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PUBLIC CONTRACTS

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THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, January 9, 2020

Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019

The Department of Justice obtained more than $3 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2019, Assistant Attorney General Jody Hunt of the Department of Justice's Civil Division announced today. Recoveries since 1986, when Congress substantially strengthened the civil False Claims Act, now total more than $62 billion.

"The significant number of settlements and judgments obtained over the past year demonstrate the high priority this administration places on deterring fraud against the government and ensuring that citizens' tax dollars are well spent," said Assistant Attorney General Hunt. "The continued success of the department's False Claims Act enforcement efforts are a testament to the tireless efforts of the civil servants who investigate, litigate, and try these important cases as well as to the fortitude of whistleblowers who report fraud."

Of the more than $3 billion in settlements and judgments recovered by the Department of Justice this past fiscal year, $2.6 billion relates to matters that involved the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians. This is the tenth consecutive year that the department's civil health care fraud settlements and judgments have exceeded $2 billion. The amounts included in the $2.6 billion reflect only federal losses, but in many of these cases the department was instrumental in recovering additional millions of dollars for state Medicaid programs.

In addition to combating health care fraud, the False Claims Act serves as the government's primary civil tool to redress false claims for federal funds and property involving a multitude of other government operations and functions. The Act helps to protect our military and first responders by ensuring that government contractors provide equipment that is safe, effective, and cost efficient; to protect American businesses and workers by promoting compliance with customs laws, trade agreements, visa requirements, and small business protections; and to protect other critical government programs ranging from the provision of disaster relief funds to farming subsidies.

In 1986, Congress strengthened the Act by increasing incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government. These whistleblower, or *qui tam*, actions comprise a significant percentage of the False Claims Act cases that are filed. If the government prevails in a *qui tam* action, the whistleblower, also known as the relator, typically receives a portion of the recovery ranging between 15 and 30 percent. Whistleblowers filed 633 qui tam suits in fiscal year 2019, and this past year the department recovered over $2.1 billion in these and earlier filed suits.

Health Care Fraud

The department investigates and resolves matters involving a wide array of health care providers, goods, and services. The department's health care fraud enforcement efforts not only recover money for federal health care programs, such as Medicare, Medicaid, and TRICARE, but also help deter fraud schemes that put patients at risk and increase health care costs.

Reflecting the department's commitment to holding drug companies accountable for their role in the opioid crisis, two of the largest recoveries involving the health care industry this past year came from opioid manufacturers. In one matter, as part of a global resolution of criminal and civil claims, Insys Therapeutics paid $195 million to settle civil allegations that it paid kickbacks to induce physicians and nurse practitioners to prescribe Subsys for their patients. The kickbacks allegedly took the form of sham speaker events, jobs for the prescribers' relatives and friends, and lavish meals and entertainment. The government also alleged that Insys improperly encouraged physicians to prescribe Subsys for patients who did not have cancer, and lied to insurers about patients' diagnoses to ensure payment by federal healthcare programs. In another matter, Reckitt Benckiser Group plc paid a total of $1.4 billion to resolve criminal and civil liability related to the marketing of the opioid addiction treatment drug Suboxone, which is a formulation of the opioid buprenorphine. As part of the resolution, RB Group paid $500 million to the United States to resolve civil allegations that it directly or through subsidiaries promoted Suboxone to physicians who were writing prescriptions for uses that were unsafe, ineffective, and medically unnecessary; promoted Suboxone Film using false and misleading claims that it was less susceptible to diversion, abuse, and accidental pediatric exposure than other buprenorphine products; and took steps to delay the entry of generic competition in order to improperly control pricing of Suboxone.

The department also pursued other cases involving drug manufacturers. For example, Avanir Pharmaceuticals paid over $95 million to resolve allegations that it paid kickbacks and engaged in false and misleading marketing to induce healthcare providers in long term care facilities to prescribe the drug Neudexta for behaviors commonly associated with dementia patients, which is not an approved use of the drug. The department also continued to investigate efforts by drug manufacturers to facilitate increases in drug prices by funding the co-payments of Medicare patients. Congress included co-pay requirements in the Medicare program, in part, to serve as a check on health care costs, including the prices that pharmaceutical manufacturers can demand for their drugs. This year, seven drug manufacturers – Actelion Pharmaceuticals US Inc., Amgen Inc., Astellas Pharma US Inc., Alexion Pharmaceuticals, Inc., Jazz Pharmacueticals Inc., Lundbeck LLC, and US Worldmeds LLC – paid a combined total of over $624 million to resolve claims that they illegally paid patient copays for their own drugs through purportedly independent foundations that the companies in fact treated as mere conduits.

The department also reported substantial recoveries involving a variety of other healthcare providers. Pathology laboratory company Inform Diagnostics, formerly known as Miraca Life Sciences Inc., paid $63.5 million to resolve allegations that it paid kickbacks to referring physicians in the form of subsidies for electronic health records (EHR) systems and free or discounted technology consulting services. Greenway Health LLC, an EHR software vendor, paid over $57 million to resolve allegations that it misrepresented the capabilities of its EHR product "Prime Suite" and provided unlawful remuneration to users to induce them to recommend Prime Suite to prospective new customers. Encompass Health Corporation (formerly known as HealthSouth Corporation), the nation's largest operator of inpatient rehabilitation facilities (IRFs), paid $48 million to resolve allegations that some of its IRFs provided inaccurate information to Medicare to maintain their status as an IRF and to earn a higher rate of reimbursement, and that some admissions to its IRFs were not medically necessary.

Procurement Fraud

In the past year, the department also pursued a variety of fraud matters involving the government's purchase of goods and services. For example, five South Korea-based companies – SK Energy Co. Ltd., GS Caltex Corporation, Hanjin Transportation Co. Ltd., Hyundai Oilbank Co. Ltd. and S-Oil Corporation – agreed to resolve allegations that they engaged in anticompetitive conduct targeting contracts to supply fuel to the U.S. military in South Korea and made false statements to the government in connection with their agreement not to compete. The United States Department of Defense paid substantially more for fuel supply services in South Korea than it would have absent collusion on the fuel supply contracts. In total, the five companies paid over $162 million as part of the False Claims Act settlements.

The Civil Division entered into a $34.6 million settlement with aluminum extrusion manufacturer Hydro Extrusion Portland Inc., formerly known as Sapa Profiles Inc. (SPI), to resolve SPI's civil liability for causing a government contractor to invoice NASA and the Department of Defense's Missile Defense Agency (MDA) for aluminum extrusions that did not comply with contract specifications. Government contractors purchased aluminum extrusions from SPI for use on rockets for NASA and missiles provided to the MDA. SPI provided those contractors with falsified certifications after altering the results of tensile tests designed to ensure the consistency and reliability of aluminum extrusions.

Several of the rockets used by NASA crashed, resulting in the loss of the NASA payloads that they carried. SPI also resolved related criminal claims arising from the same conduct.

The department recovered over $27 million from Northrop Grumman Systems Corporation (NGSC) in a settlement resolving False Claims Act allegations related to two battlefield communications contracts with the United States Air Force. The settlement resolved allegations that NGSC billed the Air Force for labor hours purportedly incurred by individuals stationed in the Middle East who had not actually worked the hours claimed.

In separate settlement agreements with the Civil Division, American Airlines paid $22 million and British Airways Plc/Iberia Airlines paid $5.8 million to resolve allegations that they falsely reported the times they transferred possession of United States mail to foreign postal administrations or other intended recipients under contracts with the United States Postal Service (USPS). USPS contracted with the airlines to take possession of receptacles of United States mail at six locations in the United States or at various Department of Defense and Department of State locations abroad, and then timely deliver that mail to numerous international and domestic destinations.

The software development company Informatica LLC paid $21.57 million to resolve allegations that it caused the government to be overcharged by providing misleading information about its commercial sales practices that was used in General Services Administration (GSA) contract negotiations. Informatica allegedly provided false information concerning its commercial discounting practices for its products and services to resellers, who then used that false information in negotiations with GSA for government-wide contracts. The false disclosures caused GSA to agree to less favorable pricing, and, ultimately, government purchasers to be overcharged.

Other Fraud Recoveries

The number and variety of judgments and settlements announced during fiscal year 2019 reflect the diversity of fraud recoveries arising under the False Claims Act. For example, Duke University paid $112.5 million to resolve allegations that it violated the False Claims Act by submitting applications and progress reports that contained falsified research on federal grants to the National Institutes of Health (NIH) and to the Environmental Protection Agency (EPA). Luke Hillier, the majority owner and former Chief Executive Officer of Virginia-based defense contractor ADS, Inc., paid $20 million to settle allegations that he fraudulently obtained federal set-aside contracts reserved for small businesses that his company was ineligible to receive. In order to qualify as a small business, companies must satisfy defined eligibility criteria, including requirements concerning size, ownership, and operational control. The government alleged that Hillier caused ADS to falsely represent that it qualified as a small business concern and that, as a result of Hillier's representations, his company was awarded numerous small business set-aside contracts for which it was ineligible. The government previously resolved related claims against ADS for $16 million and Charles Salle, the former general counsel of ADS, for $225,000.

The department also continued its efforts to hold accountable those who seek to abuse their license to remove minerals from federal lands in exchange for the payment of an appropriate royalty. This past year, gas marketer B. Charles Rogers Gas Ltd. (BCR) and its owners paid over $3.5 million to resolve allegations that they engaged in a scheme to reduce mineral royalty payments for natural gas removed from federal lands. Another individual who worked with BCR while employed as a gas supply manager at a natural gas distributor paid an additional $800,000 to resolve his alleged role in the scheme.

In another matter, Omega Protein Corp. and Omega Protein, Inc. paid $1 million to resolve allegations that it obtained a loan from the United States by falsely certifying compliance with federal environmental laws. A leading domestic producer of Omega-3 rich fish oil, protein-rich specialty fishmeal, and organic fish solubles, Omega allegedly certified to the Oceanic and Atmospheric Administration, an agency within the Department of Commerce, that it was complying with federal environmental laws while knowingly and unlawfully discharging pollutants and oil into U.S. waters.

North Greenville University (NGU) paid $2.5 million to resolve allegations that it submitted false claims to the U.S. Department of Education. Title IV of the Higher Education Act (HEA) prohibits any institution of higher education that receives federal student aid from making incentive payments to student recruiters based on their success in securing student enrollment. The settlement resolves allegations that NGU compensated a student recruiting company based on the number of students who enrolled in NGU's programs, in violation of the prohibition on incentive compensation.

Holding Individuals Accountable

The department continued its commitment to use the False Claims Act and other civil remedies to deter and redress fraud by individuals as well as corporations. In addition to the settlements with Luke Hillier and Charles Salle discussed above, the following are additional examples of recoveries involving individuals.

The department negotiated separate settlements with the individual owners of seven Osteo Relief Institutes for a total recovery from the owners and their clinics of more than $7.1 million. The settlements resolved allegations that the defendants knowingly billed Medicare for medically unnecessary viscosupplementation injections and medically unnecessary knee braces. Viscosupplementation is a treatment for osteoarthritis, in which a doctor injects a gel-like fluid into a patient's knee joint to act as a lubricant and to supplement the natural properties of joint fluid. The government alleged that these clinics administered viscosupplementation injections to patients who did not need them, used multiple brands of viscosupplements successively on patients without clinical support, and used discounted viscosupplements reimported from foreign countries. The government also alleged that they provided unnecessary custom knee braces to patients.

In addition to negotiating a settlement with Vanguard Healthcare LLC for approximately $18 million in allowed claims to resolve allegations of grossly substandard nursing home services, the department also pursued Vanguard's majority owner and CEO and Vanguard's former director of operations. These two individuals collectively paid $250,000 to resolve allegations that five Vanguard-owned skilled nursing facilities submitted false claims to Medicare and Medicaid for nursing home services that were grossly substandard or worthless, including allegations that the facilities failed to administer medications as prescribed, failed to provide standard infection control or wound care, failed to take prophylactic measures to prevent pressure ulcers, and failed to meet basic nutrition and hygiene needs of their residents.

This year, the department also obtained a $21 million settlement with a compounding pharmacy, Diabetic Care Rx LLC (which does business as Patient Care America), and a private equity firm, Riordan, Lewis & Haden Inc., (RLH) to resolve a lawsuit alleging that they submitted false claims to Tricare, the federal health care program for military members and their families, through their involvement in a kickback scheme to generate referrals of prescriptions for expensive pain creams, scar creams, and vitamins, regardless of patient need. At the same time as this settlement with Diabetic Care and RLH, the department secured settlements totaling over $300,000 with Diabetic Care Rx's Chief Executive Officer and former Vice President of Operations. All of the settlements were based on the defendants' ability to pay.

Recoveries in Whistleblower Suits

Of the $3 billion in settlements and judgments reported by the government in fiscal year 2019, over $2.1 billion arose from lawsuits filed under the *qui tam* provisions of the False Claims Act. During the same period, the government paid out $265 million to the individuals who exposed fraud and false claims by filing these actions.

The number of lawsuits filed under the *qui tam* provisions of the Act has grown significantly since 1986, with 633 *qui tam* suits filed this past year – an average of more than 12 new cases every week.

"Whistleblowers continue to play a critical role identifying new and evolving fraud schemes that might otherwise remain undetected," said Assistant Attorney General Hunt. "Taxpayers have benefitted greatly from these individuals who are often required to make substantial sacrifices to bring these schemes to light."

In 1986, Senator Charles Grassley and Representative Howard Berman led the successful efforts in Congress to amend the False Claims Act to, among other things, encourage whistleblowers to come forward with allegations of fraud. In 2009 and 2010, further improvements were made to the False Claims Act and its whistleblower provisions. Congress also included in the False Claims Act authority for the government to dismiss cases that do not advance the goal of fraud prevention, and during the past year the government made increasing use of this tool to help prioritize and protect the expenditure of government resources.

Finally, Assistant Attorney General Hunt expressed appreciation for the many dedicated public servants throughout the department's Civil Division and the U.S. Attorneys' Offices, as well as the agency Offices of Inspector General and the many other federal and state agencies that contributed to the department's False Claims Act recoveries this past fiscal year.

"The accomplishments announced today reflect the extraordinary efforts of the men and women throughout the government committed to protecting the federal fisc and the integrity of the government's programs," said Assistant Attorney General Hunt. "Having served many years in the Civil Division, I have witnessed the passion and dedication of the talented employees who have committed their careers to serving the American people and defending the interests of our great nation."

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Except where indicated, the government's claims in the matters described above are allegations only and there has been no determination of liability. The numbers contained in this press release may differ slightly from the original press releases due to accrued interest.

The year 2020 marks the 150th anniversary of the Department of Justice. Learn more about the history of our agency at www.Justice.gov/Celebrating150Years.

Attachment(s):
Download fca_fy_19_stats.pdf

Topic(s):
False Claims Act

Component(s):
Civil Division

Press Release Number:
20-14

Updated January 21, 2020

THE UNITED STATES DEPARTMENT of JUSTICE

PROCUREMENT COLLUSION STRIKE FORCE

The Procurement Collusion Strike Force (PCSF) leads a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government—Federal, state, and local. The PCSF is comprised of the Antitrust Division of the U.S. Department of Justice, multiple U.S. Attorneys' Offices around the country, the Federal Bureau of Investigation (FBI), and the Inspectors General for multiple Federal agencies.

REPORT POSSIBLE VIOLATIONS

Click to Report COVID-19 Procurement Collusion by Email

PCSF and the COVID-19 pandemic recovery

Click to Report Other Procurement Collusion by Online Form

View other ways to contact the PCSF Tip Center

See also the Division's Leniency Program for corporations and individuals.

TRAINING ON COLLUSION FOR INSPECTORS GENERAL AND PROCUREMENT OFFICIALS

The PCSF is committed to working with the Inspectors General of agencies receiving Federal funds, as well as government procurement officials, to train individuals at all levels of the funding process to better deter and detect antitrust crimes affecting government procurement, grant, and program funding.

- Who needs to be trained: Federal, state, and local agency procurement and grant officers, as well as agency auditors and investigators.
- What is the focus of training: Identifying the red flags of collusion.
- What are the goals of training:
  - Prevent collusion and related crimes in the process of awarding contracts and grants.
  - Identify and investigate possible collusion and related crimes relating to contracts or grants that have been awarded for potential criminal prosecution.

To schedule training or request more information, send an email to pcsf@usdoj.gov.

RESOURCES

Video: Recognizing Antitrust Conspiracies and Working with the Antitrust Division | Slides

Red Flags of Collusion

Antitrust Laws and You: Learn about antitrust laws

September 28, 2005
Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For

July 2019
Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

September 16, 2020
Procurement Collusion Strike Force Showcase Presentation

BLOG POST

November 12, 2020
Justice Department's Procurement Collusion Strike Force Caps Off Successful Inaugural Year by Adding Eleven New National Partners

PRESS RELEASES

November 12, 2020
Justice Department's Procurement Collusion Strike Force Announces Eleven New National Partners

November 12, 2020
Assistant Attorney General Makan Delrahim Delivers Remarks on the Future of Antitrust

June 16, 2020
Assistant Attorney General Makan Delrahim Presents Procurement Collusion Strike Force to the International Competition Community

March 9, 2020
Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products

November 5, 2019
Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding

November 5, 2019
Assistant Attorney General Makan Delrahim Delivers Remarks at the Procurement Collusion Strike Force Press Conference

November 5, 2019
Deputy Attorney General Jeffrey A. Rosen Delivers Remarks at the Procurement Collusion Strike Force Press Conference

RELATED INTERNET SITES

- Air Force Office of Special Investigations (AFOSI)
- Federal Bureau of Investigation (FBI)
- Inspectors General
    - Department of Defense, Office of Inspector General
        - Defense Criminal Investigative Service (DCIS)
    - Department of Justice, Office of Inspector General

    - Department of Homeland Security, Office of Inspector General
    - General Services Administration, Office of Inspector General
    - U.S. Postal Service, Office of Inspector General
- U.S. Attorneys
    - California, Central District (Los Angeles)
    - California, Eastern District (Sacramento)
    - California, Northern District (San Francisco)
    - Colorado (Denver)
    - District of Columbia (Washington, D.C.)
    - Florida, Southern District (Miami)
    - Georgia, Northern District (Atlanta)
    - Illinois, Northern District (Chicago)
    - Maryland (Baltimore)
    - Michigan, Eastern District (Detroit)
    - Minnesota (Minneapolis)
    - Mississippi, Southern District (Jackson)
    - New York, Eastern District (Brooklyn)
    - New York, Southern District (Manhattan)
    - North Carolina, Middle District (Greensboro)
    - Ohio, Southern District (Columbus)
    - Pennsylvania, Eastern District (Philadelphia)
    - Puerto Rico (San Juan)
    - Texas, Eastern District (Beaumont)
    - Texas, Northern District (Dallas)
    - Texas, Southern District (Houston)
    - Virginia, Eastern District (Alexandria)

Updated December 10, 2020

THE UNITED STATES DEPARTMENT of JUSTICE

STICE DEPARTMENT'S PROCUREMENT COLLUSION STRIKE FORCE CAPS OFF SUCCESSFUL INAUGURAL YEAR BY ADDING ELEVEN NEW NATIONAL PARTNERS

November 12, 2020

Courtesy of Anna Bieganowska, Paralegal, Procurement Collusion Strike Force, Antitrust Division

This month, the Justice Department celebrates the first anniversary of the Procurement Collusion Strike Force (PCSF), a coordinated national response launched in November 2019 to combat antitrust and related schemes in government procurement, grant, and program funding at all levels of government. The PCSF's successful first year featured enthusiastic support from the Council of the Inspectors General on Integrity and Efficiency (CIGIE), exponential growth and expansion with in-district working partners added across the country, and several thousand government employees trained on antitrust crimes and related schemes. The Department will continue to expand the PCSF in its second year by adding nine new U.S. Attorney's Offices, the Department of Homeland Security, Office of Inspector General (DHS OIG) and the U.S. Air Force Office of Special Investigations (AFOSI) to the interagency partnership.

The PCSF's First Year of Action

"I commend the hardworking prosecutors and agents for their impressive work during the PCSF's first year of action, despite the unprecedented challenges posed by the pandemic. The premise and promise of the PCSF was to increase collaboration among federal prosecutors and law enforcement agencies to protect the public purse and hold accountable those who corrupt the competitive process to rob taxpayers of the benefits of free competition," said Assistant Attorney General Makan Delrahim, of the Department of Justice's Antitrust Division, which is leading the PCSF effort. "We've proven the concept and with opening more than two dozen active grand jury investigations in the past year, we have made good on our promise to go after cartels that cheat the government."

Through initial outreach efforts to federal, state, and local government agencies, paired with tailored training programs aimed at those who touch procurement dollars from pre-bid to award and oversight, the PCSF has laid the groundwork for cooperation that effectively deters and detects antitrust crimes victimizing taxpayer-funded agencies, programs, and projects. In addition to facilitating reporting of anticompetitive conduct, the PCSF has been a tireless advocate of proactive new ways to detect bid rigging and other crimes, particularly in the area of collusion analytics where it functions as a knowledge-sharing forum for data teams across the government to collaborate and share best practices.

New National Partners

Building on the early successes of the PCSF, Assistant Attorney General Delrahim announced today that the PCSF is adding 11 new national partners to the Strike Force, for a total of 29 agencies and offices committed on the national level to combatting procurement collusion in government spending. Of the new partners, nine are U.S. Attorneys' Offices, with complementary enforcement priorities in U.S. cities with diverse government spending profiles. The PCSF is also welcoming as national partners the United States Air Force Office of Special Investigations) and Department of Homeland Security, Office of Inspector General, two critically important law enforcement partners with proven track records of working with the PCSF as well as the Antitrust Division.

"I am excited to welcome these new partners to the PCSF effort," Delrahim said. "By growing our national footprint, and folding in additional subject-matter experts, the PCSF is poised for even more success in its next year."

The PCSF's 22 U.S. Attorney partners include:

- Nicola T. Hanna, Central District of California
- McGregor Scott, Eastern District of California

- David L. Anderson, Northern District of California*
- Jason R. Dunn, District of Colorado
- Michael R. Sherwin (Acting), District of Columbia
- Ariana Fajardo Orshan, Southern District of Florida
- Byung J. "BJay" Pak, Northern District of Georgia
- John R. Lausch, Jr., Northern District of Illinois
- Robert K. Hur, District of Maryland*
- Matthew Schneider, Eastern District of Michigan
- Erica H. MacDonald, District of Minnesota*
- D. Michael Hurst, Jr., Southern District of Mississippi*
- Seth D. DuCharme, Eastern District of New York*
- Audrey Strauss (Acting), Southern District of New York
- Matthew G.T. Martin, Middle District of North Carolina*
- David M. DeVillers, Southern District of Ohio
- William M. McSwain, Eastern District of Pennsylvania
- W. Stephen Muldrow, District of Puerto Rico*
- Stephen J. Cox, Eastern District of Texas*
- Erin Nealy Cox, Northern District of Texas
- Ryan Patrick, Southern District of Texas*
- G. Zachary Terwilliger, Eastern District of Virginia

The PCSF's national investigative partners include:

- Department of Defense, Office of Inspector General
- Federal Bureau of Investigation
- General Services Administration, Office of Inspector General
- Department of Homeland Security, Office of Inspector General*
- Department of Justice, Office of Inspector General
- U.S. Air Force Office of Special Investigations*
- U.S. Postal Service, Office of Inspector General

*Asterisk indicates a newly added partner as of November 2020.

The PCSF today looks different from the initial district teams of 6-8 members each; the Strike Force currently has more than 360 agent, analyst, and other law enforcement and OIG working members, hailing from 46 unique agencies and offices at the federal, state, and local levels.

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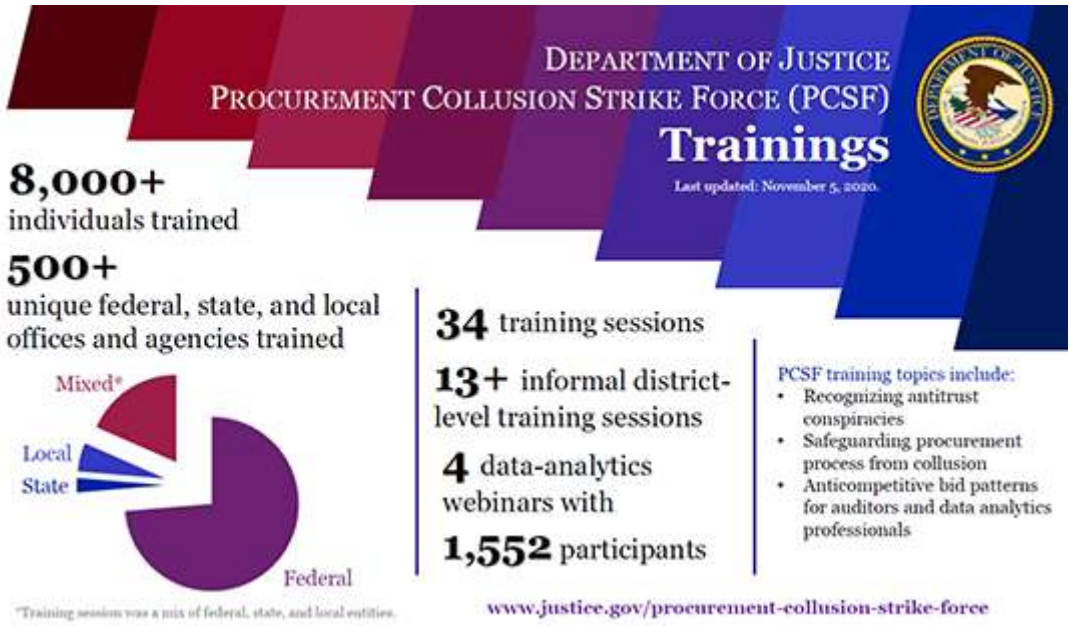
Trainings and Collaborations

The PCSF has trained more than 8,000 individuals, educating new audiences on identifying and reporting the "red flags" of collusion. While the pandemic posed several new challenges for outreach and training, the PCSF as a virtual strike force was uniquely well-positioned to pivot to interactive online training programs that have reached broad audiences across the country. In addition to nationwide webinars, individual PCSF district teams provided practical trainings to more than 30 different teams, offices, and agencies, ranging from presentations on protecting the procurement process during COVID-19 to discussions on spotting and responding to antitrust violations in hotline complaints. The Strike Force has also collaborated with CIGIE's Inspector General Criminal Investigatory Academy to provide training to approximately 1,500 special agents, investigators, and certified fraud examiners. These training efforts have boosted levels of antitrust awareness across the target communities and prompted tips to the PCSF for further investigation.



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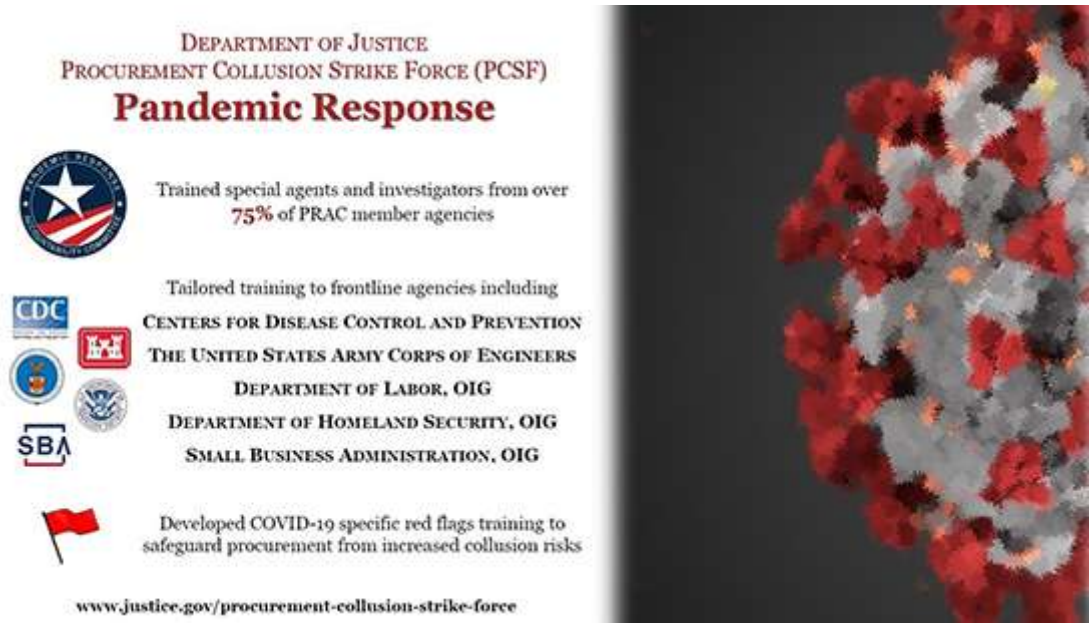
Data Analytics

Over the last year, the PCSF has boosted the strategic use of data analytics to proactively identify suspicious bid patterns that warrant further investigation and retroactively leverage data to propel existing investigations forward. The PCSF has also served as a hub for sharing best practices on collusion analytics and hosted four data analytics events for the OIG community, each averaging attendance of approximately 300 participants.

Pandemic Response

In the eight months since the Presidential declaration of a national emergency due to the COVID-19 virus, the PCSF successfully used technology to deliver interactive training experiences to groups of varying sizes. The PCSF also developed pandemic-focused training to address the heightened collusion risks in light of exigent procurement by government agencies. Following the blueprint of the district-based model, district teams facilitated conversations with agency partners on COVID-19 related fraud and collusion patterns and participated in local COVID-19 fraud task forces. The PCSF served a deconfliction role in referring substantive COVID-19 related tips to the DOJ COVID-19 Hoarding and Price-Gouging Task Force and the Department of Justice's National Center for Disaster Fraud.

The PCSF strengthened relationships through focused outreach to agencies with oversight responsibility of CARES Act funding including the Department of Labor, Office of Inspector General, Department of Health and Human Services, Office of Inspector General, the Pandemic Response Accountability Committee (PRAC), and the Small Business Administration, Office of Inspector General.



