ORAL ARGUMENT NOT YET SCHEDULED

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, *Petitioners.*	Case No. _____

EMERGENCY MOTION FOR STAY PENDING PETITION FOR A WRIT OF MANDAMUS, AND FOR A TEMPORARY ADMINISTRATIVE STAY PENDING FULL CONSIDERATION OF THIS MOTION

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Pursuant to Federal Rules of Appellate Procedure 8 and 27 and D.C. Circuit Rule 27(f), Petitioners ("KBR") respectfully request an emergency stay pending disposition of their contemporaneously filed petition for a writ of mandamus. The petition seeks review of district court orders compelling disclosure of the very same 89 documents that this Court held were protected by attorney-client privilege in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) ("*KBR*"), which granted mandamus relief from a prior disclosure order by the district court.

The district court (Gwin, J., by designation) entered the first order at issue here on November 20, 2014 (App. A). The next day, KBR moved for reconsideration of that order, for certification of an interlocutory appeal under 28 U.S.C. § 1292(b), and for a stay pending interlocutory appeal or a mandamus proceeding. Dkt. 208. At a minimum, KBR requested that the court postpone the deadline for producing the COBC documents until ten days after the court ruled on KBR's motion so that any emergency stay motion in this Court could be filed "at least 7 days before the date by which court action is necessary," as this Court's rules contemplate. D.C. Cir. R. 27(f); *see also* Dkt. 208 at 1.

The district court denied all such relief in an order entered at 7:54 p.m. on Wednesday, December 17 (App. B). The district court ordered KBR to disclose all 89 of the COBC documents at issue by 4:00 p.m. on Friday, December 26—nine days after the December 17 Order (*i.e.*, one day less than the ten-day period requested in KBR's November 21 motion). *See* Dkt. 227 at 8-9.

In a separate order also issued on the evening of December 17, the district court ruled that certain portions of the COBC documents were subject to disclosure even if KBR had not waived attorney-client privilege and work-product protection. Dkt. 228 (sealed), 231 (unsealed) (App. C-D). The court also ordered production of those portions by 4:00 p.m. on December 26. *Id.* at 21. On December 18, KBR moved for the district court to stay and certify an interlocutory appeal from its second December 17 Order. Dkt. 232. Although the district court has yet to rule on that motion, KBR is now moving in this Court for a stay of the second December 17 Order (and is filing its accompanying mandamus petition) because the production deadline set by the district court is seven days away. *See* D.C. Cir. R. 27(f); *see also* Fed. R. App. P. 8(a)(2)(A)(ii) (party may seek stay from appellate court where district court "failed to afford [such] relief" despite motion).

In the prior mandamus proceedings in this case, the Court entered an administrative stay on the same day that KBR filed its petition and stay motion, Order, *KBR* (D.C. Cir. Mar. 12, 2014), and then later granted the stay motion, Order, *KBR* (D.C. Cir. Mar. 28, 2014). KBR respectfully requests that the Court take a similar approach here. In particular, KBR requests that the Court rule on this motion to stay the November 20 and two December 17 orders before 4:00 p.m. on December

26, the production deadline set by the district court—or, at a minimum, enter a temporary administrative stay pending disposition of this motion.[1]

INTRODUCTION

Six months ago, after its own *in camera* review of 89 documents generated in KBR's attorney-run internal investigations, this Court issued a writ of mandamus holding that the plaintiff in this *qui tam* case is "not entitled to KBR's own investigation files" because KBR's assertion of attorney-client privilege over them is "materially indistinguishable" from the claim sustained in *Upjohn v. United States*, 449 U.S. 383 (1981). *KBR*, 756 F.3d at 757, 764; *see also* Order, *KBR*, No. 14-5055 (D.C. Cir. Mar. 28, 2014) (requiring KBR to submit documents "for *in camera* review"). The district court has now purported to hold that substantial portions of the very same documents are not privileged. What is more, in a ruling that shreds long-settled expectations, that court held that a corporate witness implicitly waives privilege—despite strenuous efforts to protect it in the rough-and-tumble of deposition—by answering a series of questions that all agree seek non-privileged factual information. In yet a further departure from settled law, the court denied KBR the well-recognized option of withdrawing the contention that supposedly waived privilege—the same error the Second Circuit recently corrected on mandamus. Furthermore, the court

