

No. 06-1070

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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*In re: QWEST COMMUNICATIONS INTERNATIONAL INC.*

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Petition Pursuant to 28 U.S.C. § 1651(a) and Fed. R. App. P. 21(a)  
for a Writ of Mandamus To the  
United States District Court for the District of Colorado

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**BRIEF FOR *AMICI CURIAE* THE ASSOCIATION OF CORPORATE  
COUNSEL AND THE CHAMBER OF COMMERCE OF THE UNITED  
STATES OF AMERICA SUPPORTING QWEST COMMUNICATIONS  
INTERNATIONAL INC.'S PETITION FOR WRIT OF MANDAMUS**

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Susan Hackett  
Senior Vice President and General Counsel  
Association of Corporate Counsel  
1025 Connecticut Avenue, N.W., Suite 200  
Washington, D.C. 20036  
Telephone (202) 293-4103, ext 318  
Facsimile: (202) 293-4701

Robin S. Conrad  
Amar D. Sarwal  
National Chamber Litigation Center, Inc.  
1615 H Street, N.W.  
Washington, D.C. 2006  
Telephone: (202) 463-5337  
Facsimile: (202) 463-5346

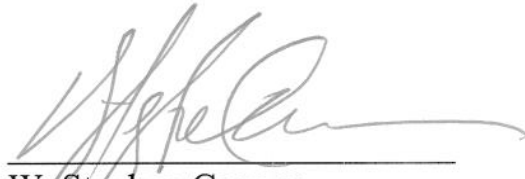
W. Stephen Cannon  
Todd Anderson  
Jean Kim  
Constantine Cannon P.C.  
1627 Eye Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 204-3500  
Facsimile: (202) 204-3501

Counsel for *Amici Curiae*

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In compliance with Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* the Association of Corporate Counsel ("ACC") is a not-for-profit bar association organized under the laws of the District of Columbia. ACC has no parent corporation, and no publicly held company owns 10% or more of its stock.

*Amicus* the Chamber of Commerce of the United States of America (the "Chamber") is a not-for-profit business federation organized under the laws of the District of Columbia. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.



W. Stephen Cannon  
Constantine Cannon, P.C.  
1627 Eye Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 204-3500  
Facsimile: (202) 204-3501  
scannon@constantinecannon.com

*Counsel for Amici Curiae*

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**INTEREST OF *AMICI CURIAE* ASSOCIATION OF  
CORPORATE COUNSEL AND THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA**

This brief of *amici curiae* is submitted by the Association of Corporate Counsel ("ACC") and the National Chamber Litigation Center on behalf of the Chamber of Commerce of the United States of America (the "Chamber").

ACC is the in-house bar association, with more than 19,000 members worldwide who practice inside the legal departments of corporations and other organizations in the private sector. As an *amicus curiae*, the ACC presents the perspective of in-house counsel who advise corporate clients on virtually every conceivable matter of law and legal policy, including on issues of how clients should treat attorney-client privileged communications that are sheltered by the attorney-client privilege and the work product doctrine. ACC members are at work in more than 8,000 corporations in the United States and abroad, including public and private companies, both large and small, as well as in various not-for-profit organizations. ACC has almost 600 members working in states covered by the Tenth Circuit. Thousands more of our members represent clients who do business in this Court's jurisdiction, as well.

The Chamber of Commerce of the United States of America is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. A significant

number of the Chamber's members conduct business in the 10th Circuit. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business.

*Amici* ACC and the Chamber have performed extensive studies, given testimony, submitted briefs and authored commentary regarding recent developments in and the preservation of the attorney-client privilege and work product doctrine.<sup>1</sup> These *amici* have an interest in this case because, unless