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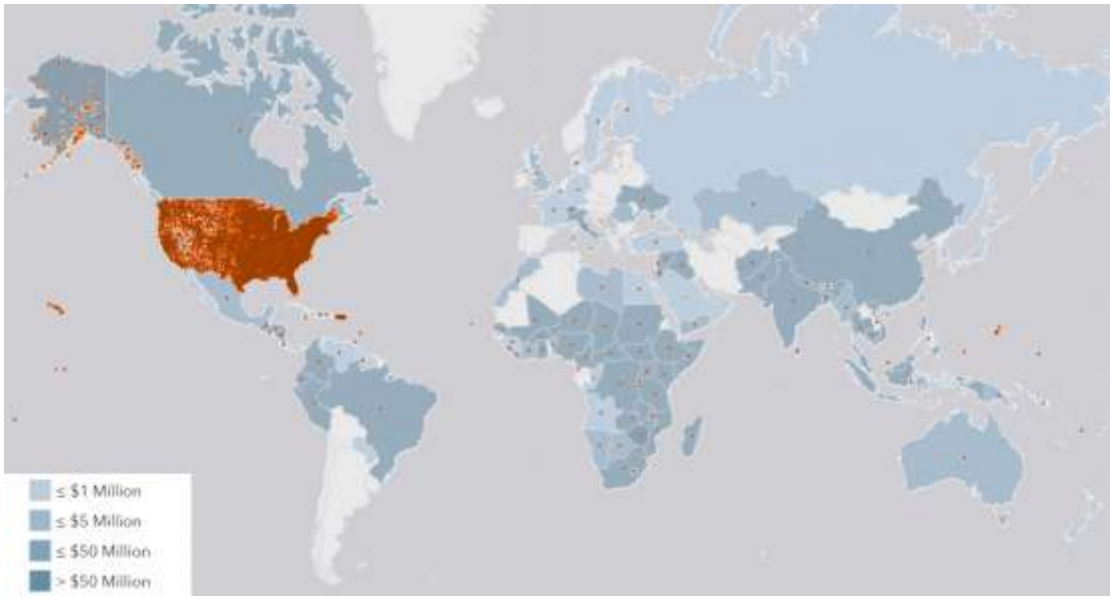
The U.S. Government has obligated millions of dollars in COVID-19 relief funding, with relief assisting Americans at home and abroad. The data on the map is based on the place of performance, or where the money went, as reported by federal agencies. The source of the data is USAspending.gov. The data was compiled and formatted by the PRAC at https://www.pandemicoversight.gov/.

The PCSF also developed training for the contract management workforce at the Federal Emergency Management Agency (FEMA), and the Centers for Disease Control and Prevention (CDC) to safeguard these critical supply chains and procurement processes from collusion and fraud.

International Reach

The PCSF has several partners with oversight responsibility for U.S. government spending abroad that represent a diverse mix of federal agencies. These partners play a critical role in deterring, detecting, investigating, and prosecuting those who undermine competition for U.S. government contracts and grants abroad. As evident in past investigations, such as the South Korea Fuel Supply investigation contracts in South Korea, and from current pandemic spending patterns, U.S. government procurement is not limited by borders, and neither can the PCSF's efforts to deter, detect, and prosecute misconduct.



PRAC

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Assistant Attorney General Delrahim also showcased the Strike Force in recent presentations delivered to the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). Delrahim highlighted the structure and early successes of the PCSF with the hope that "the Strike Force can serve as a model for other countries looking for innovative ways to more effectively fight bid rigging and other anticompetitive schemes that impact public procurement, and cheat taxpayers, all over the world." A recording of the ICN presentation is available at https://www.justice.gov/atr/video/icn-2020-conference-procurement-collusion-strike-force-showcase

Assistant Attorney General Makan Delrahim; Nick Hanna, U.S. Attorney for the Central District of California; Kevin James, Former President of the Los Angeles Board of Public Works; and David J. Scott, Supervisory Special Agent at the FBI underline the accomplishments of the PCSF on September 16, 2020.

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In the coming year, the PCSF expects to continue its focus on protecting U.S. funds spent beyond our borders and coordinating with international counterparts.

New Leadership

Assistant Attorney General Delrahim announced that Daniel Glad will serve as Director of the PCSF. Glad, who previously served as an Assistant Chief in the Antitrust Division's Chicago Office since April 2019, is the Strike Force's first permanent director.

"Naming a permanent PCSF director is an important step to continue its growth and success," said Delrahim. "I'm confident that Dan, who has experience working with agents from various agencies to fight bid rigging, price fixing, and other crimes in Chicago, will bring his dedication and innovation to this nationwide effort." Prior to his work at the Antitrust Division, Glad was an Assistant Inspector General for the City of Chicago, Office of Inspector General. He was also an associate in the antitrust and white-collar practice groups of an international law firm in Chicago and Washington, D.C, and previously served as Special Assistant United States Attorney at the U.S. Attorney's Office for the Northern District of Illinois.

The PCSF also gained its first Assistant Director in Sandra Talbott. Talbott, who currently is a Trial Attorney in the Division's Chicago Office, has experience as a prosecutor at the local, state, and federal levels. Prior to her time in the Department of Justice, Talbott also was a Vice-President and Director of Compliance at a multi-billion-dollar financial institution.

Looking Forward

As the PCSF enters its second year, it will continue to investigate aggressively cases of price fixing, bid rigging, and market allocation that target American taxpayer dollars, especially as COVID-19 collusion schemes become more evident in the peak of rapid acquisition. The Strike Force partners stand ready to pursue new leads and open additional investigations using the full range of criminal and civil tools available to the federal government, including the Clayton Act's Section 4A authority to pursue treble damages, to hold accountable corporations and individuals that undermine competition in government spending.

The PCSF has a publicly available website at www.Justice.gov/Procurement-Collusion-Strike-Force, where members of the public can review information about the federal antitrust laws and training programs, and report suspected criminal activity affecting public procurement. Individuals and companies are encouraged to contact the PCSF if they have information concerning anticompetitive conduct involving federal taxpayer dollars by emailing pcsf@usdoj.gov or filling out the PCSF anonymous complaint form, located on the PCSF website.

Federal, state, and local agencies can also contact the PCSF at pcsf@usdoj.gov for any training needs or to report suspected antitrust violations.

Topic(s):
Antitrust

Component(s):
Antitrust Division

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Updated November 13, 2020

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, November 12, 2020

Justice Department's Procurement Collusion Strike Force Announces Eleven New National Partners

The Justice Department announced today that the Procurement Collusion Strike Force (PCSF) is adding 11 new national partners to the Strike Force, for a total of 29 agencies and offices committed on the national level to combatting collusion, antitrust crimes and related fraudulent schemes, which undermine competition in government procurement, grant and program funding.

Of the new partners, nine are U.S. Attorneys' Offices, with complementary enforcement priorities in U.S. cities with diverse government spending profiles:

- David L. Anderson, Northern District of California
- Robert K. Hur, District of Maryland
- Erica H. MacDonald, District of Minnesota
- Michael Hurst, Jr., Southern District of Mississippi
- Seth D. DuCharme, Eastern District of New York
- Matthew G.T. Martin, Middle District of North Carolina
- Stephen Muldrow, District of Puerto Rico
- Stephen J. Cox, Eastern District of Texas
- Ryan Patrick, Southern District of Texas

The PCSF is also welcoming as national partners the United States Air Force Office of Special Investigations and Department of Homeland Security, Office of Inspector General, two critically important law enforcement partners with proven track records of working with the PCSF as well as the Antitrust Division.

"I am excited to welcome these new partners to the PCSF effort," Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division said announcing the new partners in Washington, D.C. "By growing our national footprint, and folding in additional subject-matter experts, the PCSF is poised for even more success in its next year."

"DHS OIG is pleased to join our law enforcement partners on the PCSF," said Inspector General Joseph V. Cuffari of the Department of Homeland Security. "We look forward to working with the Strike Force to combat antitrust crimes and related schemes on behalf of American taxpayers."

"OSI, led by our Office of Procurement Fraud Investigations team, is pleased to be a full national partner in the PCSF effort," said Brigadier General Terry L. Bullard, Commander, Air Force OSI. "We are committed to the principles of the PCSF in ensuring we educate and inform our stakeholders to deter bad actors, and in investigating crimes when they do occur. We look forward to furthering this project together with the Department of Justice and sister agencies."

In remarks delivered to the American Bar Association, Antitrust Section's Fall Forum, Assistant Attorney General Delrahim also provided recap of the PCSF's first year of accomplishments, which are detailed in a recent post to the department's "Justice Blog."

The PCSF has a publicly available website at www.Justice.gov/Procurement-Collusion-Strike-Force, where members of the public can review information about the federal antitrust laws and training programs, and report suspected criminal activity affecting public procurement. Individuals and companies are encouraged to contact the PCSF if they have information concerning anticompetitive conduct involving federal taxpayer dollars by emailing pcsf@usdoj.gov or filling out the PCSF anonymous complaint form, located on the PCSF website.

Federal, state, and local agencies can also contact the PCSF at pcsf@usdoj.gov for any training needs or to report suspected antitrust violations.

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
20-1230

Updated November 12, 2020

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Assistant Attorney General Makan Delrahim Delivers Remarks on the Future of Antitrust

Washington, DC ~ Thursday, November 12, 2020

Remarks as Prepared for Delivery

"Here I Go Again"*: New Developments for the Future of the Antitrust Division

Good afternoon, I am pleased to join you today at the ABA Antitrust Fall Forum, my fourth as Assistant Attorney General. I'd like to thank the Chair of the ABA Antitrust Law Section, Gary Zanfagna and the Conference Co-Chairs, Melanie Aitken and Anant Raut for their efforts in organizing this event.

The theme of this conference, "The Future of Antitrust," raises the important question of where antitrust is headed. Today, I am announcing three new developments that will continue to improve transparency and future enforcement efforts. As ever, we are looking back at what we've learned to forge a better path forward. First, the Division today will issue new guidance on the use of arbitration to resolve Division matters. Second, we are launching a Small Business portal to improve accessibility for these businesses which may be interacting with the antitrust laws for the first time. Third, we are expanding Procurement Collusion Strike Force (PCSF) to better safeguard important areas where the government and the American taxpayers are the victim.

1. **Merger Enforcement, Arbitration, and Small Business**

To set the stage, I will touch first on our recent learnings and accomplishments in merger enforcement. About two years ago, we began to modernize the merger review process. As part of those reforms, we published a new model timing agreement, which significantly improved how the Division approached Second Request investigations. Other improvements such as increased dialogue with the parties, pull-and-refile accountability, and CID enforcement have resulted in more effective and transparent merger review process. Our recent modernization of the Merger Remedies Manual reaffirms the Division's commitment to effective structural relief, which has been a hallmark of my tenure as AAG, and it also incorporates important changes in the merger landscape over the past decade.

American consumers have benefited recently from these principles. For instance, the structural remedy in T-Mobile's acquisition of Sprint required significant divestitures to Dish to expand output significantly by ensuring that large amounts of currently unused and underused spectrum are made available to American consumers in the form of high-quality 5G networks.

This year, the Division also has crystallized and made more transparent the analytical principles to apply when assessing vertical mergers. Most recently, the Vertical Merger Guidelines and our closing statement in *London Stock Exchange/Refinitiv* reflect our approach to identifying likely harms from a change in incentive or ability to harm rivals. The new Guidelines ensure greater predictability, efficiency, and clarity.

Another recent win for efficiency was the Division's use of arbitration to streamline the adjudication of a dispositive issue in *United States v. Novelis*. Arbitration saved resources for both taxpayers and the merging parties and ensured that competition was preserved.

I am excited to announce today that we will issue new guidance on the use of arbitration to resolve Division matters. The guidance reflects the Division's experience using arbitration for the first time in *Novelis* case. It outlines case selection criteria that will help identify Antitrust Division cases that would benefit from the application of arbitration and provides guidance on specific practices that may be employed in a future arbitration.

Additionally, on the subject of transparency and our commitment to the business community, I want to mention briefly that our efforts are not limited to addressing the needs of high-priced antitrust lawyers advising their Fortune 500 clients about how to navigate the merger process.

Today, we also are launching a Small Business Portal on our website. The portal will improve accessibility and transparency for folks who are interacting with the antitrust laws for the first time, on a do-it-yourself basis. Consider it our effort to lower entry barriers.

Fintech and Data

Speaking of entry barriers, earlier this month, the Division filed suit to enjoin Visa's proposed acquisition of Plaid, the leading financial data aggregation company in the United States. The Division has filed this lawsuit to enjoin Visa's proposed acquisition of Plaid because the transaction would eliminate the nascent but significant competitive threat Plaid poses to Visa in the online debit market and unlawfully maintain Visa's monopoly in online debit. Today, I would like to focus on another aspect of our challenge: Visa's acquisition of Plaid's vast trove of consumer data.

Plaid powers some of today's most innovative fintech apps such as Venmo, Acorns, and Betterment. The data Plaid retrieves allows these fintech apps to offer personal financial management tools, manage bill payments or other expenses, support loan underwriting, and transfer funds, among other uses. Plaid's services can also be used to reduce fraud by verifying the consumer's identity and account balance, examining the consumer's bank account history, assuring that a transaction is bona fide, and confirming that there are sufficient funds to cover a transaction at the time of payment.

The fintech world is just one area where large troves of data are being used in cutting-edge business applications. Indeed, it is increasingly important that as antitrust lawyers we remain up to speed on the latest technologies and the roles they play in markets today.

In the last year, the Division launched a novel program to build our expertise by training a handful of our attorneys and economists in blockchain, machine learning, and artificial intelligence. That program has been a success and is growing.

The foundation of this initiative is academic coursework offered by the MIT Sloan School of Management. These courses, like other online learning programs, can provide valuable foundational insights into these technologies, while focusing on practical concerns about how they may apply to new and existing business models. Our goal is for the Division's attorneys and economists to develop a basic but critical understanding of how businesses implement these technologies and what effect they might have on competition.

Machine Learning and Antitrust

Today, I would like to say a few words about machine learning, a form of data analysis that uses sophisticated algorithms that continuously learn as they are exposed to new data. Machine learning is used in many applications that we all recognize. Machine learning can be used to refine natural language search results. It can provide personalized, contextualized recommendations based on previous purchases or activity. Financial institutions can use its power to detect anomalies or outliers to detect fraudulent or suspicious transactions in real time. Machine learning can also analyze continuous streams of data from machinery, and be used to predict outages before they occur.

This technology could have significant implications for many industries and issues the Division analyzes. Increasingly, many transactions involve the acquisition of large troves of data. Understanding how that data may be used – and the potential competitive implications – is becoming more and more important in merger analysis.

There may be potential efficiencies stemming from machine learning applied to data that is merged in an acquisition. The technology can power better recommendations, or increase manufacturers' productivity, or reduce losses through more accurate fraud detection.

There also may be anticompetitive effects to consider. For example, companies that have amassed large troves of data may be able to use it to exclude competitors or to make it more difficult for customers to switch providers.

We also must be attuned to those situations where access to and the permissioned use of customer data constitutes a unique competitive advantage that forms a barrier to entry. One could envision this being true in a variety of cases where the customer data enables its holder to offer a unique service to the consumer. Examples of these unique types of data include: taxpayer information, medical health care records, or customer bank account information. In cases where incumbents with a dominant market share use their market power to block or otherwise stymie new competitors – particularly new competitors that are able to overcome these data barriers to entry, and are thus uniquely situated to enter, compete, or facilitate another company's entry – we must be willing to take action to preserve competition.

Even if the "data competitor" does not currently offer the relevant product or service for sale, antitrust enforcers must act to preserve the opportunity for entry in those markets that are concentrated because of the impact data accumulation has on competition today.

It is vital that we as antitrust enforcers understand both the potential value of the technology and the potential for its misuse. To this end, the Division's new training initiative helps ensure that we are well-equipped to assess the competitive implications of the next transaction or course of conduct where these cutting-edge business technologies may be pivotal.

2. **Criminal Enforcement and the Procurement Collusion Strike Force**

Finally, I want to turn to our criminal program: over the past three years, we have obtained convictions in significant trials against high-level executives, the second- and third-ever extraditions on Sherman Act charges, significant prison sentences, and the four highest fines or penalties ever imposed for domestic cartels. Under my leadership, the Division secured $529 million in criminal fines and penalties in FY2020—the highest total in the last five years, announced a significant policy change to incentivize and potentially reward corporate compliance efforts, and launched a first-of-its-kind Strike Force to bolster our efforts to protect the public purse from collusion.

It is that Strike Force I want to focus on with you today. The Procurement Collusion Strike Force, or the PCSF, celebrated its first anniversary week ago today, and as it continues to grow and expand, it's worth reflecting on its activities over the last year.

The PCSF is an interagency partnership among the Antitrust Division, 13 United States Attorneys' Offices, the FBI, and four federal Offices of Inspectors General. Leveraging the combined capacity and expertise of the partners, the PCSF has two core objectives. The first is to deter and prevent antitrust and related crimes on the front end of the procurement process through outreach and training. This includes providing training to the "buy side" of the procurement, *i.e.*, federal, state, and local procurement officials, on spotting the "red flags" of collusion and fraud, as well as to the "sell side," *i.e.*, general contractors, trade associations, and the procurement bar, on antitrust criminal violations and potential penalties. The second objective is to effectively detect, investigate, and prosecute procurement collusion and fraud through better coordination and partnership in the law enforcement and inspector general communities.

As I mentioned when I announced the Department initiative alongside Deputy Attorney General Jeffrey A. Rosen last year, by forming the PCSF, we are looking to use all the enforcement tools in our arsenal to protect taxpayers' funds. The premise and promise of the PCSF was to increase collaboration among federal prosecutors and law enforcement agencies to protect the public purse and hold accountable those who corrupt the competitive process to rob taxpayers of the benefits of free competition.

The Past Year of the PCSF

Since launching, our dedicated PCSF members have been hard at work. The PCSF's prosecutors, including those in the Antitrust Division and AUSAs across the country, and federal agents from various law enforcement agencies, have made incredible strides. The pandemic—which I'll discuss in more detail in a moment—didn't shut down our efforts. Indeed, the PCSF didn't miss a beat.

The first year was about proving the concept, and about standing up the in-district teams, building relationships, and getting the word out. Our initial in-district teams had six to eight members each—and our in-district teams now include over **360 federal, state, and local in-district working partners** spread all across the country and actively participating in the 13 PCSF districts.

We have processed more than **50 requests** from a diverse mix of federal, state, and local government agencies for training, assistance with safeguarding their procurement processes, and seeking opportunities to work with the PCSF on investigations. We've trained thousands of criminal investigators, certified fraud examiners, auditors, data scientists, and procurement officials from **nearly 500 federal, state, and local government agencies** on recognizing collusion risks in the procurement process, including more than five dozen local and state inspectors general.

We have been nimble and able to adapt our tactics to better respond to the global COVID-19 pandemic. During any crisis, be it a hurricane or market crash or a pandemic, public spending skyrockets to meet the moment, and too often guardrails go down during the peak of emergency response. We know that as the government responds to moments of crisis with increased spending to protect lives and livelihoods, bad actors far too often respond with new schemes to secure a bigger piece of the pie for themselves.

Established as a virtual Strike Force, the PCSF was uniquely well-positioned to deploy interactive technology, and we have trained **more than 8,000 agents**, investigators, and auditors over the last 8 months on the heightened risks of collusion and fraud due to the COVID-19 pandemic. We've gone to where the need is greatest, including training customized to the unique needs of the contract management and procurement professionals responsible for CARES Act spending at the Centers for Disease Control and Prevention (CDC), the Federal Emergency Management Agency (FEMA), and the United States Army Corps of Engineers (USACE).

The PCSF also supported the Department's COVID-19 response by creating a dedicated reporting portal for procurement collusion tips and referring hundreds of price gouging and hoarding tips to the COVID-19 task force. And we're working with the Pandemic Response Accountability Committee (PRAC) to ensure that tax dollars spent to respond to this crisis are used appropriately.

The PCSF has opened over **two dozen grand jury investigations** across the United States. These active and ongoing investigations span the range of procurement collusion and fraud matters from defense and national security to public works projects, and from domestic investigations into conduct occurring primarily within a single PCSF district to international investigations into conduct affecting U.S. government procurement overseas.

I should also note that our investigations are not limited to only those districts that have stood up PCSF teams. In fact, about one fourth of our investigations are located outside of PCSF districts, which demonstrates the breadth of our investigative efforts and that this is truly a nationwide Strike Force.

Finally, in the past year, the PCSF established its **Data Analytics Project**. This is something I'm really focused on, because data is an asset—it is something to be used, not just collected. We in the enforcement space can use data to advance the goal of maximizing taxpayer value and detecting wrongdoing.

To do this, the PCSF has supported OIG data teams focused on developing *Collusion Analytics* models that proactively identify red flags of antitrust crimes and related fraud schemes in bid and award data. We've hosted data analytics events for data scientists, and we're working to build out this important toolkit. This data will be used not only to provide evidence of conspiracies we already know about (which is something prosecutors and agents already do, to great effect), but to develop leads proactively for further inquiry.

The Future of the PCSF

We've accomplished a lot in the last year, and I'd like to turn now to our announcement today and our plans for the next year of the PCSF.

First, we're adding new partners. Today, two new national law enforcement partners are joining the PCSF: The **Department of Homeland Security's Office of Inspector General** and the **Air Force Office of Special Investigations**. Both agencies are already deeply invested in, and have been working with, our in-district teams. Adding these agencies to the roster of national partners is a natural next step.

Second, I am also announcing today that **nine U.S. Attorneys** will joining our effort. These U.S. Attorneys' Offices are located in areas of strategic importance with critical spending. The new PCSF U.S. Attorney partners are:

- David L. Anderson, Northern District of California

- Robert K. Hur, District of Maryland
- Erica H. MacDonald, District of Minnesota
- D. Michael Hurst, Jr., Southern District of Mississippi
- Seth D. DuCharme, Eastern District of New York
- Matthew G.T. Martin, Middle District of North Carolina
- W. Stephen Muldrow, District of Puerto Rico
- Stephen J. Cox, Eastern District of Texas
- Ryan Patrick, Southern District of Texas

Our existing national law enforcement partners are also contributing to this expansion by assigning agents to these new squads.

- FBI (by its International Corruption Unit and its field offices)
- Department of Defense Office of Inspector General
- Defense Criminal Investigative Service,
- General Services Administration, Office of Inspector General
- Department of Justice, Office of the Inspector General
- U.S. Postal Service, Office of Inspector General

Third, I'm happy to announce that I've appointed Daniel Glad to be the Director of the PCSF. Dan is the first permanent director the PCSF, and by making this a permanent position, I am ensuring that the PCSF is woven into the fabric and structure of the Antitrust Division. Dan was an Assistant Chief in our Chicago Office, and he's worked as a line prosecutor in that office and at USAO-N.D. Ill., and in the City of Chicago's OIG. Suffice it to say he has experience combatting collusion and fraud.

Relatedly, and as a reflection of the PCSF's growing footprint, I've appointed the first-ever Assistant Director of the PCSF, Sandra Talbott. Like Dan, Sandra has worked in our Chicago Office, and she has experience as a prosecutor at the local, state, and federal levels, as well as in the compliance space at a large financial institution.

Fourth, our efforts to deter and detect are not limited to the shores of United States. Indeed, the PCSF has several partners with oversight responsibility for U.S. government spending abroad that represent a diverse mix of federal agencies. These partners play a critical role in deterring, detecting, investigating, and prosecuting those who undermine competition for U.S. government contracts and grants abroad. As evident in past investigations, such as the South Korea Fuel Supply investigation contracts in South Korea, and from current pandemic spending patterns, U.S. government procurement is not limited by borders, and neither can the PCSF's efforts to deter, detect, and prosecute misconduct. In the coming year, the PCSF expects to continue its focus on protecting U.S. funds spent beyond our borders and coordinating with international counterparts.

I had very high expectations for the PCSF, but I have been blown away by what the district teams were able to accomplish over the last twelve months. They were not satisfied with merely sustaining the early momentum generated for the Strike Force, and despite the challenges posed by the pandemic, they have managed to generate even more momentum by conducting virtual outreach and training, and opening new investigations at a steady clip.

As the PCSF enters its second year, it will continue to investigate aggressively cases of price fixing, bid rigging, and market allocation that target American taxpayer dollars, using the full range of criminal and civil tools available to the federal government, including the Clayton Act's Section 4A authority to pursue treble damages, to recover damages for the taxpayer.

I look forward to seeing the Strike Force continue to succeed as it pursues its mission.

3. **Conclusion**

In conclusion, the Antitrust Division is committed to enforcement that occurs in a transparent manner that fosters innovation. These hallmarks are essential for our mission of serving the American people in the pursuit of justice. Over the past three plus years, I am very proud of all we have achieved in support of this goal.

As many of you may know, I have great admiration for former Antirust AAG and Supreme Court Justice, Robert H. Jackson, naming a lecture series and a conference room in his honor. When addressing the future of antitrust whether the laws should be revised, he stated that the solution "must be in terms of our ideals—the ideals of political and economic democracy" and that "we must keep our economic system under the control of the people who live by and under it." It is impossible to guarantee what the future of antitrust holds, but I know the Antitrust Division will continue to be unwavering as it enforces the law for the benefit of the American consumer.

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*Whitesnake, *Saints & Sinners* (Geffen, 1982).

Speaker:
Makan Delrahim, Assistant Attorney General

Attachment(s):
Download Delrahim Remarks on Future of Antitrust.pdf

Topic(s):
Antitrust

Component(s):
Antitrust Division

Updated November 12, 2020

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 17, 2020

M-20-22

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Michael J. Rigas
Acting Deputy Director for Management

SUBJECT: Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 (COVID-19)

Office of Management and Budget (OMB) Memorandum M-20-21 outlines the Administration's commitment to both rapid delivery of COVID-19 relief legislation funding and accountability mechanisms to help safeguard taxpayer dollars. The guidance references OMB Memorandum M-20-18[1] which is intended to help the acquisition workforce ensure the health and safety of federal contractors in light of COVID-19, while maintaining continued contract performance in support of agency missions. This memorandum supplements Memorandum M-20-18 with guidance for the implementation of section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136). Section 3610 provides agencies an additional discretionary authority to reimburse costs of paid leave to federal contractors and subcontractors, subject to conditions described below. (See attachment for text of section 3610.)

Background

OMB Memorandum M-20-18 states that maintaining the resilience of the federal contracting base requires a multi-faceted strategy to combat the significant disruptions, both to health and economic well-being, caused by COVID-19. Such strategy includes maximizing use of telework, extending performance dates if telework or other flexible work solutions are not possible, and, where appropriate, reimbursing contractors for paid leave or negotiating other forms of equitable adjustment necessary as a direct result of COVID-19. For example, the memorandum explains that it may be beneficial to reimburse contractors for paid leave to keep personnel in a mobile ready state for activities so the contractor can resume supporting the agency's mission as soon as possible when circumstances permit.[2]

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[1] M-20-18 *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)* (March 20, 2020), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf.

[2] For example, OMB M-20-18 states that it may be beneficial to keep personnel, such as national security professionals or skilled scientists, in a mobile ready state for activities the agency deems critical to national security or other high priorities or to pay leave as a bridge to hold over employees where a contract may be retooled for pandemic response.

Section 3610 of the CARES Act reinforces the legitimate role paid leave may play in maintaining the contractor in a ready state (*i.e.*, the ability to mobilize in a timely manner) by making clear that such costs may be reimbursed. At the same time, section 3610, like OMB's guidance, recognizes that an effective resiliency strategy is multi-faceted and places certain offsets on the reimbursement of paid leave, such as where certain other forms of relief are available, as well as prohibitions on the availability of paid leave, including where telework is possible.

This memorandum provides guiding principles to help agencies determine the appropriate role of section 3610 in supporting the needs of their contractors and subcontractors, both small and large.

Guiding principles

The following guiding principles are designed to support continued exercise of sound business judgment by agencies and the acquisition workforce in the use of section 3610.

Using these principles is expected to result in different applications of this authority across buying offices within agencies and across the Federal Government. This variance is no different than would typically be expected in the application of any equitable remedy to different mission requirements, contractual arrangements, and funding situations, especially in exigent circumstances. Application of these guidelines will support rationally based decisions that reflect the best interest of the Government in any given situation, fully supported by contractor records that are subject to oversight, and that safeguard the taxpayers funding these efforts.

1. Support contractor resiliency

    a. *Carefully consider if reimbursing paid leave to keep the contractor in a ready state is in the best interest of the Government for meeting current and future needs*

Contractors that are unable to perform on their contracts because telework is not suitable and the work has not been deemed essential and exempt from shelter-in-place and stay at home orders may face unprecedented hardships as a result of COVID-19. Agencies should carefully consider if reimbursement for paid leave to keep the contractor in a ready state is in the best interest of the Government for meeting current and future needs. In considering paid leave, agencies should keep in mind that section 3610 provides agencies with considerable discretion to treat paid leave as a reimbursable cost. Agencies are permitted to:

- use any "funds made available to the agency" by Congress to reimburse contractors for workers' lost time from March 27 to September 30, if the contractor provides leave to its employees or subcontractors "to maintain a ready state, including to protect the life and safety of Government and contractor personnel," which would include, but not be limited to, the circumstances addressed in M-20-18;

- modify contracts unilaterally or bilaterally to reimburse allowable paid leave costs, without securing additional consideration;

- provide reimbursement on any commercial or non-commercial contract with any contract type without invoking the need for terms and conditions associated with a reimbursable item; and

- reimburse at contractor billing rates, which might include certain overhead costs in addition to labor, but shall not include profit or fees.

b. *Be mindful of the challenges faced by small businesses*

Small businesses whose work must be stopped because of COVID-19 may face the most difficult economic hardships. Navigating the various relief provisions in the CARES Act and other recent relief legislation to determine the best approach for maintaining readiness may be complicated for small businesses. Agency contracting offices are strongly encouraged to work closely with their Offices of Small and Disadvantaged Business Utilization to ensure their small business contractors are aware of the available support resources to help them in understanding the various relief provisions. For a list of resources that can support COVID-related challenges, see the Small Business Administration (SBA) local assistance finder[3] and SBA's COVID-19 relief options and resources site.[4] Contracting officers should also work with small businesses to help them understand what documentation may be required beyond that normally submitted to support costs claimed for reimbursement under section 3610.

Agencies are reminded additional mechanisms, beyond those recently provided in the CARES Act, might assist with cash flow for small businesses. For example, section 873 of the National Defense Authorization Act for FY 2020 (Pub. L. No. 116-92) provides for accelerated payments to contractors that are small businesses, and to small business subcontractors where the government has accelerated its payment to the prime contractor. Agencies should consider issuing class deviations to exercise this authority now while the Federal Acquisition Regulatory Council completes the rulemaking process for implementing this provision in the Federal Acquisition Regulation.[5]

2. Exercise good stewardship

The Federal Government's aggressive response to COVID-19 includes an unprecedented economic relief package, including multiple mechanisms to support federal contractors and their employees. To ensure this relief achieves its desired impact and federal funds are not being used to make multiple payments for the same purpose, agencies should take the following steps.

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[3] https://www.sba.gov/local-assistance/find/.

[4] https://www.sba.gov/funding-programs/loans/coronavirus-relief-options.

