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, *Petitioners*

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

PETITION FOR WRIT OF MANDAMUS

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GLOSSARY

Abbreviation	Definition
1st Am. Comp.	Relator's First Amended Complaint [Dkt. 12]
11/20 Order	Opinion & Order, *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276 (D.D.C. Nov. 20, 2014) [Dkt. 205]
3/12/14 Mandamus Pet.	Corrected Petition for Writ of Mandamus, D.C. Cir. No. 14-5055 (Mar. 12, 2014) (Doc. 1483554)
App.	Appendix
COBC	Code of Business Conduct
DCIS	Department of Defense Criminal Investigative Service
Decl.	Declaration
Dep.	Deposition
Doc.	Document
Dkt.	District Court docket number (D.D.C. Civil Action No. 1:05-cv-1276)
D&P	Daoud & Partners
Ex.	Exhibit
FCA	False Claims 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
KBR	*In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)
KBR 3/25/14 Mandamus Reply	Reply in Support of Corrected Petition for Writ of Mandamus and Emergency Motion for Stay, D.C. Cir. No. 14-5055 (Mar. 24, 2014) (Doc. 1485182)
LOGCAP III	Logistics Civil Augmentation Program Contract III
Second 12/17 Order	Opinion & Order, *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276 (D.D.C. Dec. 17, 2014) [Dkt. 228 (sealed), Dkt. 231 (unsealed)]

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). *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757, 764 (D.C. Cir. 2014) ("*KBR*"); *see also* Order, *KBR*, No. 14-5055 (D.C. Cir. Mar. 28, 2014) ("*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 violated precedent and the plain language 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. With due respect, this series of rulings; the court's repeated unilateral disclosures of privileged information in its orders; and its flurry of *sua sponte* directives to parties and non-parties alike to brief theories of waiver

(including one the plaintiff himself had not previously pressed), creates the distinct impression that the District Judge has crossed the line from neutral arbiter to independent inquisitor. Mandamus and reassignment are warranted.

RELIEF SOUGHT

KBR respectfully requests a writ of mandamus directing the district court to vacate its Orders of November 20, 2014 (App. A) and December 17, 2014 (App. B-D).[1] KBR also requests that this Court direct the Chief Judge of the District Court for the District of Columbia to reassign this case.

ISSUES PRESENTED

(1) Whether pre-deposition review of privileged internal investigatory documents by a company's designated witness, questioning of that witness regarding what all agree are non-privileged facts, and reference to those non-privileged facts in briefs, impliedly waive attorney-client privilege and work-product protection.

(2) Given the longstanding rule that implied waivers of privilege must be narrowly tailored to the justification for waiver, whether the district court erred in ordering blanket disclosure of privileged documents to enable a plaintiff to "respond" to inferences that a defendant expressly disclaimed.

(3) Whether the district court violated this Court's mandate and erred by denying attorney-client privilege to communications between a company's employee inves-

[1] By separate motion, KBR seeks from this Court an emergency stay of the district court's orders pending resolution of this petition.

tigator or compliance personnel and its in-house counsel made to facilitate legal advice and based at least in part on privileged communications from other employees, where this Court already found the communications to be attorney-client privileged.

(4) Whether the district court erred by ordering disclosure of fact and opinion work-product, given that Relator's failure to attempt meaningful fact discovery prevents him from showing the "substantial need" and "undue hardship" prerequisites for disclosure of even fact work product, Fed. R. Civ. P. 26(b)(3)(A)(ii).

(5) Whether this case should be reassigned to a different District Judge.

STATEMENT OF FACTS

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 proceedings. The 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. *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, interviewed KBR employees, reviewed docu-

ments, 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 related documents) as attorney-client privileged and work-product protected. The district court initially directed production of the documents 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, 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, "'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)). Mandamus relief was "'appropriate'" because the "novel" ruling could "potentially [have] broad and destabilizing effects in an important area of law." *Id.* at 763. This Court instructed that "[t]o

[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.

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.

Post-mandamus, the district court ordered briefs on whether privilege "has been waived," and whether KBR had responded adequately to Relator's discovery requests. Dkt. 175. The court later announced it had "returned to individual examination of [the] documents" to "decide[] whether those documents were otherwise subject to disclosure irrespective of the Court of Appeals's holding." Dkt. 184 at 2. That *sua sponte* order improperly quoted from, and thus publicly disclosed, a document retention notice that even Relator concedes is privileged. *Id.*; *see also* Dkt. 187 at 1 n.1. The district court then, again *sua sponte*, ordered both the parties *and* the United States—a nonparty[3]—to provide information regarding KBR's prior disclosures to the government. Dkt. 184 at 2-3. Finally, the district court yet again *sua sponte* directed KBR and the government to (1) "describe whether KBR produced any documents to the Government, either under subpoena or voluntarily, related to whether KBR employees received kick-backs for the contracts involved with this litigation," (2) "identify whether KBR contested any production [under a subpoena]," and (3) "note whether any other court has ruled on whether . . . documents [subpoenaed by the government from KBR] are protected from production." Dkt. 185 at 1.

[3] *See United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009) ("The United States . . . is a 'party' to a privately filed FCA action only if it intervenes . . . .").

