No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE KELLOGG BROWN & ROOT, INC., KELLOGG BROWN & ROOT SERVICES, INC., KBR TECHNICAL SERVICES, INC., KELLOGG BROWN & ROOT ENGINEERING CORPORATION, KELLOGG BROWN & ROOT INTERNATIONAL, INC. (A DELAWARE CORPORATION), KELLOGG BROWN & ROOT INTERNATIONAL, INC. (A PANAMANIAN CORPORATION), and HALLIBURTON COMPANY

From the United States District Court for the District of Columbia
the Honorable James S. Gwin (by designation)
Civil Action 1:05-cv-1276

CORRECTED PETITION FOR WRIT OF MANDAMUS

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GLOSSARY

Abbreviation	Definition
3/6 Order	March 6, 2014 Order of the District Court (Sealed Appendix A to the Petition)
3/11 Order	March 11, 2014 Order of the District Court (Appendix B to the Petition)
App.	Appendix
COBC	Code of Business Conduct
Decl.	Declaration
Dkt.	District Court docket number (D.D.C. Civil Action No. 1:05-cv-1276)
D&P	Daoud & Partners
FCA	False Claims Act
FCPA	Foreign Corrupt Practices Act
KBR	Petitioners Kellogg Brown & Root, Inc., Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown & Root International, Inc. (A Delaware Corporation), Kellogg Brown & Root International, Inc. (A Panamanian Corporation), and Halliburton Company
LOGCAP III	Logistics Civil Augmentation Program Contract III
U.S.S.G.	United States Sentencing Guidelines

INTRODUCTION

This petition seeks relief from an unprecedented district court order compelling blanket disclosure, in their entirety, of documents generated during an internal investigation undertaken at the direction, and under the supervision, of corporate attorneys. Petitioners ("KBR") contend that these documents—which include code of business conduct ("COBC") reports about potential employee misconduct addressed to a senior in-house attorney—were protected under *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Federal courts that previously addressed the status of KBR's COBC investigative reports, and others like them, have shielded them from disclosure.[1] Against the weight of case law, the district court ordered disclosure of all 89 documents, on a sweeping and novel legal theory: materials and reports generated during a government contractor's internal investigations *cannot* be privileged because they are "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." March 6, 2014 Order ("3/6 Order") at 5.

It is no exaggeration to say that if the district court's ruling stands, no defense contractor—and indeed, no *public company*, given widespread internal-control and auditing requirements under laws such as Sarbanes-Oxley and the Foreign Corrupt Practices Act ("FCPA")—can claim privilege over materials generated in internal

[1] *See* Order, *Leamon v. KBR, Inc.*, No. 10-cv-253 (S.D. Tex. June 28, 2012) (Appendix C); Order, *Kellogg Brown & Root Servs., Inc. v. United States*, No. 1:09-cv-351 (Fed. Cl. Aug. 19, 2011) (sealed Appendix D); Order, *United States v. Mazon*, No. 05-40024-01 (N.D. Ill. Dec. 14, 2006) (Appendix E); *see also* Order, *Fisher v. Halliburton*, No. 05-cv-1731 (S.D. Tex. June 9, 2009) (Appendix F).

investigations, because all such companies face obligations under "regulatory law" (3/6 Order at 5) comparable to those the court held rendered KBR's investigative documents unprivileged. The district court's order rests on the implausible suggestion that a company's efforts to comply with federal law—in the court's words, communications to determine "whether [KBR] needed to report kickbacks or contractor fraud to the United States"—somehow do not constitute communications "to obtain legal advice." March 11, 2014 Order ("3/11 Order," App. B) at 4. The chilling effect from the threat of wholesale public disclosure sharply undercuts the strong public policy favoring internal corporate controls, voluntary investigations, and self-reporting.

The district court applied a "but-for" causation test that bars privilege unless "the communication would not have been made 'but for' the fact that legal advice was sought" (3/6 Order at 5), which is irreconcilable with decisions of this Court and others nationwide. Because KBR is subject to regulations "requiring contractors to have internal control systems," the district court held, materials generated in investigations undertaken pursuant to those internal controls are not privileged—even though, as in *Upjohn*, KBR was investigating "tips" about potential employee misconduct that might subject the company to liability. KBR's internal investigation cannot meaningfully be distinguished from the one in *Upjohn*, countless subsequent cases, or virtually identical programs at scores of defense contractors nationwide.

The district court's conduct of the privilege proceedings highlights the need for mandamus supervision. *See Cheney v. U.S. Dist. Court for the District of Columbia*, 542

U.S. 367, 380 (2004) (standard for mandamus); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (mandamus appropriate to "settle new and important problems" related to judicial administration). Most troublingly, in a case that Relator is already litigating on the front page of the Washington Post, *e.g.*, Scott Higham, *Lawsuit Brings to Light Secrecy Statements Required by KBR*, WASH. POST, Feb. 19, 2014, at A1 (discussing documents leaked by Relator), the district court's March 6 Order, without notice or an opportunity to object, extensively summarizes and quotes from (while also mischaracterizing) the very investigative documents KBR asserts are privileged—effectively transforming *in camera* review (intended to *safeguard* privilege) into unreviewable unilateral authority for a court to disclose privileged information to the world. In so doing, the district court denied KBR the procedural protections the Supreme Court identified as affording prompt, *pre-disclosure* review of adverse attorney-client privilege rulings in appropriate cases. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009). Mandamus is urgently needed.

RELIEF SOUGHT

KBR respectfully requests a writ of mandamus directing the district court to vacate its Order of March 6, 2014 (attached as sealed Appendix A), compelling disclosure of 89 documents related to KBR's COBC investigations.[2]

[2] By separate motion, KBR seeks from this Court an emergency stay of the District Court's order pending resolution of this petition.

ISSUES PRESENTED

(1) Whether a legal obligation or company policy to maintain internal controls eliminates attorney-client privilege and work-product protection for materials generated under the direction of a lawyer during an internal investigation of allegations of employee misconduct that could subject the company to liability?

(2) Whether a party invoking attorney-client privilege must show the communication would not have occurred "but for" the fact that legal advice was sought?