[5] On April 6, 2020, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2020-02 to facilitate agency issuance of class deviations for the immediate implementation of accelerated payment in accordance with section 873. See https://www.acquisition.gov/sites/default/files/page_file_uploads/CAAC-Letter-2020-02-Accelerated-payments-to-SB-contractors-and-subcontractors040620.pdf.

a. *Maintain mission focus and evaluate use of section 3610 in the broader context of all strategies to promote contractor resiliency*

Congress made clear that reimbursements made pursuant to section 3610 are subject to the availability of funds. In addition, section 3610 does not compel reimbursement of paid costs.[6] Instead, it simply authorizes payment of these costs such that agencies may use their discretion to make reimbursements only when they find that making such payments are in the best interest of the government. Accordingly, in determining where and how to implement additional paid leave, agencies should:

- first look at the funding they have available, the impact of funding or of not funding additional paid leave and the mission impact of each alternative; and

- evaluate the benefits of paid leave under section 3610 in the context of the broader universe of available options to determine where it is best applied in light of potential budget constraints. The CARES Act contains a wide-range of relief for federal contractors, including loan relief, loans, favorable tax-changes, and other assistance. Also, continued efforts to help contractors address the disruptions of COVID-19 using a multi-faceted approach, as called for by M-20-18, could help uncover untapped opportunities for telework or other virtual workplace strategies, schedule extensions, option exercises and contract extensions that may alleviate the need for paid leave.

b. *Follow restrictions in section 3610*

Section 3610 restricts the circumstances under which reimbursement may be made, and the amount of reimbursement allowed. Specifically, section 3610:

- applies only to a contractor whose employees or subcontractors:

  cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the federal government for contract performance due to closures or other restrictions, and are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for Coronavirus (COVID–19).[7]

- authorizes reimbursement only:

  at the actual amount paid but not more than the minimum applicable contract billing rates for up to an average of 40 hours per week, and

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[6] By contrast, section 18006 states that educational institutions that receive funding "shall, to the greatest extent practicable" continue to pay their contractors during the period of any disruptions or closures related to the coronavirus. Section 19005 states that the Architect of the Capitol is to "continue to make payments provided for under . . . contract for the weekly salaries and benefits of . . . [contractor] employees" who are "furloughed or otherwise unable to work" during closures.

[7] For example, a contractor could not claim paid time off for childcare under section 3610, as that would presume that the contractor's employees are able to work but must take leave for these purposes.

for contractor or subcontractor payments made no earlier than March 27, 2020 and no later than September 30, 2020.

In addition, the Government is required to reduce the maximum reimbursement authorized by this section by the amount of credit a contractor is allowed pursuant to division G of Public Law 116–127 (Families First Coronavirus Response Act) and any applicable credits a contractor is allowed under this Act. See paragraph c for additional discussion regarding this reduction.

c. *Work with the contractor to secure necessary documentation to support reimbursement and prevent duplication of payment*

Contractors are responsible for the well-being of their workforce. They also bear the burden of supporting any claimed allowable costs, including claimed leave costs for their employees, with appropriate documentation and identifying credits that may reduce reimbursement. Contractors must fully support and maintain documentation for claims made under section 3610. Agencies are encouraged to work with their contractors to understand how they are using or plan to use the relief provisions available to them under the CARES Act and the Families First Act to address the health and economic hardships created by COVID-19.

In some cases, provisions other than section 3610 may provide a more efficient means of getting payment into the hands of contract employees. In other cases, a contractor may find it beneficial to take advantage of a combination of resources. For example, a business may wish to use the Paycheck Protection Program (PPP) established pursuant to sections 1102 and 1106 of the CARES Act for certain relief and request agency support under section 3610 for other relief. For this reason, it is important to secure fully supported documentation from contractors regarding other relief claimed or received, including credits allowed, along with the financial and other documentation necessary to support their requests for reimbursement under section 3610.

Fully supported documentation, which may involve representations, will help to prevent incidence of double-dipping, as would be the case, for example, if a federal contractor that was sheltering-in-place and could not telework were to use the PPP to pay its employees, have the loan forgiven pursuant to the criteria established in the interim rule published by SBA[8] and then seek reimbursement for such payment from a federal contracting agency under section 3610. Fully supported documentation also will be necessary to offset credits in accordance with the requirements of section 3610. If the amount of a credit cannot be determined at the time reimbursement is claimed by the contractor, the contractor will be responsible for reporting to the contracting officer to ensure the government is able to recover any improper payments.

d. *Track use of section 3610*

OMB Memorandum M-20-21 sets forth principles and guidance on spending transparency and regular reporting to provide accountability mechanisms that help safeguard taxpayer dollars. As an initial step to support accountability and transparency in connection with section 3610, agencies should process modifications allowing payments authorized by this statute and report them to the Federal Procurement Data System (FPDS); entering "COVID-19

[8] https://content.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf.

3610" at the beginning of the Description of Requirements data field on the contract action report (CAR) for the modification. Such CARs must also include the National Interest Action Code established for identifying all COVID related procurement actions (COVID-19 2020). Central collection of these data will support federal-wide analysis of contractor payments, both pre and post award, to support oversight in the implementation of section 3610 and help safeguard taxpayer dollars against duplicative and wasteful spending.

Additional Information

Acquisition policy questions regarding this guidance may be directed to the Office of Federal Procurement Policy at MBX.OMB.OFPPv2@OMB.eop.gov. OMB will continue to provide updates and additional information, including additional "frequently asked questions" as needed, to support the implementation of section 3610 and other COVID-related procurement policy issues and the resiliency of the federal acquisition community generally.

Attachment

Section 3610 of the CARES Act, Pub. L. No. 116-136

FEDERAL CONTRACTOR AUTHORITY

Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID–19: *Provided*, That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116–127 and any applicable credits a contractor is allowed under this Act.

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Managing Defense Contracts Impacts of the Novel Coronavirus

The challenges that the Department of Defense (DoD) faces in response to the Novel Coronavirus (COVID-19) are historic, borne across the total force, including our military, civilian, and Defense Industrial Base (DIB) communities. We must work hand in hand to recover from this pandemic and maintain mission readiness. The effects of COVID-19 will affect the cost, schedule, and performance of many DoD contracts. Many contractors that ordinarily work side-by-side with the DoD workforce may be unable to access their work sites, and most contractors are coping with employees who are unavailable for work due to quarantine and state and local requests to restrict movement of their personnel. We must do our utmost to ensure that both the Department and the vital industrial base that support us remain healthy for the duration of this emergency and emerge as strong as ever from the challenges of this pandemic. Fortunately, we have the regulatory tools to take action to address these impacts.

DoD contracts contain clauses that excuse performance delays, including Federal Acquisition Regulation (FAR) 52.249-14, Excusable Delays; various "Termination" clauses; and FAR 52.212-4 for commercial contracts. Each of these clauses provides that a contractor will not be in default because of a failure to perform the contract if the failure arises beyond the control and without the fault or negligence of the contractor. In the event of such a delay, the contractor is entitled to an equitable adjustment of the contract schedule. Where the contracting officer directs changes in the terms of contract performance, which may include recognition of COVID-19 impacts on performance under that contract, the contractor may also be entitled to an equitable adjustment to contract price using the standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2).

Requests for equitable adjustment must be considered on a case-by-case basis, in consideration of the particular circumstances of each contract, impacts realized from COVID-19, applicable law, and regulations, and inclusive of any relief that may be authorized by laws

enacted in response to this national emergency. When reviewing requests for equitable adjustment, contracting officers are to take into account, among other factors, whether the requested costs would be allowable, allocable and reasonable to protect the health and safety of contract employees as part of the performance of the contract. Equitable adjustments to the contract or reliance on an excusable delay should not negatively affect contractor performance ratings.

In response to this national emergency, on March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES). Most notable within the act is Section 3610, Federal Contractor Authority, which provides discretion for the agency to modify the terms and conditions of the contract to reimburse paid leave where contractor employees could not access work sites or telework but actions were needed to keep such employees in a ready state (Attachment 1). Section 3610 is included for information only. DPC will provide implementing guidance for this section as soon as practicable.

The Office of Management and Budget, and many senior procurement officials of the Military Departments and Agencies have promulgated guidance similar to that in this memo regarding management of contract performance impacts due to COVID-19, many of which are available at https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html. They share the common theme that contracting officers are trusted and empowered to make the difficult decisions on appropriate adjustment to each contract. Both during and after the COVID-19 emergency, contracting officers must work closely with our industry partners to ensure continuity of operations and mission effectiveness, while protecting the continuing vitality of the DIB that is so critical to our national security.

Please ensure widest distribution of this guidance. My point of contact for this memo is Mr. Mike Pelkey at 571-309-8553 or by email at michael.f.pelkey.civ@mail.mil.

HERRINGTON.KIM.1507719313 Digitally signed by HERRINGTON.KIM.1507719313 Date: 2020.03.30 18:33:41 -04'00'

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachment:
As stated.

SECTION 3610. FEDERAL CONTRACTOR AUTHORITY. Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID–19: Provided, That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116–127 and any applicable credits a contractor is allowed under this Act.

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

In reply refer to
DARS Tracking Number: 2020-O0013

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation - CARES Act Section 3610 Implementation

Pursuant to FAR 31.101, Objectives, this class deviation to FAR 31 and DFARS 231 is effective immediately and authorizes contracting officers to use the attached DFARS 231.205-79, CARES Act Section 3610 Implementation, as a framework for implementation of section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136).

The CARES Act was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency. Section 3610 of the CARES Act allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for COVID–19 on January 31, 2020, through September 30, 2020.

As expressed in the OUSD(A&S) Defense Pricing and Contracting Memorandum, Managing Defense Contracts Impacts of the Novel Coronavirus, dated March 30, 2020, it is important that our military, civilian, and contractor communities work together to withstand the effects of COVID-19 and maintain mission readiness. Currently, many Department of Defense (DoD) contractors are struggling to maintain a mission-ready workforce due to work site closures, personnel quarantines, and state and local restrictions on movement related to the

COVID-19 pandemic that cannot be resolved through remote work. It is imperative that we support affected contractors, using the acquisition tools available to us, to ensure that, together, we remain a healthy, resilient, and responsive total force.

It is also important that our contracting officers are good stewards of taxpayer funds while supporting contractor resiliency. Therefore, contracting officers shall use the attached DFARS 231.205-79, CARES Act Section 3610 Implementation, when implementing section 3610, to appropriately balance flexibilities and limitations.

Some contractors may receive compensation from other provisions of the CARES Act, or other COVID-19 relief scenarios, including tax credits, and contracting officers must avoid duplication of payments. For example, the Paycheck Protection Program (PPP) established pursuant to sections 1102 and 1106 of the CARES Act may provide, in some cases, a direct means for a small business to obtain relief. A small business contractor that is sheltering-in-place and unable to telework could use the PPP to pay its employees and then have the PPP loan forgiven, pursuant to the criteria established in the interim rule published by the Small Business Administration. In such a case, the small business should not seek reimbursement for the payment from DoD using the provisions of section 3610.

Contractors are responsible for supporting any claimed costs, including claimed leave costs for their employees, with appropriate documentation and for identifying credits that may reduce reimbursement under section 3610. Contracting officers are encouraged to work with contractors to understand how they are using or plan to use the COVID-19 relief provisions and encourage contractors to use existing contract terms or the relief provisions available to them in response to COVID-19. In addition, it is important that contracting officers secure representations from contractors regarding any other relief claimed or received stemming from COVID-19, including an affirmation that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request, to support their requests for reimbursement under section 3610.

When implementing section 3610, contracting officers shall consider the immediacy of the specific circumstances of the contractor involved and respond accordingly. The survival of many of the businesses the CARES Act is designed to assist may depend on this efficiency. For example, the impact of COVID-19 on a contractor providing labor services will differ from the impact on a contractor that develops information systems. Some contractors may be unable to conduct any business during the COVID-19 pandemic. As a result, such contractors would generate no new revenue, and may have difficulties making payroll, retaining employees, and meeting other financial obligations. In contrast, other contractors may still have incoming revenue, and be able to conduct work remotely. While impacts will certainly be experienced by many contractors, some will have a more immediate need for relief than others.

Section 3610 seeks to provide many flexibilities for contracting officers, including the authority to:

- Enable the contractor to stay in a ready state (*i.e.*, able to mobilize in a timely manner) by treating as allowable paid leave costs a contractor incurs to keep its employees and subcontractor employees in such a state.

- Use any "funds made available to the agency" by Congress to reimburse contractors for workers' lost time, not otherwise reimbursable, between January 31, 2020, and September 30, 2020, if the contractor provides leave to its employees or subcontractor employees "to maintain a ready state, including to protect the life and safety of Government and contractor personnel," which include, but are not limited to, quarantining, social distancing, or other COVID-19 related interruptions, as discussed in Office of Management and Budget Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus*, dated March 20, 2020;

- Modify contracts to provide for reimbursement of allowable paid leave costs, not otherwise reimbursable, without securing additional consideration; and

- Provide such reimbursement on any contract type.

Section 3610 also provides limitations on reimbursements:

- A contractor may only receive reimbursement if its employees or subcontractor employees:

  - Cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the Federal Government for contract performance due to closures or other restrictions; and

  - Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for COVID–19.

- Reimbursement is authorized only:

  - At the appropriate rates under the contract for up to an average of 40 hours per week; and

  - For contractor or subcontractor payments made for costs incurred, not otherwise reimbursable, not earlier than January 31, 2020, and not later than September 30, 2020;

- The Government must reduce the maximum reimbursement authorized by the amount of credit the contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) and any applicable credits the contractor is allowed

under the CARES Act or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19; and

- Reimbursement is contingent upon the availability of funds.

We anticipate the need for additional guidance and will continue to provide answers to frequently asked questions and provide additional implementation information and guidance as appropriate.

This class deviation remains in effect until rescinded. My point of contact is Mr. Greg Snyder, who is available by telephone at 571-217-4920 or by email at gregory.d.snyder.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachment
As stated

DFARS 231.205-79 CARES Act Section 3610 - Implementation

(a) *Applicability*.

(1) This cost principle applies only to a contractor:

(i) that the cognizant contracting officer has established in writing to be an affected contractor;

(ii) whose employees or subcontractor employees:

(A) Cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the federal government for contract performance due to closures or other restrictions, and

(B) Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for Coronavirus (COVID–19).

(2) The maximum reimbursement authorized by section 3610 shall be reduced by the amount of credit a contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116– 127) and any applicable credits a contractor is allowed under the CARES Act (Pub. L. 116-136) or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19.

(b) *Allowability*.

(1) Notwithstanding any contrary provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6, and 231.7, costs of paid leave (including sick leave), are allowable at the appropriate rates under the contract for up to an average of 40 hours per week, and may be charged as direct charges, if appropriate, if incurred for the purpose of:

(i) Keeping contractor employees and subcontractor employees in a ready state, including to protect the life and safety of Government and contractor personnel, notwithstanding the risks of the public health emergency declared on January 31, 2020, for COVID-19, or

(ii) Protecting the life and safety of Government and contractor personnel against risks arising from the COVID-19 public health emergency.

(2) Costs covered by this section are limited to those that are incurred as a consequence of granting paid leave as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor's business. Costs of paid leave that would be incurred without regard to the existence of the COVID-19 national emergency

remain subject to all other applicable provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6, and 231.7. In order to be allowable under this section, costs must be segregated and identifiable in the contractor's records so that compliance with all terms of this section can be reasonably ascertained. Segregation and identification of costs can be performed by any reasonable method as long as the results provide a sufficient audit trail.

(3) Covered paid leave is limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the Federal Government, including on a government-owned, government-leased, contractor-owned, or contractor-leased facility approved by the federal government for contract performance; but

(i) The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and

(ii) Paid leave is granted because the employee is unable to telework because their job duties cannot be performed remotely during public health emergency declared on January 31, 2020, for COVID-19.

(4) The facility at which work would otherwise be performed is deemed inaccessible for purposes of paragraph (b)(3) of this subpart to the extent that travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law.

(5) The paid leave made allowable by this section must be taken during the period of the public health emergency declared on January 31, 2020, for COVID–19, up to and including September 30, 2020.

(6) Costs made allowable by this section are reduced by the amount the contractor is eligible to receive under any other Federal payment, allowance, or tax or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID–19, such as the tax credit allowed by division G of Public Law 116–127.

OFFICE OF THE UNDER SECRETARY OF DEFENSE
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WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency. Section 3610 of the CARES Act allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for COVID-19 on January 31, 2020, through September 30, 2020. Contractors usually include employee leave in calculating their indirect rates. Therefore, leave is included in any fixed price, or labor hour rate (under Time and Materials or Labor Hour contracts), or as an element of cost on cost-reimbursement contracts. Deviation 2020-O0013 establishes a new cost principle that will allow recovery of such costs where appropriate.

To ensure traceability, it is critical that the contract and supporting documentation clearly identify these costs for reimbursement paid to contractors under section 3610 authority, as well as how such costs are identified, segregated, recorded, invoiced, and reimbursed.

Implementation of section 3610 will vary based on contract type:

1. Under Fixed Price contracts (including those with incentive provisions), upon receipt of a request for equitable adjustment, the contracting officer will need to negotiate equitable adjustments to the price and delivery schedule to recognize the impact of any COVID-19 caused shutdowns. In the case of incentive contracts, this should be a separate fixed price line and not subject to the incentive structure. When the permissive authority under section 3610 is used, equitable adjustments should compensate only for the costs of providing paid leave as permitted by section 3610, for maintaining the workforce, and shall not increase profit. To the extent that the contractor workforce is shared across multiple contracts, contracting officers will need to coordinate on a reasonable allocation of costs, ideally through the administrative contracting officer. Contracting officers shall establish one or more separate contract line items for section 3610 COVID-19 payments to ensure traceability of expenditures and clarify whether payments under section 3610 constitute acceptance of the supplies or services that are not being delivered or performed.

   A suggested approach is to create a line item or set of line items, such as "Labor Force Retention COVID-19," at a fixed price per appropriate unit of measure, e.g. "Hours" or "Days," exclusive of profit. Contractors should be able to distinguish all leave paid under these line items from actual hours worked, and submit a monthly invoice under these line items with the number of hours of eligible leave per labor category. The invoice should contain supporting documentation to identify and explain why claimed hours could not be worked, along with a statement that these costs are not being reimbursed under other authorities. The acceptor (i.e. contracting officer or designee) would then verify that the conditions exist and accept the effort under that line item. The "Invoice 2in1" fixed price service only, combined invoice and acceptance document in Wide Area WorkFlow, should be used to submit the request for payment.

2. Under cost-reimbursement contracts, the recommended approach is for costs to be charged to a separate account, such as "Other Direct Cost - COVID 19." Contracting officers will need to work with the contractor to establish appropriate cost procedures. Additional efforts will be needed to adjust the estimated costs, again by segregating these on a separate line item. The information on supporting documentation would be retained for audit, while the interim voucher would be provisionally approved and paid under existing procedures.

3. Under Time and Materials or Labor Hour contracts, creation of a separate line item for this reimbursement under section 3610 authority should enable segregation of these costs, upon receipt of a request for equitable adjustment. The information on supporting documentation would be retained for audit, while the interim voucher would be provisionally approved and paid under existing procedures.

4. Because contractors can only recover once for section 3610 covered impacts, when a contract has a mix of fixed price and cost type line items, recovery need not be addressed separately for each contract type. In most cases the cost reimbursement approach is preferable.

Proper administration and traceability of actions under section 3610 will require special attention to contracting procedures and contract administration by contracting officers, the Defense Contract Audit Agency (DCAA), and contracting officer's representatives (CORs). Specifically, contracting officers are reminded to ensure that they document the dates when the applicable conditions begin and end; the extent of the conditions; specific reasons why the CARES Act applies; impact on cost and pricing; and the effect on contract performance. Furthermore, CORs must use the Surveillance and Performance Monitoring Module of the Procurement Integrated Enterprise Environment to document actions impacting contract performance due to the COVID-19 pandemic. Contracting officers should work with the CORs to ensure, when accepting services under fixed price contracts, CORs only accept completed services, as section 3610 does not allow acceptance of services that have not been delivered.

DCAA has oversight of billings under cost-reimbursement, time and materials, and labor hour line items. Contracting officers must include instructions on the proper type of payment request to be used as set forth in Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7006 Wide Area WorkFlow Payment Instructions (December 2018). Note that this version of DFARS 252.232-7006 eliminates the possibility of confusion about which type of payment request to use for cost-reimbursement line items. This policy change was designed to ensure that the contract auditor has visibility of the contract billings and is able to address the impact of the contractor's controls in ensuring that these costs are properly billed. CORs should continue to monitor the billings and notify the contract auditor of any concerns.

Remember, section 3610 is contingent upon the availability of funds and no adjustment to the contract or approval of a request for equitable adjustment should be made without sufficient funds. Contractors bear the burden of supporting any claimed costs, including claimed leave costs for their employees, allocated appropriately against individual contracts, with appropriate documentation and identifying credits that may reduce reimbursement.

To identify actions against contracts and other transactions, allowing payments authorized by section 3610, report them to the Federal Procurement Data System and enter "COVID-19 3610" at the beginning of the Description of Requirements data field on the contract action report (CAR). These CARs must also include the National Interest Action designation for identifying all COVID related actions (COVID-19 2020).

As additional information is available, updates will be provided to the Frequently Asked Questions document for Section 3610 of the CARES Act at https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html.

My point of contact for policy is Mr. Greg Snyder, gregory.d.snyder.civ@mail.mil; for pricing is Ms. Sara Higgins, sara.a.higgins2.civ@mail.mil; and for Wide Area WorkFlow is Mr. Bruce Propert, david.b.propert2.civ@mail.mil.

Kim Herrington,
Acting Principal Director,
Defense Pricing and Contracting

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ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISTION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
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DEPUTY ASSISTANT SECRETARY OF THE ARMY
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(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: DoD Process for Section 3610 Reimbursement

Defense Pricing and Contracting (DPC) has published a Class Deviation (Class Deviation 2020-O0013, Coronavirus Aid, Relief, and Economic Security (CARES) Act Section 3610 Implementation), supporting Implementation Guidance, and a series of Frequently Asked Questions (FAQs) to implement the requirements of CARES Act, Section 3610. This section allows agencies to reimburse, subject to the availability of funds, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for Coronavirus Disease 2019 (COVID-19) on January 31, 2020.

With this policy framework in place and the number of potential approaches to implement the section, the Department of Defense (DoD) must now move rapidly to provide overarching implementation guidance to our workforce. This guidance will address the reimbursement process from requesting the contracting officer's determination of an "affected contractor" to providing a checklist to guide collection, and evaluation of costs from the industry partner seeking reimbursement within the parameters of the section and the class deviation. This guidance must also provide the flexibility our contracting professionals need to resolve the numerous reimbursement requests expected under Section 3610 at the contract, business unit or the corporate level.

In alignment with our existing policy and inclusive of efforts available from our Services and Defense Agencies, we are coordinating a Department-wide, overarching guidance document for our workforce. In the coming week, we will leverage our internal coordination teams to produce a Draft DoD Process for Section 3610 Reimbursement.

The Department will then take that product and post it to our Defense Acquisition Regulations System (DARS), Early Engagement at the following web link: (https://www.acq.osd.mil/dpap/dars/early_engagement.html). We anticipate posting the draft document to the DARS site on or about, May 11, 2020. This will allow industry partners the opportunity to provide input on the draft guidance document. DoD will then leverage the same team to review and consider industry input, to achieve a target release date of May 22, 2020.

We understand that this is an aggressive timeline given the scope of Section 3610, the challenge of integrating our guidance across the depth and breadth of our contracting missions and the need to consider industry inputs to inform our final product. However, we are confident that collectively we can deliver useful, coordinated and clear guidance to implement the requirement of Section 3610 to help deal with the challenges of this pandemic.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

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Interagency Suspension and Debarment Committee (ISDC)

Reporting

FY2018
FY18 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY2017
FY17 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY2016
FY16 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY2015
FY15 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY2014
FY14 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY2013/2012
Searchable, color version of the FY 12 and 13 Report

FY12 and 13 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY 2011
FY11 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

FY2010/2009

FY09 and FY10 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Implementation Guidance for Section 3610 Reimbursement Requests on Other Transactions for Prototype Projects

The Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136) was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency declared on January 31, 2020. Section 3610 of the CARES Act authorizes, but does not require, agencies to reimburse any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for COVID–19.

The language in section 3610 provides the authority to "modify the terms and conditions of a contract, or other agreements." This includes Other Transactions (OTs) for Prototype Projects under 10 U.S.C. § 2371b. Defense Pricing and Contracting Class Deviations 2020-O0021, dated August 17, 2020, and 2020-O0013, dated April 8, 2020, and revised August 17, 2020, along with the associated Guidance for CARES Act Section 3610 Implementation, updated August 17, 2020, only apply to Federal Acquisition Regulation (FAR)-based contracts. However, the principles provided in these class deviations and associated guidance may be used in considering requests for reimbursement under Section 3610 in an OT for Prototype Projects agreement authorized under 10 U.S.C. § 2371b. Any request for reimbursement must be submitted to an Agreements Officer. If OT authority under 10 U.S.C. § 2371b(f) was used to enter a FAR-based contract for production, then Section 3610 reimbursement guidance in Class Deviation 2020-O0021 applies to section 3610 reimbursement requests under the FAR-based prototype production contract.

This memorandum remains in effect until Class Deviations 2020-O0021 and 2020-O0013 – Revision 1, and the associated Implementation Guidance are rescinded.

This memorandum does not apply to grants and other agreements (e.g., cooperative agreements, basic research agreements) that fall under the authority of the Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)). The point of contact for grants and other agreements in OUSD(R&E) is Ms. Barbara Orlando, who may be reached at 571-372-6413 or by email at barbara.j.orlando.civ@mail.mil.

My point of contact is Mr. Larry McLaury, who is available at 703-697-6710 or by email at larry.j.mclaury.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

As prescribed in 4.2105(b), insert the following clause:

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (Aug 2020)

(a) *Definitions.* As used in this clause—

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.*, connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (*e.g.*, fiber optic, coaxial cable, Ethernet).

Covered foreign country means The People's Republic of China.

Covered telecommunications equipment or services means–

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Critical technology means–

(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;

(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled-

(i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or

(ii) For reasons relating to regional stability or surreptitious listening;

(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);

(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or

(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (*e.g.*, connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Roaming means cellular communications services (*e.g.*, voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service.

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Contractor is prohibited from providing to the Government any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

(c) *Exceptions.* This clause does not prohibit contractors from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(d) Reporting requirement. (1) In the event the Contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the Contractor is notified of such by a subcontractor at any tier or by any other source, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer, unless elsewhere in this contract are established procedures for reporting the information; in the case of the Department of Defense, the Contractor shall report to the website at https://dibnet.dod.mil. For indefinite delivery contracts, the Contractor shall report to the Contracting Officer for the indefinite delivery contract and the Contracting Officer(s) for any affected order or, in the case of the Department of Defense, identify both the indefinite delivery contract and any affected orders in the report provided at https://dibnet.dod.mil.

(2) The Contractor shall report the following information pursuant to paragraph (d)(1) of this clause

(i) Within one business day from the date of such identification or notification: the contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.

(ii) Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.

(e) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (e) and excluding paragraph (b)(2), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

(End of clause)

Parent topic: 52.204 [Reserved]

52.203-13 Contractor Code of Business Ethics and Conduct.

As prescribed in 3.1004(a), insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (JUN 2020)

(a) *Definitions. As used in this clause—*

Agent means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

Full cooperation-

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require-

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from-

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

United States, means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of business ethics and conduct*. (1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall-

(i) Have a written code of business ethics and conduct; and

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) *The Contractor shall-*

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3) (i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

(i) The Contractor's internal control system shall—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including-

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts*. (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that exceed the threshold specified in FAR 3.1004(a) on the date of subcontract award and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(End of clause)

Parent topic: 52.203 [Reserved]

9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by-

(i) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504);

(5) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law102-558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub.L.102-558));

(7) Delinquent Federal taxes in an amount that exceeds $10;000. See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent;

(8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of-

(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

(9) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) of this section constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

Parent topic: 9.407 Suspension.

9.406-2 Causes for debarment.

The debarring official may debar-

(a) A contractor for a conviction of or civil judgment for-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) (1) A contractor, based upon a preponderance of the evidence, for any of the following-

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as-

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by-

(A) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Pub.L.102-558)).

(v) Delinquent Federal taxes in an amount that exceeds $10;000.

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(1) *The tax liability is finally determined*. The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) *The taxpayer is delinquent in making payment*. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(B) Examples. (1) The taxpayer has received a statutory notice of deficiency, under I.R.C. §6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(2) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. §6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(3) *The taxpayer has entered into an installment agreement pursuant to I.R.C. §6159*. The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(4) *The taxpayer has filed for bankruptcy protection*. The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of-

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order12989, as amended by Executive Order13286). Such determination is not reviewable in the debarment proceedings.

(c) A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

Parent topic: 9.406 Debarment.

United States ex rel. Adams v. Dell Comput. Corp.

Decided Oct 8, 2020

Civil Action No. 15-cv-608 (TFH)

10-08-2020

UNITED STATES OF AMERICA ex rel. PHILLIP M. ADAMS, Plaintiff/Relator, v. DELL COMPUTER CORPORATION, et al., Defendants.

THOMAS F. HOGAN United States District Judge

MEMORANDUM OPINION

Plaintiff-Relator Phillip M. Adams brings this *qui tam* lawsuit on behalf of himself and the United States of America against Dell Computer Corporation and fifteen other Dell entities (collectively, Dell or Defendants). Mr. Adams alleges that Dell violated the False Claims Act (FCA), 31 U.S.C. § 3729, *et seq*., by knowingly selling hundreds of millions of dollars of computer systems to the United States government that contained undisclosed security vulnerabilities. Mr. Adams labels those vulnerabilities as a "Hardware Trojan." The United States declined to intervene in the litigation and Dell moved to dismiss for failure to state a claim under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6). For the following reasons, the Court will grant Defendants' motion and dismiss the amended complaint.

I. BACKGROUND

Dell is a "multinational company that delivers worldwide innovative technology, business solutions and
2 services." Mot. to Dismiss First Am. Compl. (Mot.) [Dkt. 59] at 10.[1] *2 Mr. Adams is "an internationally-recognized expert in computer hardware and software systems" who "has published numerous books and articles concerning operating systems and computer architecture and has been awarded numerous patents and patents pending from the United States Patent and Trademark Office for inventions and breakthroughs in the computer area." Am. Compl. [Dkt. 49] ¶ 5(a). Mr. Adams alleges that he conducted an "independent investigation" into the existence of Hardware Trojans[2] in computer systems sold by Dell to the United States government. *Id*. ¶¶ 5(b), 22. During his investigation, he allegedly created "unique methods and tools" to identify the Hardware Trojans. *Id*. ¶ 5(b). The Hardware Trojan is a "cybersecurity hardware vulnerability [that] can be (1) exploited maliciously to deny the Government use of the Affected Computer Systems based on criteria selected by those exploiting the vulnerability; or (2) triggered unwittingly by users or software developers with the same denial-of-use effect." *Id*. ¶ 9.

[1] Page references to Defendants' motion to dismiss refer to the electronic case filing (ECF) page number.

[2] Hardware Trojan is a term used and defined by Mr. Adams. The Court uses the term because it reflects the language of the Amended Complaint.

According to Mr. Adams, Dell "directly or indirectly presented false claims for payment to the Government for Dell Defendants' Affected Computer Systems . . . and made and used false records and statements in support of their false claims for payment." *Id*. ¶ 7. Specifically, the Affected Computer Systems sold by Dell included system control chips that included legacy functions, which the United States government did not want or need the system control chip to contain. *Id*. ¶ 12. An example of a legacy system is programing to recognize a floppy disk drive. Even though government computers no longer contain or have the need to connect to floppy disk drives, the system control chip includes a legacy floppy disk controller. That legacy floppy disk controller is
3 accessible and functional, but not used by the Affected Computer *3 System because no floppy disk is present. Mr. Adams contends that these unused, but available, functions permit exploitation of the Affected Computer System. *Id*. ¶ 15.