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<sup>1</sup> See, e.g., Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* (2006), at <http://www.acca.com/Surveys/attyclient2.pdf>; Association of Corporate Counsel, *Executive Summary, Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?* (2005), at <http://www.acca.com/Surveys/attyclient.pdf>; *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers Before the Comm. on the Judiciary's Subcomm. on Crime, Terrorism and Homeland Security*, 109th Cong. (Mar. 7, 2006), at <http://judiciary.house.gov/oversight.aspx?ID=222> (testimony of Chamber CEO Thomas J. Donohue, and submission by the Coalition to Preserve the Attorney-Client Privilege, at <http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf>); *Amicus Brief of the Association of Corporate Counsel in Support of Relators' Petition for Writ of Mandamus, In re Stone & Webster, Inc., The Shaw Group Inc., and Ernst & Young LLP*, No. 05-0552 (Tex. filed Jul. 19, 2005) (No. 05-0552), at <http://www.acca.com/public/amicus/txamicus.pdf>; *Comments of the Association of Corporate Counsel (ACC) to the ABA Attorney-Client Privilege Task Force Hearings* (2005), at <http://www.acca.com/public/comments/attyclient/privilege.pdf>; comments by both ACC and the Chamber before the United States Sentencing Commission (August 15, 2005), at <http://www.acca.com/public/accapolicy/attyclient.pdf>; ACC *Amicus Brief, Exxon-Mobil Corp. v. Ala. Dep't of Conservation & Natural Res.*, at <http://www.acca.com/public/amicus/exxon/>; Letter from ACC to Deputy Attorney General Eric Holder of June 16, 1999, at

overturned, the decision of the court below will produce the inequitable result of further punishing companies that have already been forced to forgo their legitimate claims for protection of their attorney-client communications and attorney work product.

This "culture of waiver" created by the government is fostered and encouraged when prosecutors – and not clients or courts – determine whether or not a targeted corporation should be allowed to exert its privilege rights. Often, such waiver entails the promise of confidentiality agreements that will – at least – protect the company from discovery of the waived documents in subsequent third party litigation. Thus, companies such as Qwest sign confidentiality agreements to preserve their privilege rights against third parties *after* the government strips them of their practical ability to say "no" to demands for privileged material in the course of an investigation or prosecution.

To hold that production of Qwest's privileged files in this matter waived the Company's privileges to an essentially limitless universe of third parties will impose an unduly harsh sanction on this and similar corporations that decide to cooperate with law enforcement authorities under the circumstances described here. Such a result will reinforce a message that the attorney-client privilege in

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<http://www.acca.com/public/accapolicy/holder.html> (protesting the publication of the DOJ's new corporate charging policies and their impact on privilege).



the corporate context is unreliable; and an unreliable privilege is meaningless in terms of its practical application.

Erosions in the attorney-client privilege chill communications between companies and their counsel, and thus eat away at the foundations of sound compliance efforts which stand upon the regular and candid provision of legal advice, and are premised upon the confidence of employees in bringing even the most sensitive issues to company lawyers without fear that their decision to do so will later be viewed as ill-advised. A loss of the protections of the attorney-client privilege and work product doctrine is a loss to corporate clients, corporate employees, and the protections from corporate irresponsibility that we seek to offer the public at large. A loss of Petitioner Qwest's ability to protect its legitimately confidential counsel from third party demands for production as a result of Qwest's cooperation with the government creates a precedent that will operate as a loss for our shared system of justice and the rules of fair play in the adversarial system.

## **SUMMARY OF ARGUMENT**

The attorney-client privilege and work product doctrine are in serious jeopardy. In its prosecutorial zeal, the government has inappropriately stepped into the role reserved by the U.S. Supreme Court for impartial courts, claiming [under its own internal guidelines and policies, such as the Thompson Memorandum at the Department of Justice ("DOJ") or the Seaboard Report at the Securities Exchange Commission ("SEC")] that it is within the government's purview to decide when a corporate client's privilege should be waived. By unilaterally treating privilege as a bargaining chip to be played in the investigation and charging process (certainly well before any determination of guilt or even confirmation of wrongdoing), the government has created a "culture of waiver" that is dismissive of clients' rights to counsel and a balanced playing field for litigants in the adversarial process. In today's highly-charged legal compliance environment, prosecutors find it all too easy to coerce corporations who wish to survive an investigation (let alone a prosecution) to abandon the fundamental protections guaranteed to every party participating in our justice system.

The mounting alarm and frustration in response to such coercion of clients' rights is clear, but companies are at a loss for knowing to whom they can turn to seek redress:

- "Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system."
- "The government now expects a waiver as their inherent right."
- "It seems the government has taken the stand that because they are the government the rules do not apply to them and [they] can by force and intimidation take whatever they want."
- "[W]ithin a matter of a few years, these [government prosecutors] have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship."
- "We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators."
- "[T]he government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over-reaching by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty."
- "The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment. See Arthur Andersen for details . . . oh yeah . . . they cease to exist."
- "For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company."

Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-*

*Client Privilege in the Corporate Context: Survey Results* at 14-22 (2006).<sup>1</sup>

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<sup>1</sup> The summary of this survey, reflecting responses from over 1,200 in-house and outside corporate counsel, is available online at <http://www.acca.com/Surveys/attyclient2.pdf>. The broad coalition that conducted this survey is comprised of the ACC, the Chamber, the American Civil Liberties Union, the American Bar Association, The Business Roundtable, the National Association of Manufacturers, and the National Association of Criminal Defense Lawyers, among others.

Given this "culture of waiver," situations like those in the instant case are common, where private plaintiffs seek the disclosure of privileged documents which a corporation was likely coerced to provide under the narrow terms of confidentiality agreements with government regulators and the DOJ. Leaving undisturbed the lower court's decision in this case would unfairly and unnecessarily strip corporations of their fundamental rights to any remnant of their attorney-client and work product protections.

As set forth in Qwest's brief (and as has been argued by similarly-situated corporations in many other cases), companies which have been forced by government prosecutors to waive their privileges should enjoy at least the modest judicial protection of the assurance that any resulting waiver will be no broader than that agreed upon with the government. Because government prosecutors themselves originally demanded the release of information while making this promise of confidentiality that accompanies it, the court should not address the limited waiver issue as if it exists in a vacuum separated from the government's demands regarding corporate clients' privilege rights. We request that this court come to the equitable aid of Qwest in this case, and thus not cede its authority over the rules of practice and the balance of a fair playing field in our legal system.<sup>2</sup>

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<sup>2</sup> *Amici* further incorporate by reference the statement of facts, argument and authorities presented in Petitioner Qwest Communications International Inc.'s Petition for Writ of Mandamus.

## ARGUMENT

### **I. ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTIONS ARE VITAL TO CORPORATE COMPLIANCE EFFORTS AND THE ADMINISTRATION OF JUSTICE**

The attorney-client privilege is the oldest of the evidentiary privileges and is the cornerstone of the attorney-client relationship.<sup>3</sup> The privilege promotes client candor by encouraging executives and other employees of companies to seek guidance and ask difficult questions regarding the most sensitive issues. Candid communications with clients allow attorneys to gain a comprehensive understanding of the facts surrounding an issue so as to render the best legal advice. In short, guarantees of confidentiality encourage employees to engage in the "full and frank communications" necessary to avoid, uncover and address corporate wrongdoing and errors. *Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981).

Protecting the confidentiality of attorney-client communications "promote[s] . . . the observance of law and administration of justice." *Id.* at 389. *See also United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) ("counseling clients and bringing them into compliance with the law" is a "valuable social service [that] cannot be performed effectively if clients are scared to tell their lawyers what they

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<sup>3</sup> The privilege originated in the common law of England in the 1500s. *See Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580) (finding "[a] counselor not to be examined of any matter, wherein he hath been of counsel").

are doing"); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (the attorney-client privilege promotes "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth").

Like attorney-client privilege, the protection of attorney work product speaks to the desire to foster fairness in our adversarial legal system. Protecting attorneys' work product encourages thorough and careful preparation. Without this protection, counsel's legal strategies, case assessments and attorney impressions would be open to discovery by adversaries, and the message to lawyers would be: "don't write anything down, and never record your thoughts or counsel." The U.S. Supreme Court promoted the value of protecting attorneys' work product almost sixty years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947), noting that if discovery of attorney work product were permitted, "much of what is now put down in writing would remain unwritten." *Id.* at 510. The Court reasoned that if work product was not protected, "[t]he effect on the legal profession would be demoralizing" and "the interests of the clients and the cause of justice would be poorly served." *Id.*

Neither the attorney-client privilege or the work product protections that Qwest or other corporate clients seek to protect prevents prosecutors or other plaintiffs from gaining access to the facts needed to make their case. Nor does protection of a client's privilege prevent the client from cooperating in a full and meaningful fashion when the government is investigating an allegation of

wrongdoing. For the attorney-client privilege and work product doctrine are actually very narrow protections – the privilege does not protect facts from being discovered, and it does not even apply if it is consciously used by a lawyer and client to cloak fraudulent or criminal activities. *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves*, 144 F.R.D. 258, 268 (E.D. Pa. 1992) (general nature of the privileged matter and the factual circumstances of the attorney-client relationship remain discoverable even when communication itself is protected); *United States v. Johnston*, 146 F.3d 785, 795 (10th Cir. 1998) ("[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud.") (internal quotations omitted).

