No. 14-5319

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

IN RE: KELLOGG BROWN & ROOT, INC., ET AL.

On Petition for Writ of Mandamus from the United States District Court for the District of Columbia, the Honorable James S. Gwin (by designation)
Civil Action No. 1:05-cv-1276

COMBINED ANSWER OF HARRY BARKO TO MOTION FOR STAY AND PETITION FOR WRIT OF MANDAMUS

Respectfully submitted,

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GLOSSARY

Barko A-	Appendix to Barko's Combined Answer to Motion for Stay and Petition for Writ of Mandamus, USCA Case #14-5319, Filed 2/6/2015
COBC	Code of Business Conduct
Doc.	District Court docket (D.D.C. Civil Action No. 1:05-cv-1276)
Fn.	Footnote
FCA	False Claims Act, 31 U.S.C. §§ 3729-3732
FRE	Federal Rules of Evidence
KBR	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 A-	KBR's Appendix to Petition for Writ of Mandamus, USCA Case #14-5319, Filed 12/19/2014
li.	Line
LOGCAP	Logistics Civil Augmentation Contract
p.	page
Pet.	KBR Petition for Writ of Mandamus
Rule 30(b)(6)	Federal Rules of Civil Procedure Rule 30(b)(6)
Tr.	Deposition Transcript

INTRODUCTION

KBR's mandamus petition is predicated on a fallacy. KBR incorrectly reports to this Court that all Mr. Heinrich did was to "answer[] a series of questions that all agree seek non-privileged factual information." Pet. at. 1. But the record of Mr. Heinrich's deposition proves otherwise. KBR's own trial counsel initiated a course of questions and answers in which KBR's in-house counsel, Mr. Heinrich, explained how KBR's LOGCAP contract included a contract clause requiring KBR to evaluate instances of possible violations of the Anti-Kickback Act; that it was Heinrich's job to perform that evaluation for KBR; and that he utilized the Code of Business Conduct ("COBC") reports at issue to evaluate KBR's compliance with that contract clause. KBR's counsel then asked Heinrich the *ultimate* question: "Did KBR adhere to that contract clause?," and Heinrich responded: "Yes, we did." KBR A-150 (Tr. 132 li. 3-5). Without knowing that *in camera* review of the COBC documents would transpire, KBR incorporate Heinrich's newly minted deposition testimony into its motion for summary judgment. KBR A-86.

The deposition testimony of Heinrich demonstrates that KBR intentionally had its attorney inject his conclusion that KBR was its compliance with its LOGCAP contractual obligations into the case and that his conclusion was specifically derived from Heinrich's review of the COBC materials. By

unsheathing the COBC reports and using them as a sword, KBR has therefore waived its privilege.

For the second time in less than a year, KBR asks this Court to issue an extraordinary writ of mandamus in the midst of ongoing discovery. KBR's initial petition encompassed the application of the attorney-client privilege to internal compliance investigations but did not decide the issue of waiver. *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754 (D.C. Cir. 2014) ("*In re KBR*"). KBR now seeks to extend mandamus review to both fact-based district court post-writ waiver decisions and to post-writ *in camera* review where the district court further identified segregable work product material releasable under Fed. R. Civ. P. 26(b)(3)(A)(ii). KBR A-70.[1] As discussed below, KBR's dissatisfaction with the district court's correct factual findings and legal conclusions does not meet the requirements necessary for a writ to issue. KBR's petition should be summarily denied.

RELEVANT FACTS AND PROCEDURAL BACKGROUND

On June 27, 2014, this Court granted KBR's Petition for Writ of Mandamus clarifying the scope of protection afforded corporations under *Upjohn Co. v. United States,* 449 U.S. 383 (1981). It acknowledged, however, that other

[1] Although KBR asserts that this Court conducted "its own *in camera* review" of the COBC materials, the opinion issued by this court only refers to the district court's *in camera* review. *Cf.* KBR Pet. at 1 with *In re KBR*, 756 F.3d at 756.

arguments may exist "for why [the COBC] documents are not covered by either the attorney-client privilege or the work-product protection," and that "the District Court may consider such arguments." *In Re KBR,* at 764. Finally, this Court stressed that the privilege "only protects disclosure of communications; it does not apply to disclosure of the underlying facts by those who communicated with the attorney." *Id.,* (quoting *Upjohn* at 395).[2]

Discovery was ongoing when KBR filed its first petition for writ of mandamus in March of 2014. The parties requested and the district court agreed to suspend discovery and stay case deadlines while this Court considered KBR's first petition. Docs. # 166, 168, 169, 171. On remand, the district court directed the parties to file position papers addressing: (1) whether any attorney-client privilege has been waived; and (2) what discovery has arguably not been produced and what discovery requests have not been fulfilled. Doc. #175.

Barko argued in his position paper, filed in October 2014, that KBR had waived the attorney-client privilege and that KBR had not produced any of the "underlying facts" related to the subjects of the COBC reports that have been withheld on grounds of privilege. Doc.# 180. On October 10th, 2014, KBR asked for additional time to file a response to Barko's position paper. Doc.# 182. An

[2] Barko raised an express subject-matter waiver argument on February 18, 2014 -- two weeks following the conclusion of Heinrich's February 5, 2014 deposition. *See* Doc.# 143 at 16-24.

order was issued the same day granting KBR's motion and further granting KBR 25-pages to response to Barko's position paper and limiting Barko response to 20-pages. KBR A-261. This order further directed the parties and the United States to provide additional information based on the content of an email included in documents KBR had previously submitted for *in camera* review. Specifically, the district court asked the parties and the Government to explain whether a reference to kickbacks reported to the government pertained to the subcontracts at issue in this case and further directed the parties, as well as the United States (i.e., the real party in interest) to address any disclosure of information KBR made to the Government concerning the subcontracts at issue in this case. KBR A-263-264. The order, which asked for responses by October 20, 2014, was amended on October 15, 2014 to ask KBR and the government to identify "whether KBR produced any documents to the Government, either under subpoena or voluntarily" and to "identify whether KBR contested any production" in response to the subpoena. KBR A-266. On October 16, 2014 the Government filed an initial response stating its willingness to provide the requested information, but asking to delay its response until "after KBR addresses the issues." Doc.# 186. KBR did not file a timely objection to either the district court's October 10th or October 15th Orders seeking information from the government.

Barko and KBR responded timely on October 20, 2014. KBR did not

indicate any type of disagreement with the district court's request for information from the Government. KBR's response, however, failed to provide copies of the written responses or any indication of the documents it made to the Government. KBR, however, did indicate that all of the documents produced to the Government may not have been produced to Barko. Doc.# 187, at 2-3.[3]

The next day, the district court issued a follow-up order to the Government seeking a copy of the written responses the Government had received from KBR in response to the 2007 subpoena, including any privilege log or explanation for not producing responsive materials otherwise responsive to the subpoena. KBR A-269. The Government filed a substantive response on October 22, 2014. Barko A-36.