On April 22, 2015, Mr. Adams filed his *qui tam* complaint against Dell. Compl. [Dkt. 1]. The United States declined to intervene on September 23, 2015. Notice of Declination [Dkt. 5]. Mr. Adams filed an amended complaint on July 29, 2016. Am. Compl. [Dkt. 49]. On September 19, 2016, Defendants moved to dismiss. *See* Mot. Mr. Adams opposed and Defendants replied. *See* Mem. of P. & A.'s in Opp'n to Mot. to Dismiss First Am. Compl. (Opp'n) [Dkt. 62]; Reply Mem. of P. & A.'s in Supp. of Mot. to Dismiss First Am. Compl. (Reply) [Dkt. 64]. On April 26, 2017, the Court heard oral argument on the motion. Since the motion hearing, each party has filed a notice of supplemental authority which prompted an opposition and reply.[3] The motion is ripe for review.

[3] *See* Notice of Suppl. Authority Relevant to the Dell Defs.' Mot. to Dismiss First Am. Compl. [Dkt. 65]; Relator's Response to Dell's Notice of Suppl. Authority and Notice of Additional Suppl. Authority [Dkt. 66]; The Dell Defs.' Resp. to Relator's Notice of Additional Suppl. Authority [Dkt. 67]; Relator's Notice of Suppl. Authority [Dkt. 69]; The Dell Defs.' Resp. to Relator's June 22, 2020, Notice of Suppl. Authority [Dkt. 70]; Relator's Reply to the Dell Defs.' Resp. to Relator's June 22, 2020 Notice of Suppl. Authority [Dkt. 72].

II. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(6)

Rule 8 of the Federal Rules of Civil Procedure mandates that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When a party invokes Rule 12(b)(6) to challenge a complaint for failing to state a claim for relief pursuant to Rule 8, the Court must assess the complaint to determine whether it contains sufficient facts that, when accepted as true, evidence a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007);
4 *accord Ashcroft v. Iqbal*, 556 *4 U.S. 662, 679 (2009). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A court must treat the complaint's factual allegations as true, "even if doubtful in fact." *Twombly*, 550 U.S. at 555. But a court need not accept as true legal conclusions set forth in a complaint. *Iqbal*, 556 U.S. at 678. "In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

B. Motion to Dismiss under Rule 9(b)

The FCA is an anti-fraud statute, so this Circuit and every other circuit to consider the issue has held that complaints brought under the FCA must comply with Rule 9(b)'s pleading requirements. *United States ex rel. Totten v. Bombardier Corp. (Totten I)*, 286 F.3d 542, 551-52 (D.C. Cir. 2002) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995)). Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

The D.C. Circuit has explained that "'the pleader must state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a *5 consequence of the fraud.'" *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981)); *see also United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004); *Totten I*, 286 F.3d at 552.

III. ANALYSIS [4]

[4] The Court has jurisdiction over this case because it arises under the laws of the United States, specifically the False Claims Act, 31 U.S.C. § 3729 *et seq*, *see* 28 U.S.C. § 1331; and because the United States is a plaintiff, *see* 28 U.S.C. § 1345. Venue is proper in this District Court because Dell conducts business in the District and the government agencies that are alleged to have purchased, or processed the purchase of, the Affected Computer Systems are located in the District. *See* 28 U.S.C. § 1391; 31 U.S.C. § 3732(a).

Mr. Adams brings this False Claims Act case under both a presentment and false statement theory. *See* Am. Compl. ¶¶ 54-55. He alleges both that Dell presented a false claim for payment, 31 U.S.C. § 3729(a)(1)(A), and that Dell made a "false statement," *id.* § 3729(a)(1)(B). A claim brought under § 3729(a)(1)(A) has three elements: "(1) the defendant submitted a claim [for payment] to the government, (2) the claim was false, and (3) the defendant knew the claim was false." *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20, 26 (D.D.C. 2010). A claim under (a)(1)(B) requires that the defendant "made a false *statement* to the government, as opposed to the submission of a false claim for payment." *Pencheng Si v. Laogai Research Found.*, 71 F. Supp. 3d 73, 87 (D.D.C. 2014) (emphasis in original); *see also United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 501 (D.C. Cir. 2004) (finding that subsection (a)(1)(B) is "designed to prevent those who make false records or statements to get claims paid or approved from escaping liability solely on the ground that they did not *themselves* present a claim for payment or approval") (emphasis in original). *6

Mr. Adams also alleges that Dell made overt and implied false certifications. The D.C. Circuit has recognized an implied false certification theory which attaches liability if the relator demonstrates that the defendant "withheld information about its noncompliance with material contractual requirements" despite having earlier certified that it would comply with those requirements. *United States v. Sci. Applications Int'l Corp. (SAIC)*, 626 F.3d 1257, 1269 (D.C. Cir. 2010). To establish implied false certification a relator must show "express contractual language specifically linking compliance to eligibility for payment," or allege that "both parties to the contract understood that payment was conditional on compliance with the requirement at issue." *Id.* Additionally, "compliance with the legal requirement in question [must be] material to the government's decision to pay." *Id.* at 1271.

A. Fraudulent Inducement/False Statement Theory

The Amended Complaint includes a claim under 31 U.S.C. § 3729(a)(1)(B), that Dell made a false statement which fraudulently induced payment by they government. While the Amended Complaint includes a list of items Mr. Dell alleges to be "false claims," *see* Am. Compl. ¶ 24, none of the allegations include a statement made by any of the defendants. Instead, the claims listed are about false certifications, which will be considered under § 3729(a)(1)(A). Having failed to allege a single "statement" made by any of the Dell Defendants, Mr. Adam's claim under § 3729(a)(1)(B) will be dismissed.

B. False Certification Theory

Under a false certification theory, a relator must allege that (1) defendant certified compliance with a particular contractual condition, (2) defendant failed to comply with that condition, (3) defendant knowingly misrepresented the noncompliance, and (4) compliance was a condition "material to the government's decision to pay." *SAIC*, 626 F.3d at 1269-71; *see also Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016) *7 ("[T]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."). Not only must a relator comply with the general pleading requirements of Rule 12(b)(6), but "[i]t is well established that Rule 9(b) requires a relator to plea 'the who, what, when, where, and how with respect to the circumstances of' a fraudulent certification." *Pencheng Si*, 71 F. Supp. 3d at 94 (quoting *United States ex rel. Tran v. Comput. Scis. Corp.*, 53 F. Supp. 3d 104, 123 (D.D.C. 2014)).

1. False or Fraudulent Certification

Relator alleges that Dell made the following certifications:

- The items sold were as described in the contract, Am. Compl. ¶ 24(a);
- The items were warranted as "free from defects," *id.* ¶ 24(b);
- The items were "merchantable and fit for use for the particular purpose described in the contract," *id.* ¶ 24(c);
- The items complied with the Department of Defense Counterfeit Prevention regulation, *id.* ¶ 24(d);
- The items conformed to the standards of the Federal Standards Program, including minimum security requirements, *id.* ¶ 24(e);
- The items "are fully functional and operate correctly as intended," *id.* ¶ 24(g);
- The items include internal components "that directly support the provided platforms," *id.* ¶ 24(h);
- The items "satisfactorily perform the function for which [they are] intended," *id.* ¶ 24(i); and
- The items "conform to the Dell Defendants' technical representations concerning performance, total system performance and configuration, physical, design and/or functional characteristics and capabilities," *id.* ¶ 24(l).

8 *8 According to Mr. Adams, the existence of the Hardware Trojan rendered each of the above-listed certifications false.

Assuming, as the Court must on a motion to dismiss, that Mr. Adams' allegations that the Affected Computer Systems contain the Hardware Trojan are true, Dell argues that Mr. Adams has nevertheless failed to allege that the certifications were false because he does not allege how the existence of the Hardware Trojan negates any of the above certifications.

Mr. Adams lists numerous allegedly false certifications, including that Dell gave product warranties to the effect that the computer systems were free from defect. Am. Compl. ¶ 24(b). Although the parties quibble over whether Dell was required to certify that the Affected Computer Systems were without defect and, therefore, that the provision of the Systems to the government and request for payment under the contracts was a false statement or false certification, at this stage the Court must accept the well-plead allegations from Plaintiff-Relator as true. Mr. Adams has alleged that Dell was required to provide defect-free products and has alleged that a defect—the Hardware Trojan—is present in the Affected Computer Systems. *Id*. ¶¶ 9, 24(b). Therefore, accepting the well-plead allegations in the Amended Complaint, Mr. Adams has plausibly alleged a false certification under Rule 12(b)(6).

Federal Rule of Civil Procedure 9(b) requires Mr. Adams to also allege "the time, place and content of the false misrepresentations [and] the fact misrepresented." *Joseph*, 642 F.2d at 1385. Mr. Adams alleges that any of the contracts between the Dell entities and United States government agencies listed in Exhibit D to the Amended Complaint which involved the purchase of any of the Affected Computer Systems listed in Exhibits A and B to the Amended Complaint contained the false certifications and resulted in payment of a false claim by the
9 United States. *See* Exs. A, B, and D, Am. Compl. [Dkt. 49-1]. Dell argues that the list of contracts is not *9 sufficient under Rule 9(b) to provide Defendants with the ability to adequately challenge the amended complaint. "The District of Columbia Circuit has made clear that although Rule 9(b) requires the relator to 'state with particularity the circumstances constituting fraud,' [relator] is not required 'to plead representative samples of claims actually submitted to the government.'" *United States ex rel. Groat v. Boston Heart Diagnostics Corp.*, 255 F. Supp. 3d 13, 22 (D.D.C. 2017) (quoting *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 123, 126 (D.C. Cir. 2015)). Therefore, Mr. Adams' identification of the contracts, relevant Dell entity who entered into the contract, and specific computer systems that contain the Hardware Trojan is sufficient to meet the particularized requirements of Rule 9(b) and to permit Defendants to defend against the claim.

2. Materiality

FCA plaintiffs must "plead[] facts to support allegations of materiality." *Universal Health Servs.*, 136 S. Ct. at 2004 n.6 (rejecting "assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment"). Under the statute, "material" is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). The Supreme Court has recently explained that

> materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation. In tort law, for instance, a matter is material in only two circumstances: (1) if a reasonable man would attach importance to in determining his choice of action in the transaction; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter in determining his choice of action, even though a reasonable person would not. . . .
>
> The materiality standard is demanding. The False Claims Act is not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the
>
> 10 *10
>
> Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. . . .
>
> In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Universal Health Servs., 136 S. Ct. at 2003-04 (internal quotation marks and citations omitted).

Mr. Adams alleges that the existence of the Hardware Trojan is material because the government agencies who acquired the Affected Computer Systems "operate under a mandate to assure the security of their and their contractors' information technology systems," Am. Compl. ¶ 40, and agencies must comply with a variety of technology policies, *see id*. ¶¶ 40-43. Therefore, because the type of vulnerability introduced by the Hardware Trojan creates a serious risk, the agencies who acquired the Affected Computer Systems would not have done so if they were aware of the existence of the Hardware Trojan. Taking as given that government agencies are concerned with the security of the computer systems they purchase and that they must comply with various technology policies, Dell argues that the mere existence of a criteria that the systems be secure does not establish that the requirement was material.

Mr. Adams alleges that federal agencies must ensure that their technology acquisitions comply with security
11 requirements, *id*. ¶ 40, and agencies must "correct deficiencies and reduce *11 or eliminate vulnerabilities," *id*. ¶ 42. Mr. Adams then concludes that because agencies have these directives compliance is material to the purchase of computer systems.

While it is certainly possible that had the agencies been aware of the existence of the Hardware Trojan they would have decided not to purchase the Dell computer systems, an entitlement to refuse the product based on a violation of a contractual requirement is not always material. *Universal Health Servs.*, 136 S. Ct. at 2004.

Additionally, Mr. Adams does not allege that Dell was required to comply with any of the federal technology policies or that the contracts specified such compliance. He merely argues that because agencies are expected to comply with security policies, that such a requirement would have been passed along to Dell. However, even if those requirements were passed along to Dell, the technology policies referenced by Mr. Adams do not require defect-free products, merely that the agencies limit the vulnerabilities and attempt to remedy them if located. Dell could comply with the policies by providing a computer system with limited vulnerabilities and providing the necessary assistance to eliminate or reduce vulnerabilities as they appear. Therefore, the existence of a single vulnerability, namely the Hardware Trojan identified by Mr. Adams, would not necessarily be material to the agencies' acceptance of the computer systems and payment under the contracts. The allegations in the Amended Complaint are insufficient to meet the "demanding" standard of demonstrating materiality. *Id*. at 2003.[5] *12

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[5] Dell's argument that the continued purchase of computer systems by government agencies even after Mr. Adams disclosed the existence of the Hardware Trojan to the United States Attorneys Office for the Eastern District of Texas and other Department of Justice personnel further supports the Court's finding that Mr. Adams has failed to allege materiality. While the Court cannot and does not attribute knowledge by one agency to all the agencies that purchased computer systems from Dell, the knowledge is at least some evidence that the existence of the Hardware Trojan was not material.

3. Knowing Conduct

Mr. Adams' Amended Complaint also falters in its allegations of knowledge. The FCA requires that a false claim is made knowingly and defines "knowing" and "knowingly" to mean that

> (A). . . a person, with respect to information -
>
> (i) has actual knowledge of the information;
>
> (ii) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (iii) acts in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b)(1). "Strict enforcement of the FCA's scienter requirement will also help to ensure that ordinary breaches of contract are not converted into FCA liability." *SAIC*, 626 F.3d at 1271. To establish knowledge under an implied certification theory, a relator must allege both "that the defendant knows (1) that it violated a contractual obligation, and (2) that its compliance with that obligation was material to the government's decision to pay." *Id*. Additionally, a relator may not use "collective knowledge" of a multiple individuals within a company to impute knowledge on the company as a whole. *Id*. at 1274 ("[U]nder the FCA, 'collective knowledge' provides an inappropriate basis for proof of scienter because it effectively imposes lability, complete with treble damages and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act's language, structure, and purpose."). "On the other hand, 'actual knowledge possessed by individual company employees' or a conclusion that 'the company acted recklessly' based on 'the actions of employees or [the company's] systems and structure' would be sufficient." *United States v. DynCorp Int'l, LLC*, 253 F. Supp. 3d 89, 103 (D.D.C. 2017) (quoting *SAIC*, 626 F.3d at 1276). *13

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Mr. Adams' allegations that he was uniquely qualified and singularly able to identify the Hardware Trojan directly conflicts with his allegations that Dell knew or should have known that the Affected Computer Systems contained the Hardware Trojan. Mr. Adams alleges that Dell's "intimate familiar[ity] with the System

Control Chips" and actions taken to configure the Affected Computer Systems would have made Dell aware of the Hardware Trojan. Am. Compl. ¶ 44. However, he alleges that his identification of the Hardware Trojan was "gained in substantial part through his independent investigation and development of unique methods and tools." *Id*. ¶ 5(b). Additionally, in his opposition, Mr. Adams explains that "[i]t is difficult to detect and correct hardware Trojans," and "against all odds" he was able "through his own testing, in his own law, on his own initiative" to identify the Hardware Trojan. Opp'n at 5. Mr. Adams does not explain why, if it was "against all odds" and through "unique methods and tools" that he detected the Hardware Trojan, Dell employees must have had knowledge of the vulnerability or acted in reckless disregard for the truth. The conflicting nature of Mr. Adams' allegations and their conclusory nature prevents him from stating a plausible claim of knowledge.

Additionally, even if the Court accepts Mr. Adams' conclusion that Dell employees who were involved in the boot and BIOS interactions knew that the computer systems contained undocumented programmable functions, Mr. Adams has not alleged that these employees had reason to believe the existence of those functions violated a material provision in the agreement with the government agencies. Mr. Adams merely assumes that fact, *see* Am. Compl. ¶ 44(a)(10) ("In short some of Dell Defendants' employees and contractors who know about the Hardware Trojans were also aware of the false express and implied certifications by Dell Defendants to the
14 Government."); and the Court need not accept conclusory allegations in the *14 Amended Complaint. Therefore, Mr. Adams has failed to allege that Dell had knowledge of the false claim.[6], [7]

[6] Mr. Adams' allegations of deliberate ignorance or reckless indifference fair no better. His allegations that Dell deliberately structured its organization to separate individuals with technical knowledge from those involved in negotiating and fulfilling government sales contracts and, therefore, to prevent the knowledge of technical errors from spilling onto the sales force are implausible. Corporate separation of technical and sales safe is both common and expected.

[7] Because the Court finds that Mr. Adams fails to satisfy the less stringent pleading requirement of Rule 12(b)(6), it need not address Defendants' other arguments that Mr. Adams fell short of the more stringent Rule 9(b) pleading requirements or that his claim is prohibited by the public disclosure bar. --------

C. Request for Leave to Amend the Complaint

In his oppositions to Defendants' motion to dismiss, Mr. Adams requests leave to amend his complaint "[i]n the event the Court finds any fault with the First Amended Complaint and grants the motion to dismiss in while or in part." Opp'n at 40. As the D.C. Circuit has made clear, "a request for leave [to amend the complaint] must be submitted in the form of a written motion." *Belizan v. Hershon*, 434 F.3d 579, 582 (D.C. Cir. 2006); *see also Williams*, 389 F.3d at 1259 ("[A] bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion within the contemplation of Rule 15(a)."). Furthermore, Local Civil Rule 15.1 provides each "motion for leave . . . shall be accompanied by an original of the proposed pleading as amended." Mr. Adams' request is not a proper motion for leave to amend his complaint under Rule 15(a) of the Federal Rules of Civil Procedure or Local
15 Civil Rule 15.1. His request for leave to amend is therefore improper and will be denied. *15

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss will be granted and the Amended Complaint will be dismissed. A memorializing Order accompanies this Memorandum Opinion. Date: October 8, 2020

/s/

THOMAS F. HOGAN

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 17-20301-CIV-LENARD/GOODMAN

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

MATHIAS FRANCISCO SANDOVAL
HERRERA, et al.,

Defendants.
_____/

ORDER ON DEFENDANTS' MOTION TO
COMPEL PRODUCTION FROM NON-PARTY LAW FIRM

Very few decisions are consequence-free events. The discovery dispute at issue here is no exception to this practical truism.

This Order concerns the legal consequences, if any, which arise when a major law firm conducting an internal corporate investigation into its client's financial and business activities produces what the parties here call "oral downloads" of witness interview notes and memoranda to the regulatory agency investigating its client. To be more specific, the primary issue addressed here (but there are other issues, as well) is whether that law firm waived work product protection when it voluntarily gave the Securities and Exchange Commission oral summaries of the work product notes and

memoranda its attorneys prepared about interviews of its client's executives and employees. The memoranda and notes summarize the relevant portions of the witness interviews (or at least what the attorney participating in the interview deemed to be relevant enough to include in these materials).

Because there is little or no substantive distinction for waiver purposes between the actual physical delivery of the work product notes and memoranda and reading or orally summarizing the same written material's meaningful substance to one's legal adversary, the Undersigned concludes that the Morgan Lewis & Bockius LLP law firm ("ML") waived work product protection and must provide to Defendants the interview notes and memoranda that were orally downloaded. To that extent, the Undersigned **grants** Defendants' motion to compel against ML. [ECF No. 52]. The waiver, however, is *limited* to only the witnesses whose interview notes and memoranda were orally provided, which is far less than all the witnesses ML interviewed.

In addition, the Undersigned rejects Defendants' additional argument that ML should produce to them *all* the witness-interview notes and memoranda on the ground that ML also provided all witness-interview notes and memoranda to its client's auditor, Deloitte & Touche ("Deloitte"). The Undersigned finds persuasive those cases holding that disclosure of work product information to an auditor does not generate a waiver.

Unlike the SEC, Deloitte is not the adversary of ML's client, General Cable Corp.

("GCC"), the publicly-traded company being investigated. As such, the Undersigned is not persuaded by Defendants' argument that the accounting firm is actually an adversary (based on the theory that Deloitte was worried that the SEC was also investigating its auditing services, and therefore had motive to suggest that GCC did not timely and fully provide accurate information for the financial statements that needed to be restated and which led to a hefty fine against GCC by the SEC). So the Undersigned **denies** that portion of the motion to compel.

Finally, the Undersigned also rejects the defense argument that additional work product material should be provided because Defendants have a substantial need for it. Under the present circumstances, that is an inadequate ground to compel production of additional work-product information, especially attorney work-product memoranda. The Undersigned therefore **denies** that portion of the motion to compel as well.

I. Procedural and Factual Background

The SEC filed its lawsuit against Mathias Francisco Sandoval Herrera, Maria D. Cidre, and another defendant who entered into a consent judgment with the SEC shortly after the lawsuit was filed. [ECF Nos. 1; 24]. Herrera was the CEO and Cidre was the CFO of GCC's Latin American operation. The Complaint is based on allegations that Herrera and Cidre concealed the manipulation of accounting systems at the Brazilian operations of GCC, a global manufacturer of wire and cable products. The lawsuit alleges that Defendants hid from GCC's executive management material inventory

accounting errors at GCC's Brazilian subsidiary, including the overstatement of inventory.

According to the SEC's Complaint, this improper accounting of inventory caused GCC to overstate inventory and net income by millions of dollars and required the restatement of financial statements. The lawsuit alleges that this misconduct generated myriad violations of the federal securities laws.

The parties filed a joint written notice, consenting to the Undersigned's final handling of discovery disputes. [ECF No. 37]. Based on that, United States District Judge Joan A. Lenard referred to the Undersigned all discovery motions. [ECF No. 41]. The referral directed the parties to designate a discovery motion as a "Consent Motion." [ECF No. 41].

Defendants filed their motion to compel against ML, who filed an opposition response, and then Defendants filed a reply. [ECF Nos. 52; 59; 61]. The motion, the response, and the reply all failed to designate the motion as a "Consent Motion." Nevertheless, since it concerns discovery, the motion is surely a consent motion, which means that any challenge to this discovery Order would be to the Eleventh Circuit Court of Appeals (not the District Court). *See* 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). The motion is fully briefed[1] and is ripe for a ruling.

[1] Defendants also filed a privileged e-mail string, but the parties later filed a joint notice asking the Court to not consider the attachment (which had been filed under

The origins of the specific discovery dispute date back to late 2012, when GCC retained ML to provide legal advice concerning accounting errors at the Brazilian subsidiary. ML conducted an internal investigation, which included interviewing dozens of GCC personnel. ML attorneys then prepared notes and memoranda about those interviews. According to Defendants, "many" of the witnesses were interviewed "live" in Brazil. [ECF No. 52, p .2].

After ML disclosed in November 2012 to the SEC that it was conducting an investigation of GCC's accounting errors, the SEC began its own investigation of the company. In doing so, it issued several requests to GCC. In response, GCC produced documents, including e-mail communications to and from Defendants and the persons who ML interviewed.

The SEC also asked for the investigative findings, and ML provided the SEC with information about its findings, including a presentation prepared for the SEC and information about specific witness interviews, which were provided orally. An April 15, 2013 PowerPoint presentation that ML made to the SEC contained, among other things, an events timeline, the names of witnesses whom ML had already interviewed, a breakdown of the transactions deemed to be at the heart of the accounting discrepancy, and the results of its investigation. This 28-page PowerPoint presentation is now in the

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seal) because ML had inadvertently produced it to the SEC. [ECF Nos. 61-1; 70]. The Undersigned will therefore not consider that exhibit.

public record of this lawsuit, as Defendants filed it as an exhibit to their motion. [ECF No. 52-3]. The cover page of the ML-produced PowerPoint says "FOIA Confidential Treatment Request," however. [ECF No. 52-3, p. 1].

On October 29, 2013, ML attorneys met with SEC staff and provided oral downloads of 12 witness interviews.

In addition, during the investigation, Deloitte asked for information from ML about its investigative steps and findings, including information obtained through ML-conducted witness interviews. ML provided Deloitte with the information and says that it did so because it believed "Deloitte would keep it confidential, consistent with Deloitte's professional obligations to its client [GCC]." [ECF No. 59, p. 3]. Although ML provided the SEC with oral downloads of only 12 witness interviews, it provided Deloitte with information about all the interviews notes and memoranda. It appears as though this was accomplished through the reading (by an ML attorney) of memoranda and interview notes to Deloitte and generalized "access" to review interview notes selected by Deloitte's investigative team. [ECF No. 59, p. 8].

The SEC's investigation ultimately led to a Cease and Desist Order entered against GCC in December 2016, which required the payment of a $6.5 million civil monetary penalty. [ECF No. 52-2].

On August 9, 2017, defense counsel served ML with a Rule 45 subpoena in this lawsuit (filed by the SEC). [ECF No. 52-1]. ML made initial objections, and the parties

had discussions, which led to the narrowing of the issues. Specifically, Defendants' motion seeks to compel only the witness interview notes and memos (i.e., not the actual documents that ML provided to the SEC, "because those documents would presumably be produced [anyway] to the Defendants by the SEC"). [ECF No. 52, p. 7].

II. Applicable Legal Principles and Analysis

"[D]istrict courts are entitled to **broad discretion** in managing pretrial discovery matters." *Perez v. Miami-Dade Cty.*, 297 F.3d 1255, 1263 (11th Cir. 2002) (emphasis added). This discretion extends to rulings concerning the applicability of the work-product doctrine. *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1188 (11th Cir. 2013).

Federal law governs work-product assertions, regardless of whether they arise in diversity actions or federal question jurisdiction lawsuits. *See, e.g., Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 699–700 (S.D. Fla. 2007); *see also Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 702 n. 10 (10th Cir. 1998) ("[u]nlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. Pr. 26(b)(3)"); *Bradt v. Smith*, 634 F.2d 796, 799 (5th Cir. 1981) (holding that "[t]he work-product immunity [is] a federal right [] embodied [] in the Federal Rules of Civil Procedure.").

The party claiming work product immunity (which is ML in this dispute) has the burden to establish the claimed protection. *Hinchee*, 741 F.3d at 1189. There is no dispute here that the notes and memoranda prepared by ML attorneys are in fact work product

material. Rather, the dispute is over the *waiver* of the work-product doctrine protection.

Although the party seeking work-product protection bears the initial burden for establishing that the documents are entitled to such protection, after that initial burden is met, the burden shifts to the party asserting waiver to show that the party claiming the privilege has waived its right to do so. *Mitsui Sumitomo Ins. Co. v. Carbel, LLC*, No. 09-21208-CIV, 2011 WL 2682958, at *3 (S.D. Fla. July 11, 2011). In the context of work product, the question is not, as in the case of the attorney-client privilege, *whether* confidential communications are disclosed, but *to whom* the disclosure is made -- because the protection is designed to protect an attorney's mental processes from discovery by *adverse* parties. *See generally Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978).

Work-product protection is waived when protected materials are disclosed in a way that "substantially increases the opportunity for potential **adversaries** to obtain the information." *Niagara Mohawk Power Corp. v. Stone & Webster Eng. Corp.*, 125 F.R.D. 578, 587 (N.D.N.Y. 1989) (emphasis added) (quoting *In re Grand Jury Subpoenas Dated Dec. 18, 1981 and Jan. 4, 1982*, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982)); 8 Charles Alan Wright, Arthur R. Miller and Richard L. Marcus, *Federal Practice and Procedure*, § 2024 at 209–10 (1970).

As noted in *United States v. Gulf Oil Corporation*, 760 F.2d 292, 295 (Temp. Emer.

Ct. App. 1985):[2]

> [t]he purpose of the work product doctrine is to protect information against **opposing parties**, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation[.] A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against **opponents,** should be allowed without waiver of the privilege.

760 F.2d 292, 295 (citations omitted) (emphasis added).

Thus, not *every* situation in which work-product materials are disclosed warrants a finding of waiver. Rather, the "*circumstances* surrounding the disclosure are key to determining whether an actual waiver of the work-product protection has occurred." *Stern v. O'Quinn,* 253 F.R.D. 663, 676 (S.D. Fla. 2008) (emphasis added).

Generally speaking, as noted above, work-product protection is waived when protected materials are "disclosed in a manner which is either inconsistent with maintaining secrecy against **opponents** or substantially increases the opportunity for a potential **adversary** to obtain the protected information." *Niagara,* 125 F.R.D. at 590 (citing *Gulf Oil,* 760 F.2d at 295 and other cases) (emphasis supplied); *Kallas v. Carnival Corp.,* No. 06-20115-CIV, 2008 WL 2222152, at *4 (S.D. Fla. May 27, 2008) (noting that a party waives otherwise-protected work-product materials "when the covered materials are used in a manner that is inconsistent with the protection") (internal quotations omitted); *see also Bank Brussels Lambert v. Chase Manhattan Bank, N.A.,* No. 93 CIV. 5298 LMM RLE, 1996 WL 944011, at *3 (S.D.N.Y. Dec. 19, 1996) ("Work product immunity is

[2] Citing *United States v. American Tel. & Tel. Co.,* 642 F.2d 1285 (D.C. Cir. 1980).

waived only if the party has voluntarily disclosed the work product in such a manner that it is likely to be revealed to his **adversary**.") (emphasis supplied); *Falise v. Am. Tobacco Co.*, 193 F.R.D. 73, 79 (E.D.N.Y. 2000) (waiver of work-product protection found only if disclosure substantially increases the opportunity for potential **adversaries** to obtain the information) (emphasis added); *Stern*, 253 F.R.D. at 676 (finding that work-product waiver occurs when disclosure occurs in a way which "substantially increases the opportunities for potential adversaries to obtain the information").

A. ***Witness Interview Material Orally Downloaded to the SEC***

The SEC was the adversary of ML's client, GCC. The SEC was investigating GCC for alleged misstatements in its financial reports submitted as a public company and eventually imposed a $6.5 million civil penalty against it. And it does not appear as though ML takes the position that the SEC was not an adversary, as it explains in its response that "Morgan Lewis does not contend that [GCC] and the SEC shared a common interest[.]" [ECF No. 59, p. 7].

So the Undersigned easily concludes that the disclosure to the SEC was one made to an adversary. *See In re Initial Pub. Offering Sec. Litig.*, 249 F.R.D. 457, 465–67 (S.D.N.Y. 2008) (finding that company waived work-product protection by disclosure of memoranda to the **SEC,** which was investigating the possibility of the company's wrongdoing, to limit liability for that wrongdoing); *United States v. Bergonzi*, 216 F.R.D. 487, 497–98 (N.D. Cal. 2003) (finding that the company waived work-product protection

by the disclosure to **SEC** because SEC had issued a Wells letter to the company); *see also In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006) (collecting cases on waiver of work-product privilege in disclosures to investigating agencies); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 306–07 (6th Cir. 2002) (not permitting selective waiver of work-product material to government agencies and noting that "[a]ttorney and client both know the material in question was prepared in anticipation of litigation; the subsequent decision on whether or not to 'show your hand' is quintessential litigation strategy.").