STATEMENT OF FACTS

As the Government's prime contractor under the logistics civil augmentation program contract ("LOGCAP III"), KBR provided a wide range of logistical support to the U.S. military in Iraq. In this *qui tam* case, Relator alleges that KBR violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, by incurring excessive or fraudulent subcontract costs and passing them on to the U.S. Government.[3] Relator filed his complaint on June 27, 2005. After a full investigation, the United States declined to intervene, and the case was unsealed. KBR and D&P moved to dismiss on June 19 and September 11, 2009. [Dkt. 53]. The District Court (Sullivan, J.) entered a protective order on March 4, 2011, for sealed materials. [Dkt. 91].

On September 15, 2011, after the motions to dismiss had been pending for two years, this action was reassigned to Judge James S. Gwin of the U.S. District Court for

[3] Relator also sued two foreign KBR subcontractors, Daoud & Partners ("D&P") and EAMAR. 1st Am. Compl. ¶¶ 53-54.

the Northern District of Ohio, sitting by designation. [Dkt. 112]. Two more years passed without event, when, on July 8, 2013, without a hearing, Judge Gwin denied both motions to dismiss and vacated Judge Sullivan's protective order. [Dkt. 116].

Although the case had been pending for eight years, and involved a 15-count complaint alleging conduct during active hostilities in Iraq a decade earlier, Judge Gwin set a highly abbreviated schedule that none of the parties requested, ordering motions discovery to be complete in six months, and dispositive motions a week later. [Dkt. 126]. Of KBR's massive production of 100,000 pages of documents, KBR withheld only 336 documents (or parts) as privileged.

I. KBR Withholds Documents Generated During an Internal Investigation Supervised and Directed by Attorneys

KBR initiates COBC investigations after receiving "tips" that allege violations of KBR's Code of Business Conduct. *See* App. G ¶¶ 4, 7 (Heinrich Decl.). Tips are channeled directly to company attorneys, who supervise investigations. *Id.* ¶ 7. Much of the investigative work is performed by security personnel under the direction of the company's Law Department. *Id.* Investigative work is transmitted to supervising COBC attorneys, who evaluate, direct further investigation, and ultimately determine whether KBR must take action in order to avoid or minimize legal liability. *Id.* An investigation culminates in the creation of a COBC file, including a formal COBC Report addressed to the company's senior in-house attorney, witness statements, exhibits, and documentation of the investigation's final disposition. *Id.* ¶¶ 7-8.

KBR identified 89 COBC documents as responsive but privileged, and produced a privilege log on January 20, 2014. Relator moved to compel production of all 89 documents. The court ordered KBR to submit the documents for *in camera* review, and KBR complied. [Dkt. 148]; App. H. At approximately 11:55am on March 3, 2014—during a snowstorm that shut down most of Washington D.C.—the court ordered KBR to provide detailed identifying information for each person mentioned on the privilege log by 3pm that day. [Dkt. 149]. As KBR told the court, given the volume of information sought and weather-induced closures, KBR could not comply until the next day, when it produced the information and requested oral argument. App. I. At 9:43pm on March 6, without a hearing, the court issued the order under review compelling production of the 89 COBC documents.

II. The District Court Orders Blanket Disclosure of All 89 COBC Documents Based on a Novel and Sweeping Legal Theory

Before resolving the privilege dispute, the court summarized and quoted extensively from the documents, disclosing a significant amount of information that KBR contends is privileged while mischaracterizing the documents in a manner adverse to KBR. The March 6 Order stated that "KBR's COBC reports . . . are eye-openers," and discussed the investigator's specific "f[i]nd[ings]" and "eviden[tiary]" basis. 3/6 Order at 2. And it commented on the merits of Relator's claims, stating, e.g., that the underlying events were "expensive to the United States." *Id.*

The court acknowledged that "COBC investigations typically begin when KBR

receives a report of a potential COBC violation from an employee who . . . contacts the Law Department," and that "tips" are "routed to the Director of the Code of Business Conduct," *id.* at 3, a KBR attorney. The court also conceded that "the Director . . . decides whether to open a COBC File to investigate the matter," investigative documentation is "made part of the COBC File by the Director," and the final "COBC Report" is "transmitted to the Law Department." *Id.* at 3-4.

Nevertheless, the court concluded that KBR's materials are not privileged because "[t]he party invoking the privilege must show 'the communication would not have been made "but for" the fact that legal advice was sought.'" *Id.* at 5 (quoting *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 127 (D.D.C. 2012)). The materials did not meet that standard, the court held, because investigations "were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice"—*i.e.*, federal "contracting regulations" requiring "internal control systems . . . to '[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts,'" such as a "written code of business ethics" and "internal controls for compliance." *Id.* at 5-6 (quoting 48 C.F.R. § 203.7000-203.7001(a) (10-1-2001 ed.)).

In the court's view, "KBR's COBC policies merely implement these regulatory requirements." *Id.* at 6. The court sought to distinguish "the Upjohn internal investigation []as [having been] conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal

investigation." *Id.* KBR's "COBC investigative materials do not meet the 'but for' test because the investigations would have been conducted regardless of whether legal advice were sought." *Id.* The court stated that interviewed employees were not informed that "the purpose of the interview was to assist KBR in obtaining legal advice." *Id.* But the court also quoted confidentiality agreements alerting employees to the "sensitive nature" of KBR's investigation, deeming interviews "confidential," stating that information provided would be "protected," and instructing interviewees not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *Id.* at 6-7 & n.33.