KBR eventually complained that the October 21st Order asked the Government instead of KBR to provide the court with a copy of KBR's communications to the Government in response to the subpoena. However, KBR acknowledged that the production of the information was, itself, not objectionable, and KBR likewise voluntarily produced everything the Government produced plus additional communications the Government missed. Doc.# 193. The district court

[3] Barko provided the district court with a copy of the 2007 subpoena the Government served on KBR, [Barko A-26, 28-31], but was otherwise unable to respond because KBR failed in its discovery obligations to disclose both the documents and written communications it produced to the government in response to the subpoena. *Id.* Barko argued that the COBC files should have been identified and disclosed to the government in response to the subpoena. *Id*.

never chastised KBR for its initial failure to fully respond to the district court's October 10th Order, nor did the court castigate or sanction KBR for its failure to adequately respond to Barko's discovery requests that required KBR to timely produce in December 2013 the very documents and information sought in the district court's October 21st Order. The district court granted Barko's motion to compel [Barko A-54], but ultimately *denied* Barko's waiver arguments based on KBR's failure to provide the Government with a privilege log and failure to acknowledge the existence of the COBC documents in response to that subpoena. KBR A-30-36.

A. The November 20, 2014 Order Finding Waiver.

In an Order issued on November 20, 2014, the district court properly found that KBR had waived the attorney-client privilege over the COBC investigation reports based on KBR's own intentional conduct at the deposition and its offensive use of the COBC investigation results as a "sword" in KBR's summary judgment filings. KBR A-1. The district court concluded that KBR's deliberate strategy of questioning Christopher Heinrich, the KBR attorney who KBR had designated as its Rule 30(b)(6) representative, about the substance and results of the COBC investigation resulted in a knowing and voluntary waiver of the attorney-client privilege. The court further observed that KBR'S waiver was confirmed when KBR relied upon the portions of Mr. Heinrich's testimony it had elicited about the

substance and results of the COBC investigation in KBR's Statement of Material Facts in support of its Summary Judgment motion and attached Mr. Heinrich's deposition testimony as an exhibit to its summary judgment motion. The court correctly analyzed KBR's conduct as asking the court to infer from the above that no meaningful evidence of fraud could be found. KBR A-12-24. This undisputed record created by KBR required the district court to conclude that KBR had waived the privilege over the COBC and that KBR had offensively used Mr. Heinrich's testimony about the results of the COBC investigation as a "sword" in the litigation and injected the substance of the COBC investigation into the case. *Id.* As the district court noted, "KBR did not need to use the contents of the COBC documents," but "KBR injected the COBC contents into the litigation itself by soliciting Heinrich's Rule 30(b)(6) testimony" through the questioning of "KBR's own counsel." KBR A-22.

The district court further concluded that the COBC reports and documents reviewed by Mr. Heinrich should be produced under Fed. R. Evid. 612 because of the unfairness resulting from KBR's questioning of Mr. Heinrich. KBR A-24-27.

Finally, the district court also properly rejected KBR's request to "disavow" Mr. Heinrich's deposition testimony that KBR itself had elicited, and to permit KBR to withdraw the portions of the summary judgment record containing Mr. Heinrich's testimony and KBR's requested inference. KBR A-23-24. The district

court correctly held that the case law cited by KBR did not support its argument that it could somehow retract or disavow deposition testimony KBR solicited from its attorney appearing as a 30(b)(6) witness. *Id.* *Also see,* KBR A-41-43.

B. The December 17, 2014 Production Order.

Following renewed *in camera* review, the district court considered "whether portions of the COBC documents are non-privileged fact work product that is discoverable based on substantial need." KBR A-72. Answering the question affirmatively, the court issued an Order on December 17, 2014 directing KBR to release portions of the COBC documents. In reaching this conclusion, the court appropriate held that portions of the COBC documents were not privileged and at most fell within the category of fact work product. It observed that the relevant portions were prepared by KBR's investigators, did not constitute communications between lawyer and client, and did not reveal legal opinions or strategy. Rather, those portions set forth "raw factual" information about the company's business dealings with subcontractors. KBR A-83. The district court applied controlling case law and concluded that Barko's demonstrated substantial need and undue hardship outweighed KBR's work product protection. KBR A-83-87.

Notably, when concluding that Barko demonstrated substantial need and undue hardship, the district court held, in addition to the age of the case and other circumstances that had prevented Barko from commencing discovery for almost 10

years after some of the events in question, that KBR had not been fully responsive to Barko's prior discovery requests. KBR A-84-86. The court considered but did not find dispositive KBR's argument (prevalent in its mandamus petition) that KBR was being asked to do Barko's discovery for him. KBR A-87.

The court observed, for example, that "KBR gave only a cursory response" to interrogatories asking for information about witnesses who had knowledge of the contracts at issue in the complaint, and that KBR provided a "list of 205 individuals" who "may have knowledge" of the issue, but provided no response as to what any of the 205 potential witnesses knew "despite being aware of what knowledge the witnesses had." KBR A-84-86. The court found undue hardship and substantial need, in part, because Barko "would have to run through 205 deponents to determine which have actual knowledge of the alleged fraud and misconduct at the center of the suit." KBR A-85.

The district court found even more troubling KBR's failure to produce knowledgeable Rule 30(b)(6) witnesses to testify about the underlying facts. *Id.* One of them, Cheryl Ritondale, "claimed almost complete ignorance" about relevant matters, and KBR blocked Barko's efforts to obtain "meaningful testimony on why KBR chose … and did not terminate" the subcontractor at the center of fraud allegations, while at the same time KBR presenting testimony from Mr. Heinrich to support an inference that the COBC investigations into the alleged

fraud resulted in no evidence of fraud. KBR A-85-86.[4] Additionally, the district court properly noted that KBR still had the obligation to produce underlying facts in discovery even if those facts were also contained in the COBC reports. *Id.*

Taking all of these factors into consideration, the district court properly concluded that portions of the COBC reports contained factual work product and that Barko made an adequate showing to overcome that protection. KBR A-80-87.

REASONS WHY THE PETITION SHOULD BE DENIED

I. KBR CANNOT SATISFY THE STANDARD FOR MANDAMUS REVIEW.

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380 (2004). Three conditions must be satisfied before a writ of mandamus may issue. *Id.* 542 U.S. at 380. First, there must be "no other adequate means to attain the relief" through the "regular appeals process." *Id*. at 380-81. This extremely high standard protects the essential rule (and law) requiring finality of judgment prior to an appeal. Since *Cheney* was decided, the key case defining "adequate means" for obtaining relief on appeal is *Mohawk Indus. v. Carpenter,* 558 U.S. 100 (2009). In this case, KBR cannot demonstrate the irreparable harm that is necessary to avoid application of

[4] The district court elsewhere concluded that improper objections and lack of witness knowledge demonstrated that Barko's initial attempt to obtain 30(b)(6) deposition testimony were "futile," Barko A-65, and ruled on other substantive discovery issues that have not been challenged as part of this mandamus proceeding. *See* Barko A-38-41, 43-52, 58, 63-70.

the final judgment rule. *In re Papandreou,* 139 F.3d 247, 250-51 (D.C. Cir. 1998); *In re Executive Office of the President,* 215 F.3d 20, 23 (D.C. Cir. 2000); *National Association of Criminal Defense Lawyers v. U.S. Dept. of Justice,* 182 F.3d 981, 986-987 (D.C. Cir. 1999). This condition is discussed in Section III below.