ML contends that no waiver occurred, however, because it never actually produced the notes and memoranda of the witness interviews to the SEC. ML argues that there is a meaningful distinction between the actual production of a witness interview note or memo and providing the same or similar information *orally.* The Undersigned is not convinced. *See S.E.C. v. Vitesse Semiconductor Corp.*, No. 10 CIV. 9239 JSR, 2011 WL 2899082, at *3 (S.D.N.Y. July 14, 2011) *("*"While it is undisputed that NuHo did not actually produce the notes themselves to the SEC, after reviewing the SEC's notes the Court found that NuHo effectively produced these notes to the SEC through its oral summaries."); *S.E.C. v. Berry*, No. C07-04431 RMW HRL, 2011 WL 825742, at *5–6 (N.D. Cal. Mar. 7, 2011) (finding waiver of privilege in interview memoranda for five witnesses where attorneys orally disclosed to the SEC facts contained in the interviews); *S.E.C. v. Roberts*, 254 F.R.D. 371, 377 (N.D. Cal. 2008) ("to the extent that Howrey orally

disclosed to the government factual information contained in any of the written material identified by Roberts, Howrey has waived the attorney-client and work product privileges with respect to that information.").[3]

ML does not contend that it provided only vague references of the witness notes and memoranda to the SEC, nor does it argue that only detail-free conclusions or general impressions were orally provided. To the contrary, it factually concedes that its attorneys provided oral downloads of the substance of the 12 witness interview notes and memos but legally relies on *B.M.I. Interior Yacht Refinishing, Inc. v. M/Y Claire*, No. 13-62676-CIV, 2015 WL 4316929 (S.D. Fla. July 15, 2015), a non-controlling admiralty case which the Undersigned does not deem helpful or applicable.

In *B.M.I.*, the Court held that a boat captain's ambiguous and perhaps only vague oral disclosure of the contents of a boat inspector's report, prepared at counsel's request, did not waive ***counsel***'s work-product protection because "an attorney has an independent interest in privacy of his or her work product, even when the client has waived its own claim[.]" *Id.* at *5. As an alternative basis for rejecting waiver, the Court noted that **no one could recall what portion of the report was disclosed** by the captain, so evidence was lacking as to what was waived. *Id.*

Moreover, the *B.M.I.* Court implicitly acknowledged the validity of the waiver approach used in *Vitesse Semiconductor* but distinguished it because the oral summaries

[3] The Undersigned notes that these cases all involve the SEC, the same government agency at issue here.

provided there "were sufficiently detailed," as opposed to the "not very detailed" summary orally given by a boat captain. *Id.* at *6. But in this case, ML knowingly waived work-product protection in the interview notes and memoranda.

ML also argues that Defendants' claim -- that they seek to "level the playing field" -- is an argument which "rings hollow" because "the SEC does not have what the Defendants are seeking." [ECF No. 59, p. 7]. But that is an incomplete argument. Yes, it is true that the SEC does not have the *actual* witness notes and memoranda -- but it has the **functional equivalent** of them by receiving the oral summaries of the interview materials. The cases discussed above reject this crabbed theory. *See, e.g., Vitesse Semiconductor*, 2011 WL 2899082, at *3.

B. *Other Material Provided to SEC*

Defendants argue that the PowerPoint presentations ML made for the SEC is a work-product waiver. ML disagrees, contending that the presentation does not contain work-product material. ML thus takes the position that the Court need not address the waiver issue because the material was never protected by work product in the first place. It says that the presentation's content concerned facts, not attorney mental processes. For example, simply listing the names of interviewees is not a work-product scenario.

ML relies on *In re General Motors LLC Ignition Switch Litigation*, in which the court denied the plaintiffs' motion to compel interview notes and memos where GM

produced to government agencies an attorney's report summarizing an internal investigation, and where the report contained numerous citations to many of the interviews conducted. 80 F. Supp. 3d 521, 533–34 (S.D.N.Y. 2015). The court found that GM had not offensively used the report or made a selective or misleading presentation unfair to its adversaries warranting a finding of waiver with respect to the interview memos and notes. *Id.* at 534.

The Undersigned has reviewed the entire PowerPoint presentation and agrees with ML's view that it is not protected by work-production immunity for two reasons. First, it was prepared specifically for the SEC. Second, although it mentions, in passing, the names of the interviewees, the substance of what the witnesses said was not provided.

C. *Other Disclosures to the SEC*

Defendants contend that ML made other oral disclosures of work-product information to the SEC, above and beyond the oral downloads of the 12 interviews. The Undersigned cannot reach any conclusions about further disclosures unless and until ML provides additional clarification about what was disclosed. Defendants contend that the ML attorneys took notes of the discussions they had with the SEC and perhaps with the Department of Justice. Defendants request that the Undersigned review *in camera* ML's attorneys' notes of an October 29, 2013 meeting. ML does not oppose this request. [ECF No. 59, p. 7 n. 3]. But the Undersigned is unsure about whether ML

attorneys met with the SEC and/or the Department of Justice on days other that October 29, 2013.

Therefore, ML shall, **within seven days from this Order**, file under seal a copy of all attorney notes discussing or reflecting what information was disclosed to the SEC or the Department of Justice during meetings (or otherwise). Notes concerning summaries of what ML attorneys told the SEC about the substance of information given by witnesses in interviews are particularly relevant and should be filed under seal. In addition to filing these attorney notes under seal, ML shall deliver a courtesy copy to chambers within the same deadline.

D. ***Material Produced to Deloitte***

After describing Defendants' motion concerning the purported waiver by production to Deloitte as based on "scant facts," ML then explains that it does not contest that it read interviews notes and memoranda to Deloitte for purposes of this motion. [ECF No. 59, p. 8]. According to its response memorandum, 38 witnesses were interviewed. [ECF No. 59, p. 8 n. 6]. ML's argument here is different from the argument it made for the materials provided to the SEC; it contends that even the actual physical production of work product to a company's auditors does not waive work-product protection because an independent or outside auditor typically shares a common interest with the corporation for purpose of the work product and waiver doctrines.

The Undersigned agrees with ML that documents shared with Deloitte are

protected from disclosure. *See United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010) (holding that documents disclosed to Deloitte by client did not waive work product protection); *In re Weatherford Int'l Sec. Litig.*, No. 11CIV1646LAKJCF, 2013 WL 12185082, at *5 (S.D.N.Y. Nov. 19, 2013) ("Ernst & Young functioned as Weatherford's outside auditor. In this circuit, disclosure to an outside auditor does not generally waive work product protection."); *see also Regions Fin. Corp. v. United States*, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *8 (N.D. Ala. May 8, 2008) (finding same, because "E & Y was an independent auditor [and] not a potential adversary of Regions."); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) ("Transmittal of documents to a company's outside auditors does not waive the work product privilege because such a disclosure cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.") (internal quotations omitted).

In their motion, Defendants say that there is a "split" on the legal consequences arising from disclosures to a corporation's accountants or auditors but then concede that "the majority" of courts hold that auditing and accounting firms typically do share a common interest. [ECF No. 52, p. 10]. Nevertheless, they have crafted a theory to distinguish the precedent adopting the common-interest approach: they say that Deloitte "itself was on the SEC's radar and entered into a tolling agreement with the SEC regarding its own conduct." *Id.* Therefore, Defendants argue, Deloitte was a

"*potential* adversary" to GCC "because Deloitte was motivated to claim that GCC personnel had misled Deloitte regarding the accounting practices at GCC." *Id.* (emphasis added).

The Undersigned is not persuaded by this effort to treat Deloitte differently from those cases that hold that an outside auditor has a common interest with the corporation for work-product waiver issues. First, the SEC never brought an enforcement action against Deloitte concerning this investigation.

Second, the SEC's request for a tolling agreement with Deloitte occurred ten months after ML shared the results of its interviews with Deloitte.

Third, Defendants have not adequately established that ML or GCC knew at the time the witness interview materials were shared with Deloitte that the SEC was interested in a tolling agreement with Deloitte.

Fourth, Defendants have not cited any legal authority, binding or otherwise, to support the notion that a common interest disappears under factually analogous scenarios.

And fifth, even if Deloitte was a potential adversary on *that* issue, it still had a common interest for *other* purposes. *See generally Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 441, 443 (Fla. 3d DCA 1987) (noting that "common interests exception applies where the parties, although nominally aligned on the same side of the case, are antagonistic as to some issues, but united as to others" and holding that both

attorney-client privileged and work product-protected information exchanged between parties retained status under common interest doctrine even though the parties "in another respect" were "adversaries in the litigation and aligned as plaintiff and defendant respectively").

E. ***Defendants' "Need" for the Work Product Materials***

Although this Order compels ML to produce to Defendants the witness interview notes and memoranda for the 12 witnesses flagged in Defendants' motion, Defendants also argue that they are entitled to *all* of the material because they have a substantial need for it.

According to Defendants' motion, ML has pledged to continue to assist ***only*** the SEC -- but not Defendants -- by making witnesses, including current and former GCC employees whom ML represents, available for further interviews and testimony in the United States, without regard for territorial limits. [ECF No. 52-2, pp. 8–9]. And Defendants similarly contend that, armed with ML's prior disclosures and ongoing cooperation, the SEC can cherry-pick which witnesses to call and which to avoid and ML's counsel can prepare those witnesses to testify with the benefit of a panoramic view of what all witnesses previously stated.

In the same vein, Defendants also say that the SEC is similarly advantaged with regard to the Deloitte witnesses by having access to the ML interviews, and therefore, having knowledge of what all witnesses previously stated. They note that many of the

witnesses are in Brazil, which means that they have no workable alternative to interview them other than letters rogatory, which they say is time-consuming and likely to be unhelpful (because, for example, they must submit the questions in advance and be only observers in a judge-conducted questioning procedure). And they express concern over the fact that the witnesses' memories have faded -- and that the interview notes and memoranda from a few years ago would be more accurate and helpful.

The Undersigned is not persuaded.

First, ML points out that Defendants have all of the 400,000-plus documents which GCC produced to the SEC, including contemporaneous e-mail communications among the witnesses at issue, which can be used to refresh recollections. Second, if the letters-rogatory process does in fact take longer than a traditional deposition, then Defendants can seek appropriate extensions of time. Third, and perhaps most importantly, Defendants are seeking the additional disclosure of attorney work product, which is entitled to heightened protection.

An attorney's notes and memoranda of interviews performed in the course of an internal investigation are "classic attorney work product." *See, e.g., In re Gen. Motors LLC as*329 U.S. 495, 512 (1947) ("the privacy of an attorney's course of preparation is . . . essential to an orderly working of our system of legal procedure[.]"). Therefore, as the Supreme Court has explained, "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the

attorney's mental processes[.]" *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981).

"Substantial need cannot be overcome simply with an argument that documents are relevant and will assist in bolstering a party's affirmative defenses." *Beaubrun v. GEICO Gen. Ins. Co.*, No. 16-24205-CIV, 2017 WL 1738117, at *5 (S.D. Fla. May 4, 2017). And courts must not allow parties to claim substantial need as a means to "short-cut" preparation of cases. *See Stern*, 253 F.R.D. at 686.

F. *Conclusion*

ML waived work-product protection for the witnesses whose interview notes and memoranda its attorneys disclosed to the SEC in the so-called "oral downloads." Defendants advise that "at least twelve" interview memos were orally relayed [ECF No. 52, p. 8], so the Undersigned is using that number, as well. If it turns out that ML provided information to the SEC about other witness interviews besides the 12 already identified, then it shall disclose to Defendants the additional notes and memoranda. ML shall provide the notes and memoranda **within 7 days of this Order**.

In addition, ML shall, by the same deadline, file under seal (with a courtesy copy to chambers) for *in camera* review copies of the notes and memoranda reflecting any other work-product information its attorneys provided to the SEC and the DOJ about the employee interviews.

If the Court determines in its *in camera* review that additional work-product material was provided to the SEC and/or DOJ, then a follow-up order requiring

production under a waiver theory will be issued. If I conclude otherwise, then no further order will be entered.

DONE and ORDERED in Chambers, at Miami, Florida, on December 5, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Joan A. Lenard
All counsel of record

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA ex rel. BRIAN MARKUS, Plaintiff, v. AEROJET ROCKETDYNE HOLDINGS, INC., a corporation and AEROJET ROCKETDYNE, INC., a corporation, Defendants.	No. 2:15-cv-2245 WBS AC MEMORANDUM & ORDER RE: DEFENDANTS' MOTION TO DISMISS RELATOR'S SECOND AMENDED COMPLAINT, STAY PROCEEDINGS, and COMPEL ARBITRATION

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Plaintiff-relator Brian Markus brings this action against defendants Aerojet Rocketdyne Holdings, Inc. ("ARH") and Aerojet Rocketdyne, Inc. ("AR"), arising from defendants' allegedly wrongful conduct in violation of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 et seq., and relating to defendants' termination of relator's employment. Defendants now move to (1) dismiss the Second Amended Complaint ("SAC") in part for the failure to state upon which can be granted under Federal Rule of

Civil Procedure 12(b)(6), (2) stay proceedings, and (3) compel arbitration.

I. Background

Relator Brian Markus is resident of the State of California. (SAC ¶ 6 (Docket No. 42).) He worked for defendants as the senior director of Cyber Security, Compliance, and Controls from June 2014 to September 2015. (Id.) Defendants ARH and AR develop and manufacture products for the aerospace and defense industry. (Id. ¶ 7.) Defendants' primary aerospace and defense customers include the Department of Defense ("DoD") and the National Aeronautics & Space Administration ("NASA"), who purchase defendants' products pursuant to government contracts. (See id.) Defendant AR is a wholly-owned subsidiary of ARH, and ARH uses AR to perform its contractual obligations. (Id. ¶ 8.)

Government contracts are subject to Federal Acquisition Regulations and are supplemented by agency specific regulations. On November 18, 2013, the DoD issued a final rule, which imposed requirements on defense contractors to safeguard unclassified controlled technical information from cybersecurity threats. 48 C.F.R. § 252.204-7012 (2013). The rule required defense contractors to implement specific controls covering many different areas of cybersecurity, though it did allow contractors to submit an explanation to federal officers explaining how the company had alternative methods for achieving adequate cybersecurity protection, or why standards were inapplicable. See id. In August 2015, the DoD issued an interim rule, modifying the government's cybersecurity requirements for contractor and subcontractor information systems. 48 C.F.R. §

252.204-7012 (Aug. 2015). The interim rule incorporated more cybersecurity controls and required that any alternative measures be "approved in writing prior by an authorized representative of the DoD [Chief Information Officer] prior to contract award." Id. at 252.204-7012(b)(1)(ii)(B). The DoD amended the interim rule in December 2015 to allow contractors until December 31, 2017 to have compliant or equally effective alternative controls in place. See 48 C.F.R. § 252.204-7012(b)(1)(ii)(A) (Dec. 2015). Each version of this regulation defines adequate security as "protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information." 48 C.F.R. § 252.204-7012(a).

Contractors awarded contracts from NASA must comply with relevant NASA acquisition regulations. 48 C.F.R. § 1852.204-76 lists the relevant security requirements where a contractor stores sensitive but unclassified information belonging to the federal government. Unlike the relevant DoD regulation, this NASA regulation makes no allowance for the contractor to use alternative controls or protective measures. A NASA contractor is required to "protect the confidentiality, integrity, and availability of NASA Electronic Information and IT resources and protect NASA Electronic Information from unauthorized disclosure." 48 C.F.R. § 1852.204-76(a).

Relator alleges that defendants fraudulently entered into contracts with the federal government despite knowing that they did not meet the minimum standards required to be awarded a government contract. (SAC ¶ 30.) He alleges that when he started working for defendants in 2014, he found that defendants'

computer systems failed to meet the minimum cybersecurity requirements to be awarded contracts funded by the DoD or NASA. (Id. ¶ 36.) He claims that defendants knew AR was not compliant with the relevant standards as early as 2014, when defendants engaged Emagined Security, Inc. to audit the company's compliance. (See id. at ¶¶ 43, 51-53.) Relator avers that defendants repeatedly misrepresented its compliance with these technical standards in communications with government officials. (Id. ¶ 59-64.) Relator alleges that the government awarded AR a contract based on these allegedly false and misleading statements.[1] (Id. ¶ 65.) In July 2015, relator refused to sign documents that defendants were now compliant with the cybersecurity requirements, contacted the company's ethics hotline, and filed an internal report. (Id. ¶¶ 81-82.) Defendants terminated relator's employment on September 14, 2015. (Id. ¶ 83.)

Relator filed his initial complaint in this action on October 29, 2015. (Docket No. 1.) While the government was still deciding whether to intervene in this action, relator filed his First Amended Complaint ("FAC") on September 13, 2017. (Docket No. 22.) On June 5, 2018, the United States filed a notice of election to decline intervention. (Docket No. 25.) A few months later defendants filed a motion to dismiss, stay proceedings, and compel arbitration as to the FAC. (Docket No. 39.) In response to this motion, relator filed the SAC, alleging

[1] In total, relator alleges that AR entered into at least six contracts with the DoD between February 2014 and April 2015 (id. ¶¶ 84-93) and at least nine contracts with NASA between March 2014 and April 2016 (id. ¶¶ 105-114).

the following causes of action against defendants: (1) promissory fraud in violation of 31 U.S.C. § 3729(a)(1)(A); (2) false or fraudulent statement or record in violation of 31 U.S.C. § 3729(a)(1)(B); (3) conspiracy to submit false claims in violation of 31 U.S.C. § 3729(a)(1)(C); (4) retaliation in violation of 31 U.S.C. § 3730(h); (5) misrepresentation in violation of California Labor Code § 970; and (6) wrongful termination. Defendants now move to dismiss the SAC, stay proceedings, and compel arbitration. (Docket No. 50.)

II. Motion to Dismiss

A. Legal Standard

On a Rule 12(b)(6) motion, the inquiry before the court is whether, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the plaintiff has stated a claim to relief that is plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" will not survive a motion to dismiss. Id. (internal quotation marks and citations omitted).

B. Fraud Claims under the FCA

Relator brings two claims for fraud under the FCA. These two claims impose liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim

for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," id. § 3729(a)(1)(B).

Outside of the context where "the claim for payment is itself literally false or fraudulent," the Ninth Circuit recognizes two different doctrines that attach FCA liability to allegedly false or fraudulent claims: (1) false certification and (2) promissory fraud, also known as fraud in the inducement. See United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1170-71 (9th Cir. 2006) (citation omitted). Under a false certification theory, the relator can allege either express false certification or implied false certification. The express false certification theory requires that the claimant plainly and directly certify its compliance with certain requirements that it has breached. See id. An implied false certification theory "can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2001 (2016). The promissory fraud approach is broader and "holds that liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." Hendow, 461

F.3d at 1173.

Under either false certification or promissory fraud, "the essential elements of [FCA] liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." Id. Only the sufficiency of the complaint as to the materiality requirement is at issue on this motion.[2]

Under the FCA, a falsehood is material if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Most recently in Escobar, the Supreme Court clarified that "[t]he materiality standard is demanding." 136 S. Ct. at 2003. Materiality looks to the effect on the behavior of the recipient of the alleged misrepresentation. Id. at 2002. A misrepresentation is not material simply because the government requires compliance with certain requirements as a condition of payment. Id. at 2003. Nor can a court find materiality where "the Government would have the option to decline to pay if it knew of the defendant's noncompliance." Id. Relatedly, mere "minor or insubstantial" noncompliance is not material. Id. Evidence relevant to the materiality inquiry includes the

[2] Defendants correctly observe that relator's FCA claims must not only be plausible but pled with particularity under Federal Rule of Civil Procedure 9(b). See Cafasso ex rel. United States v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55 (9th Cir. 2011). However, defendants reference Rule 9(b) only to the extent they argue that relator has failed to plead particular facts in support of materiality. (See Mot. to Dismiss at 2-3, 15 & 18.) Therefore, the court assumes, without deciding, that relator has otherwise satisfied the requirements of Rule 9(b).

government's conduct in similar circumstances and whether the government has knowledge of the alleged noncompliance. See id. Defendants puts forth four different arguments in support of their contention that relator has insufficiently pled facts as to the materiality requirement.

First, defendants argue that AR disclosed to its government customers that it was not compliant with relevant DoD and NASA regulations and therefore it is impossible for relator to satisfy the materiality prong. The Supreme Court did observe in Escobar that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." Id. Here, however, relator properly alleges with sufficient particularity that defendants did not fully disclose the extent of AR's noncompliance with relevant regulations. See id. at 2000 ("[H]alf-truths--representations that state the truth only so far as it goes, while omitting critical qualifying information--can be actionable misrepresentations."). For instance, relator alleges that AR misrepresented in its September 18, 2014 letter to the government the extent to which it had equipment required by the regulations (SAC ¶ 63), instituted required security controls (id. ¶¶ 60-61, 63), and possessed necessary firewalls (id. ¶ 62). Relator also alleges that these misrepresentations persisted over time, whereby AR knowingly and falsely certified compliance with security requirements when submitting invoices for its services.

(Id. ¶¶ 135-36.)[3] While it may be true that AR disclosed some of its noncompliance (see id. ¶¶ 59-64), a partial disclosure would not relieve defendants of liability where defendants failed to "disclose noncompliance with material statutory, regulatory, or contractual requirements." See Escobar, 136 S. Ct. at 2001.

In fact, some of the evidence defendants put forth in favor of their motion to dismiss provides support for relator's allegations relevant to materiality.[4] The DoD informed the federal contracting officer that it could not waive compliance with DoD regulations, even for an urgent contract. (SAC ¶¶ 67-68; Req. for Judicial Notice Ex. Z at 1-4.) While the contracting officer was not prohibited from awarding the contract because of AR's noncompliance, AR could not process, store, or transmit controlled technical information until it was fully compliant. (Req. for Judicial Notice Ex. Z at 1.) Still, the DoD representative believed it to "be a relatively simple matter for the contractor to become compliant" based on the disclosure letter AR sent to the contracting negotiator. (Id. at 1-2.) Yet, relator's complaint alleges possible material nondisclosures

[3] The court recognizes that "allegations of fraud based on information and belief usually do not satisfy the particularity requirements under rule 9(b)." Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989) (citation omitted). However, as explained elsewhere in this motion, there are other parts of the complaint that allege fraud with sufficient particularity for the purposes of Rule 9(b).

[4] Because relator's complaint references the documents contained in defendants' Exhibits Y & Z (Docket Nos. 52-25 & 52-26) in his complaint, the court considers these materials, without converting the motion to dismiss into a motion for summary judgment, under the doctrine of incorporation by reference. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

in this letter, such as AR's failure to report its status on all required controls, its alleged misstatements as to partial compliance with protection measures, and the fact that the company cherrypicked what data it chose to report. (See SAC ¶¶ 59-64.)[5] Accepting these allegations as true, the government may not have awarded these contracts if it knew the full extent of the company's noncompliance, because how close AR was to full compliance was a factor in the government's decision to enter into some contracts.[6]

Second, defendants contend that the government's response to the investigation into AR's representations

[5] Defendants argue for the first time in their reply that these alleged misstatements were not associated with a claim for payment and thus cannot support liability under the FCA. (See Reply in Supp. of Mot. to Dismiss ("Reply") at 4 (Docket No. 54).) Contrary to defendants' understanding, the FCA merely requires that the false statement(s) or fraudulent course of conduct cause the government to pay out money due. See Hendow, 461 F.3d at 1173. Under a promissory fraud theory, the relator only needs to allege that a claim was submitted "under a contract" that "was originally obtained through false statements or fraudulent conduct." See id.; see also United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 902 (9th Cir. 2017) (reaffirming Hendow's test for promissory fraud after Escobar). Here, relator alleges that AR secured its contracts with the government through misrepresentations made to government contracting agents and that the government ultimately paid out on these contracts. (See SAC ¶¶ 59-66, 129-131.)

[6] This promissory fraud theory, supported by these allegations of specific misrepresentations, distinguishes this case from United States ex rel. Mateski v. Raytheon Co., No. 2:06-CV-03614 ODW KSX, 2017 WL 3326452 (C.D. Cal. Aug. 3, 2017), aff'd, 745 F. App'x 49 (9th Cir. 2018). In Mateski, the relator merely alleged general violations of contract provisions that the government designated compliance with as mandatory to support a false certification theory. See id. at *7. Applying Escobar, the district court concluded that "such designations do not automatically make misrepresentations concerning those provisions material." Id. (citing 136 S. Ct. at 2003).

surrounding its cybersecurity compliance undermines relator's allegations as to materiality. Both the DoD and NASA have continued to contract with AR since the government's investigation into the allegations of this complaint. (See Req. for Judicial Notice Exs. S-V (Docket Nos. 52-19, 52-20, 52-21 & 52-22).)[7] Such evidence is not entirely dispositive on a motion to dismiss. Cf. Campie, 862 F.3d at 906 (cautioning courts not to read too much into "continued approval" by the government, albeit in a different context). Instead, the appropriate inquiry is whether AR's alleged misrepresentations were material at the time the government entered into or made payments on the relevant contracts. See Escobar, 136 S. Ct. at 2002. The contracts government agencies entered with AR after relator commenced this litigation are not at issue and possibly relate to a different set of factual circumstances. As discussed previously, relator has sufficiently alleged that AR's misrepresentations as to the extent of its noncompliance with government regulations could have affected the government's decision to enter into and pay on the contracts at issue in this case.

Defendants also argue that the government's decision

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[7] The court GRANTS defendants' request that it take judicial notice of these exhibits. Exhibits T through V are publications on government websites and thus properly subject to judicial notice. See, e.g., Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010) (finding that it is "appropriate to take judicial notice of [information on government website], as it was made publicly available by government entities [], and neither party disputes the authenticity of web sites or the accuracy of the information displayed therein."). Exhibit S is an official Authorization to Operate signed by NASA officials, so its "accuracy cannot reasonably be questioned." See Fed. R. Evid. 201(b)(2).

not to intervene in this case indicates that the alleged misrepresentations were not material. (See Mot. to Dismiss at 3; Reply at 9.) As the Sixth Circuit has observed, in Escobar itself, the government chose not to intervene and the Supreme Court did not mention it as a factor relevant to materiality. See United States ex rel. Prather v. Brookdale Senior Living Communities, Inc., 892 F.3d 822, 836 (6th Cir. 2018) (citing 136 S. Ct. at 1998). Separately, "[i]f relators' ability to plead sufficiently the element of materiality were stymied by the government's choice not to intervene, this would undermine the purposes of the Act," as the FCA allows relators to proceed even without government intervention. Id. (citation omitted). And finally, there is no reason believe that the decision not to intervene is a comment on the merits of this case. See, e.g., United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006) ("In any given case, the government may have a host of reasons for not pursuing a claim."); United States ex rel. Chandler v. Cook Cty., Ill., 277 F.3d 969, 974 n.5 (7th Cir. 2002) ("The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney.").

Third, defendants argue that AR's noncompliance does not go to the central purpose of any of the contracts, as the contracts pertain to missile defense and rocket engine technology, not cybersecurity. See Escobar, 136 S. Ct. at 2004 n.5 (noting that a misrepresentation is material where it goes to the "essence of the bargain"). This argument is unavailing at

this stage of the proceedings. Relator alleges that all of AR's relevant contracts with the DoD and NASA incorporated each entity's acquisition regulations. (See SAC ¶¶ 84, 105.) These acquisition regulations require that the defense contractor undertake cybersecurity specific measures before the contractor can handle certain technical information. Here, compliance with these cybersecurity requirements could have affected AR's ability to handle technical information pertaining to missile defense and rocket engine technology. (See Req. for Judicial Notice Ex. Z at 1.) Accordingly, misrepresentations as to compliance with these cybersecurity requirements could have influenced the extent to which AR could have performed the work specified by the contract.

Fourth and finally, defendants argue that the government's response to the defense industry's non-compliance with these regulations as a whole weighs against a finding of materiality. When evaluating materiality, courts should "consider how the [government] has treated similar violations." See United States ex rel. Rose v. Stephens Inst., 909 F.3d 1012, 1020 (9th Cir. 2018). Defendants contend that the DoD never expected full technical compliance because it constantly amended its acquisition regulations and promogulated guidances that attempted to ease the burdens on the industry. This observation is not dispositive. Even if the government never expected full technical compliance, relator properly pleads that the extent to which a company was technically complaint still mattered to the government's decision to enter into a contract. (See SAC ¶¶ 66-72.) Defendants have not put forth any judicially noticeable evidence that the government paid a company it knew was

noncompliant to the same extent as AR was. Therefore, this consideration does not weigh in favor of dismissal.

Accordingly, given the above considerations, relator has plausibly pled that defendants' alleged failure to fully disclose its noncompliance was material to the government's decision to enter into and pay on the relevant contracts.[8]

C. Conspiracy under the FCA

Relator's third count alleges that defendants participated in a conspiracy to submit false claims in violation of 31 U.S.C. § 3729(a)(1)(C). Relator maintains that defendants and their officers conspired together to defraud the United States by knowingly submitting false claims. (See SAC ¶ 144.) Section 3729(a)(1)(C) imposes liability on a person who conspires to commit a violation of Section 3729(a)(1)(A) or Section 3729(a)(1)(B).

Defendants argue that this count fails as a matter of law because relator has failed to identify two distinct entities that conspired. Derived from antitrust law, the intracorporate conspiracy doctrine "holds that a conspiracy requires an agreement among two or more persons or distinct business entities." United States v. Hughes Aircraft Co., 20 F.3d 974, 979 (9th Cir. 1994) (internal quotation marks omitted). The doctrine stems from the definition of a conspiracy and the requirement that there be a meeting of the minds. See Hoefer v. Fluor Daniel, Inc., 92 F. Supp. 2d 1055, 1057 (C.D. Cal. 2000) (citing Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983)). While

[8] The court expresses no opinion as to what relator will be able to establish at summary judgment or trial.

the Ninth Circuit has not addressed this issue, several district courts have applied the intracorporate conspiracy doctrine to FCA claims. See United States ex rel. Lupo v. Quality Assurance Servs., Inc., 242 F. Supp. 3d 1020, 1027 (S.D. Cal. 2017) (collecting cases). Courts have used this principle to bar conspiracy claims where the alleged conspirators are a parent corporation and its wholly-owned subsidiary. See, e.g., United States ex. rel. Campie v. Gilead Scis., Inc., No. C-11-0941 EMC, 2015 WL 106255, at *15 (N.D. Cal. Jan. 7, 2015).

Here, relator identifies only a parent company, ARH, and its wholly-owned subsidiary, AR, as defendants. (SAC ¶¶ 7-8.) While relator alleges that defendants also conspired with its officers, a corporation, as a matter of law, "cannot conspire with its own employees or agents." Hoefer, 92 F. Supp. 2d at 1057. By failing to allege that defendants conspired with any independent individual or entity, relator's conspiracy claim fails as a matter of law.

Accordingly, the court will dismiss relator's third claim, that defendants participated in a conspiracy to submit false claims in violation of 31 U.S.C. § 3729(a)(1)(C).