[1] Pursuant to D.C. Circuit Rules 8(a)(2) and 27(f), counsel for KBR at approximately 10:00 a.m. on December 19, 2014, telephoned David Colapinto, counsel for Relator in this *qui tam* action, and notified him of KBR's intent to file this emergency motion. By email, Michael Kohn, also counsel for Relator, indicated that Relator opposes the motion.

violated precedent and the plain text of Federal Rule of Civil Procedure 26(b)(3)(A) by relieving Relator of his burden to make the showings necessary to overcome work-product protection.

In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 110-12 (2009), the Supreme Court instructed litigants on the appropriate mechanisms to obtain immediate appellate review of adverse attorney-client privilege rulings. *Mohawk* explained that a party subject to an adverse privilege ruling could, in appropriate circumstances, obtain prompt appellate review by "ask[ing] the district court to certify . . . an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)" or by "petition[ing] the court of appeals for a writ of mandamus." 558 U.S. at 110-11. The D.C. Circuit recently reaffirmed the availability of both of these mechanisms for obtaining immediate appellate review in a decision granting mandamus in this same case, regarding the very same documents at issue here. *KBR*, 756 F.3d at 759-62. Following the Supreme Court's instructions in *Mohawk*, KBR requested that the district court certify interlocutory appeals under § 1292(b), but the court has denied (or not yet acted upon) those requests. Accordingly, KBR has filed a mandamus petition in this Court contemporaneously with this stay motion.

Because further disclosure of its privileged documents (beyond the privileged material the district court has previously disclosed unilaterally, *see infra* p. 6 n.2) will cause KBR additional irreparable harm, and because the other requirements for a stay are satisfied, KBR respectfully requests that this Court stay the November 20 and two

December 17 Orders pending disposition of KBR's mandamus petition, just as the Court stayed the production order at issue in the prior mandamus proceedings in this case.

STATEMENT OF THE CASE

This Court's prior opinion sets forth relevant background facts. *See KBR*, 756 F.3d at 756-57. The present dispute involves the same 89 documents at issue in those prior mandamus proceedings. Those documents were created during KBR's internal investigation of employee "tips" raising concerns about the relationship between certain KBR employees and subcontractor Daoud & Partners ("D&P") in connection with KBR's provision of logistical support to the U.S. military in Iraq. Dkt. 135, Ex. 5. The tips included allegations of potential kickbacks and preferential treatment of D&P. *Id.* Consistent with KBR's Code of Business Conduct, KBR personnel working under the direction of Chris Heinrich, an attorney in KBR's Law Department, investigated the reports. *See* Dkt. 139 at 3-4; *KBR*, 756 F.3d at 757 ("KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity."). Richard Ervin, KBR's primary investigator for these matters, interviewed KBR employees, reviewed documents, and summarized his findings in two reports addressed to Heinrich, dated February 8, 2005, and September 11, 2006. Dkt 139 at 7; Dkt. 217 at 1.

KBR withheld the reports (and other related documents at issue here) as attorney-client privileged and work-product protected. The district court initially

directed production of the documents in their entirety, on the ground that KBR's COBC internal investigations were "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice" or "in anticipation of litigation." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *3-4 (D.D.C. Mar. 6, 2014).[2]

This Court granted mandamus relief, holding that the district court committed "clear legal error" because "KBR's assertion of the [attorney-client] privilege" was "materially indistinguishable" from the privilege assertion over internal-investigative documents upheld in *Upjohn*. *KBR*, 756 F.3d at 757, 762. In addition, this Court held that "'no other adequate means [of] relief'" existed because (1) interlocutory appeal is generally unavailable in privilege cases, and (2) "appeal after final judgment will come too late because the privileged communications will already have been disclosed." *Id.* at 760-61 (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). The Court also concluded that mandamus relief was "'appropriate'" because the district court's "novel" ruling could "potentially [have] broad and destabilizing effects in an important area of law." *Id.* at 763. The Court instructed that "[t]o the extent that [Relator] has timely asserted other arguments for why the[] documents [at issue] are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments." *Id.* at 764.