The district court also concluded that the COBC materials were not protected work product. The materials had not been prepared "because of the prospect of litigation" because, the court said, "KBR [had] conducted [its] COBC internal investigation in the ordinary course of business irrespective of the prospect of litigation." *Id.* at 7-8. Since "any responsible business organization would investigate allegations of fraud, waste, or abuse," and "regulations required KBR to investigate potential fraud," the material was not work product. *Id.* at 8. The court noted that although KBR's investigation occurred during 2004-2006, the complaint "was not unsealed until 2009," and the "investigation was conducted by non-attorney investigators." *Id.*

The next morning, KBR filed an emergency motion to seal the March 6 Order, to avoid further public disclosure of the assertedly privileged information described in it. [Dkt. 151] KBR also moved for certification of an interlocutory appeal under 28

U.S.C. § 1292(b), and for a stay pending any § 1292(b) proceedings or disposition of a petition for writ of mandamus to this Court. [Dkt. 152]

On March 11, the district court denied all three motions, and directed KBR to produce the documents "by March 17, 2014." 3/11 Order at 10 (App. B). The court said the documents were "ordinary business records" because they were "created to satisfy United States defense contractor requirements." *Id.* at 1. The court conceded that the "most important" documents are "memoranda from an investigator to members of KBR's general counsel's office." *Id.* at 3. But these attorney-client communications were not privileged because they were "created to help KBR decide whether it needed to report kickbacks or contractor fraud to the United States" under its regulatory "obligation to report improper conduct." *Id.* at 3-4 & n.13 (citing 48 C.F.R. § 203.7000-203.7001(a) (10-1-2001 ed.)). And the court noted that the memoranda—addressed to a KBR attorney from his investigator—do not expressly "request legal advice" or "identify possible legal issues." *Id.* at 4.[4]

REASONS WHY THE WRIT SHOULD ISSUE

I. Standard of Review

When a district court orders disclosure of documents claimed to be subject to

[4] Under the district court's compressed briefing schedule, KBR was required to file its summary judgment motion before submitting the documents for in camera review. In concluding that the March 6 Order did not present a "controlling" question of law under 28 U.S.C. § 1292(b), the court noted in dicta its "question" whether KBR had waived privilege or work-product protection through arguments in its summary judgment motion. 3/11 Order at 6-7. The court emphasized, however, that it reached "no final conclusion" on that issue. *Id.* at 7.

attorney-client privilege, mandamus is appropriate if the "disclosure order" amounts to a "clear abuse of discretion," "a judicial usurpation of power," or "otherwise works a manifest injustice." *Mohawk*, 558 U.S. at 111; 28 U.S.C. § 1651(a).[5] Although this standard is "demanding," it is "not insuperable." *Cheney*, 542 U.S. at 381. Indeed, "[w]rit review is rather frequently provided . . . because of the desire to protect against discovery of information that is claimed to be protected by . . . [attorney-client] privilege [or] work-product." 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3935.3 (2d ed. 2013) (citing cases). This Court has not hesitated to grant mandamus to prevent disclosure of attorney-client privileged, or work-product protected, information. *See, e.g.*, *In re Pittman*, No. 00-7195, 2000 WL 1580968 (D.C. Cir. Sept. 1, 2000); *accord In re Sealed Case*, 151 F.3d 1059 (D.C. Cir. 1998) (grand jury information).

In cases which involve "an issue important to 'proper judicial administration in the federal system,'" *In re Gonzales*, 623 F.3d 1242, 1246-47 (9th Cir. 2010) (quoting *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)), or "legal question[s] of first impression or of extraordinary significance," mandamus can lie even if error does not constitute a "clear abuse of discretion." *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987); *see also Mohawk*, 558 U.S. at 110 (mandamus for "particularly . . . novel privilege

[5] A "clear abuse of discretion . . . occurs where a court: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts" to such a degree that the errors create a "patently erroneous result." *In re Ford Motor Co.*, 580 F.3d 308, 316 (5th Cir. 2009) (quotation marks omitted).

ruling[s]"). Decisions of this Court have been read as "granting a writ to correct discovery orders that are found . . . simply to be wrong." 16 *Federal Practice & Procedure* § 3935.3 & n.17 (citing *In re Halkin*, 598 F.2d 176, 197-200 (D.C. Cir. 1979)). Where, as here, a privilege issue turns on a pure legal question, this Court can analyze that question de novo. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), reviewed de novo a legal question (whether the "fiduciary exception" to attorney-client privilege applies to the relationship between the United States and Indian tribes) that was dispositive of a privilege claim, in a mandamus posture.[6]

In any event, this petition satisfies this Court's traditional standards: "(1) whether the [petitioner] . . . has any other adequate means, such as a direct appeal, to attain the desired relief; (2) whether that party will be harmed in a way not correctable on appeal; (3) whether the district court clearly erred or abused its discretion; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises important and novel problems or issues of law." *In re Executive Office of President*, 215 F.3d 20, 23 (D.C. Cir. 2000). "[A] petitioner need not be favored by all five factors," as "it is difficult to envision a case that involves both an oft-repeated error as well as an issue of law of first impression." *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 198 (D.C. Cir. 2002) (quotation marks omitted).

[6] The dissent criticized the majority's "failure to accord proper consideration to the mandamus posture of th[e] case," by "effectively granting extraordinary relief to the Government upon no showing whatsoever that the stringent conditions for mandamus have been met." *Id.* at 2342 n.11.

II. The District Court Erred, Clearly Abused Its Discretion, and Eviscerated *Upjohn*, by Ordering Blanket Disclosure of Investigatory Materials

A. *Upjohn* Controls This Case

Upjohn held that the attorney-client privilege and work-product protection apply to communications made in furtherance of attorney-supervised internal investigations conducted "to ensure [a corporation's] compliance with the law." 449 U.S. at 392. That holding controls this case. Under the district court's own view, KBR undertook the investigation at issue, overseen by KBR's Law Department (3/6 Order at 3-4), to ensure the company's compliance with "regulatory requirements," *id.* at 6—i.e., "to help KBR decide whether [under federal law] it needed to report kickbacks or contractor fraud to the United States," 3/11 Order at 4. There is no material difference between Upjohn's efforts to comply with "securities and tax laws," "currency regulations" and "duties to shareholders" (449 U.S. at 394) and KBR's efforts to comply with an obligation to disclose kickbacks or fraud. Thus, under *Upjohn*, the communications made during and in furtherance of KBR's investigation are shielded from disclosure by the attorney-client privilege and work-product doctrine.

The similarities between this case and *Upjohn* are striking. *Upjohn* involved an internal investigation initiated after auditors told a company its subsidiary had made questionable payments to foreign officials. 449 U.S. at 386. KBR began its investigation after receiving "tips" about potential employee misconduct, to uncover information relevant to compliance and potential legal liability. 3/6 Order at 3. In *Upjohn*,

the company investigated using employee questionnaires sent to the company's General Counsel, who also interviewed questionnaire recipients and others. 449 U.S. at 387. KBR investigators acting at the direction of KBR attorneys interviewed individuals, reviewed documents, and summarized their findings in reports addressed to a KBR lawyer. 3/6 Order at 4. *Upjohn* held that the questionnaires and interview notes were subject to the attorney-client privilege and work-product protection. 449 U.S. at 389-402. Given the material similarities between the cases, the district court had no basis to reach a contrary conclusion.

B. *Upjohn* Cannot Be Distinguished on the Ground That KBR's Investigation Was Undertaken Pursuant to Regulatory Law and Corporate Policy Rather Than "to Obtain Legal Advice"

The district court sought to distinguish *Upjohn* on the ground that KBR's investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." 3/6 Order at 5. By contrast, the court reasoned, "the Upjohn internal investigation was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation." *Id.* at 6. That rationale is deeply flawed.

A memorandum "created to help KBR decide whether it needed to report kickbacks or contractor fraud to the United States" plainly involved "obtain[ing] legal advice." 3/11 Order 4. Indeed, the regulation cited by the district court contemplated that KBR would "report[] to appropriate Government officials" any "suspected or possible violation of law." 48 C.F.R. § 203.7001(a)(6) (10-1-2001 ed.) (App. M).

Determining whether alleged misconduct constituted a "violation of law" is quintessential "legal advice."

The assertion that "[n]othing suggests the reports were prepared to obtain legal advice" (3/11 Order at 4) clearly conflicts with this record. Chris Heinrich, a KBR attorney who directs the COBC program, explained that "[t]he KBR Law Department relies upon the COBC Reports and Files to provide legal advice to KBR relating to potential legal exposure and litigation . . . . COBC investigations are . . . conducted in anticipation of potential litigation involving the Government or *qui tam* actions such as the present case." Heinrich Decl. ¶ 9 (App. G). Heinrich "reviewed th[e] [COBC] reports" to decide "whether or not there was a violation of law or the creation of some legal liability," "make a determination and then talk with the senior manager of the group . . . [about] what I thought we needed to do." Heinrich Deposition 127:15-128:18 (App. L). The district court ignored this evidence.

The district court also clearly erred in suggesting that because KBR has a *policy* for investigating reports of wrongdoing—and, indeed, is required by law to have such a policy, 3/6 Order at 5-6—KBR cannot claim attorney-client privilege and work-product protection for documents associated with such investigations. Excluding from *Upjohn* internal investigations under formal or government-mandated corporate policies would deprive most major companies of that protection. But *Upjohn* itself in no way turned on the existence of formal procedures. The Court focused on "encourag[ing] full and frank communication between attorneys and their clients" and

ensuring that documents "revealing [an] attorney's mental processes" not be revealed. *Upjohn*, 449 U.S. at 389, 400.

As in *Upjohn*, KBR's investigations were initiated "to ensure [KBR's] compliance with the law" and to help lawyers assess how to minimize KBR's legal exposure from alleged wrongdoing. *Id.* at 392. The "tips" KBR received themselves suggested that the company might face claims of liability based on its use of subcontractor D&P, of the sort that often result in litigation. KBR initiated an internal investigation to determine potential liability and to ensure future compliance with the law—the heartland of *Upjohn* protection.[7]

Courts addressing the status of KBR's formal COBC investigative reports—what the district court viewed as "[t]he most important documents"—have protected them from disclosure. *See supra* n.1. *Kellogg Brown & Root Services* held that 26 of the 29 documents at issue were protected under *Upjohn*—including two formal COBC investigative reports addressed to Heinrich identified as documents Nos. 8 and 24. Order at 1 (sealed App. D). The *only* document ordered produced on "compliance" grounds (*cf.* 3/11 Order at 5) was a partial email chain between non-lawyers before

[7] The district court relied exclusively on a single district court decision, *ISS Marine*, 905 F. Supp. 2d at 127. But the company in *ISS Marine* deliberately *excluded* lawyers from the internal investigation, declining to engage the outside counsel who had proposed the work, and instead putting the investigation under the direction of an internal, non-legal, auditor. *ISS Marine*'s rationale rested "[f]irst and foremost" on the fact that the company "purposefully eschewed the involvement of . . . any attorneys whatsoever[] in the internal investigation." 905 F. Supp. 2d at 130.

KBR began its internal investigation. *Mazon* held that documents "relate[d] to KBR's internal investigation . . . appear to be subject to either the 'attorney-client' or 'work product' privilege" and were "immune from discovery."[8]

Fisher emphatically rejected the "argu[ment] that [a] Halliburton Law Department Investigation was actually a required business investigation and as such is not protected by the work product doctrine"—holding that "[t]his sweeping argument is fatally flawed from its inception, because it presupposes that a business investigation and a legal investigation are mutually exclusive." Order at 12 (App. F).[9] *Leamon* declined to compel production of "entire COBC investigative files," holding that "the majority of the files are privileged," as "communications made by corporate employees to their legal counsel in the pursuit of legal advice, notes and memorandum made

[8] The suggestion (3/11 Order at 5) that KBR's privilege argument in *Mazon* was a "throwaway" misreads the record. The subpoenas at issue sought discovery of *millions* of pages, only a fraction of which related to a COBC investigation. *See* Memo. of Law in Support of Mot. to Quash at 2, *United States v. Mazon*, No. 05-40024-01 (C.D. Ill. Sept. 1, 2006) (Doc. 76). In its initial Motion to Quash, KBR raised arguments addressing the various categories of documents, including a privilege argument focused on the COBC materials. The court granted the motion as to most of the other categories, ordering *in camera* review of *only* the investigative materials. Order at 2-4, *United States v. Mazon*, No. 05-40024-01 (C.D. Ill. Sept. 11, 2006) (Doc. 81). The December 14, 2006 order (App. E) issued three months later, after *in camera* review, and addressed *only* the privilege question. *Contra* 3/11 Order at 5.