Second, "a mandamus petitioner must show that his right to the issuance of the writ is 'clear and indisputable.'" *In re KBR,* 756 F.3d at 762, quoting *Cheney,* 542 U.S. at 381. Notably, "this second requirement is *rarely met,*" and an "erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear." *Id.,* 756 F.3d at 762 (emphasis added). Accordingly, courts "will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters." *Id.* As discussed in Section II below, both of the discovery orders at issue here follow controlling precedents and are based on factual findings that do not rise to the level of clear error or clear abuse of discretion.

Third, circumstances may not warrant a writ even if clear error has occurred. *Id.,* 756 F.3d at 762-763, citing *Cheney,* 542 U.S. at 381. None of the "potentially far-reaching consequences" found in the first mandamus proceedings apply to the circumstances that led to the district court's waiver and work product rulings at issue here. *Id.* This condition is addressed in Section IV below.

Additionally, the district court's privilege ruling does not turn on a pure

legal question. Therefore, on review, deference must be afforded to the district court's factual findings on the waiver issue that was decided in the November 20, 2014 order, and the factual *in camera* review supporting the December 17, 2014 order on the work product issue. *United States v. Phillip Morris, Inc.,* 347 F.3d 951, 955 (D.C. Cir. 2003) (district courts have "considerable discretion" in making privilege determinations and other discovery rulings). The district court did not commit a clear abuse of discretion in reaching its factual findings.

II. KBR's RIGHT TO MANDAMUS IS NOT CLEAR AND INDISPUTABLE.

A. KBR Affirmatively Waived Its Attorney-Client Privilege.

The D.C. Circuit recognized issue-injection waiver in *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) and applies "a strict rule on waiver of privileges." *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997). In other words, to avoid waiver, a party must treat the privileged communications "like jewels—if not crown jewels." *Id.,* quoting *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989).

This circuit has made it clear that parties may not abuse their right to cloak communications with privilege by using confidentiality "as a tool for manipulation of the truth-seeking process," nor is a party "allowed, after disclosing as much as he pleases, to withhold the remainder." *Ideal Electronic Security Co. v. International Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997), quoting *In re Sealed Case* 676 F.2d at 807. "The attorney-client privilege should be available

only at the traditional price: a litigant who wishes to assert confidentiality must maintain *genuine confidentiality*." *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (emphasis added).

Genuine confidentiality necessarily means that a party waives its privilege if it relies on a privileged internal compliance investigation "to create the appearance of compliance with laws requiring disclosure." *In re John Doe Corp,* 675 F.2d 482, 491-492 (2nd Cir. 1982); *accord Ideal Electronic Security Co.,* 129 F.3d 143, 151 (D.C. Cir. 1997)("Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy"). But this is just what KBR did. As discussed above, it affirmatively and proactively questioned its lawyer during a Rule 30(b)(6) deposition about the COBC investigation and asked its lawyer to answer whether KBR had complied with its contractual obligation to report violations of the Anti-kickback Act. Then, in a summary judgment motion, it used the COBC matters it claims are privileged to assert as an undisputed material fact that it complied with laws and regulations. In other words, it asked the district court to draw an inference that KBR's COBC investigative process cleared the company of having to report wrongdoing, while at the same time claiming that information about its investigation is privileged. *See* Barko A-13-15.

This is the precise scenario where courts refuse to allow privilege to serve as

both a sword and a shield. *See e.g. In re Sealed Case,* 676 F.2d 793, 807 (D.C. Cir. 1982; *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (finding waiver when a party "asserts a factual claim the truth of which can only be assessed by examination of a privileged communication"); *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005) (refusing to allow litigants to hide behind the privilege if relying upon privileged communications to make their case and observing that privilege only stands "while the sword stays sheathed"); *Cox v. Administrator United States Steel & Carnegie,* 17.F 3d 1386, 1419 (11th Cir. 1994) (stating that a corporate defendant's assertion of good faith "injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege"); *Tenn. Laborers Health & Welfare Fund v. Columbia/Hca Healthcare Corp*., 293 F.3d 289, 302-303 (6th Cir. 2002)(same); *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989)(observing as established law that "attorney-client privilege is waived when a litigant 'places information protected by it in issue through *some affirmative act* for his own benefit")(emphasis added); *Sims v. Blot*, 534 F.3d 117, 132 (2nd Cir. 2008)("'affirmative steps to inject privileged materials into the litigation'" amounts to waiver)(quoting *United States v. Doe*, 219 F.3d 175, 187 (2nd Cir. 2000); *United States Fire Ins. Co. v. Asbestospray, Inc*., 182 F.3d 201, 212 (3rd Cir. 1999) (waiver occurs by taking an "*affirmative step* in the litigation to place the advice of the attorney in issue") (quoting *Rhone-Poulenc Rorer, Inc. v.*

Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994)(emphasis added). *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2008) (waiver occurs when a party makes "intent and knowledge of the law relevant'"); *Duran v. Andrew,* 2010 U.S. Dist. LEXIS 33178, at *18-*19 (D.D.C. 2010) (factual assertions about an investigation waives the privilege).

All said and done, once "the privacy for the sake of which the privilege was created [is] gone by the [client's] own consent, . . . the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice." *Green v. Crapo*, 181 Mass. 55, 62, 62 N.E. 956, 959 (1902) (Holmes, J.).[5]

B. KBR's Claim that It Merely Relied on Non-Privileged Facts is False.

KBR relies on *United States v. White,* 887 F.2d 267, 270-71 (D.C. Cir. 1980), for the proposition that KBR is merely using "non-privileged factual statements" that are "precisely the type of 'general asertion[s] lacking substantive content' that *White* held 'not sufficient to waive the attorney-client privilege.'" KBR Pet. at 7,

[5] In *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir. 2003), a case heavily relied upon by KBR, that court also noted that an express waiver occurs not just by disclosing privileged information to a third party, but also when a party "otherwise shows disregard for the privilege by making the information public." *Bittaker,* 331 F.3d at 719. In this case, KBR expressly waived its privilege over the COBC matters by asking questions and making some of the privileged information public at the depositions of Mr. Barko and Mr. Heinrich. Barko A-17, 20-25; KBR A-12-15, 19.

11-12. However, in *White,* the district court wrongly conflated White's general denial of guilt into an advice-of-counsel defense even though White strictly "refrained from relying on any statements of counsel." *White* at 270.[6] *White* makes clear that a party who permits "actual testimony by his attorney" that reveals "any substantive information about his attorneys' review" of the legality of a particular matter waives the privilege. *White* at 271.