KBR objected to the Court's *sua sponte* disclosure of privileged material, and explained that the improperly quoted material related to a different matter unrelated to D&P or any of the subcontracts at issue here. Dkt. 187 at 1-3 & n.1. KBR also noted that it had produced documents related to the subcontracts at issue here in response to a 2007 Department of Defense Criminal Investigative Service ("DCIS") subpoena. *Id.* at 3. KBR explained that DCIS did not specifically request, and KBR did not produce, any COBC materials or other privileged documents under the subpoena. *Id.*

The court responded with yet another *sua sponte* order. Dkt. 189. To "help [it] decide whether Defendant KBR waived any attorney-client or work product privilege," the court ordered the government to "produce any written response to the [2007] subpoena (not the underlying documents)," including "any privilege log." *Id.* at 1. The court also instructed the government to attest whether KBR "sa[id] that materials were being withheld." *Id.* KBR objected that the order was essentially a *sua sponte* third-party subpoena, and expressed concern about the appearance that the court had assumed the mantle of advocate for Relator, and did not trust KBR to respond truthfully to requests to produce records in KBR's possession. Dkt. 193 at 1-3.

Taking the district court's cue, Relator then filed a brief arguing, for the first time, that KBR waived privilege by not producing a privilege log to DCIS. Dkt. 194 at 5-6. KBR explained that this late-raised argument was meritless and precluded by this Court's instruction that the district court consider only arguments that Relator "ha[d] timely asserted" prior to mandamus. *KBR*, 756 F.3d at 764; *see also* Dkt. 199.

On November 20, the district court ordered KBR to produce, in their entirety, the same 89 COBC documents that this Court already held are privileged. 11/20 Order [Dkt. 205]. The district court concluded that KBR had impliedly waived privilege by asking Heinrich to respond to 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 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 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 court denied KBR its requested opportunity to retract the allegedly waiver-inducing assertions. Dkt. 181 at 14-15. The district court acknowledged the *en banc* decision 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 that allegedly triggered waiver. KBR also sought reconsideration, certification under 28 U.S.C. § 1292(b), and a stay. Dkt. 208 at 1. Before Relator responded, the court entered another *sua sponte* order, observing that "the descriptions of [witness] statements" in Ervin's two reports were "likely privileged," but inviting briefs on whether "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, and ordered KBR to disclose the 89 documents by 4 p.m. on December 26. *See* Dkt. 227. In a separate, alternative ruling, the court held that portions of the same documents were not privileged. *See* Dkt. 228. The court distinguished between (privileged) "witness statements [from KBR employ-

ees] 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, 808 (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. On December 18, KBR moved for the district court to stay and certify an interlocutory appeal from its second 12/17 Order, Dkt. 232; that motion remains pending.

REASONS WHY THE WRIT SHOULD ISSUE

I. Standard of Review

When a district court orders disclosure of documents claimed to be subject to attorney-client privilege, mandamus is appropriate if the "disclosure order" amounts to a "clear abuse of discretion" or "otherwise works a manifest injustice." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009); 28 U.S.C. § 1651(a). This standard is "not insuperable." *Cheney*, 542 U.S. at 381. "Writ 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 (3d ed. 2014) (citing cases). This Court has already once granted mandamus to prevent 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).

For "issue[s] 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)), *rev'd on other grounds*, *Ryan v. Gonzales*, 133 S. Ct. 696 (2013), or "legal question[s] of first impression or of extraordinary significance," mandamus lies even without "clear abuse of discretion." *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987); *see also Mohawk*, 558 U.S. at 110 ("particularly . . . novel privilege ruling[s]"). This Court has "grant[ed] 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 turns on legal questions, they are reviewed *de novo*. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). This petition satisfies the traditional mandamus standards. *See KBR*, 756 F.3d at 760 (quoting *Cheney*, 542 U.S. at 380-81).

II. KBR's Right to Mandamus Is Clear and Indisputable

The November 20 Order rests on two "clear legal error[s]." *KBR*, 756 F.3d at 762. First, the district court erroneously held that KBR impliedly waived privilege by asking its witness questions regarding non-privileged facts, and then referencing those

facts in briefs. Second, the court clearly erred by requiring blanket disclosure of privileged documents to allow Relator to "respond" to inferences KBR has expressly disclaimed. The second 12/17 Order flouts this Court's mandate, and commits "clear legal error" by rejecting privilege for communications between a company's employees and its lawyers made to facilitate legal advice and based, partly or wholly, on other privileged communications. *Id.* That Order also erroneously relieved Relator of his burden to make the showings necessary to overcome work-product protection.

A. Statements Regarding Non-Privileged Facts Did Not Waive Privilege

The district court's implied-waiver determination sharply conflicts with *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989) (R.B. Ginsburg, J.). *White* held that a defendant's statement that his lawyer had "thoroughly reviewed" the matter at issue did not implicitly waive attorney-client privilege, where the defendant (like KBR here) did not assert an advice-of-counsel defense or otherwise disclose the substance of attorney-client communications. *Id.* at 270-71 (internal quotation marks omitted). "Where a defendant neither reveals substantive information, nor prejudices the [opponent's] case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver." *Id.* at 271.