## **II. A NEWLY ESTABLISHED "CULTURE OF WAIVER" IS A REALITY WITH WHICH CORPORATIONS MUST CONTEND**

Unfortunately, the decision below would further undermine these fundamental protections of both corporate clients and our legal system. The reality is that corporate clients' privilege protections have been substantially weakened in recent years due to relatively new DOJ policies and practices which force companies to waive their privilege protections during federal investigations and during charging and sentencing decisions in order to receive credit for cooperating with the authorities.<sup>4</sup> Former high-ranking bipartisan DOJ officials agree that such

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<sup>4</sup> Specifically, the so-called "Thompson Memorandum" setting forth current DOJ policy on this issue identifies nine factors that federal prosecutors should use when charging companies, *including "waiver of corporate attorney-client and work*

policies are inappropriate and unnecessary. Richard Thornburgh, the former Attorney General of the United States, recently testified that during the years he served as a federal prosecutor, "requests to organizations we were investigating to hand over privileged information never came to my attention. I ask you: what has changed in the past decade to warrant such a dramatic encroachment on the attorney-client privilege?"<sup>5</sup> The resulting "culture of waiver" has created an

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*product protections.*" Memorandum from Deputy Attorney General Larry D. Thompson to U.S. Attorneys of January 20, 2003 regarding "Principles of Federal Prosecution of Business Organizations" at 3 (emphasis added). Although waiver is not technically "mandatory" under this DOJ policy, the Thompson Memorandum, in practice, leads federal prosecutors to routinely pressure companies and other organizations to waive their privilege as a condition for receiving cooperation credit during investigations.

Federal regulators, including the SEC, have policies and practices similar to those of the DOJ which mention disclosures of protected information in the context of "cooperation credit." *See, e.g.*, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exch. Act Rel. No. 44969 (Oct. 23, 2001) (the "Seaboard Report") (outlining criteria SEC considers when assessing the extent to which a company's self-policing and cooperation effort will influence the SEC's decision to bring an enforcement action); NYSE Enforcement Division, *Cooperation* at 3 (Sept. 14, 2005) (waiver of attorney-client privilege considered in assessing a firm's cooperation). Further, although currently under review, recent amendments made to the U.S. Sentencing Guidelines exacerbate the attack on confidentiality protections. They provide that in order to qualify for a sentence reduction for assisting with the government's investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. n. 12 (2004).

<sup>5</sup> *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers*" Before the Comm. on the Judiciary's Subcomm. on Crime, Terrorism and



environment in which clients no longer feel free to consult lawyers for fear that their words will be used against them, and lawyers can no longer assert their clients' privileges against anyone, rendering the confidentiality of their counsel meaningless. Although *amici* urge this court to note with disapproval this culture of waiver as a matter of policy that should be reversed, they also recognize that regardless of whether such a pronouncement is forthcoming, privilege waiver is already an unfortunate reality impacting corporations and limiting the practical effectiveness of their compliance programs.

While prosecutors and enforcement officials suggest that corporations under threat of indictment "choose" to waive their privileges in return for the opportunity to avoid being charged or in order to increase the likelihood of leniency, there is no "choice" involved. Corporations faced with an official request for privileged documents must waive their protections because the mere threat of being labeled "uncooperative" is an entity-threatening risk. Even if the underlying criminal charges are unfounded, being publicly labeled as "uncooperative" by a prosecutor can have a profound effect on a corporation's public image, market capitalization, and even creditworthiness – the company could lose the viability of its business before the case ever got to trial.

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*Homeland Security*, 109th Cong. (Mar. 7, 2006) (testimony of Richard Thornburg, former Attorney General of the United States).

Empirical evidence underscores the situation. A recently released survey that polled over 1,200 in-house and outside corporate counsel addresses this "culture of waiver" directly. Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* (2006), at <http://www.acca.com/Surveys/attyclient2.pdf>. Almost 75% of both in-house and outside counsel who responded to the survey agree that a "culture of waiver" has evolved to a point where government agencies expect and demand a company under investigation to broadly waive privilege. *Id.* at 3-4. In addition, 52% of in-house counsel and 59% of outside corporate counsel believe that there has been a marked increase in waiver requests *as a condition of cooperation*. *Id.* at 4.

The American Bar Association's Presidential Task Force on the Attorney-Client Privilege, which is also studying this issue extensively, shares these concerns. The task force reports that evidence it has received suggests "these practices are becoming increasingly widespread and are engendering substantial concern within the professional and corporate community that the protections of the attorney-client privilege and work product doctrine are being eroded." ABA Presidential Task Force on the Attorney-Client Privilege, *Task Force Report* at 14 (2005), at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>.

