ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5319

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION FOR STAY

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GLOSSARY

Abbreviation	Definition
3/12/14 Mandamus Pet.	Corrected Petition for Writ of Mandamus, No. 14-5055 (D.C. Cir. Mar. 12, 2014)
3/21/14 Mandamus Resp.	Corrected Combined Response to Motion for Stay and Petition for Writ of Mandamus, No. 14-5055 (D.C. Cir. Mar. 21, 2014)
Amici Br.	Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioner, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Jan. 30, 2015)
Barko	*United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162 (D.D.C. 2014)
COBC	Code of Business Conduct
Dep.	Deposition
Dkt.	District Court docket number (D.D.C. Civil Action No. 1:05-cv-1276)
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)
Mot. for Extension	Relator's Motion for Extension of Time and to Exceed Page Limits, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Dec. 24, 2014)
Pet.	Petition for Writ of Mandamus, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Dec. 19, 2014)
Pet. App.	Appendix to Petition for Writ of Mandamus, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Dec. 19, 2014)
Reply App.	Appendix to Reply in Support of Petition for Writ of

	Mandamus and Emergency Motion for Stay, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Feb. 23, 2015)
Resp.	Combined Answer of Harry Barko to Motion for Stay and Petition for Writ of Mandamus, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Feb. 6, 2015)
Resp. App.	Appendix to Combined Answer of Harry Barko to Motion for Stay and Petition for Writ of Mandamus, *In re Kellogg Brown & Root, Inc.*, No. 14-5319 (D.C. Cir. Feb. 6, 2015)
Second December 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

Rife with irrelevant factual detail, Relator's response attempts to establish that "the discovery orders at issue . . . are based on factual findings." Resp. 11. But Relator cannot obscure that the orders below were based on clear legal errors, including fundamental misapplications of "at issue" waiver, "perhaps the most dangerous privilege principle." Thomas E. Spahn, *The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide* 774 (3d ed. 2013). Neither Relator nor the district court has explained why fairness demands that KBR provide Relator privileged materials so that he can test factual inferences that KBR never requested, has disavowed, and which Relator *will never have to address*. *See* Pet. 16 n.7. That error warranted mandamus in *In re Sims*, 534 F.3d 117 (2d Cir. 2008). This Court should reach the same result, especially considering the waiver ruling was coupled with clearly mistaken privilege and work-product holdings ordering disclosure of communications made to in-house lawyers that are plainly protected under this Court's prior mandamus decision, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and Federal Rule of Civil Procedure 26(b)(3).

Relator's conclusory request that KBR's stay motion be denied, Resp. 40, fails to dispute that KBR has met the stay prerequisites. Indeed, Relator previously *conceded* that KBR's petition raises "difficult," "serious and complex issues" that "could set important precedent." Mot. for Extension 3-5. That concession, and the "potential negative repercussions" a broad coalition of *amici* identify, *Amici* Br. 2, demonstrate that the requirements for a stay and mandamus relief are amply satisfied.

ARGUMENT

I. The District Court Committed Clear Legal Error

A. KBR's Non-Privileged Statements About Its COBC Process, Which Mirrored Relator's Own Inquiries, Did Not Impliedly Waive Privilege

1. *None of the White Implied-Waiver Prerequisites Is Satisfied*

Relator does not dispute (Resp. 15-18) that the district court's implied-waiver decision is governed by *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989), which held that finding implied waiver is inappropriate "[w]here a defendant neither reveals substantive information, nor prejudices the [opposing party's] case, nor misleads a court by relying on an incomplete disclosure." Relator's response lays bare the legal error—and breadth—of the district court's ruling. KBR is not using its COBC documents as a "sword" by relying on their contents in support of its defense; it is therefore entitled to the "shield" of privilege. *Cf.* Resp. 1-2, 6-7, 13-14, 33.[1]

Relator, like the district court, principally contends that KBR implicitly "revealed the substantive conclusion of its COBC investigations." Pet. App. A-21; *see also* Resp. 16-17. That issue does not turn on any factual inquiry—it is undisputed what KBR attorney Chris Heinrich was asked and answered in his deposition. According to Relator, KBR waived privilege by making the innocuous statement that it

[1] Relator does not rely on the district court's references to KBR's statements opposing Relator's motion to compel, *see* Pet. App. A-17 to A-18, A-41, or to Cheryl Ritondale's affidavit, *see id.* at A-17, A-41. Relator asserts the court "did not err" in ordering production under Federal Rule of Evidence 612, Resp. 23 n.8, but does not dispute that the court's Rule 612 ruling depended on its implied-waiver analysis, and thus is not an independent ground for upholding the court's orders, *see* Pet. 8.

"'adhere[s]'" to its contractual obligation to report suspected kickbacks to the government. Resp. 1 (quoting Heinrich Dep. 132:3-5 (Pet. App. A-150)). As *amici* explain, triggering implied waiver based on such a generalized statement of legal compliance is a trap that will discourage corporations from conducting internal investigations, *Amici* Br. 9, causing "potentially broad and destabilizing effects." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014) ("*KBR*").

