



**In the Matter of:**

**MATTHEW GLOSS,**

**ARB CASE NO. 10-033**

**COMPLAINANT,**

**ALJ CASE NO. 2009-SOX-011**

**v.**

**DATE: January 13, 2010**

**MARVELL SEMICONDUCTOR, INC., and  
MARVELL TECHNOLOGY GROUP, LTD.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Cliff Palefsky, Esq., *McGuinn, Hillsman & Palefsky*, San Francisco, California**

***For the Respondents:***

**Fred W. Alvarez, Esq., and Jeanna C. Steele, Esq., *Wilson Sonsini Goodrich & Rosati, P.C.*, Palo Alto, California**

**ORDER DENYING PETITION FOR REVIEW**

In a Notice of Petition for Review of the Administrative Law Judge's November 20, 2009 Order, dated December 7, 2009, the Respondents, Marvell Semiconductor, Inc., and Marvell Technology, Ltd., (Marvell) petition the Board pursuant to 29 C.F.R. § 1980.110(a) (2009) for review of an Order Amending 8/12/09 Discovery Order of a U.S. Department of Labor Administrative Law Judge (ALJ) issued on November 20, 2009. This case involves a complaint filed pursuant to the whistleblower protection provisions at Section 806 of the Sarbanes-Oxley

Act of 2002 (SOX).<sup>1</sup> In a discovery request for the production of documents in support of the complaint, the complainant, Matthew Gloss, sought interview memoranda that counsel for Marvell’s Board of Directors prepared in connection with internal investigations they conducted. In the ALJ’s November 20, 2009 Order, the ALJ ordered Marvell to produce the memoranda no later than December 31, 2009. The ALJ noted that the memoranda “purportedly summarize the thoughts and mental impressions of the respective counsel.”<sup>2</sup> But the ALJ determined that to the extent the memoranda were used in the process of the internal investigations, Marvell waived any attorney-client privilege and work product doctrine objections to the memoranda.<sup>3</sup>

In its Petition for Review, Marvell seeks interlocutory review of the portion of the ALJ’s Order finding waiver and ordering production of the memoranda because it asserts that the Order is immediately appealable pursuant to the collateral order doctrine’s exception to finality rule under 28 U.S.C.A. § 1291 (West 1982). Marvell has also filed a Motion to Stay Administrative Law Judge’s November 20, 2009 Order to Produce Interview Memoranda Pending Administrative Review Board’s Determination Whether to Grant Marvell’s Petition for Review, dated December 30, 2009. In its Motion, Marvell requests that the Board stay the ALJ’s Order until January 6, 2010, pending the Board’s determination whether to accept Marvell’s Petition for Review.

However, as a Notice of Recent Decision from Marvell and Gloss’s response to the Petition for Review indicate, the United States Supreme Court has recently held, subsequent to Marvell’s Petition for Review, that the collateral order exception under 28 U.S.C.A. § 1291 “does not extend to disclosure orders which are adverse to the attorney client privilege,” such as the ALJ’s Order in this case.<sup>4</sup> Specifically, the Supreme Court determined that “collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege,”<sup>5</sup> noting that “[e]ffective appellate review can be had by other means.”<sup>6</sup> For instance, the Court noted that a party may ask the trial court (such as the ALJ in this case) to certify, and the court of appeals (such as the Board) to accept an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b)<sup>7</sup> based on “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

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<sup>1</sup> 18 U.S.C.A. § 1514A (West Supp. 2008). Implementing regulations appear at 29 C.F.R. Part 1980 (2009).

<sup>2</sup> Order Amending 8/12/09 Discovery Order at 1.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009).

<sup>5</sup> *Mohawk Indus.*, 130 S. Ct. at 606.

<sup>6</sup> *Id.* at 609.

<sup>7</sup> *Id.* at 607.

advance the ultimate termination of the litigation.”<sup>8</sup> The Court further suggested that “protective orders are available to limit the spillover effects of disclosing sensitive information.”<sup>9</sup>

Prior to and in accordance with the Supreme Court’s suggestions in *Mohawk Industries*, the Board recently issued a decision in *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041 (ARB Sept. 30, 2009 Order of Remand). In *Jordan*, an ALJ granted a respondent corporation’s request that the ALJ certify to the Board for interlocutory review the issue of whether a SOX complainant may rely on statements or documents covered by the attorney-client privilege in support of the complaint, in accordance with the procedure established at 28 U.S.C.A. § 1292(b) for certifying interlocutory issues for appeal.<sup>10</sup> The Board granted the respondent corporation’s petition for interlocutory review on that issue.<sup>11</sup> But the Board denied the complainant’s subsequent motion to remand the case to the ALJ to determine the extent that the respondent corporation waived the attorney-client privilege through its disclosures during earlier proceedings, as it related to an evidentiary issue that the ALJ should ultimately decide on remand and was not relevant to the disputed legal issue before the Board on interlocutory review.<sup>12</sup> Further in accord with the Supreme Court’s suggestion in *Mohawk Industries* and 29 C.F.R. § 18.46(a), the Board was compelled to issue a protective order in the case sealing the record and pleadings filed before the Board on interlocutory review to preserve any potentially privileged materials or evidence.<sup>13</sup>