[9] Counsel for KBR only recently became aware of *Fisher* and *Leamon* decisions, in preparing this mandamus petition, after briefing in the district court was complete.

by counsel regarding interviews, and other documentation prepared in anticipation of litigation." *Leamon* Order at 2, 4 (App. C).[10]

Courts around the country agree. *U.S. ex rel. Robinson v. Northrop Grumman Corp.*, No. 89 C 6111, 2002 WL 31478259, at *4-5 (N.D. Ill. Nov. 5, 2002), upheld a defense contractor's privilege claim for documents generated in an internal investigation undertaken in anticipation of a government audit, even where (unlike here) the lawyers' involvement postdated the beginning of the internal investigation. *United States v. Shyres*, 898 F.2d 647, 655 (8th Cir. 1990), upheld privilege with respect to documents generated in a company's internal investigation of kickbacks. *Gruss v. Zwirn*, 276 F.R.D. 115 (S.D.N.Y. 2011), *rev'd in part on other grounds*, No. 09-cv-6441, 2013 WL 3481350 (S.D.N.Y. July 10, 2013), upheld a privilege claim for interview notes, summaries, and reports of an internal investigation of financial irregularities, "prepared *in part*, for the business purpose of gaining advice on what to communicate to investors and other interested business parties, rather than legal purposes." *Id.* at 126. *See also Robinson v. Morgan Stanley*, No. 06-cv-5158, 2010 WL 1050288, at *3-4

[10] A magistrate judge in *Leamon* had earlier ordered KBR to disclose certain witness statements, but not investigative reports. *See* Order, *Leamon v. KBR, Inc.*, No. 10-cv-253 (S.D. Tex. Nov. 10, 2011) (Doc. 171) (App. J). The magistrate concluded the witness statements were unprivileged under Texas law, which governed the privilege issue, and were fact work product, as to which the plaintiff had shown substantial need. *Id.* at 4. To the extent the magistrate's opinion suggests a COBC investigation into specific misconduct was not undertaken for the primary purpose of litigation, it did so without analysis, and conflicts with *Upjohn*, D.C. Circuit precedent, and that district court's later conclusion that KBR's COBC reports were privileged.

(N.D. Ill. Mar. 17, 2010) (upholding privilege for report investigating potential fraud, conducted by legal department and other groups responsible for internal controls); *Amco Ins. Co. v. Madera Quality Nut LLC*, No. 1:04-cv-06456, 2006 WL 931437, at *8 (E.D. Cal. Apr. 11, 2006) (upholding privilege under California law for internal fraud investigation materials, where "one purpose of the report was to comply with obligations under various statutes and regulations, including the Sarbanes-Oxley Act").

By improperly conflating a company's regulatory obligations with the scope of attorney-client privilege, the district court's decision eviscerates *Upjohn*. Its novel rule would deny attorney-client privilege and work-product protection to all internal investigations conducted by major federal government contractors because such contractors must have internal control systems similar to KBR's. 3/6 Order at 5-6; *see also* 41 U.S.C. § 8703(a) (requiring prime contractors to "have in place and follow reasonable procedures designed to prevent and detect" kickbacks); 48 C.F.R. §§ 3.1004(a) , 52.203-13(c)(2) (requiring, with certain exceptions, that government contracts exceeding $5,000,000 and having a performance period of at least 120 days mandate an internal control system). And it would do so on the basis of a regulation that expressly states that compliance does not require a "[c]ontractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine" and "[d]oes not restrict a Contractor from . . . [c]onducting an internal investigation." 48 C.F.R. § 52.203-13(a).

Indeed, the district court's decision would disable *most public companies* from undertaking confidential internal investigations. Under Section 404 of Sarbanes-Oxley, publicly traded companies must report annually on their internal controls to the Securities and Exchange Commission. 15 U.S.C. § 7262(a). The FCPA requires public companies to "maintain a system of internal accounting controls" to ensure management's control, authority, and responsibility over company assets. *Id.* § 78m(b)(2)(B). The government expects companies to have a mechanism for employees to "report suspected or actual misconduct" and "an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response." U.S. Dep't of Justice & U.S. Securities & Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 61 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

The U.S. Sentencing Guidelines, moreover, call for a reduction in penalties for corporate defendants that "establish standards and procedures to prevent and detect criminal conduct" and conduct "monitoring and auditing to detect [such] conduct." U.S.S.G. Manual § 8B2.1(b)(1), (b)(5)(A) (2013). "For a general counsel to ignore [U.S.S.G. § 8B2.1]," securities-law professor John C. Coffee has observed, would be "professional malpractice." Michele Galen, *Keeping the Long Arm of the Law at Arm's Length*, Bus. Wk., Apr. 22, 1991, at 104, *available at* http://goo.gl/qoXQLJ (internal quotation marks omitted). *See also Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006) ("reasonable information and reporting system[s]").

As a matter of "regulatory law and corporate policy," 3/6 Order at 5, "[m]ost big corporations . . . have policy statements or conduct codes to dissuade misconduct—and minimize their liability," Galen, *Arm's Length* at 104. In a post-Sarbanes-Oxley world, denying privilege and work-product protection for investigations conducted under policies or codes of conduct (3/6 Order at 6) would effectively overrule *Upjohn*. The chilling effect on corporate efforts to detect and address fraud internally—efforts that federal law expressly encourages—would be severe.

C. The District Court's Other Attempts To Distinguish *Upjohn* Fail

In concluding that "the purpose of [KBR's] investigation was for business rather than legal advice," the district court observed that although KBR investigators required interviewed employees to sign confidentiality agreements, those agreements did not mention that "the purpose of [KBR's] investigation [was] to obtain legal advice." 3/6 Order at 6. But the questionnaires held to be privileged in *Upjohn* also lacked any explicit statement that they were being used to obtain legal advice. *See Upjohn*, 449 U.S. at 386-87, 394-95. Here, as in *Upjohn*, interviewed employees were informed of the "sensitive nature of [KBR's] review," were instructed that the interviews were "confidential" and that information provided during the interviews would be "protected" and disclosed only to "authorized personnel," and signed statements explicitly marked "attorney-client privileged information." 3/6 Order at 6 n.33; *accord Upjohn*, 449 U.S. at 387 (managers "instructed to treat the [company's] investigation as 'highly confidential'"). KBR also instructed employees not to discuss their interviews

"without the specific advance authorization of KBR General Counsel," tying the investigation to KBR's Law Department. 3/6 Order at 6-7 n.33; *accord Upjohn*, 449 U.S. at 387, 394 (questionnaires referred to "the company's General Counsel"). In the context of government contracting, where legal regulations abound and any misconduct can easily give rise to civil or criminal liability, employees could not have escaped the conclusion that "sensitive" and "confidential" interviews that were not to be discussed without authorization from "KBR General Counsel" were undertaken for the purpose of seeking legal advice. 3/6 Order at 6-7.[11]

