EXHIBIT 3

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

JACK JORDAN, Complainant, v. DYNCORP INTERNATIONAL LLC, JASON BRANCIFORTE, ETHAN BALSAM, AND MICHAEL CANNON, Respondents.	:	Case No.: 2016-SOX-00042 OSHA No.: 7-4120-16-058 ALJ Paul R. Almanza

RESPONSE OF DYNCORP INTERNATIONAL LLC AND MICHAEL CANNON TO COMPLAINANT'S MOTION RE DISCOVERY PLAN, ANSWER AND PRIVILEGE

Respondents DynCorp International LLC ("DI") and Michael Cannon (collectively, the "DI Respondents"), by their undersigned counsel, submit the following response to Complainant Jack Jordan's Motion "re Discovery Plan, Answer and Privilege."

I. FACTUAL BACKGROUND FOR THIS MOTION

A. Complainant Jordan has been representing his wife in a workers compensation claim before the Office of Administrative Law Judges.

This action arises under the whistleblower protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. Some background facts pertinent to Jack Jordan's wife's Department of Labor administrative proceeding are necessary to an understanding of the complainant's present motion.[1] Respondent DI is a government contractor that, during the relevant time period, provided security services to the United States Department of State in Iraq. DI employed the respondent's wife Maria Jordan in its security program in Iraq until she was injured on the job in late 2012, and went on medical leave post-injury. Complainant Jack Jordan, a former security employee of DI but also a licensed attorney, represents his wife Maria in a workers

[1] These facts are set forth in greater detail in the memorandum of law in support of respondents' motion to dismiss the complaint, filed December 15, 2016.

compensation case arising out of her work-related injury in Iraq. The workers compensation case was brought under the Longshore and Harbor Workers Compensation Act, which applied to Maria Jordan's injury by virtue of the Defense Base Act ("DBA"), 42 U.S.C. § 1651 (1942). Department of Labor Administrative Law Judge Larry Merck heard testimony in the *Maria Jordan* DBA case on October 25, 2016, and post-hearing briefing is to be completed on March 17, 2017.

One of Maria Jordan's claims is that DI retaliated against her for filing the workers compensation claim by terminating her employment in 2013 rather than bringing her back to work after she recovered from her injury. DI's response to that claim is that it was shutting down its Iraq security operations and had no continuously open position available for Maria Jordan in 2013.[2] During discovery in the *Maria Jordan* matter, Jack Jordan the attorney sought internal DI communications about the shutdown of the DI-Department of State security contract in 2013. DI produced certain documents, including emails between and among program managers in Iraq, but redacted portions of documents that reflected requests of DI managers for legal advice. Jordan objected to the redactions, and a discovery dispute ensued. To resolve the dispute, ALJ Merck conducted an *in camera* review of the questioned documents. ALJ Merck concluded that DI had properly invoked the attorney-client privilege, and denied Jordan's motion to compel production of the privileged emails. (*See* February 9, 2016 Order Denying Claimant's Motion to Compel Production of Emails over which Employer has Asserted Attorney-Client Privilege and Order Denying Claimant's Motion for Sanctions, attached hereto as Exh. A). Jordan tried to get around ALJ Merck's denial of his motion to compel by filing Benefits Review Board appeals, a Freedom of Information Act ("FOIA") request to the OALJ, and several secondary motions and

[2] DI rehired Maria Jordan in 2014.

C. The ALJ should deny Jordan's request that he order DI to produce the emails that ALJ Merck found to be protected by the attorney-client privilege.

DI opposes the motion to compel the production of the communications that ALJ Merck reviewed and found privileged in the *Maria Jordan* matter. The background for Jordan's attempt to use this SOX case to make a backdoor attack on ALJ Merck's privilege decision is set forth in some detail above. It is DI's position that ALJ Merck's decision was correct and should not be revisited here. First, the communications at issue are privileged because they contain a request by program managers for legal advice from the DI in-house attorney Christopher Bellomy. ALJ Merck reviewed the unredacted versions of the documents that Jordan has attached to this current motion and made the privilege determination based on that review. No amount of sophistry or hair-splitting by Jordan will change that result. Jordan the litigant does not get to see privileged documents just because he keeps asking for them.

Second, Jordan argues an incorrect standard for determining whether a communication to a group that includes an attorney is privileged. The attorney-client privilege applies to "communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011). Jordan argues that a communication is privileged *only if* the communication would not have been sent to the recipients *but for* the client's need to seek legal advice. *See* Complainant's Motion at pp. 7, 12. The District of Columbia Circuit expressly rejected this "but-for" standard of determining whether a communication was sent "for the purpose of obtaining or providing legal advice" as "inconsistent with the principle of *Upjohn* [v. United States, 449 U.S. 383 (1981)] and long-standing attorney-client privilege law" in *In Re Kellogg, Brown & Root*, 756 F.3d 754, 759 (D.C. Cir. 2014), *cert. denied* 135 S. Ct. 1163 (2015). The court in *Kellogg, Brown & Root* reversed the

III. CONCLUSION

The DI Respondents respectfully request that this Court enter the discovery plan attached hereto as Exhibit G, and deny the remainder of Complainant Jordan's motion.

Dated: December 30, 2016

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