[2] The court's order purported to summarize, and even directly quoted from, the COBC documents—thereby publicly disclosing assertedly privileged materials before KBR could seek appellate review. *Barko*, 2014 WL 1016784, at *1-2.

Post-mandamus, the district court received supplemental briefing on several issues related to the 89 COBC documents. On November 20, 2014, the district court ordered KBR to produce, in their entirety, the same 89 COBC documents that this Court already held are privileged. Dkt. 205. The district court concluded that KBR had impliedly waived privilege by asking Heinrich to respond to three deposition questions seeking what all agree are non-privileged facts, and then restating those facts in a footnote of its summary-judgment brief, in its accompanying statement of material facts, and in its opposition to Relator's motion to compel. Those allegedly waiver-inducing factual assertions were that (1) KBR generally "abides by [its legal] obligation" to report to the government when it has "reasonable grounds to believe that a kickback or fraud ha[s] occurred," (2) "KBR investigated the alleged kickbacks" here, and (3) KBR subsequently "made no report to the Government about an alleged kickback or fraud." *Id.* at 17. According to the district court, these factual statements implicitly asserted that KBR's COBC documents "showed no reasonable ground to believe" that "fraud or kickbacks may have occurred." *Id.*

The district court rejected KBR's argument that it should have an opportunity to retract the allegedly waiver-inducing assertions. Dkt. 181 at 14-15. The district court acknowledged the *en banc* decision written by Judge Kozinski recognizing that "the holder of [a] privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition." *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003) (en banc). In the

district court's view, *Bittaker* only "allow[s] parties to drop entire claims or causes of action," and "only suggest[s] that KBR can default [on a final judgment] instead of disclosing the [COBC] documents." 11/20 Order 22-23.

In analysis that was "effectively the same as" its waiver rationale, the district court also ordered disclosure of the documents under Federal Rule of Evidence 612, because Heinrich had examined them before his deposition. *Id.* at 23-26. The court acknowledged that disclosure under Rule 612 was inappropriate unless KBR had "waived the attorney-client privilege." 11/20 Order 25 n.72 (internal quotation marks omitted); *see also id.* at 25 (Rule 612 analysis depends on "whether [KBR's] withholding [of] the documents is consistent with the purposes of attorney-client privilege and work-product protection"). For the same reasons it concluded waiver occurred, the court held that "fairness require[d] disclosure" under Rule 612. *Id.* at 25-26.

The next day, KBR filed amended summary-judgment papers that deleted all the language the district court held triggered waiver. KBR also moved for reconsideration, certification under 28 U.S.C. § 1292(b), and a stay. Dkt. 208. While Relator was preparing his response, the district court entered a *sua sponte* order observing that "the descriptions of [witness] statements" in Ervin's two reports were "likely privileged," but inviting briefs on whether the reports' "descriptions of subcontractor contract performance and . . . the acts of certain KBR employees" were protected from disclosure. Dkt. 210.

At 7:54 p.m. on December 17, the court denied reconsideration, denied certification, denied a stay pending mandamus review, and ordered KBR to disclose the 89 documents by 4:00 p.m. on December 26. *See* Dkt. 227. In denying a stay, the court concluded that KBR did not have a substantial likelihood of obtaining mandamus relief, that the risk of irreparable harm to KBR was "speculative," and that the public had "an interest in the prompt and final determination of this litigation." *Id.* at 7-8.