The district court also concluded that the documents do not qualify for work-product protection because the "timing of [KBR's] investigation" indicates that it was not conducted "in anticipation of litigation." 3/6 Order at 8 (internal quotation marks omitted); *contra* Fed. R. Civ. P. 26(b)(3)(A) ("documents and tangible things that are prepared *in anticipation of litigation*" are ordinarily not discoverable (emphasis

[11] The district court clearly erred in suggesting that interviewed employees could not "infer the legal nature of the inquiry" because interviewers were non-attorneys. Order at 7 (internal quotation marks omitted). Confidential communications made to non-attorneys working under the supervision of lawyers are privileged where, as here, they are made for the purpose of obtaining legal advice. *See, e.g.*, *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) ("The attorney-client privilege undeniably extends to communications with one employed to assist the lawyer in the rendition of professional legal services." (internal quotation marks omitted)); *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *see also* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 3:3 (2013) ("courts have extended the privilege to the substantive advice and assistance" of a wide range of non-attorneys working under the supervision of lawyers, including "investigators" and "interviewers").

added)). Relator, however, filed his lawsuit on June 27, 2005, while KBR's investigation (conducted during 2004-2006), was ongoing. 3/6 Order at 8. Although the complaint was not unsealed until 2009, the government issued a subpoena to KBR regarding the events at issue in this litigation on April 6, 2007. Defs.' Mot. to Certify Interlocutory Appeal and for Stay at 12 [Dkt. 152].

No litigation was pending or even planned when the company in *Upjohn* initiated its investigation, but the Court held that the investigatory notes and memoranda qualified as work product. *Upjohn*, 449 U.S. at 397-402. No reason exists for a different result here. KBR began its investigation after receiving "tips" that alleged potential kickbacks and preferential treatment of D&P in the process of bidding for subcontracts. Ex. 5 to Pl.'s Mot. to Compel Discovery [Dkt. 135]. If true, the alleged misconduct threatened to expose KBR to substantial civil or criminal liability under statutes such as the False Claims Act and the Anti-Kickback Act. *See* 18 U.S.C. § 287; 31 U.S.C. §§ 3729-3733; 41 U.S.C. §§ 8701-8707.

The legal consequences of the alleged misconduct were abundantly clear. As one informant observed, "[t]he feds will be all over this stuff," and "from what I understand, the[] [feds] are coming." Ex. 5 to Pl.'s Mot. to Compel Discovery at 1, 2 (comments of anonymous informant). It is simply not credible to say that an investigation initiated in response to reports of kickbacks and inflated government payments "was not conducted 'in anticipation of litigation.'" 3/6 Order at 8; *see also In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (work-product protection where document's

author has "a subjective belief that litigation [is] a real possibility, and that belief [is] objectively reasonable"); 8 Wright et al., *Federal Practice & Procedure* § 2024 ("[p]rudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced").

D. The District Court's "But For" Test Conflicts with Circuit Precedent

The district court also applied the wrong legal standard in determining whether the communications at issue were privileged. This Court has squarely held that for an attorney-client communication to be privileged, it must be made "for the purpose of securing *primarily* either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007) (emphasis added; internal quotation marks omitted). The district court here departed from that standard, holding that the "party invoking the privilege must show 'the communication would not have been made "but for" the fact that legal advice was sought.' " 3/6 Order at 5 (quoting *ISS Marine*, 905 F. Supp. 2d at 128). This Court's "primarily" standard contemplates that a privileged communication can have *more than one* cause. But under the district court's "but for" standard, any communication that serves multiple purposes—even if the purposes other than seeking legal advice play only a minor role—would be excluded from the attorney-client privilege.

The court below relied almost exclusively on a single district court decision, *ISS Marine Services*, that was never appealed. Other courts have rejected a narrow "but for" standard. *E.g.*, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust*

No. 1B, 230 F.R.D. 398, 410 (D. Md. 2005) (citing cases). And the "but for" standard is inconsistent with the Restatement formulation, under which an attorney-client communication is privileged if the client "consult[s] the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose." Restatement (Third) of the Law Governing Lawyers § 72, cmt. c.

The dearth of authority supporting the district court's "but for" standard is hardly surprising. "[M]odern lawyer[s]" are "more than predicter[s] of legal consequences." *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950). Their "duty to society as well as to [their] client[s] involve[] many relevant social, economic, political[,] and philosophical considerations." *Id.* In the internal-investigation context, for example, the client might communicate with his lawyer not only about its legal liability, but also about disciplining "complicit[]" employees and "implement[ing] prospective protective measures" to prevent the recurrence of past misconduct. *Cf. Sandra T.E. v. South Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2009) (presence of such motivations "does not remove [an internal] investigation from the protection of the work-product doctrine"). And the district court's standard would be unworkable in practice, requiring speculation about whether a communication would have occurred absent one motivation, yielding inconsistent and unpredictable results and chilling communications. *See Upjohn*, 449 U.S. at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

III. KBR Has No Other Adequate Means of Redress

KBR has no "other adequate means . . . to attain the desired relief" of protecting documents covered by the attorney-client privilege and work-product doctrines. *Venezuela*, 287 F.3d at 198. Following *Mohawk*, a ruling adverse to the attorney-client privilege is not subject to immediate "collateral-order" appeal. 558 U.S. at 107-13. KBR sought, but the district court denied, certification of the March 6 Order under 28 U.S.C. § 1292(b). *Mohawk*, 558 U.S. at 110-11; 3/11 Order at 2.

Although *Mohawk* also contemplated the possibility of accepting sanctions for disobedience with a discovery order, 558 U.S. at 111, this Court has long expressed skepticism that requiring a party to incur sanctions is a reliable path to appellate review. "[I]t is settled that a civil contempt citation is not appealable as a collateral order." *United States v. Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003) (*citing Byrd v. Reno*, 180 F.3d 298 (D.C. Cir. 1999)), *abrogated on other grounds by Mohawk*, 558 U.S. 100. A party seeking review does not know in advance "whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (per curiam); *see also* 15B Wright et al., *Federal Practice & Procedure* § 3914.23, at 146 (2d ed. 1992). And "other sanctions . . . such as striking all or a portion of the party's pleadings, *see* Fed. R. Civ. P. 37(b)(2), . . . are in the district court's discretion and are therefore not reliable avenues to appeal." *Philip Morris*, 314 F.3d at 620. Court-imposed sanctions also "may be of such severity that a reasonable party would not risk incur-

ring them, even in order to preserve a clearly meritorious privilege claim." *Id.* That risk is particularly salient given that the claims in this case (unlike the wrongful-termination claim in *Mohawk*) implicate the False Claims Act's "essentially punitive" liability scheme of treble damages and civil penalties. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000); 31 U.S.C. § 3729(a).

