Case No. A20-0427

STATE OF MINNESOTA
IN SUPREME COURT

In re Polaris, Inc., Petitioner,

Colby Thompson,

Respondent,

vs.

Polaris, Inc.,

Petitioner,

John Does I-X,

Defendants.

REQUEST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

Pursuant to Rule 129.01 of the Minnesota Rules of Civil Appellate Procedure, the National Association of Manufacturers ("NAM") respectfully requests leave to participate as *amicus curiae* and to file a brief in support of petitioner Polaris, Inc.[1]

INTEREST OF AMICUS CURIAE

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for

[1] No counsel for any party authored this brief in whole or in part. No party except for the NAM made a monetary contribution to the preparation or submission of this brief.

nearly two-thirds of all private-sector research and development in the Nation. The Manufacturers' Center for Legal Action, the litigation arm of the NAM, is the voice of manufacturers in the courts, regularly filing *amicus curiae* briefs in cases of exceptional importance. Issues involving the conduct of internal investigations in relation to regulatory enforcement actions, and the application of the attorney-client privilege and work-product protections to communications and materials prepared for such investigations, are critically important. The NAM represents a public interest in the outcome of this case.

If left undisturbed, the Court of Appeals' opinion would chill "full and frank" communications between manufacturers and their counsel operating and litigating in Minnesota. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Manufacturers depend on such communications to ensure that their products and operations are safe and compliant. The Court of Appeals' opinion would also undermine effective internal investigations by restricting a corporation's board of directors' access to critical legal advice and weakening its ability to assert the attorney-client privilege on the company's behalf.

The issues presented by the Court of Appeals' order have far-reaching ramifications for manufacturers nationwide. The NAM respectfully requests that the voice of the broader manufacturing community be heard in this matter. If leave is granted, the NAM's amicus brief will suggest that the Supreme Court of Minnesota reverse the decision of the Court of Appeals and hold that the Report, described below, is privileged.

WHY AN *AMICUS* BRIEF IS DESIRABLE

The NAM's *amicus* brief would highlight for the Court how the Court of Appeals' order threatens U.S. manufacturers that litigate or do business in Minnesota. The Consumer

Product Safety Commission ("CPSC") is just one of many federal regulatory agencies that manufacturers may engage with on daily basis; similarly, the Consumer Product Safety Act ("CPSA") is just one of dozens of federal statutes regulating manufacturers. Federal laws frequently call for complex compliance frameworks that require the use of outside legal expertise. If allowed to stand, the Court of Appeals' opinion will impair manufacturers' ability to seek effective legal counsel, and indeed discourage them from doing so. This result would frustrate the purpose and effectiveness of nearly every regulatory framework.

The NAM intends to raise the following unique arguments, not directly addressed by the parties:

1. The Court of Appeals' Unduly Narrow Concept of Legal Advice Undercuts an Important Public Policy Preference in Favor of Promoting Compliance.

The Court of Appeals concluded that a report prepared by Polaris's outside counsel after the CPSC notified the company that it was under investigation ("the Report") "was primarily nonlegal in character," because it "focused on safety and operational issues." (Add. 3.) In characterizing the Report this way, the Court erred by disregarding both the nature of the work product at-issue and the potential regulatory ramifications of the company's compliance culture. U.S. businesses operate within increasingly complex regulatory regimes in which enforcement bodies such as the CPSC retain significant discretion to sanction companies based not only on their conduct but also on the likelihood that it may recur. Manufacturers must rely on candid, fulsome legal counsel to navigate these regimes. *See Upjohn*, 449 U.S. at 392 (explaining that the attorney-client privilege for businesses is essential "[i]n light of the vast and complicated array of regulatory legislation confronting the modern

corporation" which requires corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter.") (internal quotation marks and citation omitted).

In the context of a CPSC investigation, like the one that prompted Polaris to seek legal advice here, "safety, engineering, design, and corporate practices" are inexorably intertwined with legal compliance issues. (*See* Add. 2.); *see also Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 601 n.9 (4th Cir. 1997) ("[R]etention of outside counsel indicates that [a company] wanted someone who could collect and 'sift [] through the facts with an eye to the legally relevant . . . '") (quoting *Upjohn*, 449 U.S. at 390-91).