In a separate, alternative ruling the same evening, the court held that portions of the same documents were not privileged. *See* Dkt. 228. The court distinguished between (privileged) "witness statements [from KBR employees] and summaries [thereof]," and "summaries of KBR's subcontracts with [D&P] and summaries of [D&P's] performance under those subcontracts," which the court held to be unprivileged, on the ground that they do not reflect communications between attorney and client. *Id.* at 2-3; *see also id.* at 7 ("'[C]ommunications that do not involve *both attorney and client*[] are unprotected.'" (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982))). In essence, the district court held that even though communications between a company's employees and its lawyers are privileged, such communications are unprivileged if the employee happens to be the lawyer's agent. The court agreed that the documents qualified as work product, but held that Relator had shown "substantial need" and "undue hardship" to overcome that protection, despite his virtual failure even to attempt his own fact development. *Id.* at 11-17. As explained above, *see supra* p. 2, the district court has yet to rule on KBR's motion for a stay of and certification

of an interlocutory appeal from the second December 17 Order, which also required disclosure of documents by 4:00 p.m. on December 26. Dkt. 228, at 21.

ARGUMENT

I. Legal Standard for Granting a Stay Pending Appeal

In determining whether to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 & n.1 (D.C. Cir. 1977); D.C. Cir. R. 8(a)(1). The "[p]robability of success" element "is inversely proportional to the degree of irreparable injury evidenced." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). "A stay may be granted with either a high probability of success and some injury, or vice versa." *Id.*

In this circuit, the "four factors have typically been evaluated on a sliding scale," *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (internal quotation marks omitted), under which the Court "must balance the strengths of the requesting party's arguments in each of the four required areas," such that "[i]f the showing in one area is particularly strong, [a stay] may issue even if the showings in other areas are rather weak," *Chaplaincy of Full Gospel Churches v. England*,

454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).[3] Recently, the U.S. Courts of Appeals have divided about whether *Winter v. NRDC*, 555 U.S. 7 (2008), "preclude[s] continuing adherence to the sliding-scale approach." *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011) (discussing circuit split). Although individual members of this Court have expressed the view that "a movant cannot obtain a preliminary injunction without showing *both* a likelihood of success *and* a likelihood of irreparable harm," *Davis*, 571 F.3d at 1296 (Kavanaugh and Henderson, J.J., concurring), the Court has not overruled its longstanding adherence to the sliding-scale analysis, *Sherley*, 644 F.3d at 393. In any event, the Court need not resolve the issue here, because KBR's showing independently satisfies each of the four factors.

II. KBR Has a Substantial Likelihood of Success on the Merits

To find a "strong showing" of likely success on the merits sufficient to justify a stay pending appellate review, *Nken*, 556 U.S. at 434 (internal quotation marks omitted), the Court need not conclude that the district court's ruling was probably wrong. While a movant must show more than a mere possibility of success, *id.*, it suffices to show that "serious legal questions" present "a fair ground of litigation," *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

[3] Although *Davis* and *England* involved requests for injunctive relief, no material difference exists between the factors considered in determining whether to grant an injunction and the factors considered in determining whether to grant a stay. *See Washington Metro.*, 559 F.2d at 842 n.1; *see also Nken*, 556 U.S. at 434 (noting the "substantial overlap" between the two inquiries).

KBR has a substantial likelihood of obtaining mandamus relief. This Court has not hesitated to grant mandamus when necessary to prevent disclosure of attorney-client privileged or work-product protected information; indeed, it has already once granted the writ to correct an erroneous order requiring disclosure of the very documents at issue here. *See KBR*, 756 F.3d 754; *see also, e.g.*, *In re Pittman*, No. 00-7195, 2000 WL 1580968 (D.C. Cir. Sept. 1, 2000) (per curiam).