Requiring KBR to comply with the district court's disclosure order and seek review on final judgment, long after the documents are produced, would destroy the very privilege that this Petition seeks to protect and subject KBR to harm that cannot be remedied on appeal. *See von Bulow*, 828 F.2d at 98-99 (discussing "liberal use of mandamus in situations involving the production of documents or testimony claimed to be privileged"). Post-disclosure appellate review is "obviously not adequate" to protect the privilege, because, by the time of appeal, "the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998), *superseded by statute on other grounds as stated in Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 90 (D.C. Cir. 2002).

IV. KBR Will Be Irreparably Harmed by Compelled Disclosure

This Court has squarely held that the harm from compelled disclosure of privileged attorney-client communications, which play such a vital role in our legal system, is "irreparable." *Philip Morris*, 314 F.3d at 621-22 ("the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of

privileged documents to an adverse party is clear").[12] The attorney-client privilege is a privilege against disclosure. Once disclosure has been made, the privilege's protection has been vitiated. *See von Bulow*, 828 F.2d at 98-99 ("Compliance with the order destroys the right sought to be protected."). As this Court has recognized, post-disclosure appellate review is "obviously not adequate." *Papandreou*, 139 F.3d at 251; *see also In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Once information is published, it cannot be made secret again.").

Harm is also irreparable because "attorneys cannot unlearn what has been disclosed to them in discovery," and disclosures "may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992); *see also Philip Morris*, 314 F.3d at 622 (granting a stay because "the attorneys for the United States would be able to use the [assertedly privileged document] to pursue new leads on discovery and witness questioning"). "The implications of this use of privileged material," this Court has explained, are "very difficult to remedy on appeal." *Philip Morris*, 314 F.3d at 622. Un-ringing the bell of disclosure would be particularly

[12] Other circuits agree. *See, e.g.*, *United States v. Punn*, 737 F.3d 1, 11 (2d Cir. 2013) ("subpoenas directed to attorneys . . . often present potentially irreparable disclosures of privilege"); *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010) (noting the "'irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications'" (quoting *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1491 (9th Cir. 1989))); *In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009) ("a court cannot restore confidentiality to documents after they are disclosed"); *Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir. 1985) ("irreparable").

difficult here, where Relator has studiously declined to develop independently a factual basis for his own claims, such as by deposing KBR witnesses (he has deposed only three witnesses in all)—despite requesting, and receiving, several extra weeks of discovery for precisely that purpose. Instead, the Relator has relied almost exclusively on compelling disclosure of KBR's COBC reports.

To be sure, *Mohawk* stated that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." But the Court conditioned that statement on its understanding that other "discretionary review mechanisms"—including interlocutory appeals under 28 U.S.C. § 1292(b) and writs of mandamus—are available "for promptly correcting serious errors." 558 U.S. at 109-11. Thus, *Mohawk* does not displace this Court's longstanding view that forced disclosure of assertedly privileged documents constitutes irreparable harm. *See, e.g.*, *Philip Morris*, 314 F.3d at 622; *Papandreou*, 139 F.3d at 251. Any contrary holding would undermine *Mohawk*'s assurance that parties may seek immediate appellate review of privilege-denying discovery orders by petitioning for mandamus. *Compare Mohawk*, 558 U.S. at 110-11 (mandamus available for privilege claims), *with Executive Office of President*, 215 F.3d at 23 (irreparable harm factor in test for mandamus). The Ninth Circuit has explicitly so held. *Hernandez*, 604 F.3d at 1101 (quoting *Admiral Ins. Co.*, 881 F.2d at 1491).

V. The District Court's Order Raises Important and Novel Legal Issues

Mandamus is appropriate "where the decision will serve to clarify a question

that is likely to confront a number of lower court judges in a number of suits before appellate review is possible." *Nat'l Right to Work Legal Def. & Educ. Found. Inc. v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir. 1975) (per curiam); *accord Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975) ("when . . . resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice"). This case meets that standard.

The district court's core holding—that companies with formal internal controls mandated by law or company policy cannot claim attorney-client privilege over investigatory reports and materials—is novel and will affect hundreds of defense contractors and public companies nationwide, all of which are subject to "regulatory law" similar to the regulations applicable here. *See supra* pp. 18-20. The district court's ruling also ill-serves the public interest in encouraging companies to undertake voluntary investigations and self-report potential employee wrongdoing. Government contractors will hesitate to conduct internal investigations if plaintiffs can seek treble damages and penalties under the FCA by piggybacking on the company's efforts.

VI. The District Court's Dicta about Waiver Is No Bar to Mandamus

The district court stated that even if it erred in concluding that the COBC documents were not protected, "a substantial question exists whether KBR waived" those protections. 3/11 Order at 6. The court, however, refrained from reaching a "final conclusion" on this issue, which KBR has not had an opportunity to brief. *Id.* at 7. In any event, the district court's principal rationale is fatally flawed. The court stated

that KBR "may have waived" privilege by noting, in one footnote in its summary-judgment motion, that "KBR [had] perform[ed] COBC investigations related to D&P and [KBR employee Robert] Gerlach" and had "made no reports to the Government following those investigations." 3/11 Order at 6-7. Contrary to the court's assertion, KBR's motion did not "ask[] th[e] [c]ourt to draw the inference that the COBC investigation documents showed nothing." *Id.* at 7. At most, KBR's footnote constituted a "general assertion lacking substantive content that [its] attorney[s] ha[d] examined" the alleged misconduct. *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989). Such a (literally) marginal statement is "not sufficient to waive the attorney-client privilege." *Id.*; *see also* KBR Mot. for Summ. J. at 4, n.5 [Dkt. 136] (stating that KBR did not intend to waive attorney-client privilege and work-product protection for the COBC documents).[13] The court's unresolved *suggestion* of waiver provides no basis for denying relief. *See, e.g.*, *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999) (granting mandamus where district court's rationale for denying motion was erroneous, even if court might later deny motion for other reasons).