Although Heinrich testified about KBR's *general* COBC practices,[2] he did not discuss the substantive findings of the investigations at issue here. The *only* case-specific testimony Relator cites is Heinrich's assertion of the undisputed, non-privileged fact that KBR made no kickback-related disclosure to the government regarding the matters at issue. *See* Resp. 17 (Heinrich Dep. 162:13-20 (Pet. App. A-158)). Contrary to Relator's assertion, Heinrich *never* testified that he concluded "based on his review of the [COBC] materials" that KBR had no "reasonable grounds to believe that a violation of the Anti-Kickback Act may have occurred" here, and thus "no report [to the government] was required." Resp. 16; *see also id.* at 23.[3]

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[2] *See* Heinrich Dep. 132:3-5 (Pet. App. A-150) (stating generally that KBR "adhere[d]" to kickback-reporting requirement, without referring to investigations here); *id.* at 182:19-183:8 (Pet. App. A-163) (stating "[g]enerically," in response to question from *Relator's* counsel, that Heinrich reviewed investigative reports "to determine whether or not a violation had occurred").

[3] Relator thus has no basis for saying Heinrich *expressly* waived privilege "'by making [KBR's privileged] information public.'" Resp. 15 n.5 (quoting *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)). The district court did not find express waiver; it relied solely on "implied[] or at issue waiver." Pet. App. A-9.

Although the district court concluded that an "inference" could be drawn by piecing together portions of Heinrich's testimony, Pet. App. A-18; *see also* Resp. 13, the same is true of the key statement at issue in *White*—i.e., the defendant's statement to investigators that his attorneys "had thoroughly reviewed" the allegedly unlawful decision, 887 F.2d at 270-71. That statement's most natural implication was that the defendant's attorneys had advised that the disputed transaction was lawful and he relied on that advice. Nevertheless, this Court held that no waiver had occurred. *See id.* at 271. Similarly, Heinrich's "general assertion[s]," which revealed no "substantive information" about the contents of the COBC documents, did not waive privilege. *Id.*

Relator's conclusory discussion of the remaining *White* implied-waiver prerequisites is likewise unpersuasive. Like the district court, Relator fails to explain how he could be "prejudiced" by KBR's since-withdrawn "cit[ations] to Mr. Heinrich's testimony" in a summary-judgment-motion footnote (and supporting document), Resp. 17; *see also* Pet. App. A-16 to A-17, A-22, when *Relator will never have to respond to them*, *see* Pet. 8. Relator is in the same position as if the allegedly waiving statements had never been made. And the fact that the district court has reviewed the COBC documents *in camera* and reached its own conclusions about their contents, Resp. 17-18, definitively establishes that the court has not been "misle[d]," *White*, 887 F.2d at 271.[4]

[4] Relator asserts that when KBR filed its February 10, 2014 summary-judgment motion, it did not "know[]" that the district court on February 26 would order *in camera* review of the COBC documents. Resp. 1; *see also* Reply App. A-10. But Relator's

2. *Relator's Cited Cases Do Not Support Disclosure*

The case law Relator cites is inapposite. Decisions stating that the D.C. Circuit "adheres to a strict rule on waiver of privileges," *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (Resp. 12, 24), and demands that parties "treat the confidentiality of attorney-client communications like jewels," *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (Resp. 12), address the obligation to protect privileged communications against "inadvertent disclosures," *Lavin*, 111 F.3d at 929 n.6. That is not at issue here because KBR has not revealed the contents of the COBC documents. Cases addressing *express* waivers from intentionally disclosing privileged materials likewise have no bearing here.[5] Similarly unhelpful are cases in which a party relies on, and partially discloses, assertedly privileged materials.[6] Farthest afield is the crime-fraud exception

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February 3 motion to compel expressly requested such review, Dkt. 135 at 1-2, 22-23, 25, and KBR on February 20 itself noted that *in camera* review could be used to "to avoid unnecessary disclosure of attorney work product" in the event of a waiver ruling, Dkt. 144-2 at 4 n.5.

[5] *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) (Resp. 14) (following *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (Resp. 21-22), in rejecting "selective waiver" theory); *Conkling v. Turner*, 883 F.2d 431, 432-35 (5th Cir. 1989) (Resp. 14) (plaintiff described communications with counsel in effort to overcome defense); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369-74 (D.C. Cir. 1984) (Resp. 12-13, 21) (voluntary disclosure to SEC); *In re Sealed Case*, 676 F.2d 793, 806-12, 817-25 (D.C. Cir. 1982) (Resp. 12, 14) (same); *Green v. Crapo*, 62 N.E. 956, 959 (Mass. 1902) (Resp. 15, 24) (communications entered into evidence).

[6] *See Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151-52 (D.C. Cir. 1997) (Resp. 12-13) (withholding party had "partially disclose[d] the allegedly privileged information," and access was necessary to challenge reasonableness of withholding party's attorney-fee request, which put at issue reasonableness of counsel's conduct); *Duran v. Andrew*, No. 09-730, 2010 WL 1418344, at *6 & nn.9, 12 (D.D.C. Apr. 5, 2010) (Resp.

to privilege, *see In re John Doe Corp.*, 675 F.2d 482, 491-92 (2d Cir. 1982) (Resp. 13),[7] which the district court held inapplicable here, Pet. App. A-27 to A-30. And *United States Fire Insurance Co. v. Asbestospray, Inc.*, 182 F.3d 201 (3d Cir. 1999) (Resp. 14), *undermines* Relator's waiver argument: It explained that a "party [impliedly] waives . . . privilege *only* when he or she has made the decision and taken the affirmative step in the litigation to place the *advice of the attorney* in issue," *id.* at 212 (emphasis added) (internal quotation marks omitted), which KBR has not done. *See* Pet. App. A-20 (court states waiver "not . . . based on the advice of counsel defense").