The November 20 and December 17 Orders satisfy all the prerequisites for mandamus. This Court has made clear that "the first condition for mandamus—no other adequate means to obtain relief—will often be satisfied" in privilege cases such as this one because post-disclosure appellate review "come[s] too late"—"the cat is [already] out of the bag." *KBR*, 756 F.3d at 761 (internal quotation marks omitted).

With respect to the second prerequisite, KBR's "right to the issuance of the writ is 'clear and indisputable'" because the November 20 and December 17 Orders are founded on "clear legal error[s]." *Id.* at 762 (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381 (2004)). The November 20 Order conflicts with *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989) (R.B. Ginsburg, J.), because it erroneously held that non-privileged factual assertions gave rise to an implied waiver even though they did not "reveal[] substantive information, . . . prejudice[] the [opponent's] case, []or mislead[] [the] court [through] an incomplete disclosure." *Id.* at 271; *see also* Mandamus Pet. 11-14.

The district court also erroneously ordered production based on an implied-waiver theory even though KBR repeatedly disavowed the allegedly waiver-inducing assertions, eliminating any need for Relator to obtain the documents at issue "to challenge" any KBR contentions. 11/20 Order 23. This ruling conflicts with the consensus view among federal courts that implied waivers "can be abandoned and the corresponding privilege reasserted." *Klein v. Demopulos*, No. C09-1342-JCC, 2010 WL 4365840, at *1 (W.D. Wash. Oct. 27, 2010); *see also, e.g.*, *In re Sims*, 534 F.3d 117, 126, 136-41 (2d Cir. 2008) (granting mandamus where district court ordered disclosure of records protected by psychotherapist-patient privilege even though privilege holder disavowed allegedly waiver-inducing assertions); *Bittaker*, 331 F.3d at 720 ("[T]he holder of [a] privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition."); Mandamus Pet. 15-18. Contrary to the district court's decision, 11/20 Order 22, courts have applied this principle to a variety of waiver-producing positions, regardless of whether those positions might be characterized as "claims," "causes of action," "defenses," or something else.[4] And nothing in *Bittaker* (or any

[4] *See, e.g.*, *Verinata Health, Inc. v. Sequenom, Inc.*, No. C 12-865 SI, 2014 WL 2600499, at *3 (N.D. Cal. June 10, 2014) (party could avoid implied waiver by "disavow[ing] [its] use" of former employee's testimony), *vacated in part on other grounds*, 2014 WL 4076319 (N.D. Cal. Aug. 18, 2014); *Radware, Ltd. v. A10 Networks, Inc.*, No. C-13-2021-RMW, 2014 WL 116428, at *3 (N.D. Cal. Jan. 10, 2014) (offering party seeking disqualification of opposing counsel choice of "withdraw[ing] the privileged documents" it submitted for *in camera* review or producing them to opposing counsel); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 48 (E.D.N.Y. 2013) (defendants

other case of which we are aware) suggests (as the district court did here) that to avoid "at issue" waiver, a party must forfeit any defense *whatsoever* to a plaintiff's lawsuit. *Cf.* 11/20 Order 22-23 ("KBR can default instead of disclosing the documents"). Consistent with the need to construe implied waivers narrowly, the defendant forgoes only a defense premised on the privileged documents "at issue." *See In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005) ("Implied waivers are consistently construed narrowly.").

For its part, the second December 17 Order flouts this Court's mandate, and commits "clear legal error," *KBR*, 756 F.3d at 762, by rejecting privilege for communications between a company's employees and its in-house counsel made to facilitate legal advice and based, partly or wholly, on other employees' privileged communications. *See* Mandamus Pet. 18-22. That Order also erroneously relieved Relator of his burden to make the showings necessary to overcome work-product protection. *See id.* at 22-24.