In stark contrast to the *White*, KBR had its counsel testified that it was his responsibility to ensure compliance with the LOGCAP contract clause that obligated KBR to promptly report to the government whenever KBR had reasonable grounds to believe that a violation of the Anti-Kickback Act may have occurred, and that he based his determination that no report was required based on his review of the materials KBR identified in its Privilege Log: ("Q. Was 52.203-7[7] incorporated into the LOGCAP III base contract with the government and KBR? A. Yes." KBR A-150 (Tr. 130 li. 20 – Tr. 131 li. 1. "Q. Did KBR adhere to that contract clause? A. Yes, we did." KBR A-150 (Tr. 132 li. 3-5); Q. So who was

[6] In reversing White's conviction this Court observed that: "A rule thus forfeiting the privilege upon denial of *mens rea* would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions." *White* at 270. KBR, however, did far more than merely inject a denial of *mens rea* into the case; it affirmatively asserted that it was in compliance with the its LOGCAP contract obligation requiring KBR to investigate and report potential wrongdoing detected during the course of a COBC investigation.

[7] "Federal Acquisition Regulation Clause 52.203-7, [is also] known as the Anti-Kickback Act procedures." KBR A-150 (Tr. 130, li. 17-18).

responsible for reviewing the investigative reports to determine whether or not a violation occurred? A. Me." KBR A-163 (Tr. 183 li. 4-8). "Q. With respect to the matters that we have testified about and that are indicated on [KBR's] privilege log, did KBR make a disclosure to the Department of Defense Inspector General that there was reasonable grounds to believe that a kickback had been paid or received? A. No." KBR A-158 (Tr. 162, li. 13-20).

White is inapplicable to the facts here because KBR intentionally injected "actual testimony by [KBR's] attorney" that revealed "substantive information about [Mr. Heinrich's] review" of the COBC reports and that based on the content of the COBC reports that KBR was in compliance with the anti-kickback reporting clause of its LOGCAP contract.

White also acknowledges "fairness and consistency" require the inference of waiver when a defendant (1) reveals substantive information, (2) prejudices the opponent's case, or (3) misleads a court by relying on an incomplete disclosure. *Id.,* at 271. KBR transgressed all three considerations.

First, Mr. Heinrich revealed substantive information by testifying that his review of the COBC reports established that KBR complied with its LOGCAP Anti-Kickback Act reporting requirements. Second, KBR elicited testimony from Mr. Heinrich that prejudiced Barko by citing to Mr. Heinrich's testimony in support of its motion for summary judgment. Third, KBR acknowledged that the

district court "reviewed the COBC documents *in camera* and suggested that it does not agree with the purported inference KBR never intended to request." Doc.# 208 at 8; *also see* KBR A-86 (district court found "KBR's suggested inference [to be] false"); KBR A-39-40 (district court "finds that KBR has prejudiced Barko's case and offered misleading inferences to the Court"). In no uncertain terms, and based on all three considerations, *White* supports a finding of waiver in this case.

KBR also seeks to rely on *In re Sealed Case,* 676 F.2d 793, 817 n.95 (D.C. Cir. 1982). There, the D.C. Circuit concluded that the implied waiver doctrine "allows courts to retain some discretion to ensure that specific assertions of privilege are reasonably consistent with the purposes for which a privilege was created." *Id.* at 817. It further concluded that "it makes a difference that documents that were never identified for or provided to the SEC — and that were in fact removed from the files that the SEC was likely to search when [a company executive] resigned from his position with Company — happen to be documents that impeach Company's 'official' position." *Id.* at n.95. Here, this Court's *in camera* inspection established a contradiction between what KBR alleges in its summary judgment motion and the content of its COBC files. It makes a difference that KBR injected what it claimed to be the true reasonable inferences attributable to the content of its COBC file, which, upon incidental *in camera* review conducted by the district court, proved to be fabricated. KBR A-39-40, 86.

KBR waived its asserted privilege because it would be improper to allow a defendant to "affirmatively rely on privileged communications to support [his] claim . . . and then shield the underlying communications from scrutiny by the opposing party." *Id.,* citing, *In re Grand Jury,* 219 F.3d at 182. Because KBR allowed Mr. Heinrich to rely on the content of its privileged COBC report to testify that KBR was in compliance with its contractual reporting obligation, it can no longer shield that underlying communication from scrutiny by the opposing party.

KBR's reliance on *In re Lott*, 424 F.3d 446, 448 & n.1 (6th Cir. 2005), is misplaced because that case concerns a habeas petitioner's "assertion of actual innocence" and does not concern testimony from the petitioner's counsel. *Id.,* at 456. The *Lott* court concluded that waiver would attach if Lott in some way had injected his communications with his attorney into the proceedings. It further noted that "[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 into the litigation." *Id.* Here, KBR injected testimony that it elicited from its own attorney about his review of the COBC reports and his determination that the company was in compliance with its legal obligations and not required to report violations based on the COBC reports. KBR further injected the COBC into the case by introducing an unredacted copy of Mr. Barko's COBC statement as an exhibit to Mr. Heinrich's deposition and by not

seeking a protective order when it understood that Mr. Barko had a copy of the COBC witness statement. Barko A-17.

The record of Mr. Heinrich's deposition demonstrates that KBR had its attorney affirmative assert that, based on his review of the COBC materials, KBR complied with the contract clause found in its LOGCAP contract requiring KBR to report to the Government potential violations of the Anti-Kickback Act. The district court, conducting *in camera* of the same COBC materials, found Mr. Heinrich claim to be "false" and KBR offered such testimony in order to "mislead[]"the court. KBR did more than deny *means rea,* it claimed compliance with its LOGCAP contract and based that claim on Mr. Heinrich's review of the COBC materials and his decision not to report a potential violation of the Anti-Kickback Act to the Government. KBR "injected its belief as to the lawfulness of its conduct into the case and waived the attorney-client privilege as to" the COBC matters. *Barker v. Columbus Reg'l Healthcare Sys*., 2014 U.S. Dist. LEXIS 120504, *7-8 (M.D. Ga. Aug. 29, 2014) (assertion of "good faith belief that it complied with the Anti-Kickback Statute" in a False Claims Act case waived attorney-client privilege)(citing *Cox,* 17 F.3d at 1418-19).

C. KBR's Selective and Affirmative Use of a COBC Document during Discovery Waived KBR's Right to Preserve Any Privileged Status of the COBC Files.

Although not addressed by the district court, Barko advanced KBR's use of

a COBC document during discovery as a separate basis for waiver. KBR's counsel' introduced an unredacted copy of Barko's own COBC witness statement as an exhibit in Mr. Heinrich's deposition. Barko A-17. KBR also questioned Mr. Barko during his deposition about the statement he provided to the COBC and communications he otherwise had with KBR's COBC investigator, Mr. Ervin. Barko A-20-25. The selective and affirmative use of a COBC document in discovery, and the questioning of Mr. Barko about his COBC statement to the company constitute a voluntary disclosure of a portion of the COBC investigative record sufficient to trigger waiver of KBR's asserted privilege. *In re Subpoenas Duces Tecum,* 738 F.2d at 1369 (D.C. Cir. 1984) (holding that "any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.").