CONCLUSION

The Court should grant a writ of mandamus directing the district court to vacate its March 6, 2014 order.

[13] As for the court's suggestion that KBR may have waived privilege by taking certain positions elsewhere in its summary-judgment briefing, 3/11 Order at 6, a party "do[es] not forfeit [a privilege] merely by taking a position that the evidence might contradict." *United States v. Salerno*, 505 U.S. 317, 323 (1992).

Respectfully submitted,

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Dated: March 12, 2014

* Joshua S. Johnson is an active member in good standing of the Texas Bar but has yet to be admitted to practice in the District of Columbia. His work on this case has been supervised by enrolled, active members of the District of Columbia Bar in accordance with D.C. App. R. 49(c)(8).

ADDENDUM

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners Kellogg Brown & Root, Inc., Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown & Root International, Inc. (A Delaware Corporation), Kellogg Brown & Root International, Inc. (A Panamanian Corporation), and Halliburton Company hereby certify:

1. Parties and *Amici* in this Court.

Petitioners in this Court

Kellogg Brown & Root, Inc.

Kellogg Brown & Root Services, Inc.

KBR Technical Services, Inc.

Kellogg Brown & Root Engineering Corporation

Kellogg Brown & Root International, Inc. (A Delaware Corporation)

Kellogg Brown & Root International, Inc. (A Panamanian Corporation)

Halliburton Company

Respondents in this Court

United States of America, ex rel. Harry Barko

Daoud & Partners Inc.

EAMAR Combined for Trading and Contracting Company

Intervenors and *Amici*

No entities have moved for leave to intervene or to participate as amici.

2. Parties and *Amici* in the District Court

Plaintiff

United States of America, ex rel. Harry Barko

Defendants

Daoud & Partners Inc.

EAMAR Combined for Trading and Contracting Company

Halliburton Company

Kellogg Brown & Root, Inc.

Kellogg Brown & Root Services, Inc.

KBR Technical Services, Inc.

Kellogg Brown & Root Engineering Corporation

Kellogg Brown & Root International, Inc. (A Delaware Corporation)

Kellogg Brown & Root International, Inc. (A Panamanian Corporation)

Intervenors and *Amici*

None

Movants

United States of America

2. Ruling under review. This petition for a writ of mandamus seeks review of an order of the District Court (Gwin, J.) dated March 6, 2014. The Order is unreported, but is attached as sealed Appendix A to the petition.

3. Related cases. The case on review has not previously been before this Court or any other court. At this time, to the knowledge of undersigned counsel there are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

Respectfully submitted,

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Dated: March 12, 2014

* Joshua S. Johnson is an active member in good standing of the Texas Bar but has yet to be admitted to practice in the District of Columbia. His work on this case has been supervised by enrolled, active members of the District of Columbia Bar in accordance with D.C. App. R. 49(c)(8).

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioners Kellogg Brown & Root LLC, Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown & Root International, Inc. (A Delaware Corporation), Kellogg Brown & Root International, Inc. (A Panamanian Corporation), and Halliburton Company make the following disclosures:

Kellogg Brown & Root LLC is the successor to the rights and interests of petitioner Kellogg Brown & Root, Inc. by virtue of a series of mergers. The direct parent of Kellogg Brown & Root LLC is KBR Holdings, LLC. The direct parent of KBR Holdings, LLC, is KBR, Inc. (NYSE:KBR), a publicly-traded company incorporated in Delaware. KBR, Inc., together with its subsidiaries, is a global engineering, construction and services company supporting the energy, hydrocarbons, power, minerals, civil infrastructure, government services, industrial and commercial market segments.

The direct parent of petitioner Kellogg Brown & Root Services, Inc. is KBR Holdings, LLC. The direct parent of KBR Holdings, LLC, is KBR, Inc.

The direct parent of petitioner KBR Technical Services, Inc., is KBR Holdings, LLC. The direct parent of KBR Holdings, LLC, is KBR, Inc.

The direct parent of petitioner Kellogg Brown & Root Engineering Corporation is KBR Technical Services, Inc. The direct parent of KBR Technical Services, Inc., is KBR, Inc.

The direct parent of petitioner Kellogg Brown & Root International, Inc. (A Delaware Corporation) is Kellogg Brown & Root LLC. The direct parent of Kellogg Brown & Root LLC is KBR Holdings, LLC, which in turn is owned by KBR, Inc.

The direct parent of petitioner Kellogg Brown & Root International, Inc. (A Panamanian Corporation) is KBR Group Holdings, LLC. The direct parent company of KBR Group Holdings, LLC, is KBR Holdings, LLC, which in turn is owned by KBR, Inc.

Petitioner the Halliburton Company (NYSE:HAL) is a publicly-traded company that provides services and products to the energy industry related to the exploration, development, and production of oil and natural gas.

Other than KBR, Inc., and Halliburton Company, no publicly-traded company owns 10% or more of any petitioner.

Respectfully submitted,

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Dated: March 12, 2014

* Joshua S. Johnson is an active member in good standing of the Texas Bar but has yet to be admitted to practice in the District of Columbia. His work on this case has been supervised by enrolled, active members of the District of Columbia Bar in accordance with D.C. App. R. 49(c)(8).

CERTIFICATE OF SERVICE

I certify that on this 12th day of March, 2014, a copy of the foregoing *Corrected Petition for Writ of Mandamus*, including its Addendum and Appendices, was served by hand on:

Beverly M. Russell
U.S. Attorney's Office
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555 Fourth Street, NW
Washington, DC 20530
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On this day, a copy of the foregoing *Corrected Petition for Writ of Mandamus*, including its Addendum and Appendices, was served by Federal Express on:

The Honorable James Gwin
Carl B. Stokes United States Court House
801 West Superior Avenue, Courtroom 18A
Cleveland, Ohio 44113-1838

On this day, a copy of the foregoing *Corrected Petition for Writ of Mandamus*, including its Addendum and Appendices, was served electronically on the following, pursuant to their express written consent to electronic service:

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