Finally, witnesses at a recent Congressional hearing reinforced these conclusions.<sup>6</sup> Witnesses criticizing the current "culture of waiver" included Former Attorney General Richard Thornburgh, who testified that current governmental practices seriously undermine confidentiality protections and recalled that during the years he had served as a DOJ prosecutor, privilege waiver demands had not been necessary to conduct investigations. *Id.* Expanding on this point, Representative William D. Delahunt asked "[w]hy is it . . . that traditional weapons such as grand jury subpoenas, informants, and immunity don't work anymore?" *Id.* (concluding that DOJ's justification for this new culture of waiver just doesn't hold water). In addition to concurring with these observations, Chamber President and CEO, Thomas J. Donohue, noted in his testimony that the DOJ and other regulatory agencies have unilaterally created this erosion of attorney-client and work product protections without seeking input, oversight, or approval from the Judiciary, which is the appropriate arbiter and guarantor of the privileges' protections. *Id.*

Everything points to one unfortunate conclusion -- the demand for privilege waivers by the government as a pre-requisite to fair treatment by prosecutors is now routine.

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<sup>6</sup> *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers Before the Comm. on the Judiciary's Subcomm. on Crime, Terrorism and Homeland Security*, 109th Cong. (Mar. 7, 2006).

### **III. THE COURTS SHOULD PREVENT INEQUITABLE RESULTS BY HONORING THE LIMITATIONS OF WAIVER AGREED TO BY THE GOVERNMENT**

When the government demands a privilege waiver, corporations face a "Hobson's Choice" of either (i) denying the government's waiver requests at the risk of being labeled "uncooperative" or (ii) waiving legitimate privilege to the government on the condition that a confidentiality agreement between the company and the government will at least protect the company from disclosures to third party private plaintiffs. As a matter of both policy and equity, the ACC and the Chamber believe that the inherent unfairness of this Hobson's Choice should not be compounded by the judicial expansion of the waiver beyond the limited confines in which it was given, especially since any such expansion to encompass unrelated third parties is totally unnecessary to assure fairness between the cooperating companies and those persons.

Often, as happened here to Qwest, corporations seek to protect themselves from the inevitable damage to the company and stakeholders that occurs in the event of some kind of corporate failure by entering into confidentiality agreements with government regulators and enforcement officials prior to disclosure of attorney-client privileged documents. They do so with the belief that such agreements will shield their most sensitive legal conversations (and arguably related subject matter which might also be sought) from disclosure outside the government investigation and any resulting enforcement or regulatory actions.

Such information might include witness interview notes, which contain comments about issues that should be followed up on because they sound suspicious, but which when investigated reveal no inappropriate activity; the newspaper headline would not likely pick up on the latter point.

Without the courts' protection of the limited waiver agreed upon by the government and relied upon by the corporation, the corporation is punished for cooperating with the government as mandated by the prosecutor. Obviously, a broader waiver is not essential to the accomplishment of the government's enforcement or regulatory functions, which must be presumed to have been satisfied by the agreement the parties reached. Rather, fairness in those proceedings is best addressed by focusing on whether any waiver of privilege or work product protections occurred here.

Determinations regarding privilege are within the purview of the courts as provided by Fed. R. Evid. 501 -- "[privilege] shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The Court now is in a position to mitigate the consequence of coercive government demands for waiver as a condition of cooperation by at least limiting the waiver to the arena in which it was given. Failure by this court to act swiftly and unequivocally to remedy these wrongs will not only undermine the protections that Qwest should have been allowed to rely

upon, but will also increase uncertainty as to the future protection of confidential information for other companies.

#### **IV. THIS CASE IS AN OPPORTUNITY FOR THE TENTH CIRCUIT TO CLARIFY LIMITED WAIVER DOCTRINE IN LIGHT OF CURRENT GOVERNMENT ENFORCEMENT POLICIES**

As the U.S. Supreme Court has observed, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The lack of clear judicial guidance regarding the availability of limited waiver, especially in light of the escalating practice of demanding privilege waivers in government investigations so that limited waivers become necessary, further erodes confidentiality protections.

