UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RPM INTERNATIONAL, INC., *et al.*, Defendants.	)	Civil Action No. 16-1803 (ABJ)

ORDER

On July 3, 2019, plaintiff SEC filed a motion to compel nineteen interview memoranda prepared by the law firm Jones Day. Pl.'s Mot. to Compel [Dkt. # 71]. Defendants opposed the motion, arguing that the attorney work product privilege and attorney client privilege applied to the documents and that the privileges had not been waived. Defs.' Opp. to Pl.'s Mot. to Compel [Dkt. # 73]. On February 12, 2020, the Court granted SEC's motion, finding that the attorney work product privilege did not apply to the documents in question, and if it did, any protection had been waived. Min. Entry (Feb. 12, 2020); Feb. 12, 2020 Tr. of Status Hr'g [Dkt. # 82] ("Hr'g Tr.") at 5–11. The Court also found that defendant RPM waived the attorney client privilege when it disclosed the contents of the memoranda to a third party. Hr'g Tr. at 11–16. Thus, the Court ordered defendants to produce the nineteen unredacted interview memoranda. *Id.* at 16.

On February 18, 2020, defendants moved for certification of the Court's February 12 order for interlocutory appeal and a stay of the Court's order pending resolution appellate review. Defs.' Mot. for Certification for Interlocutory Appeal [Dkt. # 83] ("Defs.' Mot. for Inter.

Appeal"). Plaintiff opposed the motion on March 3, 2020. Pl.'s Opp. to Defs.' Mot. for Inter. Appeal [Dkt. # 85]. For the following reasons, defendants' motions for interlocutory appeal and a stay are denied.

The statute governing interlocutory decisions provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves 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 advance the ultimate termination of the litigation, [s]he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it with ten days after entry of the order.

28 U.S.C. § 1292(b) (2012). Courts in this district have observed "that certification under § 1292(b) is reserved for truly exceptional cases," *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002), quoting *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 673936, at *1 (D.D.C. Jan. 27, 2000) (internal quotation marks omitted); *see also Virtual Defense & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22–23 (D.D.C. 2001), and that a party seeking certification "must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.'" *Judicial Watch*, 233 F. Supp. 2d at 20, quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974). The party seeking certification "has the burden of establishing all three elements under § 1292(b)." *Air Transp. Ass'n of Am. v. United States Dep't of Agriculture*, 317 F. Supp. 3d 385, 393 (D.D.C. 2018). Defendants have not met that burden here.

The Court notes at the outset that according to the terms of section 1292(b), the possibility of an interlocutory appeal under this provision is supposed to be triggered by a statement by the district judge included in the order to be appealed. 28 U.S.C. § 1292(b). The

ruling issued on February 12, 2020 contained no such statement. But assuming that a party may move under this provision for the district judge to certify an issue for appeal, the predicate must still be established. And here, the Court cannot make the necessary finding.

Assuming that the Court's order involves controlling questions of law, the Court must find that there is a substantial ground for dispute regarding the issues to be appealed, and it must also conclude that immediate appeal will promote efficient resolution of the case in order to certify a case for interlocutory appeal. *See* § 1292(b); *see also In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 33142129, at *2 (D.D.C. Nov. 22, 2000) ("It is the duty of the district judge faced with a motion for certification to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute.").

Here, the Court is not of the opinion that its order granting the motion to compel involved controlling questions of law as to which there is a substantial ground for difference of opinion. "The threshold for establishing the substantial ground for difference of opinion with respect to a controlling question of law . . . is a high one." *Air Transp.*, 317 F. Supp. 3d at 393, quoting *Judicial Watch*, 233 F. Supp. 2d at 19 (internal quotation marks omitted). Substantial grounds for difference of opinion may be shown "by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *Id.*

As explained at the status hearing on the record, and as summarized by plaintiff in its opposition brief, the Court's ruling was based on an application of settled law. Defendants have not submitted any precedents that would supply the grounds for a difference of opinion. Defendants have pointed to the decisions in *Upjohn v. United States*, 449 U.S. 383 (1981), *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014) ("*KBR I*"), and *In re Kellog*

Brown & Root, Inc., 796 F.3d 137, 151 (D.C. Cir. 2015) ("*KBR II*") in support of their argument. Defs.' Mot. for Inter. Appeal. at 9–10. But both *Upjohn* and *KBR I* pertained to the application of the attorney client privilege to corporations when utilizing counsel to conduct internal investigations. Here, the Court made no findings as to whether the attorney client privilege applied – indeed, plaintiff did not contest that it did apply – the Court only found that defendants had waived the privilege when they disclosed the substance of the documents to the company's auditors, Ernst & Young. Hr'g Tr. at 13. The *KBR II* decision concerned waiver of the privileges when the protected information was put "in issue" – here, the Court did not conclude that waiver occurred in this manner. Moreover, those cases arose in circumstances different than the one presented here: The interview memoranda were prepared in conjunction with an internal investigation that was conducted by outside counsel not in anticipation of litigation, but at the request of the company's auditors, so they could gain confidence in issuing the company's 10-K statement. The results of that investigation were shared by counsel with the company's auditors, and the company then authorized the auditors to share the substance of that information with the SEC.

Defendants also maintain that the "Court bucked the weight of authority holding that interview memoranda are protected work product," Defs.' Mot. for Inter. Appeal at 9–10, but interview memoranda are only work product when they are created in anticipation of litigation; not everything created by an attorney is protected work product. *See United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) (a document can be protected by the work product protection "so long as the protected material was prepared because of the prospect of litigation"); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (the privilege only applies provided that the work was done "with an eye toward litigation"). Thus, the Court's ruling that the interview

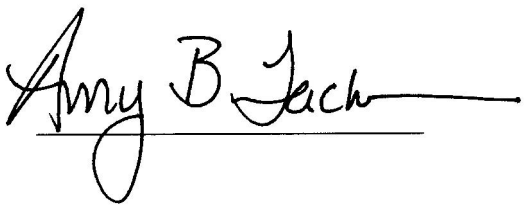
memoranda in this case were not created in anticipation of litigation has no implications for ordinary internal investigations.

In sum, defendants' own reading of the case law does not suffice to meet their burden to justify interlocutory appeal. It is well settled that "mere disagreement, even if vehement, with a court's ruling does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for interlocutory appeal." *Air Transp.*, 317 F. Supp. 3d at 393; *see also First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996) (same); *Nat'l Cmty. Reinvestment Coalition v. Accredited Home Lenders Holding Co.*, 597 F. Supp. 2d 120, 122 (D.D.C. 2009) (same).

And, even if the Court were able to find that substantial grounds for difference of opinion did exist, it would nonetheless deny the motion for certification because plaintiff has not demonstrated that this case satisfies section 1292(b)'s third requirement: "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." § 1292(b). Defendants argue that immediate appeal will advance litigation because it would "narrow the issues that remain to be litigated in this Court." Defs.' Mot. for Inter. Appeal at 10. But allowing interlocutory appeal for a non-dispositive discovery issue would only delay the ultimate resolution of the case. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 112 (2009) ("[P]iecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals."); *Cf. Am. Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261 n.63 (D.C. Cir. 1980) ("[I]t is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.").

Defendants have not satisfied their high burden to justify interlocutory appeal. Accordingly, defendants' motion for certification for interlocutory appeal [Dkt. # 83] is **DENIED**, and as a result, their motion for stay pending appeal [Dkt. # 83] is **DENIED** as moot. Defendants must produce the interview memoranda by March 19, 2020, fourteen days from the date of this order.

SO ORDERED.



AMY BERMAN JACKSON
United States District Judge

DATE: March 5, 2020