III. Motion to Compel Arbitration and Stay Proceedings

"Relator does not oppose defendants' motion to refer his employment related claims to arbitration" based on his arbitration agreement with defendants. (Opp'n to Mot. to Dismiss at 16 (Docket No. 53); see also Decl. of Ashley Neglia Ex. 1 (arbitration agreement) (Docket No. 51-1).) Relator does oppose, however, defendants' request that the entire proceedings be stayed pending the resolution of these employment related claims

in arbitration. Relator contends that a stay is inappropriate as to his FCA claims because they are brought on behalf of the government, are not referable to arbitration, and are separate from the issues involved in his employment-related claims. (See Opp'n to Mot. to Dismiss at 16-17.)

Section 3 of the FAA provides that a court "shall on application of one of the parties stay the trial" of "any suit proceeding" brought "upon any issue referable to arbitration under [an arbitration] agreement . . . until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. A party is only "entitled to a stay pursuant to section 3" as to arbitrable claims. Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979). As to nonarbitrable claims, which defendants concede the FCA claims are, this court has discretion whether to stay the litigation pending arbitration. Id. at 863-64. This court may decide whether "it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." Id. at 863. If there is a fair possibility that the stay may work damage to another party, a stay may be inappropriate. See Dependable Highway Exp., Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007) (citation omitted).

The court will not expand the stay to encompass the nonarbitrable FCA claims. The issues involved in the FCA claims differ from those involved in relator's employment-based claims. Relator's FCA claims concern fraud that defendants allegedly perpetrated on the government, while relator's employment-based

claims concern the alleged violation of his own rights during his employment. Resolution of relator's employment-based claims will not narrow the factual and legal issues underlying the FCA claims. While relator brings one of his employment claims under the FCA, "[t]he elements differ for a FCA violation claim and a FCA retaliation claim." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1103 (9th Cir. 2008). Moreover, a stay would unnecessarily work to delay resolution of relator's FCA claims, which have been pending for more than three years.

Accordingly, the court will refer relator's employment-based claims, Counts Four, Five, and Six, to arbitration and stay proceedings as to these claims only.[9]

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss Relator's Second Amended Complaint (Docket No. 50) be, and the same hereby is, GRANTED IN PART. Count Three of relator's Second Amended Complaint is DISMISSED WITH PREJUDICE. The motion is DENIED in all other respects.

IT IS FURTHER ORDERED that defendants' Motion to Compel Arbitration and Stay Proceedings (Docket No. 50) be, and the same hereby is, GRANTED with respect to Counts Four, Five, and Six of relator's Second Amended Complaint. Proceedings as to Counts One and Two are not stayed.

Dated: May 8, 2019

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[9] All remaining Requests for Judicial Notice (Docket No. 52) are DENIED as MOOT.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re GRAND JURY INVESTIGATION	Misc. Action No. 17-2336 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

This is a matter of national importance. The United States, through the Special Counsel's Office ("SCO"), is investigating foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens. The SCO has uncovered evidence that Target 1, who was associated with the campaign of one presidential candidate—now the President—and Target 2, who was Target 1's employee (collectively, "the Targets") at Target Company, may have concealed from the government the extent of their lobbying actions on behalf of a foreign government and foreign officials, in violation of federal criminal laws, by submitting two letters through their former counsel, the Witness, containing false and misleading information to the U.S. Department of Justice ("DOJ").[1] The SCO seeks to compel the Witness to testify before a grand jury regarding limited aspects of her legal representation of the Targets, which testimony the SCO believes will reveal whether the Targets intentionally misled DOJ about their work on behalf of a foreign government and foreign officials. The Witness has

[1] For the purposes of this opinion, "Target 1" refers to Paul J. Manafort, Jr., "Target 2" refers to Richard W. Gates, "Target Company" is DMP International, LLC, and "the Witness" is [redacted], an attorney at [redacted]. SCO's Motion to Compel ("SCO Mot.") at 1, ECF No. 1.

refused to testify unless directed by a court order, due to professional ethical obligations, because the Targets have invoked their attorney-client and work-product privileges. The SCO posits that the crime-fraud exception to both privileges applies and, alternatively, that the Targets have waived the attorney-client privilege to the extent of disclosures made in the submissions to DOJ, and that the work-product privilege is here overcome by a showing of adequate reasons to compel the Witness's testimony.

The attorney-client and work-product privileges play vital roles in the American legal system, by encouraging persons to consult freely and candidly with counsel, and counsel to advocate vigorously on their clients' behalves, without fear that doing so may expose a client to embarrassment or further legal jeopardy. The grand jury, however, is an essential bedrock of democracy, ensuring the peoples' direct and active participation in determining who must stand trial for criminal offenses. "Nowhere is the public's claim to each person's evidence stronger than in the context of a valid grand jury subpoena." *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982) (citing *Branzburg v. Hayes*, 408 U.S. 665, 688 & n.26 (1972)). When a person uses the attorney-client relationship to further a criminal scheme, the law is well established that a claim of attorney-client or work-product privilege must yield to the grand jury's investigatory needs.

Based on consideration of the factual proffers made by the SCO, as well as the arguments articulated by the SCO, the privilege holders and the Witness over multiple filings and three hearings held during the past two weeks, the Court finds that the SCO has made a sufficient *prima facie* showing that the crime-fraud exception to the attorney-client and work-product privileges applies. Additionally, the Targets have impliedly waived the attorney-client privilege concerning their communications with the Witness to the extent those communications formed

the basis of the disclosed text of the Witness's letters to DOJ. Finally, the SCO overcomes any work-product privilege by showing that the testimony sought from the Witness is necessary to uncover criminal conduct and cannot be obtained through other means. Thus, the SCO may compel the Witness to testify as to the specific matters delineated more fully below.

I. BACKGROUND

On May 17, 2017, Acting Attorney General Rod Rosenstein appointed Robert S. Mueller III to serve as Special Counsel for the United States Department of Justice.[2] U.S. Dep't of Justice, Order No. 3915-2017, *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters* (May 17, 2017), *available at* https://www.justice.gov/opa/press-release/file/967231/download. The Special Counsel was authorized to conduct an investigation into "(i) any links and/or coordination between the Russian government and individuals with the campaign of President Donald Trump; and (ii) any matters that arose or may arise directly from the investigation; and (iii) any other matters within the scope of 28 C.F.R. § 600.4(a)." *Id.*

As part of its investigation, the Special Counsel's Office ("SCO") is scrutinizing representations made by the Witness in two letters submitted in November 2016 and February 2017 respectively, on behalf of her clients, the Targets, to the Foreign Agent Registration Act's ("FARA") Registration Unit of DOJ's National Security Division. SCO's Motion to Compel (Sept. 19, 2017) ("SCO Mot.") at 1, ECF No. 1. The factual background pertinent to this matter is summarized first before turning to the relevant procedural history.

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[2] Deputy Attorney General Rod Rosenstein served as Acting Attorney General for the purposes of the Special Counsel appointment due to Attorney General Jeff Sessions' recusal "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States" in 2016. Press Release, U.S. Dep't of Justice, Attorney General Sessions Statement on Recusal (Mar. 2, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal.

A. Factual Background

1. The Targets' Work on Behalf of Ukraine's Party of Regions

On September 13, 2016, Heather H. Hunt, the Chief of the FARA Registration Unit, wrote separately to Target Company and Target 1, noting that "[n]umerous published sources raise questions" that Target Company and Target 1 may have engaged in activities on behalf of the European Centre for a Modern Ukraine ("ECFMU"), the Ukrainian government, the Ukrainian Party of Regions, or other foreign entities, thus requiring registration under FARA. *See* Target 1's Opp'n to SCO Mot. (Sept. 25, 2017) ("Target 1 Opp'n"), Ex. A, DOJ Requests to Target 1 (Sept. 13, 2016), ECF No. 9. Ms. Hunt requested that Target 1 and Target Company provide documents and information for review and, shortly thereafter, Target 1 retained the Witness as counsel for the purposes of responding to these requests. Target 1 Opp'n at 2.

2. The 2016 and 2017 FARA Submissions to DOJ

The SCO has advised that the information sought from the Witness focuses on two letters, dated November 23, 2016 and February 10, 2017, respectively, that the Witness sent to the FARA Registration Unit on behalf of her clients, Target Company, Target 1, and Target 2. SCO Mot. at 1. The November 23, 2016 letter explained that Target Company is a "single-member, wholly-owned, limited liability company . . . controlled by [Target 1]," that engaged in political consulting, for both foreign and domestic clients, and provided "strategic guidance on democratic election processes, campaign management, and electoral integrity." Target 2's Opp'n to SCO Mot. (Sept. 20, 2017) ("Target 2 Opp'n"), Ex. C, Letter from Witness to Heather H. Hunt, Chief, FARA Registration Unit, Nat'l Security Div., U.S. Dep't of Justice (Nov. 23, 2016) ("2016 FARA Submission") at 1, ECF No. 3. As to ECFMU, the submission stated that Target Company, Target 1, and Target 2 "did not have an agreement to provide services to the

ECFMU," and "[f]urthermore, my Clients were not counterparties to any service agreement(s) between [two government relations companies ("GR Company 1" and "GR Company 2")] and the ECFMU." *Id.* According to the submission, a "search ha[d] been conducted for correspondence containing additional information related to the matters described in" the FARA Registration Unit's inquiries, but "as a result of [Target Company's] Email Retention Policy, which does not retain communications beyond thirty days, the search . . . returned no responsive communications." *Id.*[3] A copy of that written policy was enclosed in the November 2016 letter. *Id.*

The Witness wrote a more fulsome explanation of her clients' work on behalf of the Party of Regions in the second FARA submission on February 10, 2017. According to that submission, Target Company, along with Target 1 and Target 2, were "engaged by the Party of Regions to provide strategic advice and services in connection with certain of the Party's Ukrainian and European-facing political activities." SCO Mot., Ex. A, Letter from Witness to Heather H. Hunt, Chief, FARA Registration Unit, Nat'l Security Div., U.S. Dep't of Justice (Feb. 10, 2017) ("2017 FARA Submission") at 1, ECF No. 1. The submission continued by describing the "scope of this work" as consisting "of two principal components: (1) [Target Company] provided assistance in managing the Party of Regions' party building activities and assisted in the development of its overall party strategy and political agenda, including election planning and implementation of the Party's political plan; and (2) [Target Company] provided

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[3] The Targets rely on Target Company's Email Retention Policy to advance an argument that, to the extent the Witness's letters to DOJ on their behalves materially omit or misstate facts, these failings occurred due to imperfect memory, unaided by contemporaneous emails which could have refreshed their recollection. *See* Nov. 23 Ltr. at 1–2 ("we are seeking to determine whether there are alternative sources of such information that would assist in ensuring that any responses are complete and accurate."). As discussed more fully, *infra*, this argument is belied by evidence gathered by the SCO.

counsel and advice on a number of policy areas that were relevant to the integration of Ukraine as a modern state into the European community." *Id.*

Despite this scope of work, the 2017 FARA Submission downplayed Target Company's U.S. activities for the Party of Regions. In particular, the 2017 FARA Submission stated that Target Company's "efforts on behalf of the Party of Regions and Opposition bloc did not include meetings or outreach within the U.S." *Id.* at 2. Further, the 2017 FARA Submission minimized any relationship between the Targets and the ECFMU, stating that "neither [Target Company] nor [Target 1 or Target 2] had any agreement with the ECFMU to provide services." *Id.* While Target Company provided the ECFMU "with a list of potential U.S.-based consultants," the 2017 FARA Submission states that ECFMU "contracted directly with" GR Company 1 and GR Company 2. *Id.* Further, the 2017 FARA Submission indicates that Target 2 "recall[ed]" interacting with ECFMU's consultants "regarding efforts in the Ukraine and Europe," but neither Target 1 nor Target 2 "recall[ed] meeting with or conducting outreach to U.S. government officials or U.S. media outlets on behalf of the ECFMU, nor do they recall being party to, arranging, or facilitating any such communications." *Id.* Instead, the 2017 FARA Submission explained that Target 1 and Target 2 recalled that any "such communications would have been facilitated and conducted by the ECFMU's U.S. consultants, as directed by the ECFMU, pursuant to the agreement reached between those parties (to which [Target Company] was not a party)." *Id.* at 2–3.

3. The Targets Register Under FARA

On June 27, 2017, the Witness made another submission to DOJ on behalf of her clients, the Targets, in response to "guidance and assistance offered by the FARA Registration Unit in this matter." Target 2 Opp'n, Ex. E, Letter from Witness to Heather H. Hunt, Chief, FARA

Registration Unit, Nat'l Security Div., U.S. Dep't of Justice (June 27, 2017) at 1, ECF No. 3. While stating that the "Clients' primary focus was directed at domestic Ukrainian political work, consistent with our discussions, we understand that the FARA Registration Unit has taken the position that certain of the activities conducted and/or contacts made by my Clients between 2012 and 2014 constituted registerable activity under FARA." *Id.* Accordingly, the submission states that the Targets "submitted the registration and supplemental statements with respect to their activities on behalf of the Party of Regions." *Id.*

4. The Grand Jury Subpoenas to the Witness

On August 18, 2017, a subpoena was issued, as part of the SCO's investigation, for the Witness's testimony before the grand jury. *See* Target 2 Opp'n at 2; Hr'g Tr. (Sept. 20, 2017) ("Sept. 20 Tr.") at 12:24–25, ECF No. 8. In the discussions that ensued, the Targets, through counsel, asserted to the Witness's counsel and the SCO "the protections of attorney-client privilege, attorney work product doctrine, the Rules of Professional Conduct," including "those addressing client-lawyer confidentiality and duty of loyalty." Target 2 Opp'n at 2.

The SCO responded to the objections raised by Target 2's counsel in a letter, dated September 11, 2017, outlining both the scope of the questions to be posed to the Witness and the bases for the government's position that the information sought by those questions is not shielded by the attorney-client privilege or the work product doctrine. Target 2 Opp'n, Ex. B, SCO Letter to Target 2 (Sept. 11, 2017) at 1, ECF No. 3. Further, the SCO argued that even if the communications at issue were initially protected, those privileges "would be overcome by the crime-fraud exception." *Id.*

With respect to the planned questions to the Witness before the grand jury, the SCO stated that the witness would be asked "narrow questions to confirm the source of the facts she

submitted to the government, including whether her clients gave her the information represented in the letter as coming from them and/or reviewed a draft of the letter for accuracy." *Id.*

With respect to the Targets' invocation of attorney-client privilege, the SCO set out several bases for why the Targets' communications with the Witness underlying the 2017 FARA Submission were not protected. First, the SCO expressed the view that the communications were not privileged to begin with because the submission "expressly and repeatedly attributed the information to her clients" and "[t]hat sourcing makes clear that the [submission was] intended to convey information from her clients," such that "the underlying communications were intended to be revealed to the government." *Id.* at 1–2. Second, "[e]ven if the privilege initially attached, the [Witness's] letter waived it" because the submission's contents did "more than simply present facts that were likely learned from clients; it attributes many of these facts to the 'recollections' and 'understandings' of named clients," "[a]nd because the letter did so to benefit the clients in their interactions with the FARA Unit, waiver would be implied based on objective considerations of fairness." *Id.* at 2. Third, the SCO dismissed the applicability of the work-product doctrine, stating that the doctrine did "not apply at all to the issue of whether [the Witness] showed her clients the [2017 FARA Submission] before submitting it to DOJ." *Id.* at 3. "Just as asking a lawyer whether she provided her client a document given to her by the government does not seek protected work product," the SCO continued, "neither does asking the lawyer whether she showed the client a document that the lawyer had drafted for submission to the government." *Id.* (internal citation omitted). Additionally, the SCO asserted that "[t]he same is true for the source of factual representations in the [2017 FARA Submission] about the recollections and understandings of named individual clients," because "[t]he work product doctrine does not shield 'factual confirmation concerning events the attorney personally

witnessed,' including 'as the receiver . . . of information.'" *Id.* (citing *In re Grand jury Proceedings*, 616 F.3d 1172, 1185 (10th Cir. 2010) and 8 Charles Alan Wright & Mary Kay Kane, *Federal Practice and Procedure* § 2023 (3d ed. 2017)). The SCO emphasized that it was not seeking the Witness's "witness interview notes or to probe which witnesses she believed." *Id.* at 4. Rather, the SCO was "just seeking to confirm that the source of the factual representations is what it purports to be: the clients' recollections." *Id.*

Finally, the SCO stated that the crime-fraud exception to attorney-client privilege applied to the testimony sought from the Witness since "[t]he information known to the government establishes a prima facie showing that [the Targets] violated federal law by making materially false statements and misleading omissions to the FARA Unit," including violations of 18 U.S.C. § 1001(a) (false statements to the federal government); 22 U.S.C. § 618(a)(2) (false or misleading statements and omissions "in any . . . document filed with or furnished to the Attorney General under" FARA), and 18 U.S.C. § 2(b) (willfully causing another to commit a criminal act). *Id.* at 5–6. In particular, the SCO pointed to specific text in the 2017 FARA Submission that contained either "false statements or misleading omissions," *id.*, bolstering this assertion with general information about the nature of the contradictory evidence gathered. In particular, the 2017 FARA Submission contained: (1) a statement that "misrepresented the relationship among [the Targets], the Ukrainian government, the European Centre for a Modern Ukraine (ECFMU), and two U.S. lobbying firms [('GR Company 1 and GR Company 2')]," *id.* at 6, as shown by "[d]ocumentary evidence and witness testimony [] that both [Target 1 and Target 2] played a materially different role than these representations describe and that they knew so at the time they conveyed their alleged recollections to counsel," *id.*; (2) a statement that neither Target 2 nor Target 1 "recall[ed] meeting with or conducting outreach to U.S.

government officials or U.S. media outlets on ECFMU, nor do they recall being party to, arranging, or facilitating any such communications," *id.* (quoting Feb. 10 Letter at 2), which was demonstrably contrary to "evidence establish[ing] that [Target 2], on his own and on behalf of [Target 1], engaged in weekly and at times daily calls and emails with [GR Company 1 and GR Company 2] to provide them directions as to specific lobbying steps that should be taken and to receive reports back as to the results of such lobbying," *id.*; (3) statements regarding the Targets' relationship with the GR Companies, which "convey[ed] to the FARA Unit that [Target 1] and [Target 2] had merely played matchmaker between the U.S. consultants ([GR Company 1 and GR Company 2]) and ECFMU," which was contrary to "evidence show[ing] that [Target 1 and Target 2] solicited [GR Company 2 and GR Company 1] to represent the Ukraine and directed their work," *id.* (citing *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,* 135 S. Ct. 1318, 1329 (2015) (an omission can make a statement misleading under securities laws)), and "the FARA violations were part of a sustained scheme to hide funds in violation of the applicable money laundering and tax statutes, among others," *id.*; and (4) the statement "represent[ing] that there were no documents to refresh recollections because of an alleged [Target Company] corporate policy on document retention," was not consistent with the government's "evidence to prove otherwise," *id.* at 6–7 (internal citation omitted).

B. Procedural History

In a letter, dated September 19, 2017, the Witness's counsel stated that the Witness was "committed to complying with the grand jury subpoena directed to her for testimony" but only to the extent such compliance was "within the bounds of her ethical obligations to her former clients, [Target 2 and Target 1]." Letter from Witness's Counsel to SCO (Sept. 19, 2017) at 1, Ex. B, SCO Mot., ECF No. 1. Relying on American Bar Association Formal Opinion #473,

counsel for the Witness stated that the Witness was "ethically bound not to disclose any attorney-client communications, even after receiving a grand jury subpoena, based on any reasonable grounds articulated by the client, absent a Court Order," and that, in this matter, her clients had directed the Witness "not to respond to those questions by invoking the privilege." *Id.*

That same day, the SCO moved to compel the Witness's testimony, relying on three theories. SCO Mot. at 1. First, the SCO asserts a so-called "conduit theory," under which the communications at issue are not covered by the attorney-client privilege because the clients provided information to the Witness with the expectation and understanding that the Witness would convey that information to the government. SCO Mot. at 2 (citing *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *United States v. Tellier*, 255 F.2d 441, 447 (2d Cir. 1958). Second, the SCO argues that even if attorney-client privilege attached, the FARA Submissions impliedly waived the privilege when information was voluntarily disclosed to the government, and that the work product privilege is overcome by a showing of substantial need. *Id.* at 2–3. Finally, the SCO asserts that the crime-fraud exception applies to the Targets' assertion of attorney-client privilege, because the communications at issue "were made with an 'intent' to 'further a crime, fraud or other misconduct.'" *Id.* at 3 (citing *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989)).

That same day, the Court held a hearing with counsel from the SCO and for the Witness. *See* Minute Entry (Sept. 19, 2017).[4] A second hearing was held on September 20, 2017 for the

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[4] At the September 19, 2017 hearing, the Witness's counsel asserted that the SCO had taken the position that the privilege holders lacked standing to move to quash a subpoena "unless and until a motion to compel is filed." Hr'g Tr. (Sept. 19, 2017) ("Sept. 19 Tr.") at 11:8–10. The SCO responded by making clear that the SCO had no objection to the privilege holders' counsel "being heard on behalf of their clients, given the fact that the privilege is theirs. The Special Counsel's office doesn't object to that." *Id.* at 14:15–19. Here, the Targets seek to assert their personal right to attorney-client and work-product privilege, and neither the SCO nor the Witness's counsel objected to the Targets' right to be heard. Accordingly, the Court concludes that the Targets have standing to assert their

purpose of hearing from Target 1 and Target 2, as the privilege holders, in opposition to the SCO's motion. At the second hearing, the SCO summarized the scope of questions to be posed to the Witness before the grand jury:

> The gist is, basically, we're trying to tie the statements in [the Witness's] letters, one in February of 2017, one in November of 2016 to her various clients. The letters are written on behalf of [Target Company, Target 1, and Target 2]. We're trying to understand who the source of those statements were. . . . [I]n some instances, statements are attributed to [Target 2] [him or herself]; but, certainly, we'd also want to ask if all the clients reviewed letters for the purposes of accuracy before it was submitted. So that's the gist.

Sept. 20 Tr. at 12:7–17. At the conclusion of this hearing, the government was directed to submit any written proffer supporting application of the crime-fraud exception to the attorney-client privilege as well as to address the scope of questions to be posed to the Witness. *Id.* at 29:18–25. Counsels for Target 1 and Target 2 were also given an opportunity to supplement their prior submissions. *Id.* at 30:4–5.

The Targets subsequently "engaged in discussions" with the SCO regarding the Witness's testimony. Target 2's Suppl. Opp'n to SCO Mot. (Sept. 25, 2017) ("Suppl. Target 2 Opp'n") at 1, ECF No. 7. While not conceding, as a matter of law, that the government is entitled to elicit from the Witness any information about her representation of the Targets, including (1) "the source of the representations in the November 23, 2016 and February 10, 2017 letters" to DOJ, or (2) whether the Witness's "clients saw the final letters before they were

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claim of privilege in this proceeding. *See, e.g.*, *United States v. Idema*, 118 F. App'x 740 (4th Cir. 2005) ("Ordinarily, a party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena."); *Langford v. Chrysler Motor Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975) ("In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness."); 9A Wright & Miller, Federal Practice & Procedure § 2459 (2017) ("Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought." (internal quotation marks omitted)).

sent to DOJ," the Targets informed SCO that, "in order to avoid further litigation regarding these issues," the Targets consented to the government asking the Witness those questions in connection with the two letters (*i.e.*, (1) "Who gave you *x* information?" and (2) "Did [Target 1 or Target 2] see the final letter before it was sent to the FARA unit?"). *Id.* According to Target 2's counsel, the SCO declined this offer.[5] *Id.*

On September 26, 2017, the SCO supplemented its *ex parte* proffer of evidence supporting application of the crime-fraud exception, and a third and final hearing was held, as requested by the counsel to the Targets. At this hearing, the SCO confirmed eight topics to be posed to the Witness about portions of the 2017 and 2016 FARA submissions that the SCO alleges are fraudulent or misleading:

1) "[W]ho are the sources of the specific factual representations in the November 2016 and the February 2017 letters that [the Witness] sent to the FARA Registration Unit at DOJ?" Hr'g Tr. (Sept. 26, 2017) ("Sept. 26 Tr.") at 23:8–11, ECF No. 13-1
2) "Who are the sources of [Target Company's] e-mail retention policy that was attached to the November 2016 letter to the FARA Registration unit at DOJ?" *Id.* at 23:13–16;
3) "Whether --or if, [Target 2], [Target 1] or anyone else within [Target Company] approved the [November 2016 or February 2017] letters before [the Witness] sent the two letters to the FARA Registration Unit at DOJ?" *Id.* at 23:7–23;
4) "For each of the sources that are identified in response to th[e] prior three questions, what did the source say "to [the Witness] about the specific statement in the letter?" *Id.* at 23:24–25, 24:1–3;[6]

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[5] The SCO explained the reason for declining to limit questions to those stipulated by the privilege holders, stating that "[t]here was, in our view, an effort to narrow the questions." Hr'g Tr. (Sept. 26, 2017) ("Sept. 26 Tr.") at 22:1-2, ECF No. 13-1. Further "unlike the privilege holders, we don't know what [the Witness] is going to say" and SCO "wanted to . . . have the latitude to be able to ask the right questions." *Id.* at 22:6-9. Moreover, although the SCO explained that generally "the same information" was sought under any of its theories, the SCO would likely have "more latitude if there was a ruling with respect to the crime fraud" exception, *id.* at 22:10-13, since the kinds of questions permissible to pose under the crime-fraud exception were "slightly broader" than under a waiver theory, *id.* at 22:15-18. In short, the SCO expressed its interest in being "prepared for any follow-ups based on what [the Witness] answers" to questions. *Id.* at 22:18-21.

[6] When the Court inquired as to whether the SCO intended to ask this fourth question, the SCO responded by saying that SCO was not "planning on asking about those specific communications from the client" but confirmed that they want to be "authorized to do that should [SCO] decide [to] want to pursue a follow up with that question." Sept. 26 Tr. at 24:4–14.

5) "When" and "how" the Witness received communications from her clients, including whether the conversations were by "phone, telephone, [or] e-mail[?]" *Id.* at 25:14–25, 26:1;
6) "[D]id anyone raise any questions or corrections with respect to the letter[?]" *Id.* at 26:13–15;
7) "[D]id [the Witness] memorialize [the conversations with her clients] in any way?" *Id.* at 26:15–16;
8) Whether [the Witness] "was careful with submitting these representations to the Department of Justice? And if that was her practice, to review the submissions with her clients before she did so[?]" *Id.* at 26:12–20.[7]

The arguments by the SCO, Witness and privilege holders were taken under advisement and the Court reserved decision.

II. ANALYSIS

The SCO is correct that a limited set of questions about the Witness's representation of Targets 1 and 2 and Target Company may be posed to the Witness in the grand jury because the attorney-client and work product privileges have been vitiated by operation of both the crime-fraud exception and implied waiver. Each of those exceptions are addressed *seriatim* below.

A. Crime-Fraud Exception

Following review of the legal principles governing the crime-fraud exception and the SCO's *ex parte* submission, analysis of this basis for compelling the testimony of the Witness before the grand jury is reviewed.

1. Overview of Crime-Fraud Exception

"The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law,'" aiming "to encourage full and frank

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[7] The SCO stated that it was not "presently" intending to ask the Witness for any of her notes, but assured the Court that "[w]ithout any additional application to the Court, we wouldn't ask [for] the notes from" the Witness. *See* Sept. 26 Tr. at 27:14–21. The SCO disclaimed any plan to ask what the Witness "thought about what her clients told her," "what advice she gave to her clients," or anything "about any of the clients' communications to [the Witness] about matters outside specific statements in the two letters[.]" *Id.* at 29:10–21.

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014).

The doctrine of the crime-fraud "[e]xception comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." *In re Sealed Case*, 676 F.2d at 807. "Attorney-client communications are not privileged if they 'are made in furtherance of a crime, fraud, or other misconduct.'" *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)). "To establish the exception . . . the court must consider whether the client 'made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act,' and establish that the client actually 'carried out the crime or fraud.'" *In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000) (quoting *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997)).

To satisfy its burden of proof as to the crime-fraud exception, the government may offer "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." *In re Grand Jury*, 475 F.3d at 1305 (internal quotation marks omitted). It "need not prove the existence of a crime or fraud beyond a reasonable doubt." *In re Sealed Case*, 754 F.2d at 399. "The determination that a prima facie showing has been made lies within the sound discretion of the district court," *id.* at 400, which must "independently explain what facts would support th[e] conclusion" that the crime-fraud exception applies. *Chevron Corp. v. Weinberg Grp.*, 682 F.3d 96, 97 (D.C. Cir. 2012). The D.C. Circuit has "approved the

use of '*in camera, ex parte* proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings.'" *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006) (quoting *In re Sealed Case No. 98–3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998)). "[*I*]*n camera, ex parte* submissions generally deprive one party to a proceeding of a full opportunity to be heard on an issue, and thus should only be used where a compelling interest exists." *In re Sealed Case No. 98-3077*, 151 F.3d at 1075 (internal citation and quotation marks omitted).

2. SCO's* Ex Parte *Proffer

The SCO intends to ask the Witness about five distinct portions of the 2017 FARA Submission, two of which portions are also reflected in the 2016 FARA Submission. *See* Hr'g Tr. (*ex parte*)(Sept. 26, 2017) at 15:1–14. In its two declarations, submitted *ex parte*, the SCO offers witness testimony and documentary evidence to show that these statements are false, contain half-truths, or are misleading by omission. The veracity of these five portions of the 2017 FARA Submission are assessed before turning to the applicability of the crime-fraud exception to the underlying communications that may have served as a basis for these five statements contained in the Witness's 2017 FARA Submission. The underlined portion of each set of statements indicates the text that the SCO believes is "either false or constitutes a half-truth." Gov't's Ex Parte Suppl. Decl. of Brock W. Domin, Special Agent, Federal Bureau of Investigation, in Supp. of Gov'ts Showing of Crime Fraud ("Gov't Ex Parte Suppl. Decl.") ¶ 6, ECF No. 12-1.

a) **"[Target Company's] efforts on behalf of the Party of Regions and Opposition Bloc did not include meetings or outreach within the U.S." 2017 FARA Subm'n at 2.**

[redacted] establish that the above statement is false, a half-truth, or at least misleading because evidence shows that Target 1 and Target 2 were intimately involved in significant outreach in the United States on behalf of the ECFMU, the Party of Regions and/or the Ukrainian government. [redacted]

[redacted]

b) **"[N]either [Target Company] nor [Target 1 or Target 2] had any agreement with the ECFMU to provide services." 2017 FARA Subm'n at 2.**

Although no evidence presented reflects any formal written contract between the Targets and ECFMU, Target 1 and Target 2 clearly had an informal agreement with ECFMU to direct the government relations and public affairs activities of GR Company 1 and GR Company 2, and also to fund these activities. [redacted]

> **c) "[Target Company] did provide the ECFMU, at the request of members of the Party of Regions, with a list of potential U.S.-based consultants—including [GR Company 2 and GR Company 1]—for the ECFMU's reference and further consideration. ECFMU then contracted directly with [GR Company 2] and [GR Company 1] to provide services within the United States for which these entities registered under the Lobbying Disclosure Act." 2017 FARA Subm'n at 2.**

As the SCO puts it, the phrasing in this portion of the 2017 FARA Submission suggests that the Targets "were little more than matchmakers" between ECFMU, GR Company 1, and GR Company 2, [redacted] when, in fact, both Target 1 and Target 2 played far more significant and continuing roles.[8] [redacted]

[8] The 2016 FARA Submission also portrays the Targets' involvement with ECFMU as limited, stating the following: "With respect to the [ECFMU], [Target Company] did not have an agreement to provide services to the ECFMU. Likewise, [Target 1 and Target 2] did not have an agreement to provide services to the ECFMU. Furthermore, my Clients were not counterparties to any service agreement(s) between [GR Company 2], [GR Company 1] and the ECFMU." 2016 FARA Subm'n at 1.