Case law on the issue of limited waiver adds to the confusion regarding the extent of the protections provided by the attorney-client privilege and work product doctrine. The 8th Circuit has unqualifiedly adopted a limited waiver doctrine, reasoning that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1997). While the D.C., First, Second and Seventh Circuits have declined to adopt a blanket limited waiver doctrine, they have indicated that limited waiver may

apply in a context – such as the one presented in the instant case – in which the government and the company have entered into a confidentiality agreement. The Third, Fourth and Sixth Circuits have rejected the limited waiver doctrine.

It is important to note, however, that even the leading case rejecting limited waiver, *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002), was decided prior to the issuance of the Thompson Memorandum, the empirical analysis confirming this newly established "culture of waiver," and the recent recognition of this issue by Congress. Accordingly, the Sixth Circuit's *Columbia/HCA Healthcare* decision does not speak to the viability of the limited waiver doctrine in the face of "culture of waiver" that now characterizes corporate prosecutions.

The Tenth Circuit now has an opportunity to clarify the application of the limited waiver doctrine in this circuit and, if it reverses the lower court in this case, to eliminate the inequitable results and uncertainty facing companies doing business here.

### **PRAYER**

For all these reasons, *amici* pray that this Court grant the Petition for Writ of Mandamus and reverse the actions of the United States District Court for the District of Colorado with respect to its February 2, 2006 Order which compels the producing of documents.

Respectfully submitted,



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Robin S. Conrad  
Amar D. Sarwal  
National Chamber Litigation Center, Inc.  
1615 H Street, N.W.  
Washington, D.C. 20062  
(202) 463-5337  
(202) 463-5346 (Fax)  
*Attorneys for Amicus Curiae the Chamber of  
Commerce of the United States of America*

Susan Hackett  
Senior Vice President and General Counsel  
Association of Corporate Counsel  
1025 Connecticut Avenue, N.W., Suite 200  
Washington, D.C. 20036  
(202) 293-4103, ext. 318  
(202) 293-4701 (Fax)  
*Attorney for Amicus Curiae Association of  
Corporate Counsel*

W. Stephen Cannon  
Todd Anderson  
Jean Kim  
Constantine Cannon, P.C.  
1627 Eye Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 204-3500  
Facsimile: (202) 204-3501  
*Attorneys for Amici Curiae*



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. E. App. P. 32(a)(7)(C), I hereby certify that this brief was produced in Times Roman 14 point typeface using Microsoft Word 2003 and contains 2,901 words



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Kevin P. Morrison

**CERTIFICATE OF DIGITAL SUBMISSIONS**

I HEREBY CERTIFY, PURSUANT TO Tenth Circuit Emergency General Order of October 20, 2004 *In re Electronic Submission of Selected Documents*, as revised, as follows:

(1) All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(2) The digital submissions have been scanned for viruses by the following program and, according to the program, are free of viruses: Symantic Antivirus Version 9.0.0.38, updated 3/8/2006



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KEVIN MORRISON

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March 2006, a copy of the foregoing *Brief for Amicus Curiae the Association of Corporate Counsel and the Chamber of Commerce of The United States of America*, was served (i) via e-mail on the following persons at the following e-mail addresses pursuant to Tenth Circuit Emergency General Order of October 20, 2004, *In re Electronic Submission of Selected Documents*, as revised; (ii) via First Class Mail on the following persons at the following addresses pursuant to Fed. R. App. P. 25; and (iii) via Federal Express on Judge Blackburn of the United States District Court for the District of Colorado pursuant to Fed. R. App. 21(a)(1).

### PLAINTIFFS:

Michael J. Dowd  
Spencer A. Burkholz  
Thomas E. Egler  
**Lerach, Coughlin, Stoia, Geller,  
Rudman & Robbins LLP**  
655 West Broadway; Suite 1900  
San Diego, CA 92101  
**Counsel for Plaintiff in In re Qwest  
Secs. Litig.**  
Telephone: (619) 231-1058  
[miked@lerachlaw.com](mailto:miked@lerachlaw.com)  
[spenceb@lerachlaw.com](mailto:spenceb@lerachlaw.com)  
[tome@lerachlaw.com](mailto:tome@lerachlaw.com)

Robert J. Dyer, III  
Kip B. Shuman  
Jeffrey A. Berens  
**Dyer & Shuman, LLP**  
801 East 17<sup>th</sup> Avenue  
Denver, CO 80218-1417  
**Counsel for Plaintiff in In re Qwest  
Secs. Litig.**  
Telephone: (303) 861-3003  
[bob@dyershUMAN.com](mailto:bob@dyershUMAN.com)  
[kshuman@dyershUMAN.com](mailto:kshuman@dyershUMAN.com)  
[jberens@dyershUMAN.com](mailto:jberens@dyershUMAN.com)

