IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STEVEN M. ANDERSON, *Plaintiff/Counterclaim Defendant,* v. FLUOR INTERCONTINENTAL, INC. et al., *Defendants/Counterclaim Plaintiffs.*	Case No. 1:19-cv-289 Hon. Liam O'Grady

MEMORANDUM OPINION & ORDER

This matter comes before the Court on Defendants' Motion for Reconsideration. Dkt. 115. The motion has been fully briefed. An opposition, reply, surreply, and amicus brief have been filed. The Court dispensed with oral argument because it would not aid in the decisional process.

I. Background

In this case, Plaintiff Brigadier General Anderson ("Plaintiff") sued his former employer and related entities (collectively "Defendants" or "Fluor") who have counterclaimed against him. The claims generally involve Plaintiff's employment, termination, and Defendants' internal investigation of Plaintiff. One aspect of the internal investigation was a report or disclosure which Defendants submitted to the Department of Defense Inspector General.

A Scheduling Order issued which provided that the discovery phase of litigation would conclude on October 11, 2019. Dkt. 22 ¶ 1. On September 27, 2019, Plaintiff moved to compel Defendants to produce various documents, interrogatory responses, and deposition testimony. Dkt. 40. Although the report itself was produced in discovery, Defendants asserted privilege

over subsequent inquiries into information relating to the report. At the time Plaintiff moved to compel production, Defendants had not provided a privilege log.

A hearing was held before Magistrate Judge Buchanan on October 4, 2019. Plaintiff, still without a privilege log, argued that discoverable information relating to Defendants' internal investigation was being withheld. Hr'g Tr. 2-3, Oct. 4, 2019. The issues were thereafter limited to the discoverability of documents relating to the government report. Hr'g Tr. 3. The motion to compel was denied, Dkt. 61, based on the Court's conclusion that all the documents related to the disclosure to the Inspector General and investigation were subject to the attorney-client privilege and work product privilege, Hr'g Tr. 8.

On October 10, 2019, Plaintiff objected to the discovery order denying the motion. Dkt. 78. Defendants provided Plaintiff with their privilege log on the same day.

This Court sustained the objection to the discovery order in part on November 8, 2019. Dkt. 113. Based both on Defendants' judicial admissions that the government disclosure was voluntary, and independently on the disclosure's contents which exceeded the governmental reporting requirements, this Court found that select portions of the report waived privilege as a third-party disclosure. Accordingly, this Court ordered Defendants to timely address any deficiencies in their privilege log and ordered Plaintiff to state any further privilege disputes with specificity, pursuant to Local Rule 26(C). The case was remanded to Magistrate Judge Buchanan for review of the privilege log and to determine the extent of the waiver.

II. Legal Standard

Defendants, requesting an opportunity to be heard, now move under Fed. R. Civ. P. 54(b) for this Court to reconsider this Court's November 8, 2019 discovery order. The Rule provides that "any order or other decision, however designated, that adjudicates fewer than all the claims

or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment . . . ." Fed. R. Civ. P. 54(b). It empowers a district court to revise interlocutory orders prior to judgment. *See Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991); *Orbcomm Inc. v. Calamp Corp.*, 215 F. Supp. 3d 499, 503 (E.D. Va. 2016). Discovery orders are inherently interlocutory. *In re Naranjo*, 768 F.3d 332, 342 (4th Cir. 2014).

"The precise standard governing a motion for reconsideration of an interlocutory order is unclear," *Butler v. DirectSAT USA, LLC*, 307 F.R.D. 445, 449 (D. Md. 2015), because the Fourth Circuit has declined to thoroughly address "the interplay" of the Rules allowing reconsideration of final and interlocutory orders, *Fayetteville Inv'rs*, 936 F.2d at 1472. Motions under Rule 54(b) are "not subject to the strict standards" which apply to reconsideration of final judgments or orders. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003); *see, e.g.*, *Carrero v. Farrelly*, 310 F. Supp. 3d 581, 584 (D. Md. 2018) (looking generally to the Rule 59(e) standard); *McLaughlin v. CSX Transportation, Inc.*, 260 F. Supp. 3d 523, 526 (D.S.C. 2017) (same); *S. Coal Corp. v. IEG Pty, Ltd*, 2016 WL 393954, at *1 (E.D. Va. Jan. 29, 2016) (same). Undoubtedly, however, the standard governing reconsideration of interlocutory orders "closely resembles" that of motions to reconsider final judgments and orders, but accounts "for potentially different evidence discovered during litigation." *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017).