Decisions holding that a defendant waives privilege by "placing [its] knowledge of the law in controversy" are also inapposite, *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2009) (Resp. 15), because KBR has not asserted a defense that it held a good-faith belief that the conduct alleged in Relator's complaint was lawful. *See In re Cnty. of Erie*, 546 F.3d 222, 226, 229 (2d Cir. 2008) (implied waiver occurs only when party "rel[ies] on privileged advice from his counsel to make his claim or defense"; deposition testimony referencing attorney-client communications did not

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15) (company issued press release publicizing conclusion of internal investigation and disclosed investigative report to CEO's spouse, and plaintiff relied on investigative findings to support defamation claim). Indeed, *Ideal Electronic* recognized that the privilege holder could "withhold the [privileged] information" if it accepted "dismiss[al]" of its attorney-fee claim. 129 F.3d at 152. *See infra* pp. 10-14.

[7] Although a separate section of *John Doe* held that the company had waived privilege by making "calculated use of otherwise privileged materials for [the] commercial purpose[]" of facilitating its public offering of registered securities, KBR has not made a similar "corporate decision to use [its privileged] materials for purposes other than seeking legal advice." 675 F.2d at 488-89 & n.5.

waive privilege where defendants did "not claim a good faith . . . defense").[8] KBR is defending itself on the grounds that Relator has not and cannot prove a False Claims Act ("FCA") violation—that is, that there was no fraud. Mere "[d]enial of an essential element" of a claim does not give rise to waiver. *Bilzerian*, 926 F.2d at 1293.

3. *Relator, Not KBR, Put the COBC at Issue*

Despite accusing KBR of "inject[ing]" the COBC issue into this case, *e.g.*, Resp. 1, Relator does not contest that he sought discovery "on the very same issue[s]" *before* KBR questioned Heinrich. Dkt. 213 at 5; *see also* Pet. 14. For example, Relator sought documents related to KBR's "practices . . . with respect to compliance with Federal Acquisition[] Regulations," Pet. App. A-246, but now claims that Heinrich waived privilege by testifying that KBR "'adhere[s]'" to Federal Acquisition Regulation § 52.203-7(c)(2), which requires contractors to report when they have reasonable grounds to believe a kickback has been made. Resp. 1 (quoting Heinrich Dep. 132:3-5 (Pet. App. A-150)). Although Relator places great weight on Heinrich's testimony that KBR made no kickback-related disclosure to the government with respect to the matters at issue, *see* Resp. 17 (citing Heinrich Dep. 162:13-20 (Pet. App. A-158)), he *previously* asked KBR by interrogatory whether it had "reported to anyone about the subject matter of any of the allegations" in the complaint, Pet. App. A-235.

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[8] *Cf. United States v. Bilzerian*, 926 F.2d 1285, 1291-94 (2d Cir. 1991) (Resp. 14) (good-faith defense); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994) (Resp. 14) (same); *United States ex rel. Barker v. Columbus Reg'l Healthcare Sys., Inc.*, No. 4:12-cv-108, 2014 WL 4287744, at *1-5 (M.D. Ga. Aug. 29, 2014) (Resp. 20) (same).

Relator also inquired into the COBC process about one week before Heinrich's deposition at KBR designee Cheryl Ritondale's Rule 30(b)(6) deposition. Relator's counsel asked, "If a [COBC] investigation identified fraud . . . wouldn't the federal government have to get told?" Ritondale Dep. 195:12-15 (Reply App. A-5); *cf.* Pet. App. A-18 (basing waiver in part on KBR's eliciting testimony regarding duty "to report any reasonable evidence of kickbacks"). He then inquired, "Are you aware of any documentation that was submitted to the Government pertaining to . . . the investigation of [KBR] that contract fraud had occurred?" Ritondale Dep. 196:12-16 (Reply App. A-6); *cf.* Pet. App. A-19 (basing waiver in part on KBR's eliciting testimony that KBR did not make disclosure to government).

As Relator notes, *see* Resp. 19, "[i]t is important to cabin the implied waiver of privileges to instances where *the holder of the privilege has taken some affirmative step* to place the content of the confidential communication" at issue. *In re Lott*, 424 F.3d 446, 455 (6th Cir. 2005) (emphasis added). Where, as here, a privilege holder "did not 'voluntarily' inject the [allegedly waiver-inducing] issue into the case" and instead was responding to "an issue injected into the [case] by [his adversary]," the fairness concerns underlying the implied-waiver doctrine do not support imposing waiver. *Williams v. Sprint/United Mgmt. Co.*, 464 F. Supp. 2d 1100, 1115-16 (D. Kan. 2006); *see also Ward v. Succession of Freeman*, 854 F.2d 780, 789 (5th Cir. 1988) (no waiver where privilege holder responded to adversaries' effort to "exploit[] the attorney-client communications . . . to prove their claims"); *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 432 (D.

Kan. 2009) (no implied waiver where testimony was elicited by adversary's counsel).