Joe R. Whatley, Jr.  
Glen Connor  
**Whatley Drake, LLC**  
2323 Second Avenue North  
Birmingham, AL 35202  
Telephone: (205) 328-9576  
**Counsel for Plaintiff in ERISA matter**  
[jwhatley@whatleydrake.com](mailto:jwhatley@whatleydrake.com)  
[gconnor@whatleydrake.com](mailto:gconnor@whatleydrake.com)

Jay W. Eisenhofer  
Michael J. Barry  
Sharan Nirmul  
**Grant & Eisenhofer, LLP**  
1201 North Market Street, Suite 2100  
Wilmington, DE 19801  
**Counsel for Plaintiffs in Stichting  
matter**  
Telephone: (302) 622-7700  
[jeisenhofer@gelaw.com](mailto:jeisenhofer@gelaw.com)  
[snirmul@gelaw.com](mailto:snirmul@gelaw.com)  
[mbarry@gelaw.com](mailto:mbarry@gelaw.com)

Clyde A. Faatz  
Christopher J.W. Forrest  
**Hamilton & Faatz, a Professional  
Corporation**  
1600 Broadway, Suite 500  
Denver, CO 80202-4905  
**Counsel for Plaintiffs in Stichting  
matter**  
Telephone: (303) 830-0500  
[cfaatz@handf.com](mailto:cfaatz@handf.com)  
[ciforrest@handf.com](mailto:ciforrest@handf.com)

## **DEFENDANTS**

Frederick J. Baumann  
James M. Lyons  
**Rothgerber Johnson & Lyons LLP**  
1200 17<sup>th</sup> Street, Suite 3000  
Denver, CO 80202-5855  
**Counsel for Alvarado, Anschutz,  
Barrett, Brown, Donohue, Haines,  
Harvey, Hellman, Khosla, Popoff,  
Slater & Stephens**  
Telephone: (303) 623-9000  
[fbaumann@rothgerber.com](mailto:fbaumann@rothgerber.com)  
[jlyons@rothgerber.com](mailto:jlyons@rothgerber.com)

Scott B. Schreiber  
John A. Freedman  
Kwame Clement  
Elissa Preheim  
**Arnold & Porter**  
555 Twelfth Street, NW  
Washington, DC 20004-1206  
**Counsel for Arthur Andersen LLP &  
Mark Iwan**  
Telephone: (202) 942-5000  
[Scott.shreiber@aporter.com](mailto:Scott.shreiber@aporter.com)  
[John.freedman@aporter.com](mailto:John.freedman@aporter.com)  
[Kwame.clemente@aporter.com](mailto:Kwame.clemente@aporter.com)  
[Elissa\\_preheim@aporter.com](mailto:Elissa_preheim@aporter.com)

Herbert J. Stern  
Edward S. Nathan  
Jeffrey Speiser  
Joel M. Silverstein  
**Stern & Kilcullen**  
75 Livingston Avenue  
Roseland, NJ 07068  
Telephone: (973) 535-2600  
**Counsel for Joseph P. Nacchio**  
[dpenna@sgklaw.com](mailto:dpenna@sgklaw.com)  
[jseiser@sgklaw.com](mailto:jseiser@sgklaw.com)  
[jsilverstein@sgklaw.com](mailto:jsilverstein@sgklaw.com)  
[enathan@sgklaw.com](mailto:enathan@sgklaw.com)

James Miller  
David Meister  
John Carroll  
**Clifford Chance US LLP**  
31 West 52<sup>nd</sup> Street  
New York, NY 10166  
**Counsel for Robert Woodruff**  
Telephone: (212) 878-8000  
[james.miller@cliffordchance.com](mailto:james.miller@cliffordchance.com)  
[david.meister@cliffordchance.com](mailto:david.meister@cliffordchance.com)  
[john.carroll@cliffordchance.com](mailto:john.carroll@cliffordchance.com)

Bruce F. Black  
Michael J. Hoffman  
Martin D. Litt  
**Holme Roberts & Owen LLP**  
1700 Lincoln Street, Suite 4100  
Denver, CO 80203  
**Counsel for Phillip Anschutz & Craig Slater**  
Telephone: (303) 861-7000  
[blackb@hro.com](mailto:blackb@hro.com)  
[hofmanm@hro.com](mailto:hofmanm@hro.com)  
[littm@hro.com](mailto:littm@hro.com)

