appeal have already recognized.

Courts such as the Fourth Circuit have succinctly explained the strong policy reasons for requiring litigants to either wait for the conclusion of the litigation or risk a contempt citation in order to appeal an unfavorable discovery order. Requiring litigants to weigh and balance the costs of complying with the discovery order against the risk of a contempt citation ensures that only the most important discovery disputes are brought to the Court of Appeals and allowed to delay litigation:

We recognize, of course, that the contempt route is a difficult path to appellate review, and one that may carry with it a significant penalty for failure. In discovery disputes, however, this difficulty is deliberate. As Judge Friendly has noted, the contempt limitation ensures that the aggrieved party will first take a careful “second look” at the issue in question to determine whether it truly

may not be sufficiently severe to be an appealable order under the contempt law of some circuits. But that argument ultimately fails as, even in those circuits, disobeying that sanction will eventually lead to either a default or a finding of criminal contempt.

warrants inviting a contempt citation. . . . Indeed, the discovery appeals that arise from that calculus will most likely be those of the greatest significance to both parties – the party resisting discovery must risk a citation for contempt, while the party seeking discovery must move for contempt and thereby risk an interlocutory appeal. *Id.* The alternative to the contempt route, by contrast, is one that encourages appeal of every unpalatable discovery ruling.

MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 121-22 (4th Cir. 1994) (footnote omitted). See also *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992) (“requiring the party [complaining about a discovery order] to take some risk – to back up his belief with action – winnows weak claims.”)

Succinctly stated, the law does not and should not encourage a party to seek immediate appeal of a discovery order – this is the reason for the final judgment rule. But in the rare case where the discovery order was egregious and clearly and indisputably incorrect, the party can obtain immediate appeal either through the mandamus or contempt avenue. The law sets the bar high on mandamus and the risk high on inviting a contempt finding for good reason: to limit immediate appeals of discovery orders to the very rare cases where the district court has indisputably issued an incorrect order that has serious consequences.

In this regard, it is important to note that Mohawk is substantially understating the implications

of the expansion of appellate jurisdiction that it is requesting here. Were this Court to grant *certiorari* and expand the collateral order doctrine, the implications would necessarily be profound. Indeed, any discovery order in which the losing party had asserted an objection of privilege (whether attorney/client, accountant/client, doctor/patient, husband/wife, deliberative process or the numerous other privileges recognized by law) or confidentiality (whether based on a claim of trade secret, right to privacy or otherwise) would, under the same rationale, be immediately appealable under the view of Mohawk and the minority circuits. While Mohawk focuses on the attorney-client privilege, it cannot logically or legally place a wall around only that privilege under *Cohen*.

Indeed, the arguments are compelling that it is at least as important (and arguably much more important) to protect valuable trade secrets than it is to protect privileged communications. (One need only ask Coca-Cola whether it is more important to protect the Coca-Cola formula or a statement made by one of its in-house lawyers to an employee.) If Mohawk's view were adopted by this Court, it would result in an ever-increasing number of appeals of non-final discovery orders to the appellate courts.

This is precisely why almost all circuits have rejected Mohawk's argument to expand appellate jurisdiction under *Cohen*. They have recognized that an objection on the basis of attorney-client privilege cannot be distinguished under *Cohen* from other

related discovery objections. See e.g., *Bacher*, 211 F.3d at 55 (“we must be careful not to open the door to a flood of collateral order appeals from discovery orders requiring disclosure of unprivileged information which might be characterized as ‘sensitive.’ Thus, while there may be very good reasons to overturn the district court’s order, if we take jurisdiction here we may have difficulty drawing the jurisdictional line in future cases.”); *MDK*, 27 F.3d at 119-20 (“A judicially created exception to nonappealability for categories of sensitive information is the quintessential slippery slope. Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court.”)

It is worth noting that Mohawk has successfully delayed discovery by well more than a year in this case simply by seeking appellate review of an interlocutory discovery order. In so doing it has contravened a purpose of the final judgment rule that this Court reiterated in keeping *Cohen* narrow – “the sensible policy of ‘avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.’” *Will v. Hallock*, 546 U.S. 345, 350 (2006).

III. The District Court’s Discovery Order Is Not Immediately Appealable Under *Cohen*.

Mohawk correctly states that collateral order jurisdiction can exist only when it involves an order that (1) conclusively determines a 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. *Coo-pers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Here, the Eleventh Circuit held that Mohawk could not meet the third prong. But in fact, under clear Supreme Court precedent, Mohawk cannot meet either the second or third prong.

With respect to the second prong, putting aside a debate on whether the discovery order here resolved an important issue, discovery orders generally (and particularly ones addressing the doctrine of implied waiver of a privilege) are not “completely separate” from but instead inextricably intertwined with the merits of the action. The most instructive case on this point is *Cunningham v. Hamilton County*, 527 U.S. 189 (1999).

In *Cunningham*, the plaintiff ignored a Magistrate’s Order to respond to written discovery requests in a civil rights action. The Magistrate imposed sanctions on the plaintiff’s counsel under Fed. R. Civ. P. 37. The District Court affirmed, and the lawyer sought an immediate appeal under the collateral order doctrine, but the appellate court held that the doctrine did not apply and dismissed the appeal. This

Court agreed and held that the second prong of *Cohen* is not triggered by a discovery sanctions order stating:

... [A] Rule 37(a) sanctions order often will be inextricably intertwined with the merits of the action. An evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response. . . . Such an inquiry would differ only marginally from an inquiry into the merits and counsels against application of the collateral order doctrine. Perhaps not every discovery sanction will be inextricably intertwined with the merits, but we have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral.