D. KBR Cannot Now Disavow Its Voluntary Waiver.

After selectively and expressly waiving the privilege as described above, KBR can no longer claim a privilege over Mr. Heinrich's advice or any COBC matters, whether KBR decides to use the information or not. *Periman Corp.,* 665 F.2d at 1221-22 (rejecting a limited waiver argument and holding that, once a matter is voluntarily disclosed by a party, it cannot selectively assert protection of that information under the attorney-client privilege); *In re Subponeas Duces Tecum,* 738 F.2d at 1369-1372 (holding that attorney-client and work product privileges

had been waived by prior disclosure). As the *Bittaker* court also noted, "[d]isclosures that effect an express waiver are typically within the full control of the party holding the privilege; courts have no role in encouraging or forcing the disclosure – they merely recognize the waiver after it has occurred." 331 F.3d at 719, citing *Periman Corp.,* 665 F.2d at 1219-22. Once the disclosure of privileged information is made, "the privilege is gone, and the litigant may not thereafter reassert it to block discovery of the information and related communications by his adversaries." *Bittaker,* 331 F.3d at 720, citing *In re Sealed Case,* 676 F.2d at 809.

By questioning its own in-house attorney at a deposition about the COBC investigation KBR waived the privilege and it "cannot later insist upon [its] attorney's silence based upon the privilege." *ITT v. United Tel. Co.,* 60 F.R.D. 177, 185-186 (M.D. Fla.1973), citing *Hunt v. Blackburn,* 128 U.S. 464, 9 S. Ct. 125 (1888). There can be no subsequent avoidance of the waiver once a party makes an assertion in proceedings that implicates the privileged information as material to the case.

"[I]t has long been held that once waived, the attorney-client privilege cannot be reasserted." *United Sates v. Suarez,* 820 F.2d 1158, 1160 (11th Cir. 1987), citing *United States v. Blackburn,* 446 F.2d 1089, 1091 (5th Cir. 1971), *cert.* denied, 404 U.S. 1017 (1972); *United States v. Krasnov,* 143 F. Supp. 184, 190-191 (E.D. Pa. 1956), aff'd., 353 U.S. 5 (1957); *also see, Drimmer,* 628 F. Supp. at

1252. KBR placed the results of the COBC investigation in the public domain through its own questions at the depositions of Mr. Barko and Mr. Heinrich. The contents of the COBC documents disclosed through KBR's questioning at the depositions of Mr. Heinrich and Barko and the selective disclosure of Barko's COBC statement waived KBR's continued ability to withhold disclosure of the full COBC file.[8]

Only after having lost the waiver argument did KBR attempt to "disavow" the false inference it inserted into its summary judgment filing. KBR's conduct is fatal to this effort. The waiver occurred before KBR filed for summary judgment when it asked Heinrich to assert under oath that the information contained in the COBC file did not require a disclosure required under a clause in its LOGCAP contract; and when KBR questioned Barko at his deposition about the written statement Mr. Barko provided during the course of the COBC investigation and other communications he had with KBR's COBC investigator. A voluntary waiver of its claimed privilege occurred and it cannot be undone once KBR asked questions of witnesses at depositions about the COBC investigation and had its attorney opine about the ultimate conclusion he reached based on his review of the COBC file.

After losing the waiver issue, without seeking leave of court, KBR

[8] The district court did not err in holding that COBC file received by Heinrich should be produced under FRE 612. KBR A-24-27.

unilaterally disavow it summary judgment filing by filing an untimely, revised motion for summary judgment that removed Heinrich's deposition testimony and reference to the COBC investigation. KBR did this without seeking leave or showing good cause for filing its motion beyond the February 2014 deadline set forth in the district court's scheduling order. Barko A-5-6 (requiring one summary judgment motion and leave of court to file any supplemental motion).[9] KBR's tactical decision and taking actions in violation of the Scheduling Order does not constitute "good cause". *Id.* KBR's attempt to disavow waivers 10 months after they were already deliberately made is unavailing. Consistent with the "strict rule on waiver of privileges" adopted by this Circuit in *Lavin*, and, as Justice Holmes aptly observed, waiver should not be viewed as an "additional weapon to use or not at [KBR's] choice." *Green,* supra.

Notably, KBR has not cited any case holding that a party that has waived the privilege can avoid the results of that waiver by attempting to strike from the case the facts and testimony that resulted in waiver. Rather, the case cited by KBR involved a voluntary decision by a plaintiff to either turn over the information as required or "abandon" his entire claim (i.e., voluntarily dismiss the case) to avoid

[9] Where a party delays in moving to amend or seek a modification of a Scheduling Order under Fed. R. Civ. P. 16(b) there is no good cause shown for the proposed modification. *Southern Grounds & Mortars, Inc. v. 3M Co.,* 575 F.3d 1235, 1241 (11th Cir. 2009) (lack of good cause may be found where party already has full knowledge of information it seeks or where party fails to act diligently).

having to disclose the privileged information. *Bittaker,* 331 F.3d at 721, citing *Lyons v. Johnson,* 415 F.2d 540, 541-42 (9th Cir. 1969). However, *Bittaker* may allow a plaintiff to abandon an entire claim, but it does not permit selective withdrawal of information from the record to avoid having to produce additional information after a waiver has occurred. KBR's reliance on *Bittaker* is also misplaced because *Bittaker* concerns an ineffective assistance of counsel habeas petition meaning that "[t]he defendant impliedly waives his attorney-client privilege the moment he files a habeas petition alleging ineffective assistance of counsel." *Lambright v. Ryan*, 698 F.3d 808, 818 (9th Cir. 2012).

KBR overlooks a key holding in *Koch v. Cox*, 489 F.3d 384, 388 (D.C. Cir. 2007) (Ginsberg, J.), when arguing that seeking to file a revised summary judgment motion renders the district court's waiver analysis moot. Actually, *Koch* holds just the opposite. As the D.C. Circuit *explicitly* acknowledged in *Koch,* abandoning a claim "does not, however, moot the district court's decision and the SEC's argument that Koch put his mental state in issue by acknowledging he suffers from depression. We therefore must decide whether a plaintiff puts his mental state in issue in such a way as to waive the psychotherapist-patient privilege by acknowledging he suffers from depression." *Id.,* at 388-90.[10]

[10] The waiver framework announced in *Koch* is equally applicable to waiver with respect "to the attorney-client and spousal privileges." *See Koch* at 390.

Thus, KBR's "disavowal" of the testimony it elicited from its attorney in no way moots the district court's waiver analysis. As *Koch* instead explains: "A plaintiff who makes no claim for recovery based upon injury to his mental or emotional state puts that state in issue and thereby waives the psychotherapist-patient privilege when ... selectively disclos[ing] part of a privileged communication in order to gain an advantage in litigation." *Koch* at 390 (citations and quotation marks omitted). KBR's "disavowal" of its intended inferences in its summary judgment motion is immaterial. KBR's argument directly conflicts with *Koch,* where the D.C. Circuit acknowledged that abandonment of a claim does not moot the district court's need to determine whether waiver occurred prior to abandonment. *Koch,* at 388.