Robert N. Miller  
Stephanie E. Dunn  
**Perkins Coie, LLP**  
1899 Wynkoop St., Ste. 700  
Denver, CO 80202  
**Counsel for James A. Smith**  
Telephone: (303) 291-2300  
[rmiller@perkinscoie.com](mailto:rmiller@perkinscoie.com)  
[sdunn@perkinscoie.com](mailto:sdunn@perkinscoie.com)

Mark T. Drooks  
Thomas V. Reichert  
**Bird, Marella, Boxer & Wolpert, PC**  
1875 Century Park East, 23<sup>rd</sup> FL  
Los Angeles, CA 90067-2561  
**Counsel for Robin Szeliga**  
Telephone: (310) 21-2100  
[mtd@birdmarella.com](mailto:mtd@birdmarella.com)  
[tvr@birdmarella.com](mailto:tvr@birdmarella.com)

Tim Atkeson  
**Arnold & Porter**  
370 Seventeenth Street, Suite 4500  
Denver, CO 80202  
**Counsel for Arthur Andersen LLP & Mark Iwan**  
Telephone: (303) 863-1000  
[Tim.atkeson@aporter.com](mailto:Tim.atkeson@aporter.com)

Barbara Moses  
Ashley Rupp  
**Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C.**  
565 Fifth Avenue  
New York, NY 10017  
**Counsel for Afshin Mohebbi**  
[bmoses@magislaw.com](mailto:bmoses@magislaw.com)  
[arupp@magislaw.com](mailto:arupp@magislaw.com)

Mark C. Hansen  
Kevin B. Huff  
David L. Schwarz  
**Kellog, Huber, Hansen, Todd & Evans, P.L.L.C.**  
Sumner Square  
1615 M Street NW, Suite 400  
Washington, D.C. 20036-3209  
**Counsel for Phillip Anschutz & Craig Slater**  
Telephone: (202) 326-7900  
[mhansen@khhte.com](mailto:mhansen@khhte.com)  
[khuff@khhte.com](mailto:khuff@khhte.com)  
[dschwarz@khhte.com](mailto:dschwarz@khhte.com)

Greg Waller  
**Andrews Kurth LLP**  
600 Travis, Suite 4200  
Houston, TX 77002  
**Counsel for Gregory Casey**  
Telephone: (713) 220-4790  
[gregwaller@andrewskurth.com](mailto:gregwaller@andrewskurth.com)

James Nesland  
Paul Schwartz  
Jeff Smith  
**Cooley Godward LLP**  
380 Interlocken Crescent, Suite 900  
Broomfield, CO 80021-8023  
**Counsel for Drake Tempest**  
Telephone: (720) 566-4000  
[neslandje@cooley.com](mailto:neslandje@cooley.com)  
[schwartzph@cooley.com](mailto:schwartzph@cooley.com)  
[jsmith@cooley.com](mailto:jsmith@cooley.com)

Terrance C. Gill  
**SHERMAN & HOWARD, LLC**  
633 Seventeenth Street  
Denver, CO 80202  
**Counsel for Qwest Communications International, Inc.**  
Telephone: (303) 297-2900  
Facsimile: (303) 298-0940  
[tgill@sah.com](mailto:tgill@sah.com)

Jonathan D. Schiller  
David R. Boyd  
Alfred P. Levitt  
Kenneth F. Rossman IV  
**BOIES, SCHILLER & FLEXNER LLP**  
5301 Wisconsin Avenue, N.W.  
Washington, D.C. 20015  
**Counsel for Qwest Communications International, Inc.**  
Telephone: (202) 237-2727  
Facsimile: (202) 237-6131  
[jschiller@bsfllp.com](mailto:jschiller@bsfllp.com)  
[dboyd@bsfllp.com](mailto:dboyd@bsfllp.com)  
[alevitt@bsfllp.com](mailto:alevitt@bsfllp.com)  
[krossman@bsfllp.com](mailto:krossman@bsfllp.com)

**INTERVENOR PLAINTIFF:**

William J. Leone

**U.S. Attorney's Office-Denver Colorado**

1225 Seventeenth Street, #700

Denver, CO 80202

**Counsel for the United States Department of  
Justice**

Telephone: (303) 454-2063

[William.Leone@usdoj.gov](mailto:William.Leone@usdoj.gov)

A handwritten signature in black ink, appearing to read 'KM', is written over a horizontal line.

KEVIN MORRISON