The non-privileged factual statements here were precisely the type of "general assertion[s] lacking substantive content" that *White* held "not sufficient to waive the

attorney-client privilege."[4] *Id.* None of *White*'s prerequisites for drawing an "inference of waiver" is present. *Id.* Far from "reveal[ing] substantive information" about COBC documents, *id.*, KBR has zealously guarded their confidentiality. KBR expressly stated that it "intend[ed] for [its internal] investigations to be protected by the attorney-client privilege and attorney work product privilege." Dkt. 136 at 4 n.5 And KBR has repeatedly disclaimed any intent to request inferences about the conclusions of the COBC investigations. 3/12/14 Mandamus Pet. 30; Dkt. 181 at 2, 9-12; Dkt. 187 at 3-4; Dkt. 208 at 2, 7, 9-10, 13; Dkt. 220 at 1, 3, 8-9, 13. The district court's suggestion that KBR "has, in effect, revealed the substantive conclusion of its COBC investigations" is baseless. 11/20 Order 20.

Nor can it possibly be suggested that "KBR has prejudiced [Relator]." Dkt. 227 at 3. Even *Relator* has not claimed "prejudice[]" to his case—nor could he, given KBR's consistent disavowal of any inferences regarding the documents' contents. *White*, 887 F.2d at 271; *see also* Dkt. 213 at 8. Nor did KBR "misle[ad] [the] court by relying on an incomplete disclosure." *White*, 887 F.2d at 271. KBR made no "disclosure" (complete or incomplete) of the documents' contents. *Id.* Far from "relying" on KBR's non-privileged statements, *id.*, the district court reviewed the documents *in camera* and provided its own characterization of them, *see, e.g.*, *Barko*, 2014 WL

[4] The factual assertions described only non-privileged "details"—"the who, what, where and why"—about privileged communications and documents. 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:29 (2014).

1016784, at *1-2. There was never any real possibility of limited, non-privileged statements in a footnote of a summary-judgment brief being misleading; any such possibility was eliminated by *in camera* review and KBR's express disavowals.

Even Relator's response to KBR's November 21 motion for reconsideration did not claim that KBR's statements in opposing Relator's motion to compel, *see* 11/20 Order 16-17; Dkt. 227 at 4, were grounds for waiver—for good reason. KBR never requested the "inference" that its investigatory documents "show nothing," 11/20 Order 17, much less "reveal[ed] substantive information" regarding the documents' contents, *White*, 887 F.2d at 271.[5]

If anything, it is Relator, not KBR, who has (desperately) sought to put KBR's COBC investigations "at issue." Because implied waiver applies only "where the *holder of the privilege* has taken some affirmative step to place the content of the confidential communication" at issue, no basis exists for waiver here. *In re Lott*, 424 F.3d 446, 455 (6th Cir. 2005) (emphasis added); *accord Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 13 (D.D.C. 2010) ("[A] party must

[5] The district court also clearly erred to the extent its waiver analysis relied on the contention that KBR "used the affidavit of Cheryl Ritondale, KBR's Global Director of Procurement," to "suggest[] [an] inference" regarding the Army's approval of a $3.3 million payment to D&P. 11/20 Order 16 n.42; *see also* Dkt. 227 at 4. As the district court recognized, KBR never gave the Army *any* "COBC documents [or] reports" related to the subcontract for which the Army approved payment, and the affidavit did not claim otherwise. 11/20 Order 16 n.42. Indeed, it does not even mention KBR's COBC investigations. Dkt. 136-2. The suggestion that Ritondale's affidavit requested "inferences" about COBC documents *it never discussed* is baffling. 11/20 Order 23.

put the [attorney's] advice in issue before she forfeits the privilege.").

Relator concededly sought discovery "on the very same issue[s]" allegedly giving rise to waiver *before* KBR questioned Heinrich. Dkt. 213 at 5. Pre-deposition Interrogatory No. 18 asked whether KBR had "reported to anyone about the subject matter of any of the allegations in [Relator's] First Amended Complaint." Dkt. 180-3, Ex. 2 at 48. Before the deposition, Relator also requested production of documents pertaining to KBR's COBC investigations. Dkt. 181-1 ¶¶ 18, 19, 23, 31, 33. He designated as a topic for Heinrich's deposition "[t]he scope of any factual information contained in or gained through the course of any COBC-related investigation" relating to his allegations. Dkt. 181-2 ¶ V. He asked a barrage of questions during the deposition related to the process for reporting, investigating, and imposing discipline based on COBC violations. *See, e.g.*, Heinrich Dep. 11:1-46:4, 48:11-49:6, 50:20-51:20, 54:2-73:12, 80:5-119:2 [Dkt. 181-5]. Relator's direct examination pursued lines of inquiry paralleling those supposedly causing waiver: (1) whether the COBC policy requires KBR to investigate wrongdoing and take action if found, *see, e.g.*, *id.* at 19:14-20:5; (2) whether KBR investigated the alleged misconduct here, *see, e.g.*, *id.* at 71:4-17; and (3) whether KBR took any corrective or disciplinary actions based on those investigations, *see, e.g.*, *id.* at 54:11-15. Where, as here, "an opponent injects attorney-client communications into the case, the privilege is not waived." *Gardner v. Major Auto. Cos.*, 11 Civ. 1664, 2014 WL 1330961, at *7 (E.D.N.Y. Mar. 31, 2014).