Moreover, in *Jordan* we ultimately held that a SOX complainant may rely on statements or documents covered by the attorney-client privilege, as an exception to the privilege, in support of a SOX complaint alleging that a covered employer retaliated against an employee in violation of the SOX Section 806 whistleblower protection provisions. Specifically, pursuant to SOX

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<sup>8</sup> 28 U.S.C.A. § 1292(b) (West 1993).

<sup>9</sup> *Mohawk Indus.*, 130 S. Ct. at 608.

<sup>10</sup> See *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 2 (Order Granting Petition for Interlocutory Review, Establishing Briefing Schedule and Denying, in part, Motion to Proceed Under Seal and the Use of Pseudonyms, June 19, 2008).

<sup>11</sup> *Jordan*, June 19, 2008 Order Granting Petition for Interlocutory Review, Establishing Briefing Schedule and Denying, in part, Motion to Proceed Under Seal and the Use of Pseudonyms; see also *Jordan*, Sept. 30, 2009 Order of Remand, slip op. at 3.

<sup>12</sup> *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 7 (Order Granting Temporary Protective Order to Seal the Record and Establishing Briefing, May 20, 2009); see also *Jordan*, Sept. 30, 2009 Order of Remand, slip op. at 4.

<sup>13</sup> *Jordan*, May 20, 2009 Order Granting Temporary Protective Order to Seal the Record, slip op. at 6-7; see also *Jordan*, Sept. 30, 2009 Order of Remand, slip op. at 4; 29 C.F.R. § 18.46(a)(2009) (ALJ may issue protective or other orders consistent with objective of protecting privileged communications).

Section 307, Congress gave the SEC authority to “issue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing” before the SEC.<sup>14</sup> In light of the mandate of Section 307, the SEC implemented rules at 17 C.F.R. Part 205 requiring, in part, that an attorney “report” in-house any “evidence of a material violation.”<sup>15</sup> We concluded:

[U]nder 17 C.F.R. § 205.3(d)(1), if an attorney reports a “material violation” in-house in accordance with the SEC’s Part 205 regulations, the report, though privileged, is nevertheless admissible in a SOX Section 806 proceeding as an exception to the attorney-client privilege in order for the attorney to establish whether he or she engaged in SOX-protected activity. Furthermore, . . . we similarly conclude that Congress also intended that any other relevant attorney-client privileged communication that is not a Part 205 report is also admissible in a Section 806 whistleblower proceeding in order for the attorney to establish whether he or she engaged in SOX protected activity.<sup>16</sup>

Furthermore, in accord with the Supreme Court’s suggestion in *Mohawk Industries*, we noted that it is within an ALJ’s discretion to issue “such protective, in camera, or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications pursuant to 29 C.F.R § 18.46(a).”<sup>17</sup>

In this case, Marvell only seeks interlocutory review of the ALJ’s Order adverse to its claim of the attorney-client privilege based on the “collateral order doctrine,” but did not ask the ALJ to certify, and the Board to accept, an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) based on “a controlling question of law.” Thus, in light of the Supreme Court’s holding in *Mohawk Industries*, Marvell’s petition for review fails. In any event, even if Marvell had instead filed an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) based on “a controlling question of law,” the relief Marvell seeks is unavailable in light of our holding in *Jordan* that a SOX complainant may rely on statements or documents covered by the attorney-client privilege in support of a SOX whistleblower complaint.

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<sup>14</sup> 15 U.S.C.A. § 7245.

<sup>15</sup> 17 C.F.R. §§ 205.1, 205.3(b)(1), (3)-(4).

<sup>16</sup> *Jordan*, Sept. 30, 2009 Order of Remand, slip op. at 17.

<sup>17</sup> *Id.* at 17, n.68.

Accordingly, we **DENY** Marvell's Petition for Review and **REMAND** this case for further proceedings consistent with this opinion.<sup>18</sup>

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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<sup>18</sup> Inasmuch as we deny Marvell's Petition for Review, Marvell's Motion to Stay Administrative Law Judge's November 20, 2009 Order to Produce Interview Memoranda Pending Administrative Review Board's Determination Whether to Grant Marvell's Petition for Review is moot.