KBR's reliance on *Sims v. Blot*, 534 F.3d 117 (2nd Cir. 2008), is seriously misplaced. In evaluating waiver, the Court of Appeals identified "whether the privilege holder took 'affirmative steps to inject privileged materials into the litigation'" as a critical factor that must be considered. *Id.*, at 132, quoting *United States v. Doe*, 219 F.3d 175, 187 (2nd Cir. 2000). *Sims* involved a *pro se* prisoner who was trapped into testifying about his psychotherapist-patient privilege when deposed. He never sought to inject the issue of his mental state into the case. The opposite happened here. KBR intentionally questioned Mr. Henrich about the COBC matters so as to purposefully inject that testimony and the inferences drawn

therefrom into the case. Another key factor articulated in *Sims* is whether there is a "risk that some independent decisionmaker will accept [the privilege-holder's] representations without the [adversary's] having adequate opportunity to rebut them." *Sims* at 132, quoting *In re Grand Jury Proceedings John Doe Co. v. United States*, 350 F.3d 299, 305 (2d Cir. N.Y. 2003). While that factor is absent in *Sims,* the purpose behind KBR eliciting testimony from Mr. Heinrich was to establish an inference in its favor to help it prevail at summary judgment while, at the same time, refusing to allow Barko's counsel the opportunity to probe that inference in the course of the deposition. KBR's deliberate conduct warrants waiver under *Sims*.

KBR's argument that it can disavow the waiver is an attempt to turn the privilege into "another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2nd Cir. 1993). Allowing a party to abandon its injection of an issue into the case when the legal strategy behind the injection backfires invites manipulation of the legal process. Accordingly, there was no "clear error of law" or abuse of discretion committed by the district court when it rejected KBR's argument to disavow the waiver.

E. The District Court Did Not Commit Clear Error in its December 17 Order.

While the work product doctrine shields documents and things prepared by

an attorney in anticipation of litigation, it does not protect the underlying facts contained in the documents from discovery.[11] See, *United States v. Deloitte LLP*, 610 F.3d 129, 139 (D.C. Cir. 2010). The summaries in the COBC reports that contain underlying facts, such as narrative descriptions of subcontractor performance and background facts about the contracts at issue in this case are not work product and deserve no protection. KBR A-86; KBR A-273.

After examining the documents *in camera,* the district court held that these same portions of COBC documents did not qualify for protection under the attorney-client privilege, because those portions of the reports prepared by KBR's investigators did not reveal any communications between lawyer and client and they could only be protected by the work product doctrine. KBR A-77-83. The district court properly concluded that these portions of the COBC reports could not be "opinion work product" because they did not describe witness statements, nor did they reveal legal opinions or strategy, but rather contained "raw factual" information about the company's business dealings with subcontractors. KBR A-83.

[11] Additionally, the Restatement (Third) of the Law Governing Lawyers ("*Restatement*") expressly excludes "underlying facts" from work product protection. *Restatement* at § 87(1) ("Work product consists of tangible material or its intangible equivalent in unwritten or oral form, *other than underlying facts*, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation") (Emphasis added.).

F. Barko Met His Burden to Overcome Work-Product Protection.

Even if the work product doctrine applies to the portions of COBC documents containing underlying facts, the district court correctly concluded that Barko met the "substantial need" and "undue hardship" test for the production of factual information that is not protected by the attorney-client privilege. *See* FRCP 26(b)(3); *In re Sealed Case,* 676 F.2d 793, 809 (D.C. Cir. 1982); *Chevron v. Weinberg Group,* 286 F.R.D. 95, 99-100 (D.D.C. 2012); *Alexander v. FBI,* 198 F.R.D. 306, 318-319 (D.D.C. 2000). Given the passage of time, the unavailability of such information from other sources, and the other factors cited by the district court, Barko is entitled to production of those portions of the COBC reports that contain non-privileged facts or fact work product.

KBR has failed to effectively refute Barko's substantial need for the information or claim of undue hardship. It asserts that Barko should be required to first depose 205 witnesses, whose addresses and contact information, and the identity of facts within these witnesses' knowledge, has not been disclosed by KBR as requested by Interrogatory No. 1, about matters that took place about 10 years ago is rather remarkable.[12] On January 24, 2014, KBR partially identified for

[12] KBR's corporate representative testified that KBR employees who were interviewed by COBC investigators were prevented by a Confidentiality Statement [Barko A-18] from disclosing any information about the underlying substantive facts of wrongdoing to anyone, including counsel for a FCA relator. KBR A-157, 161-162.

the first time 205 potential witnesses who were KBR employees during the 2003-2006 time frame, but KBR did not state what these witnesses know or provide any contact information as requested by Barko. See KBR A-188, 191-224. KBR did not make any Rule 26(a)(1) disclosures separate from its response to the interrogatory. The passage of time – given the unique procedural posture of this case -- and the lack of information provided by KBR in response to Barko's interrogatories about these witnesses who KBR claims "may" have first hand information satisfies Barko's burden under the substantial need and hardship test. There is no practical "alternative source" for the factual information. *Eckert v. Fitzgerald,* 119 F.R.D. 297, 300 (D.D.C. 1988). The COBC documents related to interviews of or communications with non-KBR employees also would not be privileged because such documents, if they exist, would simply be conveying information obtained from a non-privileged source. *Alexander v. FBI,* 198 F.R.D. 306, 317 (D.D.C. 2000), quoting *Brinton v. Department of State,* 636 F.2d 600, 604 (D.C. Cir. 1980) (footnote omitted), cert. den., 452 U.S. 905 (1981).

III. THE FINAL JUDGMENT RULE ADEQUATELY PROTECTS KBR.

KBR cannot establish that there are "no other adequate means to attain the relief" through the "regular appeals process." *Cheney,* 542 U.S. at 380-81.

This Court has previously explained when a temporary loss of privilege may justify review by mandamus, and when it would not. *In re Papandreou*, supra.

This Court held that it would "stretch the doctrine" in the extremely limited circumstances. 139 F.3d at 250-51. Accordingly, a temporary loss of the privilege for KBR can be remedied on appeal, or challenged through other means, such as contempt proceedings. Likewise, in *Byrd v. Reno*, 180 F.3d 298 (D.C. Cir. 1999), the Court in no uncertain terms held that protecting the work product privilege did not satisfy the mandamus test for "no other adequate means" to obtain relief. *Id.*, p. 299. Because the denial of that privilege could be "reviewable upon entry of a final judgment," neither the collateral order doctrine nor the mandamus doctrine applied. This was true even though the petitioner had been held in civil contempt for violating the discovery order. *Id.,* p 302–303.

In *In re Executive Office of the President*, supra, this Court explained that it granted a writ of mandamus in *Papandreau* because an order forcing diplomats to submit to depositions was a diplomatic immunity case that was completely distinct from a privilege case. The Court also explained that in *Byrd* it denied the mandamus in a case "where attorney claimed work-product privilege." 215 F.3d at 23. Notably, this Court rejected the Executive Office of the President's assertion that it would "suffer serious harm if required" to answer discovery that would "result in the release of information it regards as privileged." *Id.* In the "normal course ... mandamus is not available to review a discovery order," even when the

Executive Office of the President alleged "serious harm" if its "privilege" was temporarily lost. *Id*.