B. KBR's Disavowal of the Allegedly Waiver-Producing Contentions Eliminates Any Ground for Compelling Disclosure

A "court must impose [an implied] waiver no broader than needed to ensure the fairness of the proceedings before it." *Bittaker*, 331 F.3d at 720; *see also, e.g.*, *In re Lott*, 424 F.3d at 453 ("Implied waivers are consistently construed narrowly."). As a result, "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." *Bittaker*, 331 F.3d at 721. Because the privilege holder is no longer putting his privileged documents at issue, his adversary no longer has any need to review them to rebut the abandoned contention. The district court's ruling flouts these well-established principles, improperly treating *implied* waiver like *express* waiver.

Bittaker is not limited to "causes of action." *Cf.* 11/20 Order 22. The opinion expressly states that "a claim *or defense*" can give rise to an implied waiver. *Bittaker*, 331 F.3d at 720 (emphasis added) (internal quotation marks omitted). *Bittaker*'s reference to "abandon[ing] [a] claim," *id.* at 721, simply reflects that the privilege holder in that case was a habeas petitioner asserting an ineffective-assistance-of-counsel claim, *see id.* at 716-17. There is no principled reason for holding that causes of action and defenses can both give rise to implied waiver, but that only abandoning causes of action (not defenses) can avoid such waivers. And nothing in *Bittaker* (or any 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").

This Court has recognized the *Bittaker* principle, holding in *Koch v. Cox*, 489 F.3d 384, 388 (D.C. Cir. 2007), that a plaintiff could avoid implied waiver by "abandon[ing]" waiver-inducing claims—there, "for damages due to emotional stress."[6] A leading privilege treatise also embraces this principle. *See* 2 Rice, *supra* § 9:46 ("Once advice of counsel has been placed in issue by a claim or defense, waiver can be avoided by the withdrawal of the claim or representation to the court that the defense will not be asserted."). Indeed, the Second Circuit granted mandamus to correct a district court's conclusion that a party could not "unring the bell" of an alleged implied waiver. *In re Sims*, 534 F.3d 117, 126, 136-41 (2d Cir. 2008).[7]

Bittaker, *Koch*, and *Sims* represent 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,

[6] That *Koch* also considered (and rejected) a second potential ground for finding implied waiver—i.e., that the plaintiff "put his mental state in issue by acknowledging he suffers from depression," 489 F.3d at 388; *see also* Dkt. 227 at 5-6—is wholly irrelevant, and in no way undermines *Koch*'s clear holding that waiver-inducing assertions can be "abandoned," 489 F.3d at 388.

[7] The rule strikes the appropriate balance between protecting privilege and ensuring fairness to adversaries. Where "considerations of fairness" support finding implied waiver, the opposing party can request production to challenge the privilege holder's waiver-inducing contentions. *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003). The privilege holder then has a "cho[ice]": Either produce the privileged materials or "abandon the claim that gives rise to the waiver." *Bittaker*, 331 F.3d at 721. In either event, the opponent suffers no prejudice: either he receives materials necessary to test the privilege holder's contentions, or the contentions are withdrawn, in which case the adversary is no worse off than if the assertions had never been made.

2010). Courts have applied this principle to a variety of waiver-producing positions, whether "claims," "causes of action," "defenses," or something else.[8]

The district court denied KBR the waiver-avoiding opportunity that these cases unambiguously require. 11/20 Order 22-23. Despite KBR's express and repeated disavowals, *see supra* p. 12, the district court concluded that "fairness dictates that all the documents in question be produced so that [Relator] [is] able to examine the documents to challenge whether the withheld documents actually support the inferences that KBR attorneys suggested to th[e] Court." 11/20 Order 23. But this conclusion—the *sole* basis for the Court's production order—makes no sense; there are no requested "inferences" for Relator "to challenge." *Id.*

Nor has there been any "prejudice[]" to Relator. *Id.* at 20. Relator has not yet even responded to KBR's summary-judgment motion, and the district court reviewed the documents *in camera* and rejected the inference KBR allegedly requested, *see, e.g.*,

[8] *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 could "choose whether to assert the[ir] affirmative defense or the [attorney-client] privilege"), *aff'd*, 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").

Barko, 2014 WL 1016784, at *1-2. The court repeated the "inexplicable" error that warranted mandamus in *Sims*—i.e., it held that it would be "unfairly prejudic[ial]" to deny a party "access to . . . privileged information that might 'prove the negative'" of a contention that the privilege holder had expressly "renounced." 534 F.3d at 140.[9]

C. The Second 12/17 Order Violates this Court's Mandate, *Upjohn*, and Well Established Privilege Authorities

The court's second 12/17 Order purported to hold that portions of the 89 documents were unprivileged insofar as they involved communications to KBR in-house counsel from KBR Investigator Richard Ervin (author of the two main investigative reports) and KBR procurement compliance personnel (authors of COBC Docs. 46-49). That ruling, however, is foreclosed by this Court's mandate. After *in camera* review of all 89 documents, this Court held that Relator "was not entitled to KBR's own investigation files" because "KBR's assertion of [attorney-client] privilege in this case is materially indistinguishable" from *Upjohn*. *KBR*, 756 F.3d at 757, 764.[10]

The Order also violates *Upjohn*. Here, as there, the documents are confidential communications "made by [KBR] employees" to "counsel for [KBR] acting as such,"

[9] That "KBR's hired counsel questioned an in-house KBR lawyer at a deposition," Dkt. 227 at 5 n.19, does not make the district court's rationale here any less "inexplicable" than it was in *Sims*, 534 F.3d at 140.