Cunningham, 527 U.S. at 206-07 (citations omitted).

If an order sanctioning a failure to produce discovery often will be inextricably intertwined with the merits because of the necessity of examining the substance of the discovery order, then a discovery order is often inextricably intertwined with the merits for the same reason. Indeed, in this case, the District Court held that Mohawk had impliedly waived the privilege because of positions asserted to it in a brief because Mohawk “placed the actions of Attorney Morillo at issue” and because fairness requires an examination of those actions and communications. Pet. App., p. 51a. The District Court could not make such a finding completely divorced

from examining the merits. Indeed, to determine what “fairness” in the case requires, and whether a party has placed a privileged communication “at issue” in the case, it is necessary to determine if it relates to the merits of the suit and it is common for the parties to disagree what issues affect the merits.

It is not the case that the appellate court must resolve the merits in order for its exercise of jurisdiction over it to violate the second prong of *Cohen*. Instead, it must only be established that its role is not “completely separate from the merits.” Moreover, the fact that a particular discovery order may not sufficiently call for an examination of the merits is not dispositive under *Cunningham*. Instead, if reviewing the type of order at issue “will often” intertwine the appellate court with the merits, the second prong is not met. In *Cunningham*, this Court in essence held that discovery orders will often touch on the merits and thus they cannot trigger *Cohen* review – this is presumably why this Court has never applied the doctrine to allow immediate appeal of a discovery order. In essence, this Court already has rejected Mohawk’s argument in *Cunningham*.

Moreover, as the Eleventh Circuit recognized, Mohawk cannot meet the third *Cohen* prong. If the District Court erred in its discovery order, that decision is fully appealable by Mohawk at the conclusion of the litigation. *Boughton*, 10 F.3d at 749 (holding that a discovery order involving privilege issues was not appealable under the collateral order doctrine because, among other things, “[t]he practical

consequences of the district court's decision on the controversy between the parties can be effectively reviewed on direct appeal following a judgment on the merits. 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, forbidding any use of the improperly disclosed documents. . . .")

Mohawk responds to this view of the vast majority of the circuits by arguing that the "cat is out of the bag," even with a reversal and a new trial that prevents Carpenter from relying on any privileged information (or information gained from privileged information). This argument does not survive under close scrutiny. The primary harm to Mohawk if the District Court is wrong (and it clearly was not wrong) is that Carpenter gets to use the privileged communications to undermine Mohawks' defenses and prevail at trial. If the order were reversed after a final judgment, Carpenter would have to seek to prevail without that evidence and the essential harm to Mohawk would be remedied. Mohawk's contention that it would still suffer egregious harm because it was required to produce documents that Carpenter could not use at trial is simply unsupported.

Moreover, virtually every discovery order – if reversed after final judgment – leaves some residual harm to the producing party. There is nothing unique about the attorney-client privilege with respect to that effect. Mohawk's argument could apply to any

claim for privilege or confidentiality – objections raised in response to a substantial number if not most discovery requests in federal court today.

Indeed, if a party loses even a burdensomeness objection and must spend substantial money and time producing requested documents, a reversal of that discovery order will not reimburse the producing party its lost money and time.

At the end of its Petition, Mohawk argues that, with respect to its "cat out of the bag" argument, an incorrect discovery order not involving a privilege objection is distinguishable from an order involving a privilege objection because, with respect to the former, "the parties were entitled to that information in the first instance through lawful discovery under Rule 26" but, with respect to the latter, "privileged information . . . is not discoverable and opposing counsel and parties never had any entitlement to the privileged information in the first place." Mohawk's distinction is without a difference.

With respect to *any* objection to discovery, the objecting party is contending that the requesting party does not have entitlement to the discovery in the first place. And if the requesting party moves to compel that discovery, it is always contending that it is entitled to the discovery under Rule 26. Moreover, where the District Court orders the discovery to be produced, it is always holding that the requesting party was correct and that it was indeed entitled to the discovery in the first place under Rule 26.

The discovery order here is no different – the District Court held that Carpenter was entitled to the privileged information under Rule 26 – because of a waiver. The same result would have occurred if it had determined that the communications at issue were not privileged. If a party obtains discovery that should not have been produced but was subject to production because of an incorrect discovery order, that party always obtains what Mohawk contends to be an “unfair advantage” as it still has knowledge of that discovery. Even with a reversal of a verdict in favor of that party and the order of a new trial, the party who obtained the discovery still has some advantage because of its knowledge of the existence and substance of the discovery that was produced in response to the reversed discovery order. However, to require that the entire cat must be returnable to the bag would require that virtually every discovery order be subject to immediate appeal – effectively reversing the final judgment rule.

In sum, there will almost always be some unremedied harm to the losing party even if the discovery order is reversed on appeal. But a virtual evisceration of the final judgment rule is not warranted just because all the hairs of the cat cannot be stuffed back into the bag after a final judgment. The important question in interpreting the very narrow collateral order doctrine is whether the remedy will realistically prevent a new trial or risk the effectiveness of the functioning of government.

CONCLUSION

For the reasons stated herein, the Respondent respectfully requests that the Court deny Petitioner’s Petition.

Respectfully submitted,

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