The central question is "not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal." *Mohawk Indus.,* 558 U.S. at 108.[13] In other words, that the attorney-client privilege is significant in a general or an abstract sense is not sufficient for mandamus. Rather, KBR must show that some vital interest–other than the temporary loss of a privilege--is so imperiled that immediate appeal is urgently necessary. KBR has made no such showing.[14]

Whatever argument remained that an attorney client privilege could meet the "no adequate means to attain relief" standard was unequivocally laid to rest in *Mohawk.* Although *Mohawk* arose in the context of the availability of interlocutory review under the "collateral order" doctrine, its holding is, as a matter of Circuit law, fully applicable here because "mandamus's 'no other adequate means' requirement tracks *Cohen's* bar on issues effectively reviewable on ordinary appeal." *In re Papandreou*, 139 F.3d at 250 (emphasis added).

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[13] Although the Court in *Mohawk* pointed to a potential mandamus remedy in extraordinary cases, this very narrow exception does not negate or undermine Mohawk's core holding. If a party can use any of the methods identified in *Mohawk* to have the privilege appealed after final judgment, then the very narrow mandamus exception would not apply. 558 U.S. at 107-111.

[14] In this case, the district has ordered that all documents remain under seal which further protects KBR from any temporary loss of a privilege if it had to appeal after final judgment. KBR A-36, 91-92.

This is not to say that mandamus review should never be available to protect a privilege. But something more than just protection against the loss of the privilege itself must be as stake – something that would result in irreparable harm. *See, e.g., Papandreau*, p. 251. Because post-judgment appeal remains an adequate means of relief for a temporary loss of privilege resulting from the district court's orders, KBR's petition for a writ of mandamus should be denied on this basis.

IV. THERE IS NO "NOVEL" RULING AT ISSUE AND THE DISTRICT COURT'S ORDERS WILL NOT HAVE "BROAD AND DESTABLIZING EFFECTS"

The district court's finding of waiver does not generally or broadly implicate the application of the privilege in the business setting. No company could possibly be dissuaded from conducting an internal investigation, and no settled internal compliance rules would be disturbed, by the district court's rulings because it was KBR's conduct (i.e., KBR's asking Mr. Heinrich questions about the privileged investigation and KBR's placing the COBC investigation at issue) that resulted in waiver of the privilege; nor is there anything unusual about the district court's *in camera* review of documents and conclusion that some factual portions of the documents are discoverable under the circumstances of this case. Companies do not routinely call their in-house attorney to testify about compliance investigations, or seek to use such testimony or other information about privileged investigations offensively as a "sword" in litigation. In the rare situation where, as here, a party

makes a strategic decision to place privileged information at issue to defeat claims, it waives the privilege. Accordingly, the specific facts here that resulted in waiver simply do not generally threaten the application of the privilege in the business setting. This factor weighs heavily against KBR in this mandamus proceeding.

V. KBR'S RENEWED REQUEST TO REASSIGN THE CASE TO A DIFFERENT JUDGE IS WITHOUT MERIT.

Like KBR's earlier request for reassignment, *In re KBR,* 756 F.3d at 763-764, KBR's second request for reassignment is based on its disagreement with the district court's judicial decisions, not judicial bias. It should also be denied. Contrary, to KBR's assertions, the district court judge did not "cross the line" following the issuance of the writ. Rather, he followed the ruling in *In re KBR,* and fairly considered all of the issues raised by the parties when resolving contentious discovery disputes. *See,* e.g., Barko A-35-70. Nothing in the district court's ruling rises to the level of judicial misconduct requiring reassignment. None of the district court's actions cited by KBR involve extra-judicial comments or other acts of extreme bias.[15] KBR cannot meet its heavy burden. As the D.C. Circuit has noted, judicial statements based on the facts are not evidence of

[15] *Cf. United States v. Microsoft Corp.,* 56 F.3d 1448, 1463 (D.C. Cir. 1995) (finding reassignment appropriate where judge made repeated negative comments about defendant relied on a book that was not part of the evidence, permitted *ex parte* contacts, criticized the defendant and its attorneys in open court on matters outside the issues before the court, and granted requests for parties to appear anonymously out of fear of retaliation based on bias against defendant).

inappropriate bias and only extreme circumstances warrant removal:

> we must take special care to avoid undermining the ability of district judges to perform their responsibilities. Particularly in hard-fought litigation dealing with controversial issues, district judges must sometimes take strong actions and use strong words. Presiding over such challenging cases would become even more difficult if district judges had to worry that appellate courts would routinely review their decisions not just for legal error, but for bias as well." *See United States v. Roach*, 323 U.S. App. D.C. 448, 108 F.3d 1477, 1484 (D.C. Cir. 1997) ("In a controversial, sharply contested case presided over by an experienced district judge, strongly stated judicial views rooted in the record should not be confused with judicial bias."), *vacated in part on other grounds*, 329 U.S. App. D.C. 54, 136 F.3d 794 (D.C. Cir. 1998). For this reason, and because except in the most unusual circumstances we trust judges to put their personal feelings aside, recusal must be limited to truly extraordinary cases where, as *Liteky [v. United States*, 510 U.S. 540 (1994)] puts it, the judge's views have become 'so extreme as to display clear inability to render fair judgment,' *Id.*, at 551.

Cobell v. Kempthorne, 455 F.3d 317, 332 (D.C. Cir. 2006). None of the circumstances KBR cites demonstrate any basis for reassignment.

First, KBR's claim that the district court is biased because after conducting the difficult task of reviewing *in camera* documents to resolve KBR privilege claims unrelated to the COBC, the court's ruling observed that one of the documents submitted by KBR was an email referring to KBR's disclosure of information to the Government about allegations regarding former employees receiving kickbacks. Barko had not "conceded" that the email referred to by the

district court [KBR A-261] was privileged. *Cf.* KBR Pet., p. 5.[16] In any event, KBR's complaint is make weight because it did not ask the district court to seal the portion of the October 10 Order [KBR A-261] it claims is privileged and KBR's petition does not seek mandamus relief to set aside that order in whole or in part to challenge the district court's ruling that the email is not privileged.

Second, KBR complains that the district court must be biased because it requested the parties, and the United States (the real party in interest), to address any KBR disclosure of information to the Government about the allegations in this case. KBR A-263-264. KBR's main objection is that the district court sought information from the Government about KBR's response to a 2007 government subpoena issued to KBR to help the government decide whether it should intervene in this very case. Additionally, KBR incorrectly claims that the district court alerted Barko to a waiver issue that he had not raised. Regardless, KBR's arguments lack merit. Notwithstanding KBR's claim, the Court was not functioning in an "investigative, quasi-inquisitorial, quasi-prosecutorial role." *Cobell v. Norton,* 334 F.3d 1128, 1142 (D.C. Cir. 2003).

Notably, when the district court initially issued its orders, KBR A-261, 265. KBR never objected to the court seeking information from the Government – the

[16] In response to KBR's earlier filed motion for protective order, Barko did not challenge some of the emails listed on KBR's privilege log that were submitted *in camera,* but Barko did not concede that the document referenced by the district court was privileged. Barko A-43-44.