[10] This Court's recognition that the district court could consider other arguments that Relator "ha[d] timely asserted . . . for why th[e] documents are not covered by either the attorney-client privilege or the work-product protection," *id.* at 764, referred to the implied-waiver issue raised, but not decided, before mandamus, Dkt. 155 at 6-8. It did not invite the district court to reconsider this Court's conclusion that the documents at issue were privileged.

"at the direction of corporate superiors," *Upjohn*, 449 U.S. at 394; *see also KBR*, 756 F.3d at 758 (investigations "conducted at the direction of . . . KBR's Law Department"), "in order to secure legal advice from counsel," *Upjohn*, 449 U.S. at 394; *see also, e.g.*, 11/24 Order 2 ("Heinrich ordered the reports to investigate possible[] fraud or kickbacks . . . .").[11] Because the documents were communicated to counsel, they are unlike the uncommunicated attorney notes and memoranda *Upjohn* limited to work-product protection. *See* 449 U.S. at 397-402. *Contra* Dkt. 228 at 8. The court's concern about companies "filter[ing] . . . document[s] through [their] legal department[s]," *id.*, is adequately addressed by the requirement that communications be aimed at "secur[ing] legal advice from counsel"—satisfied here, *Upjohn*, 449 U.S. at 394.

The documents at issue are also privileged because their authors acted as "agents of attorney[]" Heinrich. *KBR*, 756 F.3d at 758. The privilege encompasses "confidential communications . . . between [a client's] lawyer and the lawyer's representative" "made for the purpose of facilitating the rendition of professional legal services to the client." Proposed Fed. R. Evid. 503(b)(2).[12] The district court rejected

[11] As this Court has recognized, Investigator Ervin's status as a KBR employee does not render unprivileged the statements he obtained from other KBR employees in his attorney-directed investigation. *See KBR*, 756 F.3d at 758 (investigations "conducted by agents of the client" can be privileged (internal quotation marks omitted)); *see also, e.g.*, *Williams v. Sprint/United Mgmt. Co.*, 238 F.R.D. 633, 638 (D. Kan. 2006) ("[P]rivilege extends to communications made within a corporation if those communications are made for the purpose of securing legal advice.").

[12] Courts routinely consult Proposed Federal Rule of Evidence 503 "as evidence of common law practices." *In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998) (per curi-

this standard based on dicta from *Sealed Case*, 676 F.2d at 809, that "communications that do not involve both attorney and client[] are unprotected." But *In re Sealed Case* had no reason to decide whether the privilege is limited to communications between attorneys and clients, and other decisions of this Court make clear that it is not.[13] This Court's decision in this case recognized that "communications made by and to *non-attorneys*" are "routinely protected by the attorney-client privilege" where non-attorneys "serv[e] as agents of attorneys in internal investigations." *KBR*, 756 F.3d at 758 (emphasis added). Similarly, an accountant's communication to a lawyer of the accountant's assessment of client-provided financial records can qualify for attorney-client privilege when made to facilitate the provision of legal advice. *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980). The district court's rigid rule requiring a client and a lawyer on each end of a privileged communication threatens disclosure of

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am). That rule also accords with the Restatement (Third) of the Law Governing Lawyers ("Restatement"), to which the D.C. Circuit regularly looks for guidance on privilege issues. *See, e.g.*, *KBR*, 756 F.3d at 757-58, 760. Under the Restatement, the privilege applies to confidential communications "between privileged persons" for the purpose of obtaining or providing legal assistance for the client, Restatement § 68 (2000), and the term "privileged persons" includes "the client's lawyer" and "agents of the lawyer who facilitate the representation," including "investigators," *id.* § 70 & cmt. g. Significantly, the district court "misinterpret[ed] the thrust" (Dkt. 228 at 9) of both KBR's argument and the Restatement by focusing on Restatement § 70 comment f, which addresses "a client's agent for communication," rather than comment g, which specifically recognizes that an "investigator" who serves as a "lawyer's agent" qualifies as a "privileged person" under the Restatement. *See* Dkt. 228 at 9-10 & n.31.

[13] *In re Sealed Case* focused on work-product protection because (1) the principal documents at issue "were not meant for any eyes but their author's" (and thus were not communications at all), and (2) "even if the attorney-client privilege applied to the[] items, that privilege had been waived." 676 F.2d at 811-12.

communications long considered privileged, including those between attorneys within a law firm, and between attorneys and their investigators.

Contrary to the district court's apparent view, the "factual summaries" it ordered disclosed, Dkt. 228 at 9, did "not spring from [the document authors'] heads as Athena did from the brow of Zeus," *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). The summaries are privileged if they are "based, *in part at least*, upon . . . confidential communication[s] . . . from [the client]." *Id.* (internal quotation marks omitted); *see also Upjohn*, 449 U.S. at 401 (work product "reveal[ing] [privileged] communications" is protected by attorney-client privilege); 1 Rice, *supra* § 5.5 (communications from attorney's agent to attorney "are protected to the extent the communications reveal client confidences"). The privilege extends to a client's communication of pre-existing documents to its attorney for review. *See* 1 Rice, *supra*, § 5:10. Therefore, "[a]ttorney notes that reflect the content of pre-existing documents communicated to the attorney by the client . . . are protected by the [attorney-client] privilege *even though the pre-existing documents themselves are not*." *Id.* (emphasis added); *accord United States v. Willis*, 565 F. Supp. 1186, 1210 (S.D. Iowa 1983). Because attorney-supervised internal investigations conducted by non-lawyers "are protected by the attorney-client privilege to the same extent as" investigations conducted by lawyers, the non-attorney descriptions of KBR documents at issue here are no less privileged than if authored by KBR counsel. *KBR*, 756 F.3d at 758 (quotation marks omitted); c*f.* 8 Wigmore, *Evidence* § 2308, at 595 (McNaughton rev. 1961) ("client's disclosure to the attorney of the

contents of a pre-existing document will almost always be an act of communication").

The second 12/17 Order contains *no* discussion of this issue, despite ordering the disclosure of documents containing discussions "based, *in part at least*, upon . . . confidential communication[s] [to the lawyer] from [the client]." *In re Sealed Case*, 737 F.2d at 99 (internal quotation marks omitted). This "clear legal error" warrants mandamus relief. *KBR*, 756 F.3d at 762.

D. The District Court Erroneously Relieved Relator of His Burden to Overcome Work-Product Protection

The district court erred by concluding that KBR's COBC investigative reports contain no "opinion work product" entitled to heightened protection under Federal Rule of Civil Procedure 26(b)(3)(B), even though portions of the reports clearly set forth "conclusions" and "opinions" within the meaning of that provision. *See, e.g.*, Dkt. 228 at 17-18 (requiring disclosure of portions of "Synopsis" and "Summary" of COBC Doc. 56 opining on what employee interviews and contract reviews indicate).

The court compounded its error by relieving Relator of his burden of establishing (1) "substantial need" for the work product and (2) inability, "without undue hardship, [to] obtain the[] substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii); *see also Beard v. Middle Tenn. Home Health Serv.*, 144 F.R.D. 340, 342 (E.D. Tenn. 1992) (party seeking discovery bears burden). Relator offered no more than "broad unsubstantiated assertions," *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982), that obtaining evidence through, e.g., depositions

"would be impractical and impossible," Dkt. 143 at 21. Indeed, Relator could not have made a "particularized showing" of the costs and burdens, *In re Int'l Sys. & Controls*, 693 F.2d at 1241, because he has conducted only three depositions, two of which were of KBR's Rule 30(b)(6) witnesses. *See* Dkt. 228 at 15, 17. Contrary to the contention that Relator "would have to run through" all 205 individuals KBR identified during discovery "to determine which have [relevant] knowledge," Dkt. 228 at 15, Relator knows full well who the key players are from his review of relevant subcontract files while working for KBR in Iraq in 2005, *see* Dkt. 220 at 14-15 & n.9 (identifying three individuals). He simply has chosen not to depose them.

The district court held that Relator had no burden "to demonstrate the futility" of trying to obtain substantially equivalent information through depositions. Dkt. 228 at 17. The court's sole rationale was that it *might* be hard for Relator to locate and arrange depositions, *see, e.g.*, *id.* at 14 (some potential witnesses may no longer be KBR employees or may live abroad), and that memories might have faded with time, *see id.* at 15. Absent evidence that Relator attempted to depose witnesses and confronted such difficulties, however, the court's observations are speculation, insufficient to overcome work-product protection. *See In re Student Fin. Corp.*, No. 06-MC-69, 2006 WL 3484387, at *14 (E.D. Pa. Nov. 29, 2006) ("speculat[ion]" that witnesses would invoke the Fifth Amendment insufficient to overcome work-product protection where party offered no evidence it had tried to question witnesses); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 621 (S.D. Ohio 1983) (same, for "speculat[ion]"

that "deponents may have faulty memories, or display hostility, or [that] . . . depositions would be prohibitively expensive, or even impossible to take"); *see also Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 190 F.R.D. 532, 538-39 (S.D. Ind. 1999) (no undue burden where plaintiff "has not offered any evidence . . . that it was prevented from . . . interview[ing] [even] . . . 600 [potential witnesses]"). By relieving Relator of the burden to affirmatively "show" substantial need or undue hardship, Fed. R. Civ. P. 26(b)(3)(A)(ii), the court facilitated Relator's litigation based on "wits borrowed from the adversary"—precisely what the work-product doctrine was designed to prevent. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).[14]

III. KBR Has No Other Adequate Means of Redress

In its mandamus decision, this Court stated that the requirement of having "'no other adequate . . . relief'" "will often be met" where a "a district court erroneously ordered disclosure of . . . privileged documents." *KBR*, 756 F.3d at 760-61 (quoting *Cheney*, 542 U.S. at 380). This is so because (1) interlocutory appeal is unavailable absent district court certification (not granted here), and (2) "appeal after final judgment will come too late because the privileged communications will already have been disclosed pursuant to the district court's order." *Id.* at 761. Once "'the cat is out of the bag,'" post-disclosure review of the district court's decision is generally "inadequate," for "the very purpose of [privilege] is to prevent the release" of confiden-

[14] The second 12/17 Order's approach of mandating production of only portions of privileged documents also puts KBR in the position of potentially needing to waive privilege over other portions necessary to contextualize the selective production.

tial information. *Id.* (quoting *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998)).

The need for immediate review is pronounced here, because Relator has deliberately forgone his own meaningful fact discovery, instead piggybacking on KBR's privileged investigations. Relator has conducted only three depositions, *see supra* p. 23; has not even deposed Robert Gerlach, whom he puts at the center of the alleged fraud, *see* 1st Am. Compl. [Dkt. 12]; and admitted he has virtually no evidence to support his allegations, *see* 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 hinges 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 ("fruits" of erroneously compelled disclosures must be excluded from evidence).

IV. The District Court's Novel and Erroneous Ruling Again Threatens Broad and Destabilizing Effects in an Important Area of Law

In its prior mandamus decision in this case, the Court concluded that mandamus was "'appropriate under the circumstances,'" *KBR*, 756 F.3d at 760 (quoting *Cheney*, 542 U.S. at 381), because the district court's decision was "novel[]" and threatened "uncertainty" and "broad and destabilizing effects" in the "important area" of attorney-client privilege. *Id.* at 763. So too here. The November 20 Order is "novel[]." *Id.* Neither the district court nor Relator can cite *any* case finding implied waiver under remotely comparable circumstances. They have also identified no case com-

pelling production of privileged documents based on implied waiver, where the privilege holder expressly disavowed any reliance on the statements at issue. The district court's ruling conflicts with *White*, *see supra* pp. 11-14, and its refusal to give effect to KBR's disavowal conflicts with the consensus view of courts, *see supra* pp. 15-18.

The November 20 Order also threatens "broad and destabilizing effects" and "uncertainty" in the "important area of [privilege] law." *KBR*, 756 F.3d at 763. By triggering irremediable waiver based on unprivileged factual assertions, the November 20 Order invites parties to pore over opponents' statements and conduct for *any* potential inference of implied waiver. The November 20 Order risks making implied-waiver battles a costly and burdensome staple of civil litigation. Indeed, months and countless dollars have been spent on resolving whether three non-privileged factual assertions here impliedly waived privilege. That expense and burden should have been avoided by giving effect to KBR's early, express, and repeated disavowals.

The potential harms are far reaching. A wide range of legal contentions—from affirmative defenses in employment-discrimination cases, *see Koumoulis*, 295 F.R.D. at 41, to "claims for emotional distress," *Sims*, 534 F.3d at 134—can potentially give rise to implied waivers. Whether a particular contention provides grounds for waiver is not clear cut. *See, e.g.*, *In re Perrigo Co.*, 128 F.3d 430 (6th Cir. 1997) (waiver from motion to dismiss shareholder derivative action); *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 396 (W.D. Pa. 2005) (rejecting notion that merely defending against inequitable-conduct claim in patent case waived privilege).

Indeed, such uncertainty is hard-wired into False Claims Act litigation. This Court has held that a corporate defendant's structures for identifying potential fraud may be relevant to whether and how the statute's "knowledge" element is satisfied. *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1275 (D.C. Cir. 2010). The district court's holdings make it very difficult to put forward this defense without risking waiver of privilege over internal investigations. 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."). Other circuits have granted mandamus to correct similar errors. *See, e.g.*, *Sims*, 534 F.3d at 126, 136-41; *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010) (writ where "district court clearly erred in finding a blanket waiver of the attorney-client and work product privileges").

The second 12/17 Order warrants mandamus for similar reasons. It reaches a "novel" result contrary to this Court's mandate, *Upjohn*, other cases, and the plain text of Rule 26(b)(3)(A)(ii). *KBR*, 756 F.3d at 762; *see supra* pp. 18-22. It also threatens "broad and destabilizing effects" by lowering the bar for overcoming work-product protection, adopting a stringent, erroneous rule requiring an attorney and a client at each end of a communication, and excluding from the privilege communications involving a client's employees acting as agents of a lawyer. *KBR*, 756 F.3d at 763.

V. This Case Should Be Reassigned to a Different Judge

Under 28 U.S.C. § 455(a), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." That statute, as well as the Court's "general supervisory power to 'require such further proceedings to be had as may be just under the circumstances,'" authorizes this Court "to reassign [a] case to a different judge on remand." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam) (quoting 28 U.S.C. § 2106); *see also* 28 U.S.C. § 1651(a).[15]

The Court previously declined to exercise this authority, stating that "[b]ased on the record before [it], [the Court] ha[d] no reason to doubt that the District Court will render fair judgment in further proceedings." *KBR*, 756 F.3d at 763-64. The District Judge's subsequent conduct, however, has raised serious questions regarding his ability to fairly preside over this litigation. In particular, the court has:

- Quoted in a public order from a document retention notice that even Relator concedes is privileged, *see supra* p. 5;
- Again quoted at length (and purported to summarize) KBR's assertedly privileged COBC documents before KBR had an opportunity to seek appellate review, see Dkt. 228 at 16 & n.55; *see also* Dkts. 230-31 (partially granting KBR's motion to seal these discussions);
- Issued a series of *sua sponte* orders compelling disclosures from the U.S.