[redacted]

The 2017 FARA Submission attempts to paint the Targets as mere spectators in a game when they actually were integral players. Far from mere matchmakers, the Targets were significantly involved in U.S.-based advocacy efforts on behalf of ECFMU and the Ukrainian government.

> **d) "To [Target 2's] recollection, these efforts included providing policy briefings to the ECFMU and its consultants on key initiatives and political developments in Ukraine, including participation in and/or coordination of related conference calls and meetings. Although [Target 2] recalls interacting with ECFMU's consultants regarding efforts in the Ukraine and Europe, neither [Target 2] nor [Target 1] recall meeting with or conducting outreach to U.S. government officials or U.S. media outlets on behalf of the ECFMU, nor do they recall being party to arranging, or facilitating any such communications. Rather, it is the recollection and understanding of [Targets 1 and 2] that such communications would have been facilitated and conducted by the ECFMU's U.S. consultants, as directed by the ECFMU, pursuant to the agreement reached between those parties (to which [Target Company] was not a party)." 2017 FARA Subm'n 2–3.**

Based on the evidence already discussed, [redacted] evidence confirming the level of regular contact by the Targets with the GR Companies, the representation above that neither Target 1 nor Target 2 could recall "being party to, arranging, or facilitating any such communications" with U.S. government officials or U.S. media outlets, strains credulity. [redacted]

[redacted]

> e) **"With respect to other specific matters on which [Target 2] interfaced with the ECFMU and its consultants, . . . [Target Company's] Email Retention Policy does not retain communications beyond thirty days, and the information that would be contained in such correspondence is vital to refreshing recollections regarding these matters." 2017 FARA Subm'n at 3.** [9]

Both the 2016 and 2017 FARA Submissions refer to the Target Company's undated Email Retention Policy, which states that Target Company "does not retain communications beyond thirty days." 2016 FARA Subm'n at 1; 2017 FARA Subm'n at 3. [redacted]

[redacted]

[9] The 2016 FARA Submission included a similar claim. *See* 2016 FARA Subm'n ("[A] search has been conducted for correspondence containing additional information related to the matters described in your letters. However, as a result of DMP's Email Retention Policy, which does not retain communications beyond thirty days, the search has returned no responsive communications.").

[redacted]

3. *Conclusion*

Through its *ex parte* production of evidence, the SCO has clearly met its burden of making a *prima facie* showing that the crime-fraud exception applies by showing that the Targets were "engaged in or planning a criminal or fraudulent scheme when [they] sought the advice of counsel to further the scheme." *In re Grand Jury*, 475 F.3d at 1305 (quoting *In re Sealed Case*,

754 F.2d at 399); *see also In re Sealed Case*, 107 F.3d at 49 (same). This evidence establishes that Target 1 and Target 2 likely violated federal law by making, or conspiring to make, materially false statements and misleading omissions in their FARA Submissions, which may constitute violations of, *inter alia*, 22 U.S.C. § 618(a)(2) (false or misleading statements and omissions "in any . . . document filed with or furnished to the Attorney General" under FARA); 18 U.S.C. § 1001(a) (false statements to the executive branch); and 18 U.S.C. § 371 (conspiracy to commit any offense against the United States or to defraud the United States).[10]

"Communications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or other misconduct." *In re Sealed Case*, 754 F.2d at 399. Generally, the crime-fraud exception reaches communications or work product with a "relationship," *In re Sealed Case*, 676 F.2d at 814–15 (opinion of Wright, J.), to the crime or fraud. *See In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (requiring "some relationship between the communication at issue and the prima facie violation"). With respect to work product protection, the crime-fraud exception applies where "some valid relationship between the work product under subpoena and the prima facie violation" is present. *In re Sealed Case*, 676 F.2d at 814–15 (opinion of Wright, J.). The inquiry focuses on the "client's intent in consulting the lawyer or in using the materials the lawyer prepared." *In re Sealed Case*, 107 F.3d at 51. "The question is: Did the client consult the lawyer or use the material for the purpose of committing a crime or fraud." *Id.*

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[10] The list provided by the SCO of federal criminal statutes that would be violated by submission of false and fraudulent or misleading representations to DOJ's FARA unit in the course of its investigation whether a FARA registration was required, is not exhaustive. *See, e.g.*, 18 U.S.C. § 1519 (criminalizing knowing conduct that "conceals, covers up, falsifies, or makes a false entry in any record, document ...with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States").

Given the *prima facie* showing of crime, fraud, or misconduct with respect to the five areas of false or misleading statements in the 2017 FARA Submission, the Witness may be compelled to answer the following seven questions with respect to these statements:

1. Who were the sources for each of the specific factual representations alleged to be false or misleading in the submissions, dated November 23, 2016 and February 10, 2017, made by the Witness on behalf of her clients, Targets 1 and 2 and Target Company, to the Foreign Agent Registration Act's ("FARA") Registration Unit of the National Security Division of the U.S. Department of Justice?

2. Who were the sources of information regarding the Target Company's email retention policy that the Witness attached to the November 23, 2016 FARA Submission?

3. Did Target 1, Target 2, or anyone else within the Target Company, if anyone, approve the November 23, 2016 and February 10, 2017 FARA Submissions before the Witness sent each such submission to the FARA Registration Unit at the U.S. Department of Justice?

4. For each source of information identified in response to the prior three questions, what did that source tell the Witness about the specific factual representations alleged to be false or misleading in the November 23, 2016 and February 10, 2017 FARA Submissions?

5. When and how did the Witness receive communications from Target 1, Target 2, or anyone else within Target Company regarding the specific factual representations alleged to be false or misleading in the November 23, 2016 and February 10, 2017 FARA Submissions?

6. Did Target 1 or Target 2, or anyone else within Target Company, raise any questions or corrections with the Witness regarding the specific factual representations alleged to be false or misleading in the November 23, 2016 and February 10, 2017 FARA Submissions before the Witness sent those submissions to the FARA Registration Unit at the U.S. Department of Justice?

7. Was it the Witness's practice to review with her clients written submissions prior to sending such submissions to the FARA Registration Unit at the U.S. Department?

The first six questions call for answers regarding communications that have, at the very least, "some relationship" with the "prima facie violation" of law. *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *see also In re Sealed Case*, 676 F.2d at 814–15 (opinion of Wright, J.)

(explaining that for the crime-fraud exception to apply to the work-product doctrine, there must be "some valid relationship between the work product under subpoena and the prima facie violation").[11] The final question calls for general information—not specific to the Witness's representation of any particular client—that does not fall within the scope of any privilege.

B. Implied Waiver of the Attorney-Client Privilege

The SCO also contends that the Targets impliedly waived the attorney-client privilege as to the testimony sought from the Witness by disclosing the 2016 and 2017 FARA Submissions to DOJ. The waiver extends to the Targets' specific conversations with the Witness that were released in substance to DOJ in these FARA Submissions.

1. Implied Waiver Generally

The scope of the implied waiver comports with the D.C. Circuit's "adhere[nce] to a strict rule on waiver of [the attorney-client] privilege[,]" requiring a privilege-holder to "zealously protect the privileged materials" and "tak[e] all reasonable steps to prevent their disclosure." *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (quoting *In re Sealed Case*, 877 F.3d 976, 980 (D.C. Cir. 1989)). As such, "disclosure will waive the privilege." *In re Sealed Case*, 877 F.3d at 980. A client waives the privilege by disclosing privileged information's "substance . . . before an investigative body at the pretrial stage." *White*, 887 F.2d at 271; *see also In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (a client waives the privilege entirely as to all "material that has been disclosed to [a] federal agency"); *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (a client "destroy[s] the confidential status of . . . communications by permitting their disclosure to the SEC staff"). Waiver of the privilege

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[11] As discussed above, the SCO also seeks to also ask the Witness whether she "memorialized" any of her communications with the Targets. The propriety of asking this question is addressed *infra* Part II.C.

"extends to all other communications relating to the same subject matter." *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994); *see also Williams & Connolly v. SEC*, 662 F.3d 1240, 1244 (D.C. Cir. 2011) ("[One who] voluntarily discloses part of an attorney-client conversation . . . may have waived confidentiality—and thus the attorney client privilege—for the rest of that conversation *and* for any conversations related to the same subject matter."); *In re Sealed Case*, 877 F.2d at 980–81 ("[W]aiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter.'" (quoting *In re Sealed Case*, 676 F.2d at 809)).

2. Analysis

Upon sending the FARA Submissions to DOJ, the Targets waived, through voluntary disclosure, any attorney-client privilege in their contents.[12] *White*, 887 F.2d at 271; *In re Subpoenas Duces Tecum*, 738 F.2d at 1370; *Permian Corp.*, 665 F.2d at 1219. In fact, the FARA Submissions made specific factual representations to DOJ that are unlikely to have originated from sources other than the Targets, and, in large part, were explicitly attributed to one or both Targets' recollections.[13] *See* 2017 FARA Subm'n at 1–3; 2016 FARA Subm'n at 1–2. Additionally, the Targets impliedly waived the privilege as to their communications with the

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[12] The government also argues that the attorney-client privilege never attached to the communications with the Witness reflected in the FARA Submissions in the first place because the Targets intended to disclose the information to DOJ from the outset. SCO Mot. at 1–2; SCO Suppl. Mem. in Supp. of Mot. ("SCO Suppl. Mem.") at 4, ECF No. 11; *see In re Sealed Case*, 877 F.2d at 979 & n.4 ("[D]ata that [a client] intends to report [to the IRS] is never privileged in the first place" so long as it does not "reveal directly the attorney's confidential advice."); *(Under Seal)*, 748 F.2d at 875; *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984); *Naegele*, 468 F. Supp. 2d 165, 170 (D.D.C. 2007). This "conduit theory" need not be addressed, as the SCO's motion to compel is granted on alternative grounds.

[13] Target 1 argues that the SCO has not shown that the 2016 FARA Submission contained representations sourced to the Targets themselves rather than to publicly-available sources such as "media reports, or a corporate registry or similar database," Target 1 Opp'n at 5, but even a cursory review of this letter shows otherwise. The 2016 FARA Submission contained representations the Witness could not plausibly have gathered solely from publicly-available sources, such as that the Targets had no agreement to provide the ECFMU services or were counterparties to any service agreements between ECFMU and the GR Companies. *See* 2016 FARA Subm'n at 1. The Targets repeated these representations in the 2017 FARA Submission. *See* 2017 FARA Subm'n at 2.

Witness to the extent that these communications related to the FARA Submissions' contents. *Williams & Connolly*, 662 F.3d at 1244; *In re Sealed Case*, 29 F.3d at 719; *In re Sealed Case*, 877 F.2d at 980–81; *In re Sealed Case*, 676 F.2d at 809.

In re Sealed Case (1994) is instructive. There, the target, who was subject to a grand jury investigation of his financial transactions with a foreign government, disclosed to the government details about his conversations with a lawyer "in connection with" the transactions, thereby waiving the privilege as to the disclosed conversations. 29 F.3d at 716–17. The government "subpoenaed the [l]awyer to appear before the grand jury to testify and to produce any and all documents relating to and/or generated as a result of discussions and/or consultation with the" target, the target's business partner, "and/or any representative or agent of" a company the target had created to accept payments from the foreign government. *Id.* at 717 (alterations and internal quotation marks omitted). The D.C. Circuit determined that the target's waiver "extended to all conversations between the [l]awyer and him relating to the same subject matter, specifically including documents in the case files," as "the material sought has an obvious relationship to the subject matter of [the target's] admissions." *Id.* at 719–20 (internal quotation marks omitted). Here, the testimony sought from the Witness has a similarly "obvious relationship" to the subject matter of the disclosures to DOJ. *Id.*; *see also In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir. 1988) (holding that submission of a Position Paper by counsel on behalf of the client urging the U.S. Attorney not to indict waived the privilege as to "audit papers" and "witness statements" from which factual statements in the Position Paper "were derived"). For these reasons, the attorney-client privilege does not prevent the SCO from compelling the Witness's testimony about the limited subjects already disclosed in the 2016 and 2017 FARA Submissions.

C. The Work-Product Privilege

Even if the Targets impliedly waived the attorney-client privilege with respect to the communications as to which the SCO seeks to compel the Witness's testimony, the Targets are partially correct that the work-product privilege would still apply. *See* Target 1 Opp'n at 5; Target 2 Opp'n at 5–10. In the Targets' view, the work-product privilege operates to block SCO from compelling testimony from the Witness on all questions that the SCO seeks to pose. The SCO's proposed questions, however, with one exception, seek production only of fact work product, which may be compelled upon a showing of adequate reasons.

1. The Work-Product Privilege Generally

The work-product privilege protects "material 'obtained or prepared by an adversary's counsel' in the course of his legal duties, provided that the work was done 'with an eye toward litigation.'" *In re Sealed Case*, 676 F.2d at 809 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). This material includes the attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions," and "personal beliefs." *Hickman*, 329 U.S. at 511. The work-product privilege affords greater protection to "*opinion* work product, which reveals 'the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation,'" than to "*fact* work product, which does not." *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015) (quoting FED. R. CIV. P. 26(b)(3)(B)). Fact work product is discoverable "upon showing a substantial need for the materials and an undue hardship in acquiring the information any other way," *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997), a test we equate with a requirement "to show 'adequate reasons' why the work product should be subject to discovery," *Boehringer*, 778 F.3d at 153 (quoting *In re Sealed Case*, 676 F.2d at 809).

Opinion work product, in contrast, "is virtually undiscoverable."[14] *Vinson & Elkins*, 124 F.3d at 1307.

Where information "contains both opinion and fact work product, the court must examine whether the factual matter may be disclosed without revealing the attorney's opinions." *Boehringer*, 778 F.3d at 152. The D.C. Circuit has rejected "a virtually omnivorous view" of opinion work product, cautioning that "not every item which may reveal some inkling of a lawyer's mental impressions . . . is protected as opinion work product." *Id.* at 151–52 (quoting *In re Sealed Case*, 124 F.3d 230, 237 (D.C. Cir. 1997), *rev'd on other grounds sub nom. Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988)). Rather, information constitutes opinion work product only if it "reflects the attorney's focus in a meaningful way." *Id.* at 151. "[T]o convert [a] fact into opinion work product . . . . there must be some indication that the lawyer 'sharply focused or weeded the materials.'" *Id.* (quoting *In re Sealed Case*, 124 F.3d at 236).

2. Analysis

The Targets argue that the Witness's testimony sought by the SCO calls for production of opinion work product, and that the SCO has made no sufficient showing of necessity and burden to overcome the privilege regardless of whether fact or opinion work product is to be disclosed. In the Targets' view, the work-product privilege attached to the information sought by the eight questions the SCO proposes to pose to the Witness because those questions will elicit testimony as to her communications with the Targets, including "statements" made during and her "mental

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[14] The SCO acknowledges that opinion work product withstands even the force of the crime fraud exception to remain privileged unless the attorney knows of or participates in the crime or fraud. SCO Suppl. Mem. at 1 n.* (citing *In re Grand Jury Subpoena*, No. 16-4096, 2017 WL 3567824, at *3 (4th Cir. Aug. 18, 2017)). Here, the Witness was an unwitting participant in the crime alleged. *See* Sept. 26 Tr. at 20:13–23.

impressions" of them. *Hickman*, 329 U.S. at 511. With one exception, discussed below, the testimony the SCO seeks is fact work product only, not opinion work product, as the SCO's proposed inquiry would not require the Attorney do disclose her "personal beliefs," *id.*, "opinions," or information that "reflects [her] focus in a meaningful way." *Boehringer*, 778 F.3d at 151.

The Targets rely on a recent Fourth Circuit decision holding that the question "What did [the Witness] tell you?" sought opinion work product. *In re Grand Jury Subpoena*, No. 16-4096, 2017 WL 3567824, at *3 (4th Cir. Aug. 18, 2017). There, the government, after securing a criminal defendant's conviction, observed that an exhibit the defendant had introduced appeared to be a forgery. *Id.* at *1. The defendant's attorney gave the government a higher-quality copy of the exhibit, which confirmed that the exhibit was in fact forged. *Id.* The government sought to interview the attorney and her investigator, both of whom declined to be interviewed, and then issued grand jury subpoenas compelling their testimony. *Id.* The attorney and investigator invoked the work-product privilege and moved to quash. *Id.* The Fourth Circuit determined that the government could ask two questions—"(1) Who gave you the fraudulent documents?" and "(2) How did they give them to you, specifically?"—as these sought only fact work product, but that a third question—"(3) What did [a specific party under investigation] tell you?"—required production of opinion work product. *Id.* at *1, **3–4 (alterations in original). "To answer this question," the Fourth Circuit reasoned, would require lawyers "to disclose their recollections of witness statements and reveal what they deemed sufficiently important to remember from those discussions." *Id.* at *3. This information "contain[s] the fruit of the attorney's mental processes," the Fourth Circuit held, and thus "falls squarely within the category of . . . opinion work product." *Id.* (alterations and internal quotation marks omitted). In making this

determination, the Fourth Circuit relied on *Hickman*, where the Supreme Court had deemed improper under the work-product privilege a "functionally equivalent . . . interrogatory . . . which asked the attorney to 'set forth in detail the exact provisions of any such oral statements or reports [from witnesses].'" *Id.* (quoting *Hickman*, 329 U.S. at 499).

Judge Niemeyer, dissenting, described the panel's assumption "regarding the nature of memory" as "shaky," noting the myriad factors at play in why an attorney might recall a conversation with a client, including "[p]erhaps the attorney remembers what the Witness told her about the document because she found it significant to her client's defense . . . . [or] because the Witness made a joke or was wearing an interesting shirt or used a strange turn of phrase[;] [o]r maybe the attorney simply has a good memory and is able to relate accurately what was told to her." *Id.* at *7 (Niemeyer, J., concurring in part and dissenting in part). Whatever the reason, "[t]he grand jury will never know," even though "[t]here thus remains an important difference between an attorney's present memory of a witness's statement and her contemporaneous notes and memoranda of a witness's statement, which are written specifically *to document the portions* of the statement that she considered relevant to her client's case—*i.e.*, what she 'saw fit to write down.' Only the latter provides a window into the attorney's thought process." *Id.*

Judge Neimeyer's analysis both is more persuasive and better comports with D.C. Circuit work-product privilege jurisprudence, which rejects "a virtually omnivorous view" of opinion work product, *Boehringer*, 778 F.3d at 152 (quoting *In re Sealed Case*, 124 F.3d at 237), than that of the majority of the Fourth Circuit panel. The Fourth Circuit panel majority appears to conflate as the same question asking "What did the client tell you?" and "What of importance did the client tell you?" These are different questions, and only the latter implicates opinion work product.

Boehringer is on point. The D.C. Circuit held there that documentary materials "contain[ing] only factual information . . . . produced by non-lawyers . . . d[id] not reveal any insight into counsel's legal impressions or their views of the case" and thus was not opinion work product, even though the information was "requested or selected by counsel." 778 F.3d at 152. Here, the SCO seeks to compel the Witness to testify only as to "factual information"—that the Witness may have selected which of the Targets' disclosures to include in or omit from the FARA Submissions does not bring the proposed testimony within the scope of opinion work product protection. *Id.*

In any event, *Hickman* is inapposite, as the Supreme Court did not characterize the information sought as opinion work product—indeed, no such distinction between fact and opinion work product was then recognized, as that doctrinal development occurred later. *See generally Hickman*, 329 U.S. 495; *see also In re Grand Jury Subpoena*, No. 16-4096, 2017 WL 3567824, at *6 (Niemeyer, J., concurring in part and dissenting in part) ("In the years since *Hickman*, courts have distinguished between 'opinion work product' and 'fact work product' when assessing the nature of the showing necessary to justify production of attorney work product."). *Hickman*, if anything, suggested that the material sought to be produced more properly was characterized as fact than opinion work product by determining that the petitioner had not made the requisite showing of necessity and undue hardship for discovery of fact work product, but which showing is more or less irrelevant to discovery of opinion work product. *Hickman*, 329 U.S. at 508–09; *see also Vinson & Elkins*, 124 F.3d at 1307.

Thus, the first six questions amount, if anything, to only fact work product. They each seek only factual information—testimony as to the Witness's mere "present memory of a [client's] statement," *id.*—and thus do not require the Witness to reveal her "mental processes,"

id. at *3. The mere fact that the Witness can recall things the Targets told her provides, by itself, no "indication that [she] 'sharply focused or weeded the materials.'" *Boehringer*, 778 F.3d at 152 (quoting *In re Sealed Case*, 124 F.3d at 236). At most, it reveals "some inkling of [the Witness's] mental impressions," which itself is not "protected as opinion work product." *Id.* at 151 (quoting *San Juan*, 859 F.2d at 1015); *see also id.* at 152 ("[T]he mere fact that an attorney had chosen to write a fact down [i]s not sufficient to convert that fact into opinion work product."). The eighth question does not seek work product at all, for reasons discussed *supra* Part II.A.6.

Without additional foundation, however, the SCO's proposed seventh question—whether the Witness "memorialize[d]" her conversations with the Targets regarding the FARA Submissions, Sept. 26 Tr. at 26:15–16—seeks opinion work product. While the mere fact that an attorney can recall something her client told her does not necessarily "reveal what [she] deemed sufficiently important to remember from those discussions," *In re Grand Jury Subpoena*, No. 16-4096, 2017 WL 3567824, at *3, as Judge Nieyemer ably explained, the fact that an attorney memorialized, in writing or another form, particular client communications reveals her "thought processes," *id.* at *7 (Niemeyer, J., concurring in part and dissenting in part), by showing her "focus in a meaningful way," *Boehringer*, 778 F.3d at 151, particularly if the attorney only recorded a client's communication that she considered significant in some way. In that circumstance, an attorney's "contemporaneous notes and memoranda of a [client's] statement . . . provides a window into [her] thought process" precisely because they show "that she considered" the statement "relevant to her client's case" and "saw fit to write [them] down." *In re Grand Jury Subpoena*, No. 16-4096, 2017 WL 3567824, at *7 (Nieyemer, concurring in part and dissenting in part) (internal quotation marks omitted).

Thus, with the exception of the seventh question, the SCO seeks to compel production of fact work product only, and thus must show "a substantial need for the materials and an undue hardship in acquiring the information any other way." *Vinson & Elkins*, 124 F.3d at 1307. This, in turn, requires a showing only that "adequate reasons" exist to compel the Witness's testimony. *Boehringer*, 778 F.3d at 153 (quoting *In re Sealed Case*, 676 F.2d at 809). The SCO has satisfied this burden here by showing that any protected material is relevant to establishing criminal activity, as already explained *supra* Part II.A, and that the only other persons who plausibly could describe the Witness's communications with the Targets are the Targets themselves, who likely would be unwilling to testify before the grand jury, for obvious reasons.

Target 2 disputes whether the SCO can demonstrate substantial need for the Witness's testimony, asserting that the SCO already has the FARA Submissions, which purported to be written on the Targets' behalves, as well as evidence of inconsistencies between the FARA Submissions' representations and the Targets' behavior, *see* Gov't Ex Parte Decl.; Gov't Ex Parte Suppl. Decl., and thus that the SCO seeks merely "corroborative evidence." Suppl. Target 2 Opp'n at 7–8. The Court disagrees. The Witness's testimony would not be merely corroborative because the SCO does not possess direct evidence that the Targets knew of or approved the FARA Submissions' contents before the Witness disclosed them to DOJ, nor can the SCO plausibly obtain such evidence from sources other than the Witness or the Targets themselves. For these reasons, the work-product privilege does not prevent the SCO from compelling the Witness's testimony.

* * *

To summarize, the SCO may pose to the Witness the first six and eighth proposed questions. The first six questions seek testimony that (1) falls within the scope of the crime-

fraud exception, (2) is unprotected by the attorney-client privilege, which the Targets have impliedly waived as to the information targeted by those questions, and (3) constitutes fact work product, which the SCO overcomes by showing adequate reasons. The eighth question seeks testimony that neither the attorney-client nor work-product privileges shield from disclosure at all. The seventh question seeks opinion work product, and the SCO has not made the extraordinary showing necessary to justify posing it, nor shown (or even alleged, see SCO Suppl. Mem. at 1 n.*) that the Witness knew of or participated in the Targets' crimes, a precondition to compelling production of opinion work product under the crime-fraud exception.

III. CONCLUSION

The SCO's motion to compel the Witness's testimony is granted. The SCO may compel the Witness to answer seven of the eight questions enumerated at the September 26, 2017 hearing. The SCO is directed, by October 3, 2017, to review this Memorandum Opinion and propose to the Court any redactions that should be made prior to making the opinion available under seal to the Witness and privilege holders. The order will be stayed until October 4, 2017, on which date, if not earlier, the Witness and privilege holders will be provided a copy of this Memorandum Opinion, with any necessary redactions, under seal. The Witness or the privilege-holders may seek a further stay of this Order pending any appeal.

An appropriate Order, which is filed under seal, accompanies this Memorandum Opinion.

Date: October 2, 2017

Beryl A. Howell

BERYL A. HOWELL
Chief Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1241

In re: FLUOR INTERCONTINENTAL, INC., a California corporation; FLUOR FEDERAL GLOBAL PROJECTS, INC.; FLUOR FEDERAL SERVICES, LLC,

Petitioners.

On Petition for Writ of Mandamus. (1:19-cv-00289-LO-TCB)

Submitted: March 2, 2020 Decided: March 25, 2020

Before DIAZ, THACKER, and RUSHING, Circuit Judges.

Petition granted by unpublished per curiam opinion.

Mark C. Moore, Jennifer S. Cluverius, NEXSEN PRUET, LLC, Greenville, South Carolina; John P. Elwood, Craig D. Margolis, Tirzah S. Lollar, Christian D. Sheehan, Samuel M. Shapiro, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., for Petitioners. Eric N. Heyer, Thomas O. Mason, THOMPSON HINE LLP, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

On March 13, 2020, we granted a petition by Fluor Intercontinental, Inc., Fluor Federal Global Projects, Inc., and Fluor Federal Services, LLC (collectively "Fluor") for a writ of mandamus. We directed the district court to vacate portions of three orders that required Fluor to produce information over which the district court concluded Fluor had waived attorney-client privilege. We set out our reasons here.

I.

In 2017, Fluor, a government contractor, began an internal investigation of an alleged conflict of interest involving an employee, Steven Anderson, and a company (Relyant Global, LLC) to which Fluor planned to award a contract. Fluor's legal department supervised the investigation, providing advice about Fluor's potential legal exposure and the need to report any wrongdoing to the government. Following its investigation, Fluor terminated Anderson. It also sent a summary of its findings to the government pursuant to 48 C.F.R. § 52.203-13(b)(3)(i), which provides that "[t]he Contractor shall timely disclose, in writing, to the agency Office of the Inspector General . . . whenever . . . the Contractor has credible evidence" that an employee has violated certain federal criminal laws, including the False Claims Act.[1]

[1] In addition to the disclosure requirement, this regulatory regime, called the "Contractor Code of Business Ethics and Conduct," requires government contractors to have a written code of business ethics and conduct, exercise due diligence to prevent and detect criminal conduct, and establish an ongoing business ethics awareness and compliance program as well as an internal control system. *Id.* § 52.203-13(b)–(c). The

The summary of Fluor's findings includes the following statements: (1) "Anderson had a financial interest in and appears to have inappropriately assisted [a] Fluor supplier and potential subcontractor"; (2) "Fluor considers this a violation of its conflict of interest policy and Code of Business Conduct and Ethics"; (3) "Anderson used his position as the [Afghanistan] project manager to pursue Relyant concrete contracts with the German military, and Mr. Anderson used his position as the [Afghanistan] project manager to obtain and improperly disclose nonpublic information to Relyant"; and (4) "Fluor estimates there may have been a financial impact to the Government because Mr. Anderson's labor was charged to the contract task order while he engaged in improper conduct." Pet. Writ of Mandamus 13.

Anderson filed suit against Fluor, asserting claims of, among other things, wrongful termination, defamation, and negligence stemming from Fluor's internal investigation and disclosure to the government. In discovery, Anderson sought copies of Fluor's files regarding the internal investigation. Fluor objected, arguing that the files were protected by attorney-client privilege and the work-product doctrine. Anderson moved to compel production, but a magistrate judge denied the motion, agreeing with Fluor that the files were protected from disclosure.

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internal control system must provide for, among other things, "[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions." *Id.* § 52.203-13(c)(2)(ii)(G). The disclosure requirement is meant to "emphasize the critical importance of integrity in contracting." Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064-02, 67071 (Nov. 12, 2008).

On November 8, 2019, the district court overruled (in part) the magistrate judge's order. As relevant here, the court concluded that the four statements described above in Fluor's disclosure to the government revealed "legal conclusions which characterize [Anderson's] conduct in a way that reveals attorney-client communications," Pet. Writ of Mandamus Ex. D, at 10, and thus that Fluor had waived attorney-client privilege as to those statements, other communications on the same subject matter, and the details underlying them, including fact work product. The district court also concluded that Fluor's description of the disclosure as "voluntary" in its answer and counterclaim was a binding judicial admission. And it asserted that 48 C.F.R. § 52.203-13(b)(3)(i) requires only "a mere notice disclosing the fact that the contractor has credible evidence," so Fluor's disclosure of information beyond that fact was voluntary. Pet. Writ of Mandamus Ex. D, at 12 n.1. Fluor moved for reconsideration of the district court's ruling, but the court denied the motion on December 20, 2019.

The magistrate judge then ordered Fluor to produce the relevant internal investigation files. But based on Fluor's representation that it would promptly seek appellate review, the magistrate judge stayed the production order. On February 26, 2020, the district court overruled the magistrate judge's order staying production and ordered Fluor to produce the relevant materials within seven days.

Fluor then sought mandamus relief in our court.

II.

"Mandamus is a 'drastic' remedy that must be reserved for 'extraordinary situations[.]'" *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 52 (4th Cir. 2016) (quoting *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976)). We provide mandamus relief "only when (1) petitioner 'ha[s] no other adequate means to attain the relief [it] desires'; (2) petitioner has shown a 'clear and indisputable' right to the requested relief; and (3) the court deems the writ 'appropriate under the circumstances.'" *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)). As we explain, we conclude that Fluor has satisfied these exacting standards.