As for the final mandamus prerequisite, "'the writ is appropriate under the circumstances'" because the district court's "novel[]" decisions threaten to have "broad and destabilizing effects in [the] important area of [privilege] law." *KBR*, 756

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could "choose whether to assert the[ir] affirmative defense or the [attorney-client] privilege"), *aff'd*, --- F. Supp. 2d ---, 2014 WL 223173 (E.D.N.Y. Jan. 21, 2014); *Oracle Am., Inc. v. Innovative Tech. Distribs., LLC*, No. 11-cv-1043-LHK, 2011 WL 2559825, at *2 (N.D. Cal. June 28, 2011) (similar to *Radware*); *Klein*, 2010 WL 4365840, at *1 (party could avoid waiver by "withdraw[ing] his indemnification claim, and stat[ing] that he will not assert an advice-of-counsel defense").

F.3d at 762-63 (quoting *Cheney*, 542 U.S. at 381). By triggering irremediable waiver based on non-privileged factual assertions, the November 20 Order invites parties seeking to pierce privilege to pore over their opponents' statements and conduct for *any* potential inference of implied waiver. The November 20 Order thus risks making implied-waiver battles a costly and burdensome staple of civil litigation. Furthermore, parties cannot rely on privilege *ex ante* if courts readily imply waiver, and then refuse any opportunity to avoid it. This uncertainty chills the beneficial conduct that the privilege and work-product doctrines promote. *See, e.g.*, *Upjohn*, 449 U.S. at 389, 397-98; *see also id.* at 393 ("An uncertain privilege . . . is little better than no privilege at all."); Mandamus Pet. 26-27.

The second December 17 Order also reaches a "novel" result contrary to this Court's prior mandate, *Upjohn*, other precedent, and the plain text of Federal Rule of Civil Procedure 26(b)(3)(A)(ii). *KBR*, 756 F.3d at 762. And it threatens "broad and destabilizing effects" by lowering the bar for overcoming work-product protection and adopting a stringent, erroneous rule requiring an attorney and a client at each end of a privileged communication, and excluding from the privilege communications involving a client's employees acting as agents of a lawyer. *Id.* at 763; *see also* Mandamus Pet. 27.

III. A Stay Is Necessary To Prevent Irreparable Harm

This Court's prior mandamus decision in this case reaffirmed the Court's longstanding position that compelled disclosure of privileged information is

"irreparable." *United States v. Philip Morris Inc.*, 314 F.3d 612, 621-23 (D.C. Cir. 2003) (observing that "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"), *abrogated on other grounds by Mohawk*, 558 U.S. 100 (2009); *see also KBR*, 756 F.3d at 760-62. As the Court explained, "post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents." *KBR*, 756 F.3d at 761; *accord id.* ("[A]ppeal after final judgment will come too late because the privileged communications will already have been disclosed pursuant to the district court's order."). This Court concluded that this concern warranted both a stay and mandamus relief in the prior mandamus proceedings. *See id.* at 756. The same considerations definitively establish that a stay is necessary to prevent irreparable harm here.

The harm of compelling disclosure before this Court has had an opportunity to review the district court's Orders would be particularly pronounced in this case because Relator has deliberately forgone his own meaningful fact discovery, instead preferring to piggyback on KBR's privileged internal investigations. Relator has conducted only three depositions, two of which were of KBR's Rule 30(b)(6) designees, and he has admitted that he has virtually no evidence to support his allegations. Dkt. 136-2, Ex. 1. If KBR is forced to disclose its privileged documents and this Court later reverses the disclosure order, it will be difficult, if not impossible,

"to unscramble the effects of the disclosure," because Relator's litigation strategy appears to hinge on obtaining the COBC documents. *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992); *see also Mohawk*, 558 U.S. at 109 (requiring that the "fruits" of erroneously compelled disclosures be excluded from evidence).[5]

IV. A Stay Will Not Significantly Harm Relator

The only potential harm to Relator from a stay of the district court's discovery order would be the possibility of a delay in the schedule set by that court—in particular, a possible short delay in Relator's summary-judgment deadline. As a threshold matter, it bears emphasis that Relator's complaint in this case was filed in June 2005 and unsealed on January 12, 2009, and almost six years have passed since the unsealing as preliminary proceedings and initial discovery have been conducted. In the prior mandamus proceedings, less than four months elapsed between the filing of KBR's mandamus petition and the issuance of this Court's opinion. A similar, brief delay here will be insignificant in the context of this case's overall progress.

[5] Given Relator's virtual failure to conduct any independent investigation and his conceded dearth of evidence to support his claims, Relator's entire case is likely to be tainted by any erroneously compelled disclosure. Therefore, the appropriate remedy for such a disclosure may well be dismissing Relator's claims with prejudice, or at least disqualifying Relator's counsel. *Cf. Chase Manhattan*, 964 F.2d at 165 (noting that "attorneys cannot unlearn what has been disclosed to them in discovery," and that disclosures "may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses"); *Maldonado v. N.J. ex rel. Admin. Office of the Cts.-Prob. Div.*, 225 F.R.D. 120, 141 (D.N.J. 2004) (mandating disqualification of counsel to remedy "substantial taint" resulting from counsel's review of privileged document).

Moreover, in granting a stay pending appeal of a prior attorney-client privilege ruling, this Court squarely held that "[a] mere assertion of delay does not constitute substantial harm" sufficient to bar a stay. *Philip Morris*, 314 F.3d at 622. In addition, any such delay can readily "be minimized by [the Court's] expedition in hearing" this matter. *Id.*

V. The Public Interest Favors Granting a Stay

Because "the attorney-client privilege is an 'institutionally significant status or relationship' with deep roots in our nation's adversary system," this Court has expressly held that the public interest favors a stay pending appeal of an attorney-client privilege ruling. *Philip Morris*, 314 F.3d at 622 (quoting *In re Ford Motor Co.*, 110 F.3d 954, 960 (3d Cir. 1997)). As the Court has explained, "granting a stay to allow [a party] to defend its claim of privilege" before an appellate court "advances 'broader public interests in the observance of law and administration of justice.'" *Id.* (quoting *Upjohn*, 449 U.S. at 389).

The reasoning and result of *Philip Morris* strongly support granting a stay here. KBR's claim that the documents in question are subject to the attorney-client privilege and work-product protection implicates the same "institutionally significant status or relationship" fundamental to "our nation's adversary system" that advances "broader public interests" beyond the effects on the particular parties to this litigation. *Id.* (internal quotation marks omitted). Sound legal "advice or advocacy depends upon the lawyer's being fully informed by the client," but clients will hesitate "'to make full

disclosure to their attorneys'" if their communications might be handed over to their adversaries. *Upjohn*, 449 U.S. at 389 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). As a result, requiring KBR to disclose the documents at issue in this case before obtaining appellate review would harm the same public interests "in the observance of law and administration of justice" that the D.C. Circuit found to warrant a stay in *Philip Morris*, as well as in the prior mandamus proceedings in this very case. *Philip Morris*, 314 F.3d at 622 (internal quotation marks omitted); *see also KBR*, 756 F.3d at 756.

CONCLUSION

KBR respectfully requests that this Court issue on an emergency basis a stay of the district court's November 20 and two December 17 Orders pending disposition of KBR's mandamus petition. KBR further requests that the Court enter a temporary administrative stay of the Orders until the Court rules on this stay motion. KBR requests that the Court rule on this stay motion or enter a temporary administrative stay before 4:00 p.m. on December 26, the production deadline set by the district court.

Dated: December 19, 2014

Respectfully submitted,

/s/John P. Elwood

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CERTIFICATE OF SERVICE

I certify that on this 19th day of December, 2014, a copy of the foregoing motion, including its appendices, was served by Federal Express on:

Beverly M. Russell
U.S. Attorney's Office
Civil Division
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On this day, a copy of the foregoing motion, including its 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 motion, including its appendices, was served electronically on the following, pursuant to their express written consent to electronic service:

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