There are countless other complex regulatory statutes that, like the CPSA, transform corporate practices and operations into legal issues. Courts across the country have consistently held that documents prepared by attorneys (and in some cases, consultants) that evaluate compliance with these statutes and interrelated issues of company culture and operations ***are*** protected by the attorney-client privilege, *e.g.*:

- The Clean Air Act, 42 U.S.C. § 7401 et seq., and related state law. *See, e.g.*, *Graff v. Haverhill N. Coke Co.*, No. 1:09-cv-670, 2012 U.S. Dist. LEXIS 162013, at *27, 33 (S.D. Ohio Nov. 13, 2012) (following notice of violation by the Ohio EPA, documents related to an Health, Environmental, and Safety audit conducted by a third-party consultant at the direction of company's in-house counsel "to assess its compliance with regulatory requirements and company policies and to provide . . . legal advice based on such findings" were privileged and not discoverable).

- The Securities Exchange Act, 15 U.S.C. § 78a et seq. *See, e.g.*, *In* re *LTV Sec. Litig.*, 89 F.R.D. 595, 615 (N.D. Tex. 1981)(reports generated by a Special Officer retained "to investigate questionable accounting and auditing practices to determine how they can be brought into compliance with SEC standards, and to investigate the conduct of corporations . . . . particularly when made in the face of a pending enforcement proceeding, is the type of activity protected by the attorney-client privilege and work-product rule.").

- The False Claims Act, 31 U.S.C. §§ 3729-3733. *See, e.g.*, *In re Kellogg Brown & Root*, *Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) ("As in *Upjohn*, [defendant company] initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, [the company's] investigation was conducted under the auspices of [its] in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.").

2. Disclosure to a Company's Board of Directors Does Not Destroy Privilege.

In addition to adopting an unduly narrow concept of legal advice, the Court of Appeals also strayed from settled privilege law by using the Report's "consideration by [Polaris's] board of directors" as evidence of its discoverability. In fact, Polaris's board of directors is well-situated to implement recommendations from the Report, especially if those recommendations involve significant new expenses and/or the conduct of corporate officers. Directors are therefore uniquely justified in seeking and receiving legal advice pertaining to compliance matters. The same would be true of any corporation.

The U.S. Supreme Court has made clear that "the authority to assert and waive the corporation's attorney-client privilege" rests with "management." *Commodity Futures Trading Comm'n v Weintraub*, 471 U.S. 343, 348-49 (1985). State corporation laws, including Minnesota law, vest management authority in a corporation's board of directors. *See* Minn. Stat. Ann. § 302A.201 ("The business and affairs of a corporation shall be managed by or under the direction of a board").

In other words, "[t]here is but one client, and that client is the corporation." *Milroy v. Hanson*, 875 F. Supp. 646, 649 (D. Neb. 1995) (citing *Weintraub*, 471 U.S. at 348). This is true despite the fact that a corporation can only act through human beings. *Milroy*, 875 F. Supp.

at 649; *see also Santrade, Ltd. v. GE*, 150 F.R.D. 539, 545 (E.D.N.C. 1993) ("[D]ocuments subject to the privilege may be transmitted between non-attorneys (especially individuals involved in corporate decision-making) so that the corporation may be properly informed of legal advice and act appropriately.").

In this case, Polaris's General Counsel retained outside counsel to conduct an investigation and provide legal advice to Polaris, the one client. Providing that advice to Polaris's board equated to sharing privileged information with Polaris's management. To deny privilege in this context would turn established Supreme Court precedent on its head.

CONCLUSION

In view of the above, the NAM submits that it can provide the Court with a unique perspective and urges the Court to grant it leave to submit a brief as *amicus curiae* in this case. It will abide by Rule 132.01's requirements and avoid repetitious arguments.

Dated: August 13, 2020

Respectfully submitted,

/s/ Patrick Hedren
Patrick Hedren (#0391766)
Manufacturers' Center for Legal Action
733 10th Street NW, Suite 700
Washington, DC 20001
Phone: 202.637.3100
Email: PHedren@nam.org

Counsel for the National Association of Manufacturers

APPLICANT NATIONAL ASSOCIATION OF MANUFACTURERS' PUBLIC ADDENDUM

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O R D E R

#A20-0427

Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and Rodenberg, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

Petitioner Polaris Inc. seeks a writ of prohibition, challenging the district court's rulings on claims of attorney-client and work-product privilege. In the alternative, Polaris seeks temporary relief and full briefing. *See* Minn. R. Civ. App. P. 120.04. The parties have fully briefed the issues presented and we conclude that it is appropriate to address the merits of the petition.

The supreme court has indicated that if the facts relating to a claim of privilege "are not disputed," the appellate court should "review the matter de novo." *Kobluk v. Univ. of*

Minn., 574 N.W.2d 436, 439 (Minn. 1998). But the court has also said that "the question of privilege is one of fact," the appellate court must determine whether "the district court's findings are supported by the evidence," and prohibition is properly denied if the petitioner has "not met its burden of showing that" the district court ordered disclosure of a communication that is "clearly not discoverable." *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 19 (Minn. 2009). Under either standard, we conclude that prohibition should be denied.

"[T]he party resisting disclosure bears the burden of presenting facts to establish the privilege's existence." *Kobluk*, 574 N.W.2d at 440; *see also Abbott*, 767 N.W.2d at 19. "[A] document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" *Kobluk*, 574 N.W.2d at 439. "[A] court should decide, as a threshold matter, whether the contested document embodies a communication in which legal advice is sought or rendered." *Id.* at 444. The involvement of a lawyer or law firm is prima facie evidence that a client is seeking legal advice, but that evidence can be overcome by a showing that the advice provided is "of a nonlegal character." *Cf. id.* at 442.

If viewed as a question of fact, *see Abbott*, 767 N.W.2d at 18, our close review of the record establishes that there is ample evidence to support the district court's finding that the purpose of the report was to "address safety, engineering, design, and corporate practices," not to provide legal advice. Because the report is not currently accessible to the public, we will not quote it directly, but its analysis of corporate culture and recommendations for changes to internal business operations, its consideration by the board of directors in 2016 and its subsequent use in safety discussions, and the weight of the evidence cited by the parties do not support petitioner's assertion that the district court

ordered the production of a document that is clearly not discoverable. *See id.* at 19. If the claim is evaluated de novo, *see Kobluk*, 574 N.W.2d at 439, the report cannot fairly be described as analogous to a confidential conversation "in which legal advice is sought or rendered." *See id.* at 444. The report to the board of directors focused on safety and operational issues, as the district court correctly found. Respondent established that the advice provided was primarily nonlegal in character, overcoming any presumption that outside counsel was providing legal advice.

Petitioner also argues that the report is protected by work-product privilege. That privilege protects "an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial." *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986); *see also* Minn. R. Civ. P. 26.02(d). Partial redaction may be the appropriate remedy when a party establishes that discovery documents include opinion work product. *See State ex rel. Humphrey v. Philip Morris, Inc.*, 606 N.W.2d 676, 681-82 (Minn. App. 2000), *review denied* (Minn. Apr. 25, 2000). The contested report and recommendations focused on corporate culture and safety issues, not legal strategy, and the district court specifically authorized the redaction of "those limited sections that contain legal opinions" regarding the interpretation of federal regulatory requirements.

Petitioner failed to establish that the district court ordered production of information that is clearly not discoverable. Accordingly, prohibition will not lie.

Both parties properly segregated confidential documents filed in the district court in confidential addenda, as required by Minn. R. Civ. App. P. 112.02. Respondent Colby Thompson moves for acceptance of a redacted version of the response to the petition. It

appears that the proposed redactions are limited to information contained in documents filed in the district court that are not currently accessible to the public. Accordingly, we conclude that acceptance of the redacted version is consistent with Minn. R. Civ. App. P. 112.03.

IT IS HEREBY ORDERED:

1. The petition for prohibition is denied.

2. The motion to accept a redacted version of the response to the petition is granted.

Dated: July 1, 2020

BY THE COURT

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Tracy M. Smith
Presiding Judge