4. *Relator's Express-Waiver Argument Based on KBR's Use of Relator's COBC Statement Is Meritless, Forfeited, and Mandate-Precluded*

Relator contends that KBR *expressly* waived privilege over the COBC documents by designating an unsigned copy of Relator's *own* statement to KBR investigators as an exhibit at Heinrich's deposition, and asking limited follow-up questions at Relator's deposition after Relator raised the topic of his interview with the investigators. *See* Resp. 19-21, 23; *see also* Barko Dep. 24:5-8 (Resp. App. A-21). As Relator concedes, *see* Resp. 20-21, the district court did not adopt this argument, and for good reason: This Court's mandamus decision limited the district court's consideration to privilege arguments that Relator "ha[d] timely asserted" before the mandamus proceedings, *KBR*, 756 F.3d at 764. Relator did not raise this argument before the mandamus decision, or even in his initial post-mandamus position paper on waiver; instead, he first raised it in his *response* to KBR's position paper. *See* Dkt. 193 at 6-7. The argument is thus doubly forfeited and precluded by this Court's mandate.

In any event, the argument is meritless. Although Relator asserts KBR "selective[ly] disclos[ed] [his] COBC statement," Resp. 23, *Relator* produced the unsigned statement during discovery, *see* Dkt. 188 at 6 n.3. Relator cites no case holding that a party's limited references to a document *the other party produced* waives privilege not only with respect to that document, but also as to other documents over which privilege claims have repeatedly been asserted. Under Federal Rule of Evidence 502(a), an ex-

press waiver extends to undisclosed documents only if "they ought in fairness to be considered together" with the disclosed document. Relator does not even cite this rule, much less explain why fairness demands disclosure of all KBR's privileged COBC documents based on limited testimony as to the statement he produced.

B. KBR's Disavowal Avoids Implied Waiver

The district court and Relator rely on an erroneous "pinprick" view of implied waiver—i.e., once potential grounds for finding implied waiver arise, the privilege "balloon" is irremediably popped. Although a party may be unable to "reassert[]" a privilege after an *express* waiver, the consensus view among federal courts is that "implicit 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* 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:46 (2013). The principle is so well established that the Second Circuit held that a district court's conclusion that a party could not "unring the bell" of implied waiver was "not within the permissible limits of discretion" and warranted mandamus. *Sims*, 534 F.3d at 136-41.[9] The district court here thus committed "clear legal error" by denying KBR an opportunity to avoid producing its privileged COBC documents by withdrawing its allegedly waiver-inducing assertions. *KBR*, 756 F.3d at 762. There is no "risk" here that a "de-

[9] Even if a privilege holder has counsel and is not "trapped" into making its waiver-inducing assertions, *see* Resp. 26-27, it is still "inexplicable" to hold, as the district court did, that an adversary "would be unfairly prejudiced by lacking access to . . . privileged information that might 'prove the negative'" of a disavowed contention. *Sims*, 534 F.3d at 140.

cisionmaker will accept" the allegedly requested inferences because they are not in issue. *Sims*, 534 F.3d at 132 (internal quotation marks omitted).

Relator cites *no case* in which a court has compelled production of privileged documents based on an implied-waiver theory after the privilege holder has expressly disavowed reliance on the allegedly waiver-inducing contentions. He primarily relies on cases discussing *express* waivers resulting from the actual disclosure of privileged materials.[10] Because the district court grounded its decision solely on the "doctrine of implied[] . . . waiver," Pet. App. A-9, those cases are irrelevant.

Relator does not deny that *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003), allows a privilege holder to avoid waiver by "abandon[ing] an entire claim," Resp. 25, such as the waiver-inducing ineffective-assistance-of-counsel claims at issue in *Bittaker* and *Lambright v. Ryan*, 698 F.3d 808 (9th Cir. 2012) (Resp. 25). Yet Relator provides no basis for refusing to apply this rule to assertions made by defendants—an

[10] *See, e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888) (Resp. 22) (client could not prevent attorney's testimony where she asserted attorney had deceived her); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (Resp. 27) (rejecting "selective waiver" theory); *United States v. Suarez*, 820 F.2d 1158, 1159-60 (11th Cir. 1987) (Resp. 22) (after expressly waiving privilege, defendant could not reassert it); *United States v. Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971) (Resp. 22) ("expressly waived the privilege"); *Drimmer v. Appleton*, 628 F. Supp. 1249, 1251-52 (S.D.N.Y. 1986) (Resp. 22-23) (attorney testified about communications' substance); *International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 185-86 (M.D. Fla. 1973) (Resp. 22) (party could not deny access to privileged materials and then selectively introduce evidence relating to communications); *United States v. Krasnov*, 143 F. Supp. 184, 190-91 (E.D. Pa. 1956) (Resp. 22) (documents produced "without claim of privilege"), *aff'd*, 355 U.S. 5 (1957); *see also supra note* 5 (addressing additional express-waiver cases).

application clearly supported by *Bittaker*'s recognition that either "a claim *or defense*" might give rise to an implied waiver. *Bittaker*, 331 F.3d at 720 (emphasis added) (internal quotation marks omitted). The rule recognized in *Bittaker* applies to a wide range of assertions, *see* Pet. 17 & n.8; contrary to Relator's suggestion, Resp. 24, courts have *squarely held* that parties can avoid waiver by disclaiming reliance on allegedly waiver-producing testimony.[11] Moreover, just as *Bittaker* would permit a habeas petitioner to pursue other claims even if he "abandon[ed]" his waiver-inducing ineffective-assistance claim, 331 F.3d at 721, KBR can avoid waiver without forfeiting all defenses and submitting to "default" judgment, Pet. App. A-23 to A-24.

Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007), *refutes* Relator's argument that "KBR's 'disavowal'" of the allegedly requested inferences at issue "is immaterial." Resp. 26. *Koch* held that a plaintiff could avoid implied waiver by "abandon[ing]" waiver-inducing claims "for damages due to emotional stress." 489 F.3d at 388. Like the district court, Pet. App. A-42 to A-43, Relator tries to muddy this holding by conflating it with the decision's separate *rejection* of the argument that a plaintiff alleging

[11] *See, e.g.*, *In re Cnty. of Erie*, 546 F.3d at 226, 229 (no waiver where defendants did not rely on deposition testimony referring to attorney-client communications); *Sims*, 534 F.3d at 141 (no waiver where privilege holder "will not offer any evidence" giving rise to alleged implied waiver); *Gardner v. Major Auto. Cos.*, No. 11 Civ. 1664, 2014 WL 1330961, at *1-3, 5-7 (E.D.N.Y. Mar. 31, 2014) (no waiver where defendants disclaimed advice-of-counsel defense, even though deposition testimony referred to such advice); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 727 F. Supp. 2d 256, 275 (S.D.N.Y. 2010) (no waiver where trial testimony "stepped over the line" into privilege but court gave curative instruction that legal advice was not at issue).

discrimination based on physical disabilities waives his psychotherapist-patient privilege merely by acknowledging that he suffers from depression, *see* Resp. 25-26; *see also Koch*, 489 F.3d at 389. That holding further undermines the district court's order requiring disclosure because of inferences on which KBR does not rely; the *Koch* plaintiff's acknowledgment of his depression did not waive privilege because *he did not rely on that condition* to support his claims. *See Koch*, 489 F.3d at 390-91.

Finally, Relator renews his meritless contention—which he raised below but the district court did not adopt, *see* Dkt. 213 at 2; *see also* Pet. App. A-40 to A-43—that KBR's disavowal of its allegedly waiver-inducing statements was untimely. *See* Resp. 23-24. The *day after* the district court's March 11, 2014 order discussing, but not resolving, the waiver issue, *see United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 167-68 (D.D.C. 2014) ("*Barko*"), KBR expressly disclaimed any intent to "'ask[] th[e] [c]ourt to draw the inference that the COBC investigation documents showed nothing,'" 3/12/14 Mandamus Pet. 30 (quoting *Barko*, 4 F. Supp. 3d at 168). And in its October 6 position paper on waiver, KBR argued that it "should be permitted to avoid [an implied] waiver by amending" its summary-judgment filings. Dkt. 181 at 14. Thus, this is not a case in which KBR has "fail[ed] to act diligently." Resp. 24 n.9. Because the district court's scheduling order does not set a deadline for *amending* a summary-judgment motion to *delete* material, Relator's reliance on Federal Rule of Civil Procedure 16(b) is misplaced. *See id.*; *see also* Resp. App. A-5 to A-6 (scheduling order requires leave only for "additional or supplemental motions"). Even if that Rule

applied, the court's implied-waiver ruling would constitute "good cause" for amending the scheduling order, Fed. R. Civ. P. 16(b)(4), to afford KBR an opportunity to "abandon" the allegedly waiver-inducing statements, *Bittaker*, 331 F.3d at 721.

C. The Second December 17 Order Warrants Mandamus

After KBR sought reconsideration, noting the flaws in the district court's implied-waiver analysis, the court took the extraordinary step of ordering briefing *sua sponte* on whether descriptions of "background facts" in certain COBC documents were subject to disclosure. Pet. App. A-273. In taking the further extraordinary step of ordering portions of the *same* documents disclosed on a second theory (that they were not privileged and Relator had made a sufficient showing to overcome work-product protection), *see id.* at A-48 to A-69, the court clearly erred.

The documents were confidential communications from KBR employees (and agents of KBR lawyers) to KBR counsel for the purpose of facilitating legal advice. *See* Pet. 18-22. The ruling that these documents are not attorney-client privileged is so indefensible that Relator barely tries: He merely asserts without analysis that the court "appropriate[ly] held that portions of the COBC documents were not privileged." Resp. 8; *see also id.* at 28 (describing, but not defending, holding).[12] This forfeiture, as

[12] Relator states that "COBC documents related to interviews of or communications with non-KBR employees . . . would not be privileged." Resp. 30. But confidential communications *from* KBR employees *to* in-house counsel for the purpose of facilitating legal advice are privileged in their entirety, even if they include descriptions of non-privileged matters. *See* Pet. 18-21; *cf. Alexander v. FBI*, 198 F.R.D. 306, 317 (D.D.C. 2000) (Resp. 30) (addressing communication of non-privileged facts *from coun-*

well as the arguments set forth in KBR's petition, *see* Pet. 18-22, puts to rest any dispute regarding the second December 17 Order. *See City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (per curiam) (refusing to consider inadequately briefed argument). The Order cannot stand if the COBC documents at issue are privileged in their entirety. *See KBR*, 756 F.3d at 764 (granting mandamus based on attorney-client privilege without addressing work product).