[15] This Court has "supervisory authority" to order reassignment under 28 U.S.C. §§ 1651(a) and 2106 even in cases where "the requirements [for disqualification under] § 455(a)" are not satisfied. *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167 (3d Cir. 1993); *see also Liteky v. United States*, 510 U.S. 540, 554 (1994) (noting that § 2106 "may permit a different standard"). Although *KBR* applied the § 455(a) standard, 756 F.3d at 763, the question whether a different standard applies under 28 U.S.C. §§ 1651(a) and 2106 was not briefed in that case.

Government, a nonparty, *see supra* pp. 5-6;

- Written orders in a manner that injected into this litigation a new waiver theory (the DCIS subpoena issue) that Relator himself had never raised;
- Ordered supplemental briefing *sua sponte* on whether "portions of the COBC documents that reveal only background facts are subject to disclosure," 11/24/14 Order 2; and
- In violation of this Court's mandate, ordered disclosure of privileged communications and opinion work product based on the theory embodied in the court's November 24 *sua sponte* order, *see supra* pp. 22-24.

This conduct creates the unmistakable appearance that the District Judge's role as neutral adjudicator has been undermined by his *in camera* review of KBR's privileged COBC documents. Without the benefit of KBR's analysis or interpretation of its own internal reports, the court called them "eye-openers" containing "direct and circumstantial evidence" of fraud, *Barko*, 2014 WL 1016784, at *1, and it has firmly expressed its opinion that the COBC documents are "directly oppos[ed]" to "factual representations" in KBR's summary-judgment motion, *United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 165 (D.D.C. 2014).

The court's persistent efforts to identify *some* grounds for compelling disclosure of the same documents this Court found to be privileged suggests that it holds the "unshakeable view that [KBR] is guilty of global malfeasance, and that the court's duty is to ferret out the evidence of its misdeeds." *Cobell v. Kempthorne*, 455 F.3d 317, 332 (D.C. Cir. 2006) (internal quotation marks omitted); *see also* Dkt. 228, at 16 (suggesting KBR counsel violated "duty of candor" regarding privileged documents' contents de-

spite counsel's inability to provide their views on documents without triggering waiver).[16] Because the court has "assumed the mantle of a prosecutor," reassignment is needed to avoid the "appearance of partiality," which "cuts at the heart of the judicial system." *Cobell*, 455 F.3d at 332, 334-35; *see also Liteky*, 510 U.S. at 551 ("unfavorable predisposition . . . display[ing] clear inability to render fair judgment"); *cf. Microsoft*, 56 F.3d at 1463-65 (reassigning where, *inter alia*, court "made several comments . . . which evidenced his distrust of [defendant's] lawyers and his generally poor view of [defendant's] practices").

CONCLUSION

The Court should grant a writ of mandamus directing the district court to vacate its November 20 and December 17 orders, and direct the Chief Judge of the District Court to reassign this case.

[16] The District Judge's post-mandamus conduct builds on similar pre-mandamus acts: (1) publicly disclosing (and mischaracterizing) portions of the COBC documents before KBR could appeal, *see Barko*, 2014 WL 1016784, at *1-2; (2) violating Federal Rule of Appellate Procedure 21(b)(4)'s prohibition against uninvited participation in mandamus proceedings, *see* KBR 3/25/14 Mandamus Reply 14-15; and (3) gratuitously stating in an unrelated order that the privileged documents "directly conflict with positions KBR takes in this litigation and directly conflict with arguments KBR [m]akes in its summary judgment motion," 4/11/14 Order 1-2 [Dkt. 169].

Respectfully submitted,

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Dated: December 19, 2014

ADDENDUM

CERTIFICATE AS TO 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* in this mandamus proceeding.*

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

* When the case on review was previously before this court as *In re Kellogg Brown & Root, Inc.*, No. 14-5055, the following organizations participated as *amici*: The Chamber of Commerce of the United States of America, National Association of Manufacturers, Coalition for Government Procurement, American Forest & Paper Association, and Association of Corporate Counsel. At this time, none of these entities has moved for leave to participate as *amici* in this proceeding.

Movants

United States of America

2. Ruling under review. This petition for a writ of mandamus seeks review of orders of the District Court (Gwin, J., by designation) dated November 20, 2014, and two orders dated December 17, 2014. The Orders are unreported, but are attached as Appendices A through D to the petition.

3. Related cases. The case on review was previously before this Court in *In re Kellogg Brown & Root, Inc.*, No. 14-5055. 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: December 19, 2014

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 Group Holdings, LLC. The direct parent of KBR Group Holdings, LLC, 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 Group Holdings, LLC.

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 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,

/s/ John P. Elwood

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Dated: December 19, 2014

CERTIFICATE OF SERVICE

I certify that on this 19th day of December, 2014, a copy of the foregoing *Petition for Writ of Mandamus*, including its Addendum and Appendices, was served by Federal Express on:

Beverly M. Russell
U.S. Attorney's Office
Civil Division
555 Fourth Street, NW
Washington, DC 20530
(202) 252-2531

On this day, a copy of the foregoing *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 *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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/s/ Jeremy C. Marwell
Jeremy C. Marwell