"real party in interest" in this case. Nor is it unusual in an FCA case where there is no Government intervention for the Government to still file briefs or provide information to the court.[17] It is both logical and reasonable that the Government would be a source of information about its investigative efforts dating back to the time the case was under seal if a later question arises and the parties do not have the information. Ultimately, KBR's argument amounts to assigning error to the district court's request of the Government to disclose information about KBR's response to the Government's 2007 subpoena. Even if, for the sake of argument, there is some error, "repeated reversals, without more, are unlikely to justify reassignment." *Cobell,* 455 F.3d at 332, 335.

KBR's objection was also untimely raised, harmless error at worst, and moot based on KBR's own admission. When KBR responded to the district court's Orders [KBR A-261-267] it failed to raise any objections to the involvement of the Government. *See* Doc.# 187 at fn. 1. KBR admits it was in possession of the

[17] Even in non-intervened cases, "the United States is aware of and minimally involved in every FCA action," *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 931 (2009). The FCA was worded to preserve the Government's "basic right of litigation." *Id.,* at 935-936. The Government always "retain[s] various rights including the right to be served with copies of pleadings, to limit discovery, to later intervene under certain circumstances, to settle with the defendants, and to seek dismissal of the case." *United States ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 504 (S.D. Tex. 2011), quoting *United States ex rel. Gudur v. Deloitte Consulting Llp,* 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007). Also, the Government often files "statements of interest" supporting the relator or opposing case dismissals. *See,* e.g., *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 270 (D.D.C.2002).

documents and claims it would have provided the same information to the district court on its own initiative. Doc.# 193 at 3-4. However, a review of the orders [KBR A-261-267] and KBR's response [Doc.# 187] reflect that KBR failed to fully comply with the Court's directive and failed to provide sufficient or complete information about its response to the Government's subpoena when given the opportunity to do so. This prompted the district court to seek information from the Government so as to timely complete its *in camera* review and to ultimately grant Barko's motion to compel. Barko A-36, 38-41. It was KBR failure to properly response to Barko's discovery requests that prevented Barko from being able to fully respond to the district court in the first instance, and it is the same failure to adequately respond to the district court that prompted the district court to seek reliance on the Government to clarify what had been produced.

Third, KBR also incorrectly claims that only after the district court issued its October 21st Order [KBR A-268-270] did Barko raise for the "first time" that KBR had waived the privilege by failing to produce a privilege log in response to the Government's 2007 subpoena. KBR Pet. at 6. However, Barko's October 20th Response Brief argued that the Government's subpoena in 2007 required production of the COBC reports, and that KBR's failure to provide a copy of its written response to the Government's 2007 subpoena, or a privilege log, or written explanation of withheld material, not only demonstrated that KBR had failed to

comply with Barko's discovery requests in this case, but that KBR "has concealed facts related to the waiver issue and the underlying facts concerning this case." Doc.# 188, at 17-18. Regardless of who first raised the issue, nothing was "late raised." Discovery proceedings were not closed and the district court had the authority to ask the parties to provide specific information about the ongoing discovery disputes and to further brief the waiver issue and other matters that were subject to ongoing discovery disputes.

As for KBR's other claims of judicial bias based on alleged publication of privileged material in court orders, the district court granted each of KBR's requests to keep such information under seal. Barko A-61, 86. It has never even asked the court to seal any allegedly privileged information. In one of the orders about which KBR now complains [KBR A-261], KBR further complains about the district court's observation that a counsel's duty of candor required the production of underlying facts in discovery. KBR A-86. This observation was appropriately made in the context of evaluating KBR's deficient responses to Barko's discovery requests and resolving a motion to compel. Moreover, even "commenting that a party's conduct is 'unacceptable' or even 'outrageous' is neither unprecedented nor exceptional in the course of trial litigation," *United States v. Stevens*, 663 F.3d 1270, 1277 (D.C. Cir. 2011).

In short, KBR's complaints about judicial conduct do not establish any basis

for reassignment. This case has been pending for approximately 10 years. In 2011, the case was reassigned to Judge Gwin. Barko A-1. Due to earlier orders entered in the case Barko was prevented from conducting any discovery until late in 2013. Barko A-84. The original scheduling order and trial date has been continued twice due to KBR's failure to comply with Barko's discovery requests. Barko A-3, 55-56. Another judicial reassignment will cause further delay and severely impact and prejudice Barko who has been waiting 10 years to complete discovery and prepare this case for trial.

Conclusion

For the foregoing reasons, KBR's second petition for writ of mandamus and motion for stay in this case should be denied. In the event this Court determines that further proceedings are necessary to consider KBR's petition, Barko requests that the Court grant the parties right to submit briefs in accordance with Fed. R. App. P. 21(b)(5).

Respectfully submitted,

/s/ Michael D. Kohn

/s/ David K. Colapinto

/s/ Stephen M. Kohn

Attorneys for Mr. Barko

February 6, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 35(c), Harry Barko, respondent-relator, by and through counsel, hereby certifies in accordance with Circuit Rule 28(a)(1)(A):

I. PARTIES AND *AMICI*

United States of America, ex rel., Harry Barko is the plaintiff-relator below and respondent-relator in this mandamus proceeding. The United States of America is the real party in interest as plaintiff.

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 are the defendants below and petitioners herein.

The following parties were also named as defendants in the district court: Daoud & Partners, Inc. and EAMAR Combined for Trading Contracting Company.

No amici or intervenors have appeared in the district court. However, the following entities have moved for leave to participate as amici in this mandamus proceeding, but that motion is pending and will be opposed by Mr. Barko: 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, and Pharmaceutical Research

and Manufacturers of America.

II. RULINGS UNDER REVIEW

The underlying decisions from which KBR requested emergency relief are: (1); *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, Opinion and Order (D.D.C. November 20, 2014) [Doc. #205], in which the District Court, the Honorable James S. Gwin, held that KBR waived the attorney-client privilege; and (2) *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, Opinion and Order (D.D.C. December 17, 2014) [Doc. #231], in which the District Court, the Honorable James S. Gwin, held that certain portions of documents contained facts that were not protected by the attorney work product, and if the documents contained work product that Mr. Barko had satisfied his burden to establish substantial need and undue hardship to overcome any work product protection.

III. RELATED CASES

There are no related cases.

Respectfully submitted,

/s/ Stephen M. Kohn

/s/ Michael D. Kohn

/s/ David K. Colapinto

Attorneys for Respondent-Relator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Combined Answer of Harry Barko to Motion for Stay and Petition for Writ of Mandamus, together with the accompanying Addenda and Certificates, was served on this 6th day of February, 2015, by U.S. Priority Mail, on:

Beverly M. Russell
Assisstant U.S. Attorney
U.S. Attorney's Office
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530

The Honorable James S. Gwin
U.S. District Judge
Carl B. Stokes United States Courthouse
801 West Superior Avenue, Courtroom 18A
Cleveland, OH 44113-1838

and electronically via the Court's ECF system on all counsel who have appeared in this action, and upon:

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By: /s/ David K. Colapinto
David K. Colapinto