Because the district court clearly erred in concluding portions of the documents were non-privileged, this Court need not address whether it also erred in concluding Relator had made a sufficient showing to overcome work-product protection. But the court likewise committed clear legal error there.[13] Like the district court, Relator relies on generalities: Vague assertions about the passage of time, Resp. 30, without demonstrating that specific witnesses' memories have been lost, *cf. Alexander v. FBI*, 198 F.R.D. 306, 317 (D.D.C. 2000) (Resp. 29); and assertions about the large number of potential witnesses, Resp. 29-30, even though Relator well knows the key players from his work for KBR in Iraq, *see* Pet. 23. When the district court ruled, Relator had de-

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sel to client—not at issue here). Non-privileged matters may be discoverable by other means, but privileged communications describing them are not.

[13] No basis exists for Relator's contention that "summaries in the COBC reports that contain underlying facts . . . are not work product." Resp. 27-28. The district court held that the "reports qualify for work product protection." Pet. App. A-58. Although work-product protection does not apply to "'underlying facts,'" Resp. 28 n.11 (quoting Restatement (Third) of Law Governing Lawyers § 87(1)), that only means that a party cannot suppress a fact that happens to be reflected in work product; the party need not produce the protected document itself. *See* Spahn, *supra*, at 1027.

posed *only one* percipient witness and KBR's Rule 30(b)(6) witnesses. *See id.* Absent a meaningful effort to depose fact witnesses, assertions about the difficulties Relator will encounter, *see* Resp. 29-30, are pure speculation, insufficient to meet his burden of showing "substantial need" and "undue hardship." *See* Pet. 22-24.[14] And like the district court, Relator fails to explain why "Synopsis" and "Summary" sections of investigative reports are not highly protected opinion work product, where they opine on information obtained in employee interviews and contract reviews. *See id.* at 22.

II. Appeal After Final Judgment Is Not an Adequate Remedy

Relator's assertion that "post-judgment appeal [is] an adequate means of relief," Resp. 33, resurrects an argument that Relator raised and lost in the prior mandamus proceeding, invoking the same cases he cited last time. *See* 3/21/14 Mandamus Resp. 1-8. He fails even to acknowledge this Court's square holding in *KBR* that "the first condition for mandamus—no other adequate means to obtain relief—will often be satisfied in attorney-client privilege cases." 756 F.3d at 761. Nor does he identify any reason not to apply that general rule here. Although the district court has entered protective orders to limit Relator's disclosure of the documents, *see* Resp. 32 n.14, it entered a similar order before the first mandamus proceeding, *see Barko*, 4 F. Supp. 3d at 170, yet this Court still concluded that post-judgment appeal would be an inade-

[14] The district court's work-product analysis did not rely on the confidentiality statements signed by interviewed KBR employees. *See* Resp. 29 n.12. KBR has never invoked the statements, which protect *privileged communications*, to prevent a witness from providing information regarding non-privileged facts. *See* Heinrich Dep. 188:9-189:8 (Pet. App. A-164).

quate remedy. Furthermore, Relator does not dispute that it would be difficult, if not impossible, "to unscramble the effects of [an erroneously compelled] disclosure" because Relator has deliberately forgone his own meaningful fact discovery and has instead focused on obtaining KBR's COBC documents. *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992); *see also* Pet. 25.

III. The District Court's Novel Rulings Risk Significant Harm

Relator's assertion that the district court's decisions were not "novel," Resp. 33 (capitalization and internal quotation marks omitted), conflicts with his earlier concession that KBR's petition raises "difficult," "serious and complex issues" that "could set important precedent," Mot. for Extension 3-5. His contention that the orders "do not generally threaten the application of . . . privilege in the business setting," Resp. 34, ignores the broad coalition of industry, trade, and professional associations that has explained that "threaten[ing] corporate defendants with unforeseeable, irrevocable privilege waivers" creates a "sobering disincentive [against] undertak[ing] elective compliance investigations," "impeding [companies'] ability" to perform investigations "to 'ensure [their] compliance with the law.'" *Amici* Br. 2, 8-9 (quoting *KBR*, 756 F.3d at 757). "[T]he specific facts" of this case, Resp. 34, epitomize *amici*'s concerns. KBR did not "make[] a strategic decision to place privileged information at issue." Resp. 33-34. Instead, it was confronted with an irrevocable waiver based on deposition questions that mirrored Relator's *own lines of inquiry* during discovery. *See supra* pp. 7-9.

The broad implications of the district court's novel pinprick view of implied

waiver make this one of the "more consequential attorney-client privilege rulings." *KBR*, 756 F.3d at 761 (internal quotation marks omitted). Unlike the consensus view that implied waivers can be disavowed, it "invites manipulation of the legal process," Resp. 27, by encouraging costly battles over implied waiver. *See* Pet. 26. It is also unnecessary: Either the adversary receives the materials necessary to test the waiver-inducing assertions, or the assertions are withdrawn, and the adversary is no worse off than if they had never been made. *See id.* at 16 n.7. Mandamus review would allow the Court to "eliminate uncertainty" in an "important area" of law. *KBR*, 756 F.3d at 763 (internal quotation marks omitted). "[A]t issue" waiver, Pet. App. A-9, is "perhaps the most dangerous privilege principle" because parties "may not realize its effect in time to avoid disaster." Spahn, *supra*, at 773-74. It is thus essential to allow parties to "avoid the unpredictable and harsh impact of the doctrine" by disavowing waiver-producing assertions. *Id.* at 797.