A.

We consider first whether Fluor has other adequate means to attain the relief it seeks. Anderson argues that Fluor has available to it three such means—(1) disobey the district court's order, be found in contempt, and appeal the contempt order; (2) seek certification of an interlocutory appeal under 28 U.S.C. § 1292(b); and (3) appeal after final judgment.

But under the circumstances of this case, we cannot agree that these means are adequate. As to appealing from a contempt order, we have previously held that "such an appellate remedy is hardly 'adequate.'" *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (noting that "forcing a party to go into contempt is not an 'adequate' means of relief"). As we have explained, a civil contempt sanction is not immediately appealable as an interlocutory order. *United States v. Myers*, 593 F.3d 338, 344 (4th Cir. 2010). And while

"a party to an action may immediately appeal an order of *criminal* contempt," Fluor couldn't have known in advance "whether the [d]istrict [c]ourt would punish its disobedience with an appealable criminal sanction or an 'onerously coercive civil contempt sanction with no means of review until the perhaps far distant day of final judgment.'" *See In re The City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (quoting 15B Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, *Federal Practice and Procedure* § 3914.23, at 146 (2d ed. 1992)).

As to seeking certification of an interlocutory appeal under § 1292(b), we agree with Fluor that this means of relief is inadequate in light of the district court's suggestion that such an effort would be futile. When considering the magistrate judge's order staying production, the district court evaluated Fluor's likelihood of success on appeal. In doing so, it noted that, despite Fluor's "significant briefing and argument," Fluor "ha[d] not gone so far as to identify specific grounds which will satisfy the preconditions for [interlocutory appeal]." Pet. Writ of Mandamus Ex. K, at 8.

Nor are we satisfied that appealing after a final judgment is an adequate means of relief here. True, in *Mohawk Industries, Inc. v. Carpenter*, the Supreme Court concluded that post-judgment appeals are generally adequate means of relief from disclosure orders adverse to attorney-client privilege. 558 U.S. 100, 109 (2009). But it also noted that in "extraordinary circumstances," such as "when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice," a party may still "petition the court of appeals for a writ of mandamus." *Id.* at 111 (quoting *Cheney*, 542 U.S. at 390).

We conclude that such circumstances are present in this case. First, for the reasons discussed below, the district court's ruling that Fluor's disclosure waived attorney-client privilege is clearly and indisputably incorrect. Second, the ruling implicates "the important legal principles that protect attorney-client relationships," which we recently "elucidate[d]" in *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 172–74 (4th Cir. 2019). Third, requiring Fluor to produce privileged materials is particularly injurious here, where Fluor acted pursuant to a regulatory scheme mandating disclosure of potential wrongdoing. Government contractors should not fear waiving attorney-client privilege in these circumstances. We think that together, these circumstances work a manifest injustice.

For these reasons, we conclude that Fluor has no other adequate means to attain the relief it desires.

B.

We consider next whether Fluor has shown a clear and indisputable right to relief. Fluor contends that it has done so as to three erroneous conclusions by the district court: (1) that Fluor's disclosure revealed attorney-client communications and thus waived attorney-client privilege, (2) that Fluor's disclosure was voluntary under 48 C.F.R. § 52.203-13, and (3) that Fluor's description of the disclosure as "voluntary" in its answer and counterclaim was a binding judicial admission. We agree that the district court clearly and indisputably erred as to the first conclusion, and so find it unnecessary to address the others.

The district court overruled the magistrate judge's denial of Anderson's motion to compel production of the internal investigation files because it concluded that the four

statements described above in Fluor's disclosure to the government waived attorney-client privilege. It focused on the following portions of the statements: "(i) Plaintiff 'appears to have inappropriately assisted . . .'; (ii) 'Fluor considers [that] a violation . . .'; (iii) Plaintiff 'used his position . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information . . .'; and (iv) 'Fluor estimates there may have been a financial impact . . . [due to] improper conduct.'" Pet. Writ of Mandamus Ex. D, at 9–10.

According to the district court, because these four statements are "conclusions which only a lawyer is qualified to make," *id.* at 10 (quoting *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997)), they revealed attorney-client communications and thereby waived attorney-client privilege. Respectfully, the district court's conclusion was clearly and indisputably incorrect.

To find waiver, a court must find that there has been "disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Fed. R. Evid. 502. But we will not infer a waiver merely because a party's disclosure covers "the same topic" as that on which it had sought legal advice. *Sky Angel U.S., LLC v. Discovery Commc'ns, LLC*, 885 F.3d 271, 276 (4th Cir. 2018); *see also United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) ("[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney.' In order to waive the privilege, the client must disclose the communication with the attorney itself." (internal citation omitted)).

Relatedly, in determining whether there has been disclosure of a communication covered by the attorney-client privilege, we distinguish between disclosures based on the

advice of an attorney, on the one hand, and the underlying attorney-client communication itself, on the other. *See In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir. 2003). In *In re Grand Jury Subpoena*, we considered whether the appellant waived attorney-client privilege by answering "no" to a question on a publicly filed document based on the advice of his attorney, and whether the appellant waived privilege by telling FBI agents that he answered "no" to the question "under the advice of an attorney." *Id.* at 334, 336.

We concluded that the appellant's statement—based on the advice of his attorney—on a publicly filed document did not waive privilege. *Id.* at 336. We explained that "[t]he underlying *communications* between Counsel and Appellant regarding his submission of [the publicly filed document] are privileged, regardless of the fact that those communications may have assisted him in answering questions in a public document." *Id.* Put differently, "Appellant filled out and submitted [the publicly filed document] himself; that he may have answered a question in a particular way on the advice of his attorney does not subject the underlying attorney-client communications to disclosure." *Id.* Ruling otherwise, we noted, "would lead to the untenable result that any attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—would be unprotected." *Id.*

But, as to the appellant's statements to the FBI agents, we concluded that he waived attorney-client privilege because he "clearly stated to a third party that his attorney had advised him to answer 'no'" to the relevant question, thereby disclosing the content of the underlying attorney-client communication itself. *Id.* at 337.

These principles reveal the clear and indisputable error in the district court's assertion that Fluor's disclosure contained "legal conclusions as to past events, as well as recommendations for future conduct, [] conclusions which only a lawyer is qualified to make." Pet. Writ of Mandamus Ex. D, at 10 (quoting *In re Allen*, 106 F.3d at 605). Setting aside whether Fluor's statements were in fact legal conclusions that only a lawyer could make, that is not the test for whether waiver of attorney-client privilege has occurred.[2] Instead, to find waiver, a court must conclude that there has been disclosure of *protected communications*.

As applied here, the fact that Fluor's disclosure covered the same topic as the internal investigation or that it was made pursuant to the advice of counsel doesn't mean that privileged communications themselves were disclosed. The district court clearly and indisputably erred in finding otherwise.

We also disagree with the district court's conclusion that this case is similar to *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). On the contrary, that case highlights the problem with the district court's determination that Fluor disclosed privileged communications. There, we concluded that the appellant waived privilege over protected internal audit interviews because its disclosure to the government quoted from the interviews, and it waived privilege over protected internal notes and memoranda on the

[2] As Fluor correctly notes, *In re Allen* has nothing to do with waiver. There, we held simply that because documents prepared by a lawyer contained legal conclusions that only an attorney was qualified to make, the documents were prepared in the attorney's capacity as an attorney rather than as a lay investigator. 106 F.3d at 605.

interviews because the disclosure "summariz[ed] in substance and format the interview results." *Id.* at 626 n.2. For example, the disclosure stated that "'of those consulted within the Company all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud,' and 'there is no evidence, testimonial or documentary, that any company officials in the meeting [of November 17, 1983] except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its [] contract.'" *Id.* at 623. By directly quoting and summarizing what employees had said to counsel in the interviews, the appellant in *In re Martin Marietta Corp.* revealed privileged communications.

But here, there is no evidence to suggest that the four statements in Fluor's disclosure quoted privileged communications or summarized them in substance and format. Rather, the statements do no more than describe Fluor's general conclusions about the propriety of Anderson's conduct. We are unwilling to infer a waiver of privilege on these facts. The most that can be inferred from this record is that Fluor's statements were based on the advice of its counsel. Because that is clearly and indisputably insufficient to show waiver, Fluor has shown a clear and indisputable right to relief.

C.

Lastly, we are satisfied that a writ is appropriate under the circumstances. In addition to being manifestly incorrect, the district court's decision has potentially far-reaching consequences for companies subject to 48 C.F.R. § 52.201-13 and other similar disclosure requirements. We struggle to envision how any company could disclose credible evidence of unlawful activity without also disclosing its conclusion, often based

on the advice of its counsel, that such activity has occurred. More likely, companies would err on the side of making vague or incomplete disclosures, a result patently at odds with the policy objectives of the regulatory disclosure regime at issue in this case.

The district court's decision also introduces uncertainty and irregularity into waiver determinations. Whether a conclusion is one that only an attorney could make is a subjective determination that will likely depend on the particular legal question at issue. The Supreme Court has stated that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). We agree, and therefore find it necessary to issue the writ here.

***

For the reasons given, we grant Fluor's petition for a writ of mandamus on the terms set out in our March 13 order.

PETITION GRANTED

THE ESTATE OF MALCOLM J. BRYANT, Plaintiff,
v.
BALTIMORE POLICE DEPARTMENT, et al., Defendants

Case No.: ELH-19-384

United States District Court, D. Maryland
October 29, 2020

Boardman, Deborah L., United States Magistrate Judge

MEMORANDUM OPINION AND ORDER

The parties to this civil rights lawsuit jointly moved to compel the Baltimore City State's Attorney's Office ("SAO"), a nonparty, to produce documents responsive to a Rule 45 subpoena. ECF 106.[1] The SAO withheld the documents on work product grounds. The SAO filed a response to the motion to compel, ECF 110, and submitted a copy of its privilege log to chambers. Because the privilege log was not filed on the docket and should be part of the record, it is attached to this memorandum opinion and order. The parties filed a joint reply. ECF 111. The Court held a Zoom hearing on October 8, 2020 and directed the SAO to submit the withheld documents for in camera review. The Court held a second Zoom hearing on October 14, 2020. Counsel for the parties and the SAO participated in both Zoom hearings.

The privilege log includes forty-two entries.[2] In response to the parties' motion, the SAO produced three documents it initially withheld. After the first Zoom hearing, the SAO agreed to produce additional documents. It offered to do so out of fairness and in the interest of justice, but on the condition that the production would not be considered a waiver of the privilege as to the other documents. The parties agreed to this offer. As a result, several documents are no longer at issue. They are documents 2, 3, 14–22, 24, 26–28, and 42. Additionally, the parties reached an agreement on several other documents that were redacted or withheld because they contained personal identifying information. They are documents 8–12 and 29–41. Those documents also are no longer at issue. For reasons stated on the record during the second Zoom hearing, the Court ordered the production of documents 1, 6 (with criminal history redacted), and 25 (with the second page redacted).

The Court took under advisement the question of privilege as to documents 4, 5, 7, and 23 and the second page of document 25. The Court also took under advisement the argument advanced by the individual defendants, Detective William Ritz and Analyst Barry Verger, that the SAO waived the privilege entirely when it disclosed its file to the Quattrone Center for the Fair Administration of Justice ("Quattrone Center") as part of a collaborative post-exoneration examination of Mr. Bryant's wrongful conviction. The Court has reviewed the parties' filings, heard their arguments and the arguments of the SAO, and reviewed the documents submitted for in camera review. For the following reasons, the Court finds the SAO did not waive the work product privilege by providing its file to the Quattrone Center or allowing two of its prosecutors to be interviewed by the Quattrone Center. The Court further finds the work product privilege protects from

disclosure documents 7, 23, and page two of document 25. The parties' motion to compel is denied as to those documents. The Court finds the work product privilege does not protect from disclosure documents 4 and 5. The parties' motion to compel is granted as to those documents.

I. Discovery of Work Product

Rule 26(b) provides that parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...." Fed. R. Civ. P. 26(b)(1). Privileged matters include those protected by the work product doctrine, which is " 'a qualified privilege,' to be held by lawyer and client alike, 'for certain materials prepared by an attorney "acting for his client in anticipation of litigation." ' " In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 173–74 (4th Cir. 2019), as amended (Oct. 31, 2019) (quoting United States v. Nobles, 422 U.S. 225, 237– 38 (1975) (quoting Hickman v. Taylor, 329 U.S. 495, 508 (1947))). A document is prepared "in anticipation of litigation" if it is "prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992) (emphasis in original). Pursuant to the work product doctrine, which has been incorporated into the Federal Rules of Civil Procedure at Rule 26(b)(3), "an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation." Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999) (quoting In re Doe, 662 F.2d 1073, 1077 (4th Cir. 1981)); see Fed. R. Civ. P. 26(b)(3). The burden is on the party seeking the doctrine's protection to demonstrate that it applies. Solis v. Food Employers Labor Relations Ass'n, 644 F.3d 221, 232 (4th Cir. 2011).

The law distinguishes between fact work product and opinion work product. Fact work product "is 'a transaction of the factual events involved,' " whereas opinion work product " 'represents the actual thoughts and impressions of the attorney.' " In re Search Warrant Issued June 13, 2019, 942 F.3d at 174 (quoting In re Grand Jury Subpoena, 870 F.3d 312, 316 (4th Cir. 2017) (internal quotation marks omitted)).

Work product may be discovered under certain circumstances. The production of fact work product may be compelled "in limited circumstances, where a party shows 'both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.' " Id. (quoting In re Grand Jury Subpoena, 870 F.3d at 316); see Fed. R. Civ. P. 26(b)(3). Opinion work product is afforded far more protection than fact work product. Even establishing a substantial need for the protected information does not allow access to opinion work product. The "Fourth Circuit has made clear that such production [upon a showing of substantial need] should not include opinion work product." Owens v. Mayor & City Council of Baltimore, No. 11-3295-GLR, 2015 WL 6082131, at (D. Md. Oct. 14, 2015) (citing In re Allen, 106 F.3d 582, 607 (4th Cir. 1997)). Indeed, "[o]pinion work product...'enjoys a nearly absolute immunity' and can be discovered by adverse parties 'only in very rare and extraordinary circumstances.' " In re Search Warrant Issued June 13, 2019, 942 F.3d at 174 (quoting In re Grand Jury Subpoena, 870 F.3d at 316).

II. Waiver of Work Product

Before the Court considers whether the privilege applies to documents 4, 5, 7, and 23 and the second page of document 25, the Court will address the individual defendants' argument that the SAO has waived the work product privilege for all of the documents in the Bryant prosecution file. In support of this sweeping argument, they point to the fact that the SAO collaborated with the Quattrone Center after Mr. Bryant was released from prison. As part of the collaboration, the SAO disclosed all or most of its file to the Quattrone Center for a substantive post-exoneration review of the case. By disclosing the prosecutorial file to the Quattrone Center, the individual defendants argue, the SAO waived its right to assert work product protection for any of the documents disclosed and any other documents in the file that might not have been disclosed but relate to the subject matter. In support of their waiver argument, the individual defendants argue that the results of the collaboration between the Quattrone Center and the SAO have been published in a public document, a November 2018 Report of the Baltimore Event Review Team on State of Maryland v. Malcolm J. Bryant.[3] They also have submitted transcripts of Quattrone Center interviews with two SAO prosecutors conducted as part of the collaboration between the two organizations. Defs.' Ltr. 3; ECF 111-1, 111-2. They argue that the SAO waived work product protection through these "extensive interviews," in which "ASA Michael Leedy discussed credibility of the DNA, conversations with other attorneys, and the SAO policies" and "Lauren Lipscomb, chief of the Conviction Integrity Unit,...cover[ed] her three conversations with [eyewitness] Ms. Powell, opinions on the credibility of Powell's statements, and interviews with the victim's family." Defs.' Ltr. 3.

"To find waiver, a court must find that there has been 'disclosure of a communication or information covered by the attorney-client privilege or work-product protection.' " In re Fluor Intercontinental, Inc., 803 F. App'x 697, 701 (4th Cir. 2020) (quoting Fed. R. Evid. 502); see Sky Angel U.S., LLC v. Discovery Commc'ns, LLC, 885 F.3d 271, 276 (4th Cir. 2018) (same). "Any voluntary disclosure of privileged or protected information typically waives both attorney-client privilege and work-product protection." In re Grand Jury 16-3817 (16-4), 740 F. App'x 243, 246 (4th Cir. 2018) (citing In re Martin Marietta Corp., 856 F.2d 619, 622-23 (4th Cir. 1988)). To waive work product protection, the disclosure of "the contents of otherwise protected work product [must be] to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material." Owens, 2015 WL 6082131, at (quoting Doe v. United States, 662 F.2d 1073, 1081 (4th Cir. 1981)). Typically, "[d]isclosure to a person with an interest common to that of the attorney or the client...is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver." In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prod. Liab. Litig., No. 17-MD-2775, 2019 WL 2330863, at (D. Md. May 31, 2019) (quoting In re Doe, 662 F.2d at 1081).

In addition, "parties may contract to limit the effect of such a disclosure on the disclosing party's right to assert privilege in future proceedings," and "[a] confidentiality agreement between [a] disclosing party and [a] recipient may prevent waiver of work-product protection." In re Grand Jury 16-3817 (16-4), 740 F. App'x at 246 (citing Fed. R.

Evid. 502(e); United States v. Deloitte LLP, 610 F.3d 129, 141 (D.C. Cir. 2010)). To determine whether a confidentiality agreement prevented waiver or limited its effects, the Court "appl[ies] standard principles of contract interpretation." Id. (citing United States v. Gillion, 704 F.3d 284, 292 (4th Cir. 2012)). The Court "look[s] at the agreement's language to determine the parties' intent" and "read[s] the contract 'to give effect to all its provisions and to render them consistent with each other.' " Id. (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995)). Then, if "the words of a contract in writing are clear and unambiguous," the Court ascertains "its meaning...in accordance with its plainly expressed intent." Id. (quoting M & G Polymers USA, LLC v. Tackett, — U.S. — , 135 S. Ct. 926, 933 (2015)).

The disclosure of fact work product results in a "waiver [that] is broad and pertains to all information related to the same subject matter." Owens, 2015 WL 6082131, at (quoting In re Martin Marietta Corp., 856 F.2d at 623). In contrast, when the disclosure of opinion work product results in waiver, "the waiver is 'limited' and pertains to only the information actually disclosed." Id. (quoting In re Martin Marietta Corp., 856 F.2d at 623).

Here, the SAO did not waive the work product privilege by producing confidential documents from the Bryant prosecution file to the Quattrone Center. The SAO and Quattrone Center were not adversaries. On the contrary, they were collaborators working together to learn from the mistakes made in the investigation and prosecution of Malcolm Bryant. They were united in their effort to prevent wrongful convictions from happening in the future. Their relationship "is not inconsistent with an intent to invoke the work product doctrine's protection." In re Smith & Nephew, 2019 WL 2330863, at (quoting In re Doe, 662 F.2d at 1081).

The terms of their collaborative relationship were memorialized in a mutual non-disclosure agreement.[4] The agreement clearly and unambiguously shows that the SAO intended to retain its work product privilege. See In re Grand Jury 16-3817 (16-4), 740 F. App'x at 249 (finding, under plain language of a non-disclosure agreement, the party with privileged information that was disclosed to the other party retained its right to assert privilege).[5] Pursuant to the non-disclosure agreement, the SAO agreed to provide confidential information, including attorney work product, to the Quattrone Center so that it could "conduct a Just Culture Event Review" of the case and "provide insight to the parties, and ultimately the citizens of Maryland, regarding the improvement of the criminal justice system and the accuracy of the adjudication of criminal cases." Non-Disc. Agr. 1. To protect confidentiality, the Quattrone Center agreed not to use confidential information shared by the SAO "for any purpose except to evaluate and engage in discussions concerning the Just Culture Event Review" and not to disclose such information except to Quattrone Center employees "who [were] required to have the information in order to evaluate or engage in discussions concerning the contemplated business relationship." Id. 2. The Quattrone Center also agreed to "take reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of the [SAO's] Confidential Information," and "to ensure that its employees who have access to Confidential Information...understand their obligations under this Mutual Nondisclosure Agreement" before the information is disclosed to

them. Id. 3.[6] Additionally, the Quattrone Center agreed that the drafts of any report generated would "be properly attributed to confer any and all permissible confidential protections under Maryland or federal law." Id. 4. It also agreed that any drafts and the final report would be submitted to the SAO before publication so that the SAO could "recommend changes" and notify the Quattrone Center if "the report disclose[d] Confidential Information owned by [the SAO] which the [SAO] wishe[d] to withhold from the report," in which case the Quattrone Center would remove the information from the report. Id. Given the language in the non-disclosure agreement and the alignment of interests between the SAO and the Quattrone Center, it is clear that the SAO did not intend to waive the work product privilege when it disclosed its file and allowed its prosecutors to speak with the Quattrone Center.

In response to a Rule 45 subpoena, the Quattrone Center produced documents it received from the SAO to the parties in this case.[7] This disclosure does not change the waiver analysis here. The SAO did not know about or authorize this disclosure. By entering into the non-disclosure agreement, the SAO attempted to prevent an unauthorized disclosure. Therefore, the Quattrone Center's production to the parties did not waive the SAO's work product protection.

III. The SAO Documents

The Court has reviewed the five remaining documents at issue. The SAO has properly asserted the work product privilege as to documents 7, 23, and 25. It has not met its burden of establishing work product privilege as to documents 4 and 5.

Document 7, referred to as "Record Synopsis of ASA Lipscomb – Court preparation for NP 5/11/16," is a two-page May 10, 2016 memorandum to file from ASA Lipscomb. It contains a brief, general synopsis of the case and reinvestigation. It appears to be prepared in anticipation of her presentation at a court hearing the next day. This memo is attorney opinion work product. The parties have not demonstrated extraordinary circumstances requiring its production. Indeed, they only argue that they have a substantial need for the documents. See Jt. Reply 2. This standard applies only to fact work product, not opinion work product, which requires extraordinary circumstances for production. See In re Search Warrant Issued June 13, 2019, 942 F.3d at 174; In re Allen, 106 F.3d at 607; Owens, 2015 WL 6082131, at . The motion to compel the production of document 7 is denied.

Document 23, referred to as "Notes and analysis, fact outline – post conviction ASA 5/11/09," is a six-page outline prepared by a prosecutor handling a post-conviction claim by Malcolm Bryant. It contains the prosecutor's summary, impressions, and legal analysis of the trial and evidence. This entire document is opinion work product. The parties have not established extraordinary circumstances to warrant its production. The motion to compel the production of document 23 is denied.

Document 25, referred to as "Memo to file – notes and analysis of 1st testing order – post conviction ASA," has been produced with the exception of the second page. The second page contains the prosecutor's thoughts and recommendations on DNA testing. This is purely opinion work product. The parties have not shown extraordinary

circumstances to warrant its production. The motion to compel the production of the second page of document 25 is denied.

The SAO has not met its burden of establishing work product protection for documents 4 and 5. The privilege log describes these documents as "Notes by ASA Lipscomb analyzing 8-201 2/9/18" and "Notes by ASA Lipscomb analyzing 8-301 2/9/18." The SAO informed the Court that both documents are draft letters to outside counsel from the State's Attorney, prepared by ASA Lipscomb. Document 4 appears to be a February 9, 2018 draft letter to Malcolm Bryant c/o of Joshua Treem regarding Md. Code Ann., Crim. Proc. § 8-201. Document 5 appears to be an October 12, 2017 letter to Lamar Johnson c/o Parisa Dehghani-Tafti, Esquire, Legal Director of the Mid-Atlantic Innocence Project regarding Md. Code Ann., Crim. Proc. § 8-301. It is not clear whether the letters ever were sent to Mr. Treem or Ms. Dehghani-Tafti. Upon review of the draft letters, the Court does not find that they contain legal analysis, as asserted by the SAO, although they do contain legal conclusions and some procedural background on the cases.

Setting aside any quibble over a description of the contents of the letters, it is unclear to the Court whether the letters were drafted in anticipation of a litigation, an essential requirement of the work product privilege.[8] The SAO bears the burden of establishing the document was prepared "because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." Nat'l Union Fire Ins. Co., 967 F.2d at 984 (emphasis in original). The draft letters were written at least one year after Mr. Bryant's conviction was vacated on May 11, 2016. The only possible litigation that the Court is aware of that could have been anticipated by Ms. Lipscomb when she drafted the letters was this civil rights lawsuit. The Court notes that Mr. Treem is counsel of record for the plaintiff in this case. Even considering the identity of the recipients, the Court cannot discern from the face of the letters whether they were prepared in anticipation of litigation. Even if they were prepared in anticipation of this lawsuit, the Court has no basis to conclude that Ms. Lipscomb drafted the letters because the SAO (as opposed to the individual officers and the Baltimore Police Department) faced a claim or potential claim following an event that reasonably could result in litigation. The SAO has not met its burden of establishing the work product doctrine applies to documents 4 and 5, and there are no other asserted grounds on which to withhold them. They must be produced.

Date: October 29, 2020 /S/

Deborah L. Boardman
United States Magistrate Judge
Document 118-1 Filed 10/29/20 Page 1 of 4
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Document 118-1 Filed 10/29/20 Page 2 of 4
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Document 118-1 Filed 10/29/20 Page 3 of 4

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Document 118-1 Filed 10/29/20 Page 4 of 4
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Documents from the State
Privilege Log
Document Number of Description of Document Basis of Privilege Number Pages
1 1 pg ASA notes from notification meeting with Victim's mother 4.12.16 Work Product 2 1 pg Letter to Victim's sister from ASA Lipscomb (pending 8-201 Work Product hearing prep) sent (pending 8-201 hearing prep) sent 5.9.16 5/11/16
3 1 pg Letter to Witness Powell from ASA Lipscomb Work Product 4 1 pg Notes by ASA Lipscomb analyzing 8-201 2/9/18 Work product this is a draft letter 5 1 pg Notes by ASA Lipscomb analyzing 8-301 2/9/18 Work product this is a draft letter copied from another file 6 15 pages Internal memo: re-investigation notes, legal analysis and Deliberative process and recommendation of ASA Lipscomb to SA compiled 4.5.16 through work product 7 1 page Record Synopsis of ASA Lipscomb – Court preparation for NP Work Product 8 7 pages BPD Powell Statement – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
9 32 pages Renaldo Rich BPD documents - redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
10 209 pages Discovery and Court motions - redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
11 424 pages Trial Transcripts - redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information
12 9 pages Autopsy - redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information
13 53 pages Notes and analysis - Trial ASA 3/2/99 Work Product these are generally undated, but the 1st page has the date 3/2/99 on it

14 8 pages Notes and analysis – Trial ASA to be sent Work Product 15 1 page 1.11.11 Notes of Post-Conviction ASA Work Product 16 3 pages 2009 draft order – Post-Conviction ASA 5/22/09 Work Product 17 5 pages 2009 draft order – Post-Conviction ASA 5/20/09 Work Product 18 6 pages Draft letter to Judge Rasin – Post Conviction ASA 9/17/09 Work Product 19 7 pages Draft letter to Michelle Nethercott – post

Conviction ASA 7/16/09 Work Product 20 10 pages Notes and analysis saved as "Malcolm Bryant" – post conviction Work Product
ASA 11/25/08 conviction ASA conviction ASA
21 8 pages Notes and analysis of Malcolm Bryant BPD interviews – post Work Product
22 9 pages Notes and analysis of trial transcript – post conviction ASA 12/8/08 Work Product 23 11 pages Notes and analysis, fact outline – post conviction ASA 5/11/09 Work Product 24 11 pages Notes and analysis of testing – post conviction ASA Work Product 25 12 pages Memo to file – notes and analysis of 1st testing order – post Work Product
26 13 pages Draft of State's response to 8-201 – post conviction ASA Work Product 27 14 pages Draft of State's proposed testin, analysis – post conviction ASA Work Product 28 1 page Notes regarding DNA testing – post conviction ASA Work Product 29 75 pages DNA 1.27.17 pdf file - redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal
Identifying Information
30 12 pages Voir Dire and Jury Notes - redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
31 37 pages Defendant's Statements – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
32 8 pages Indictments - redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information
33 34 pages Leads and Suspects of BPD – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
34 28 pages Offense reports - redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information
35 7 pages BPD Powell Statement – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
36 19 pages Run Sheets and ECU – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
37 4 pages Sketch and Array– redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information

38 10 pages Renaldo Rich – Info – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
39 651 pages Court Transcripts - redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information
40 5 pages Sketch and Array– redactions of personal identifying information Address, phone number, and social security numbers are redacted - Personal

Identifying Information
41 23 pages Run Sheets and ECU – redactions of personal identifying Address, phone number, and information social security numbers are redacted - Personal

Identifying Information
42 1 page 2/17/16 Electronic case system notes of ASA Lipscomb – notes Work Product

taken during telephone calls

Footnotes
[1] The parties filed a letter with the Court explaining the dispute with the SAO over the subpoena and seeking the Court's assistance. ECF 106. I have construed the joint letter as a motion to compel.
[2] The SAO did not include a column in the log that identifies the documents by number. For the sake of clarity, the Court has inserted a column with numbers and will refer to the documents by the corresponding number on the log.
[3] See https://www.law.upenn.edu/live/files/8862-malcolm-bryant-exoneration
[4] Because the agreement was not filed on the docket and should be part of the record, it is attached to this memorandum opinion and order.
[5] The Court recognizes that In re Grand Jury 16-3817 (16-4), 740 F. App'x 243, is not binding Fourth Circuit precedent and is not exactly on point. In that case, the parties who that were disputing the disclosure of privileged information were the same parties that previously had entered into an agreement regarding the disclosure of privileged information. The issue before the Court was whether the agreement between the government and a corporation "preserved [the corporation's] attorney-client privilege and work-product protection for information that the General Counsel of [a subsidiary of the corporation] disclosed to the Government." Id. at 244. Here, the non-disclosure agreement is not between the parties and the SAO; it is between the SAO and the Quattrone Center, which is not a party to this case or involved in this dispute. However, the principles of contract interpretation discussed in In re Grand Jury 16-3817 (16-4) in the context of a waiver argument are instructive here as the Court attempts to discern whether the SAO intended to waive the work product privilege by disclosing confidential information to the Quattrone Center.
[6] The Quattrone Center's interviews with ASA Lipscomb and ASA Leedy were conducted as part of the post-exoneration case review. These interviews, which included discussion of the prosecutors' opinions on the case and witness credibility, were

conducted pursuant to the non- disclosure agreement. The agreement's definition of "Confidential Information" includes oral disclosures.
[7] Document 13 is one of the documents produced by the Quattrone Center and, therefore, is no longer at issue.
[8] It is also unclear why document 5, which appears to concern a totally different case, is responsive to the subpoena. The SAO noted in the privilege log that document 5 is a "draft letter copied from another file," but it did not object to its production on relevance grounds. Without knowing why this document was in the Bryant prosecution file or whether it is relevant to this case, the Court will assume its relevance because the SAO has not explicitly argued otherwise.