Motions to reconsider interlocutory orders are committed to the court's discretion, and the court's responsibility is to reach the correct legal judgment. *Am. Canoe Ass'n*, 326 F.3d at 515 (citing *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 (1983)). "[T]he discretion Rule 54(b) provides is not limitless." *Carlson*, 856 F.3d at 325. To guide their

discretion, courts treat interlocutory rulings as "the law of the case," and may depart from the law of the case due to "(1) 'a subsequent trial producing substantially different evidence'; (2) a change in applicable law; or (3) clear error causing manifest injustice.'" *Id.* (alteration omitted) (quoting *Am. Canoe Ass'n*, 326 F.3d at 515).

With that framework in mind the Court reconsiders the order which sustained, in part, Plaintiff's objection to the Magistrate Judge's denial of Plaintiff's motion to compel.

III. Discussion

Defendants have argued for reconsideration on three grounds. First, Defendants argue that this Court erred by treating repeated statements offered in the answer as judicial admissions. Second, Defendants argue this Court misconstrued government contractor reporting requirements. Specifically, they argue that the plain language of governing regulations, the regulatory history, and official government guidance make clear that the entirety of the report was submitted to the government pursuant to mandatory regulatory requirements. Third and finally, Defendants argue the Court's finding of waiver is irreconcilable with *Upjohn v. United States*, 449 U.S. 383 (1981), and contrary to the law of privilege. Each argument will be addressed in turn.

1. Judicial Admissions of Voluntariness

The November 8, 2019 order issued by this Court found Defendants bound by judicial admissions as to the voluntariness of a disclosure to the government. Defendants' Answer repeatedly referred to the report sent to the Inspector General as "voluntary," and because intentional and unambiguous waivers such as those are binding when they are in a party's pleadings, this Court held those judicial admissions binding upon the Defendants.

Defendants argue the admissions of voluntariness were unintentional misstatements of applicable law. Specifically, Defendants claim they should not be bound by the admissions because references to "voluntary disclosure" were mistakes resulting from counsel's familiarity with the former disclosure program's old name.[1] The old name, the "Voluntary Disclosure Program," was changed to "Mandatory Disclosure Program" in the year 2008.

Today, the Mandatory Disclosure Program is a regulatory regime governing federal contractors which, among other things, imposes upon contractors a legal obligation to report certain unlawful activity to the government. 48 C.F.R. § 52.203-13(b)(3)(i). Those reports are mandatory disclosures. But the disclosures are mandatory only when "the Contractor has credible evidence" of certain violations. *Id.* This "credible evidence" standard is "a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government." 73 Fed. Reg. 67,073 (Nov. 12, 2008); *see also* 73 Fed. Reg. 67,074 ("Until the contractor has determined the evidence to be credible, there can be no 'knowing failure to timely disclose.'"). Thus, a disclosure made before or without credible evidence is not a mandatory disclosure, but a voluntary one.

Here, the Court is unpersuaded that Defendants mistakenly used the word "voluntary" to describe or refer to the former program for three reasons. First, the old program was supplanted more than a decade ago. Second, in addition to the change in the program's name (and function), the word at issue, "voluntary," was conspicuously replaced with "mandatory"—an antonym. Third, as Defendants point out, the Answer describes the admittedly "voluntary disclosure," as

[1] *See, e.g.*, Dkt. 116 at 17 ("[Defendants'] answer mistakenly used the term 'voluntary disclosure' out of force of habit because of counsel's familiarity with the old voluntary disclosure regime . . .").

having been "consistent with [regulatory] obligations." *See* Dkt. 33 at 10, 55.[2] These references to regulatory obligations demonstrate cognizance of the mandatory disclosure regime, and accordingly show the use of the word "voluntary" was intentionally used to describe the type of disclosure. Thus, Defendants' arguments that the Answer's uses of "voluntary" were unintentional or misstatements of applicable law fail.

After considering the arguments about voluntariness in Defendants' motion, as well as the supplemental authority, the Court declines to modify the finding of voluntariness in the November 8, 2019 discovery order. For the reasons stated in that order and for the reasons stated above, the Court finds Defendants' use of "voluntary" was a clear, unambiguous, and intentional judicial admission.

2. Contractor Reporting Requirements

Defendants also contend that, as a matter of law, their government disclosure did not contain more information than the mandatory disclosure regulation requires because that regime requires comprehensive disclosures. While the regime requires comprehensive disclosures pursuant to and in the context of the regulatory "full cooperation" requirement, the Mandatory Disclosure Rule ("MDR") is separate and distinct. Defendants' arguments are therefore meritless.

The plain language of the regulation is clear. The MDR is located in subsection (b) of the regulation. It provides that contractors:

> 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 . . .

[2] Defendants argue that the references to "voluntary disclosure" and regulatory "obligations" show ambiguity in their descriptions, and that as a result they should not be held to their judicial admissions for a lack of clarity. But voluntary admissions are not entirely precluded by the Mandatory Disclosure Program. A voluntary disclosure can be made, consistent with the regulatory obligations, when it is made without credible evidence for the reasons explained above. Thus, the admissions of voluntariness were not ambiguous or unclear due to the references to regulatory obligations.

> [a] contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed [certain violations of law.]

48 C.F.R. § 52.203-13(b)(3)(i). In addition, subsection (c) of the regulation requires that contractors have and maintain an internal control system. § 52.203-13(c)(2). That internal control system must perform at least seven functions. *See* § 52.203-13(c)(2)(iii)(A)-(G). One internal control system function, like the MDR, requires:

> Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with . . . any Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of [certain crimes.]

§ 52.203-13(c)(2)(F).

The language here is plain. It requires a timely, written disclosure, upon credible evidence. Neither of these regulatory rules contains a requirement that the disclosure be comprehensive. Instead, a natural reading leads to the conclusion that the substance of the disclosure should be a notification that the contractor has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed a violation.

The interpretive canon that regulatory provisions should be construed together to effectuate the purpose of the overall regulatory scheme also supports this conclusion. The regulation contemplates comprehensive government disclosures which do not waive privilege—but it does not do so in the MDR. Instead, the regulation provides definitions, the first of which is "full cooperation." § 52.203-13(a)(1).

> 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.

Id. But this defined phrase does not appear within the Mandatory Disclosure Rule. *See* § 52.203-13(b)(3)(i). Nor does "full cooperation" appear within the similar internal control system function. *See* § 52.203-13(c)(2)(f). Instead, besides the definitions section, "full cooperation" appears only once in the regulatory text: it is a required internal control system function, separate and distinct from both the MDR and the other internal control system function, which is similar to the MDR.

Accordingly, to effectuate the regulatory scheme by giving effect to each section and subsection of the regulation, this Court must construe the regulation's plain language as written. Unlike the "full cooperation" requirement, which explicitly obligates contractors to provide "information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible," and "includes . . . complete response[s] to Government auditors' and investigators' request[s]," § 52.203-13(a)(1), the MDR requires only a timely disclosure, in writing, whenever there is credible evidence of a proscribed act, § 52.203-13(b)(3)(i). To read the contractor's obligations under the defined phrase "full cooperation" into the MDR when they are not present would distort the regulatory scheme which was duly enacted.

***3. Privilege Waiver and* Upjohn**

Defendants assert both that the regulation protects their disclosure from waiver, and that no waiver occurred because this case is materially indistinguishable from *Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S. Ct. 677, 685, 66 L. Ed. 2d 584 (1981). Both arguments are incorrect.

First, while the regulation protects certain government disclosures from waiver, Defendants' disclosure here is not one of them. The regulation, 48 C.F.R. § 52.203-13 contemplates protection of privilege. Specifically, it defines "full cooperation" to "not require"

any "Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine." § 52.203-13(a)(2)(i). Yet, as discussed above, the text of the MDR does not contain the defined phrase "full cooperation," and thus it does not contain the protections of that distinct regulatory obligation. And unlike the "full cooperation" rule, the MDR does not contain an explicit textual privilege protection.[3]

The regulatory history further supports the conclusion that the "full cooperation" privilege protections do not extend to the MDR. The MDR was codified by final rule and became effective in December of 2008. *See* 73 Fed. Reg. 67,064. The final rule setting out the MDR, the Federal Acquisition Regulation Contractor Business Ethics Compliance Program and Disclosure Requirements, contains thirteen subsections. One subsection, entitled "mandatory disclosure to the OIG," relates to the MDR, while a separate and peer subsection, subsection four, is entitled "Full Cooperation" and relates to the "full cooperation" requirement. *See id.* The subsection discussing the MDR is eight pages long but does not include a single mention of "privilege" or "waiver." *See* 73 Fed. Reg. 67,068-76. The "full cooperation" subsection is only three pages long, yet the word "privilege" appears eleven times the word "waive" appears ten times. 73 Fed. Reg. 67,076-78.[4]

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[3] Quite the opposite. The MDR provides that any disclosure to an Inspector General made pursuant to that rule is no longer within the disclosing entity's control. It states that an MDR disclosure may be released to the public pursuant to a Freedom of Information Act request "without prior notification to the Contractor," and that "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." § 52.203-13(b)(3)(ii). This paragraph operates as a limitation on the disclosing contractor's expectation of continued control over its disclosure by creating authority within the government recipient of the original disclosure to further disseminate the disclosed information. This goes to the very essence of the attorney-client privilege. Not only does the holder's voluntary disclosure to a third party waive the privilege, but "[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

[4] *See also* 73 Fed. Reg. 67,077 ("To address concern that cooperation might be interpreted to require disclosure of materials covered by the work product doctrine, the Councils have added a definition of 'full cooperation' at 52.203–13(a) to make clear that the rule does not mandate disclosure of materials covered by the attorney work product doctrine.").

The regulatory history is therefore in accord with the regulatory text. The Court is forced to conclude that the privilege protections which are afforded by the text to "full cooperation" obligations are not also afforded to initial disclosures made pursuant to the MDR. Since the MDR, unlike "full cooperation," does not require comprehensive disclosure for compliance, the MDR does not call for the privilege protections that "full cooperation" does.

Second, Defendants are incorrect in claiming that the issue here is the same issue which the Supreme Court considered in *Upjohn Co. v. United States*. 449 U.S. 383 (1981). In that case, Upjohn Company conducted an internal investigation into certain "questionable payments" made to foreign government officials. *Id.* at 386. The company subsequently "voluntarily submitted" a report to the government which "disclos[ed] certain questionable payments." *Id.* at 387. The Internal Revenue Service received a copy of that report and began to investigate the company. *Id.* When the government sought to compel Upjohn to produce the internal investigation documents relating to the payments, the company asserted the attorney-client privilege and declined to produce them. *Id.* at 388. The Supreme Court held that the documents underlying the internal investigation were "covered by the attorney-client privilege," as well as work-product doctrine. *Id.* at 397.

Here, like in *Upjohn*, the Defendants conducted an internal investigation. And here, like in *Upjohn*, Defendants submitted a disclosure to the government.[5] This case is critically different from *Upjohn*, however, because Defendants here did not merely disclose facts. Whereas Upjohn disclosed to the government the mere fact that payments had occurred, the attorney-client privilege "does not protect disclosure of the underlying facts." *Id.* at 395. Here, unlike in *Upjohn*, Defendants' disclosure goes beyond underlying facts. The report to the

[5] As described in the November 8, 2019 order and herein, Defendants admitted the disclosure here was voluntary, and in any case, Defendants' disclosure contained more than the MDR requires.

government in *Upjohn* disclosed the existence of past payments, but the report to the government in this case disclosed Defendants' substantive legal conclusions as to past events, and fruits of internal investigation which were necessarily communicated to Defendants by counsel. This case is therefore distinguishable from, and reconcilable with, *Upjohn*.

Finally, and again contrary to Defendants' arguments, finding waiver here furthers the purpose of the attorney-client privilege. While, certainly, a client does not waive attorney-client privilege by taking action based on a lawyer's advice, it is equally certain that voluntary disclosure to a third party waives the attorney-client privilege. *See Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (compiling cases). The privilege at issue is the attorney-client privilege, and the government is therefore a third party. This Court is not free to disregard the waiver doctrine or the regulatory text. Neither protects privilege against waiver in this instance.

IV. Conclusion

The Court has considered the additional and supplemental authorities and arguments, and for the reasons stated above, Defendants' Motion to Reconsider, Dkt. 115, is hereby **DENIED**.

It is **SO ORDERED**.

December 20, 2019
Alexandria, Virginia

Liam O'Grady
United States District Judge