Contrary to Relator's unsupported contention, Resp. 33, "it is not uncommon" for in-house counsel to serve as Rule 30(b)(6) witnesses, *New Jersey v. Sprint Corp.*, No. 03-2071-JWL, 2010 WL 610671, at *3 (D. Kan. Feb. 19, 2010). Relator also does not dispute that testimony regarding a company's "compliance system" may be relevant to whether the FCA's scienter element is satisfied. *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1275-76 (D.C. Cir. 2010); Pet. 27. Under the district court's rationale, any corporate representative—whether an attorney or not—who testifies that the corporation follows procedures for identifying, investigating, and reporting fraud

may risk waiver through even general comments on the litigation at issue. The prospect of such unexpected and irrevocable waivers highlights the need for mandamus.

The second December 17 Order is equally destabilizing—(1) denying attorney-client privilege to communications from KBR employees and attorney agents during an internal investigation clearly protected by *Upjohn* and this Court's prior mandamus decision, and (2) permitting work-product protection to be overcome by the *most general* assertions of need. Mandamus is "appropriate under the circumstances" of this case. *KBR*, 756 F.3d at 762 (internal quotation marks omitted).

IV. Reassignment Is Warranted

Relator's factual distortions[15] cannot dispel the appearance of a court that has

[15] Relator faults KBR for not moving to seal the October 10, 2014 order quoting privileged material, *see* Resp. 36, but neither notes KBR's prompt objection to the disclosure, Dkt. 187 at 1 n.1, nor acknowledges the district court's refusal to seal a prior *sua sponte* disclosure, *see Barko*, 4 F. Supp. 3d at 170-71. Relator's suggestion that the court's October 21 order directed the government to produce documents because KBR provided an incomplete response to its October 10 and 15 orders, Resp. 5, 38, is baseless: Not even the district court offered that explanation for its actions, *see id.* at 5-6. KBR objected to the October 21 order *two days* after it was issued. Dkt. 193 at 1-4. *Contra* Resp. 37 (arguing KBR's objection was "untimely"). Finally, there is no basis for Relator's suggestion that he, rather than the district court, "first raised the issue" of whether KBR had waived privilege by failing to provide a privilege log in response to the Department of Defense Criminal Investigative Service's subpoena. Resp. 39. Relator's court filings gave no hint of his view that KBR's subpoena response might be relevant to COBC privilege issues until October 20, *see* Dkt. 188 at 17-18—*five days after* the district court inquired *sua sponte* "whether KBR contested any production" under a government subpoena, Pet. App. A-266. And Relator did not argue waiver based on KBR's failure to provide a privilege log until October 28, Dkt. 194 at 5-6—one week after the district court *sua sponte* ordered the government to assist it in "decid[ing] whether . . . KBR waived . . . privilege" by stating whether KBR's subpoena response "did not say that materials were being withheld," Pet. App. A-269.

abandoned its role as neutral arbiter to "assume[] the mantle of a prosecutor" seeking to "ferret out . . . evidence of [KBR's supposed] misdeeds," *Cobell v. Kempthorne*, 455 F.3d 317, 332, 334-35 (D.C. Cir. 2006) (internal quotation marks omitted), meeting any legal obstacle with new initiatives to compel production of the COBC documents on alternate grounds. The district court's conduct before the first mandamus decision was itself remarkable. *See* Pet. 30 n.16. Since then, the court's continued disclosures of privileged material; its *sua sponte* pursuit of novel theories; its identification, on its own initiative, of additional grounds for disclosure when its primary waiver ruling was called into doubt, *see* Pet. App. A-48 to A-69; and its allegation that KBR counsel violated their "duty of candor," *id.* at A-86, regarding documents about which KBR cannot express its views without triggering waiver, create the appearance of a concerted effort to circumvent this Court's prior mandamus decision and ensure production of KBR's privileged documents. *See* Pet. 28-30. This "appearance of partiality cuts at the heart of the judicial system" and warrants reassignment. *Cobell*, 455 F.3d at 332.

CONCLUSION

The Court should grant a writ of mandamus directing the district court to vacate its November 20 and December 17, 2014 orders, and direct the Chief Judge of the District Court to reassign this case. It should also stay the November 20 and December 17 orders pending disposition of KBR's mandamus petition.[16]

[16] Although Relator requests additional briefing, Resp. 40, he does not explain why that is necessary or would be helpful to the Court.

Respectfully submitted,

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Dated: February 23, 2015

CERTIFICATE OF SERVICE

I certify that on this 23rd day of February, 2015, a copy of the foregoing *Reply in Support of Petition for Writ of Mandamus and Emergency Motion for Stay*, including its Appendix, was served by Federal Express on:

Beverly M. Russell
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On this day, a copy of the foregoing *Reply*, including its Appendix, was also served by Federal Express on:

The Honorable James Gwin
Carl B. Stokes United States Court House
801 West Superior Avenue, Courtroom 18A
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On this day, a copy of the foregoing *Reply*, including its Appendix, was also served electronically on the following via the Court's CM/ECF system:

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No. 14-5319

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

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

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

APPENDIX TO REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION FOR STAY

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Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN THE MATTER OF:

UNITED STATES OF AMERICA
ex rel. HARRY BARKO,

Plaintiff-Relator,

Case No.
1:05-CV-1276
(JSG)

v.

HALLIBURTON COMPANY, et al.,

Defendants.

Thursday,
January 30, 2014
Washington, D.C.

DEPOSITION OF:

CHERYL RITONDALE, RULE 30(b)(6) DESIGNEE

called for examination by Counsel for the Plaintiff-Relator, pursuant to Notice of Deposition, in the law offices of Kohn, Kohn & Colapinto, LLP, located at 3238 P Street, N.W., Washington, D.C., when were present on behalf of the respective parties:

APPEARANCES:

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point we had a consent requirement reviewed and validated that claim, but we did not have funding on the task order, could not get funding from the Government on that task order until we filed a certified claim a year, or sometime in 2012. And then subsequently the task order funding came in. We've not paid Daoud for that settlement for other reasons and other issues between Daoud and KBR not related to B6.

Q Did KBR tell the Government that Mr. Covelli had raised allegations of fraud with respect to the B6 main camp point in time he left?

MS. LOLLAR: Objection to the form.

MR. KOHN: Let me rephrase the question.

BY MR. KOHN:

Q The information that was provided to the Government for the basis of the settlement, did it include any information pertaining to Mr. Covelli's code of business

conduct allegation of fraud?

MS. LOLLAR: Same objection. You can answer, if you know.

THE WITNESS: The individuals that would have been working the claim and submitting the consent package to the ACO would have been subcontract administrators in Houston. They would not have been privy to what was the code of business conduct call or anything like that as a standard course of business in their day.

Q If a code of business conduct investigation identified fraud against the federal government wouldn't the federal government have to get told?

MS. LOLLAR: Objection. Again, same objection that I made before as beyond the scope of the topics for Ms. Ritondale. She can answer if she knows based on her personal knowledge.

THE WITNESS: I know there have been instances where there have been

notification, not in this instance or anything of this case, there have been notifications to the Government of issues. And it would have been a different set of the Government than those working the consent group, that would have reviewed the consent. And if I may add, and those kind of communications to the Government are not spread out through the company. I mean it's still between lawyers and the customer.

BY MR. KOHN:

Q Are you aware of any documentation that was submitted to the Government pertaining to Mr. Covelli's claim or the investigation of it that contract fraud had occurred?

MS. LOLLAR: Objection to the form; beyond the scope. You can answer, if you know.

THE WITNESS: I don't know.

BY MR. KOHN:

Q What document was provided to the Government with respect to the final - with

respect to the entirety of the settlement discussions and negotiations with D&P on the main camp?

A In our claim to the Government?

Q Yes.

A I'd have to pull it, but I recall looking at a synopsis of the negotiations and the percent complete of each line item of the subcontract.

MS. LOLLAR: And it's also been - the entire claim has been produced.

MR. KOHN: Right. Well, if you can just shoot me an email with the Bates numbers for that, I don't have to ask her questions about that.

MS. LOLLAR: Sure, we'd be happy to do that.

MR. KOHN: Thank you.

BY MR. KOHN:

Q Did KBR incur expenses for the temporary housing of its employees while it waited for the main camp dormitory to be

United States Court of Appeals for the District of Columbia Circuit

Reply in Support of Petition for Writ of Mandamus and Emergency Motion for Stay

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *ex rel.* Harry Barko,	:	CASE NO. 1:05-CV-01276
Plaintiff,	:	
vs.	:	OPINION & ORDER
HALLIBURTON COMPANY, *et al.*,	:	
Defendants.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this *qui tam* action, Plaintiff-Relator Barko requests an extension of time to file his opposition to the KBR[1/] and Daoud[2/] Defendants' motions for summary judgment.

Plaintiff-Relator Barko says the KBR Defendants produced around 74,000 documents between January 11, 2014 and February 3, 2014, and on the doorstep of summary judgment deadlines. Plaintiff-Relator Barko further says the KBR Defendants produced around 9,400 documents on February 17, 2014. Barko says that he will be severely prejudiced if he is not granted an extension to review all these late produced documents before filing his opposition to the motions for summary judgment.

Because of the amount of documents produced near the dispositive motions deadline, the

[1/]The KBR Defendants refers to Kellogg Brown & Root Services, Inc., Kellogg Brown & Root, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown and Root International, Inc. (A Delaware Corporation), Kellogg Brown & Root International, Inc. (A Panamanian Corporation), and Halliburton Company.

[2/]The Daoud Defendants refers to Daoud & Partners Inc.

Case No. 1:05-CV-01276
Gwin, J.

Court grants an extension on the summary judgment briefing. The Plaintiff may file any opposition to summary judgment by March 17, 2014. The reply will now be due March 24, 2014. The Court denies the request for an extension of the expert report dates. The Court notes that any prejudice can be cured by the parties' ability to offer supplemental and/or rebuttal expert reports 30 days before trial.

Additionally, to avoid further discovery disputes on the assertion of privilege, the Court orders Plaintiff and Defendants to submit for *in camera* review their privilege logs, any earlier redacted versions of documents on the privilege log, unredacted versions of documents on the privilege log, and any withheld documents on the privilege log. The documents must be provided in both hardcopy and in electronic format and mailed express to the courthouse.

IT IS SO ORDERED.

Dated: February 26, 2014

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE