No. 14-5055

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

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

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

CORRECTED COMBINED RESPONSE TO MOTION FOR STAY AND PETITION FOR WRIT OF MANDAMUS

Respectfully submitted,

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* Denotes authorities chiefly relied on.

GLOSSARY

Abbreviation	Definition
A-[#]	Barko Addendum
Pet. A-[#]	Petitioners' Appendix
Barko	Respondent Harry Barko
COBC	Code of Business Conduct
Decl.	Declaration
Doc.	District Court docket number (D.D.C. Civil Action No. 1:05-cv-1276)
FCA	False Claims Act
FDA	U.S. Food and Drug Administration
HSP	Health and Safety Plan
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
LCvR	U.S. District Court Civil Rule
NADCL	*National Association of Criminal Defense Lawyers v. U.S. Dept. of Justice,* 182 F.3d 981, (D.C. Cir. 1999).

Pet.	Petition or Petitioner
SEC	U.S. Securities and Exchange Commission

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. STANDARD OF REVIEW.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). In determining whether such an "extraordinary situation" exists requiring mandamus relief, this Circuit considers five factors: "(1) whether the party seeking the writ has any other adequate means; (2) whether that party will be harmed in a way not correctable on appeal; (3) whether the district court clearly erred or abused its discretion; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises important and novel problems or issues of law." *In re Executive Office of the President,* 215 F.3d 20, 23 (D.C. Cir. 2000), citing *National Association of Criminal Defense Lawyers v. U.S. Dept. of Justice,* 182 F.3d 981, 987 (D.C. Cir. 1999) ("*NACDL").*

Contrary to KBR's assertion, mandamus review is not frequently provided in this Circuit to protect against the disclosure of attorney-client privileged, or work product protected, information. KBR has cited only one unpublished case in this Circuit where a writ of mandamus has issued regarding application of the attorney-client privilege. *In re Shaw Pittman,* 2000 U.S. App. LEXIS 26860, 2000 WL

1580968 (D.C. Cir. Sept. 1, 2000).[1] In that case, which was decided before *Mohawk Indus. v. Carpenter*, 558 U.S. 100 (2009), the writ was granted because the district court had decided the privilege claim "on the basis of an inadequate record." *Id.* This Court directed the district court "to develop an appropriate record" on remand, "including affidavits, allow the parties an opportunity to present their arguments in writing and, if necessary, undertake an *in camera* review." *Id.* By contrast, the decision below was made on the basis of a complete record.

More importantly, KBR cannot point to a single instance where this Circuit has granted mandamus relief to set aside a district court's discovery order made on the basis of its own *in camera* review of documents. An *in camera* review was noticeably absent in *In re Shaw Pitman.* By contrast, in this case, the district court conducted an *in camera* review of KBR's withheld documents. Doc. #150; Doc. #155; Doc. #135; Doc. #139; Doc. #143.

The principal issue presented by KBR is not a "pure legal question" because it involves an intensive review of the factual record. *Cf.* Pet. at 11 (citation omit-

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[1] KBR's reliance on an unpublished opinion issued prior to 2002 is misplaced since it is not binding precedent. D.C. Cir. Rule 32.1(b)(1). In two other cases cited by KBR, this Circuit granted a writ of mandamus on issues other than the attorney-client or work product privileges. *In re Sealed Case,* 151 F.3d 1059 (D.C. Cir. 1998) (granting writ requested by Independent Counsel to protect against disclosure of grand jury material); *In re Papandreou,* 139 F.3d 247, 251 (D.C. Cir. 1998) (petitioner's sovereign immunity claim protecting diplomats from depositions "has special characteristics beyond those of ordinary privilege"). The special circumstances beyond a routine privilege discovery ruling that arose in those cases are not present here.

ted). This Court reviews petitions for a writ of mandamus under the abuse of discretion and clearly erroneous standards. *NACDL,* 182 F.3d at 986-87. In privilege cases, this Court has deferred to district courts to sort out the facts, and has noted that the district courts have "considerable discretion" in making privilege determinations and other discovery rulings. *United States v. Phillip Morris, Inc.,* 347 F.3d 951, 955 (D.C. Cir. 2003) (remanding to district court for further proceedings to decide the privilege issue).

II. KBR HAS OTHER ADEQUATE MEANS TO OBTAIN REVIEW.

In 2009, the Supreme Court held that postjudgment appeals provide adequate means to obtain review of adverse discovery rulings on the attorney-client privilege. *Mohawk Indus.,* 558 U.S. at 109. The Court noted that: "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Id.*

Notably, the Supreme Court rejected the very "chilling effect" and "cat is out of the bag" arguments raised by KBR here. The Court rejected the argument that immediate review is needed because the privilege affords a right not to disclose the information in the first place. *Id.* Instead, the Supreme Court held that "deferring review until final judgment does not meaningfully reduce the *ex ante*

incentives for full and frank consultations between clients and counsel." *Id.* The Supreme Court held there was a "lack of a discernible chill" on the attorney-client privilege if a postjudgment appeal is taken. *Id.,* at 110. While the Court noted that a writ of mandamus might be appropriate in "extraordinary circumstances" such "mechanisms do not provide relief in every case…" *Id.,* at 111.

Even before the Supreme Court's *Mohawk Indus.* decision, this Circuit has not hesitated to deny mandamus review where attorney-client or work product privileges were claimed. *In re Executive Office of the President,* 215 F.3d at 23 (denying mandamus review of an interlocutory discovery order where Executive Office of President claimed serious harm if ordered to release information asserted to be protected by the attorney-client, work product and deliberative process privileges); *Byrd v. Reno,* 180 F.3d 298, 303 (D.C. Cir. 1999) (denying mandamus of discovery order where attorney claimed work product privilege). "There is ample precedent in this Circuit for taking an appeal of a discovery order after entry of judgment." *Banks v. Office of the Senate Sergeant-at-Arms,* 471 F.3d 1341, 1346-47 (D.C. Cir. 2006) (denying review of order granting discovery sanctions). *Also see, NACDL,* 182 F.3d at 985 (denying mandamus review because a party can appeal an interim award of attorneys fees after final judgment).

Following the Supreme Court's *Mohawk Indus.* decision, KBR has "ade-

quate means" to appeal the March 6, 2014 order after final judgment.[2] KBR's reliance on pre-*Mohawk Indus.* cases to assert otherwise is unavailing.[3] KBR fails to square the adequate relief standard with *Mohawk Indus.*, which clearly stated that an appeal of adverse privilege rulings after final judgment is an adequate remedy.

III. KBR WILL NOT BE HARMED IN A WAY NOT CORRECTABLE ON POSTJUDGMENT APPEAL.

KBR will not be irreparably harmed if a writ is denied. In *Mohawk Indus.*, the Supreme Court made clear that adverse discovery rulings ordering disclosure of attorney-client or work product privileged information are correctable on post-judgment appeal. 558 U.S. at 108-12. As this Court has noted, "clear error alone [...] does not support the issuance of a writ of mandamus" because "any error – even a clear one – could be corrected on appeal[.]" *NACDL,* 215 F.3d at 23.

This Court can remedy any erroneous rulings on application of the privilege by vacating an adverse judgment or remanding for a new trial. *Mohawk Indus.,* 558 U.S. at 108-112. In the meantime, KBR's compliance with the production order,

[2] *United States ex rel. Gohil v. Aventis Pharmaceuticals, Inc.,* 387 Fed. Appx. 143, 2010 U.S. App. LEXIS 15225 (3rd Cir. July 23, 2010) (Holding that postjudgment appeals sufficed to assure the vitality of the attorney-client privilege following *Mohawk Indus.).*

[3] KBR's reliance on *United States v. Philip Morris, Inc.,* 314 F.3d 612, 620 (D.C.Cir. 2003), decided only under the collateral order doctrine and not mandamus, is curious because the holding of that case was abrogated by the Supreme Court in *Mohawk*, which likewise rejected *In re Papandreou*'s the "cat is out of the bag" line of reasoning in, as well as the destruction of privilege argument in *In re von Bulow,* 828 F.2d 94, 98-99 (2nd Cir. 1987).

which included a protective order, (Doc. #155 at 10), will not affect its right to seek later review. *Mohawk Indus.,* 558 U.S. at 108-112*; United States v. Jicarilla Apache Nation,* __ U.S. __, 131 S.Ct. 2313, 2320 n. 2 (2011). KBR has not demonstrated irreparable harm would result if it produced the Code of Business Conduct ("COBC") documents pursuant to the protective order entered on March 11, 2014 [Doc. #155 at 10], and it later seeks review in this Court following post-judgment appeal. *Mohawk Indus.,* 558 U.S. at 108-12.

An adverse privilege ruling does not, by itself, cause irreparable harm justifying mandamus relief. In *Mohawk*, the Supreme Court held that harms ordinarily arising from an adverse privilege ruling—even an erroneous one—are not "sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." 558 U.S. at 107.[4] Rather, some heightened injury is required to justify discretionary review, otherwise the irreparable harm factor could be claimed in

[4] These harms—which necessarily occur in every adverse privilege determination—include disclosure of the information itself, and that adversary counsel may benefit from that information. *Cf.* Pet. at 26-27. With respect to a generalized, institutional harm to the privilege itself, *id.*, the Supreme Court held that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Mohawk*, 558 U.S. at 109. The Court further explained that deferring review will not chill attorney communications because "clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal." *Id.* at 110. Moreover, parties must already account for the real possibility of disclosure due to a misapprehension of the privilege's scope, waiver, or the crime-fraud exception. *Id.*

every petition for mandamus review of a discovery order. *Chase Manhattan Bank, N.A. v. Turner & Newall,* PLC, 964 F.2d 159, 164 (2nd Cir. 1992) ("the argument that the cat is being let out of the bag could logically be made in any case where a court rejects a claim of work product or attorney-client privilege"). This Court has noted that while postjudgment review of "*highly* privileged material" is "not adequate," "[i]n the normal course [...] mandamus is not available." *See In re Executive Office of the President*, 215 F.3d at 23, citing *In re Papandreou*, 139 F.3d at 251 (emphasis added).

In discussing the irreparable harm factor in light of *Mohawk*, the Ninth Circuit noted the Supreme Court's admonition that mandamus be reserved for a "*particularly* injurious or novel privilege ruling." *Hernandez v. Tannien*, 604 F.3d 1095, 1101 (9th Cir. 2010), quoting *Mohawk*, 558 U.S. at 101 (emphasis added).[5] Accordingly, the Court "consider[ed] whether the district court's ruling is particularly injurious[.]" *Id.* Because the district court found a "blanket waiver" of the attorney-client privilege and work product doctrine, the *Hernandez* court held that "the breadth of the waiver finding, untethered to the subject matter disclosed, constitutes a particularly injurious privilege ruling." *Id.* By comparison, the district court below found only that the 89 documents it reviewed *in camera* were not privileged,

[5] Notably, *Hernandez* is the only post-*Mohawk* case cited by KBR. *United States v. Punn* explicitly "express[ed] no opinion as to whether, given subsequent case law development, [i.e., *Mohawk*], [the order at issue] would still be immediately appealable today." 737 F.3d 1, 11 n. 8 (2nd Cir. 2013).

and petitioners can point to no particular harm so injurious as to warrant mandamus relief. Doc. #150 at 8.

IV. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR OR ABUSE ITS DISCRETION.

A. The District Court did not Make Erroneous Factual Findings

With respect to factual findings, the standard of review on mandamus is whether the district court "relies on clearly erroneous factual findings" to such a degree that the errors create a "patently erroneous result." Pet. at 10, citing *In re Ford Motor Co.,* 580 F.3d 308, 316 (5th Cir. 2009) (quotation marks omitted). The single factual finding KBR disputes is the district court's finding that "[n]othing suggests the reports were prepared to obtain legal advice." Pet. at 14, citing Doc. #155 at 4. KBR is very much mistaken. The district court's findings are not clearly erroneous, because it reviewed *all* of the materials claimed to be privileged and confirmed that "[i]n none of the documents is legal advice requested or offered," Doc. # 155 at 4; that "[t]he COBC investigation was a routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy," *id.* at 6; "[t]hat employees who were interviewed were never informed that the purpose of the interview was to assist KBR in obtaining legal advice," *id;* and "that the investigation was conducted by non-attorney investigators," *id.* at 8. As summarized in the district court's March 11 Opinion and Order:

> "[T]he question of whether the COBC documents were subject to the attorney-client privilege or work-product doctrine *was not close*. None of the documents request legal advice. None of the documents give legal advice. Investigators, not attorneys, conducted the interviews and wrote the reports. The investigators wrote the reports when no litigation had been filed. KBR investigators wrote the reports and conducted the interviews to comply with federal defense contracting regulations, not to secure legal advice."

Id., at 8 (emphasis added). With the exception of raising a legal challenge that *Upjohn* cannot be distinguished on the ground that KBR's investigation was undertaken pursuant to regulatory law and corporate policy, KBR does not question the accuracy of any of these findings. KBR's sole factual assault rests with its citation to Mr. Heinrich's declaration at ¶9 and to his deposition testimony appearing at Tr. 127-128 to bolster a claim that the reports were prepared for the purpose of obtaining legal advice. Pet. at 14. However, in both instances, Mr. Heinrich spoke in generalities and *never* directly addressed or asserted that he provided legal advice to anyone in connection with the two specific COBC reports at issue in this matter. To the contrary, upon careful review of all of the claimed privileged communications, the district court did not find a single instance of legal advice having been sought or given with respect to those reports.

Moreover, there is substantial additional evidence in the record supporting the district court's finding that Mr. Henrich *never* provided legal advice in connection with the investigations at issue here. First, KBR—in all of the published descriptions of the COBC program submitted in filings made with the SEC, to its

employees on a web page, A-47, and in published pamphlets handed out to employees, A-49—never once asserted that investigations conducted under the COBC were for the purpose of obtaining legal advice, (A-146-147, Heinrich Depo. Tr. 174-175, 189-190); A-32-46, COBC; A-47-48, KBR Ethics Point Website; A-49-69, KBR CBOC Brochure; A-75-77, KBR Manual. Second, Mr. Heinrich never shared the witness statements or discussed the investigative findings with anyone, including KBR's Policy Committee or compliance department. (A-98-99, A-114-117, A-133-134, A-145, A-155, Heinrich Depo. Tr. 21-22, 101-104, 112, 148-149, 173, and 185). Third, Mr. Heinrich had no knowledge of any government audit or investigations that touched upon the COBC investigations at issue here. (A-125-136, Henrich Depo. Tr. 151-152). Fourth, Mr. Heinrich can not recall ever speaking to the investigator who conducted the investigations at issue. (A-123, Heinrich Depo. Tr. 115). Fifth, Mr. Heinrich did not oversee how these investigations were conducted and had no input into who was to be interviewed. (A-93, A-102, A-128; Heinrich Depo. Tr. 16, 44, 134). Sixth, his nearly total lack of involvement led to Mr. Henrich making the erroneous claim at his deposition that there were three separate investigative reports issued, an error KBR was forced to correct in its Opposition to the Motion to Compel, Doc. # 139 at 7 n. 9.

Elsewhere, KBR incorrectly implies that the internal investigations at issue in this case were supervised and directed by "*attorneys*" and that "*[m]uch* of the

investigative work is performed. . . under the direction of the company's Law Department" "who evaluate [and] direct further investigation." Pet. at 5 (emphasis added). However, the record actually establishes that only one attorney—Mr. Heinrich—performed purely ministerial tasks: transmitting a "tip" to a non-attorney KBR Security Manager (William Rice) who, in turn, gave it to a non-lawyer security department investigator (Mr. Ervin), who performed an investigation without direction or contact from Mr. Heinrich, and at the conclusion of the investigation the record of investigation was then forwarded from Mr. Ervin to Mr. Rice and only then on to Mr. Heinrich, who was responsible for depositing the investigative record into the company's formal COBC record keeping system. (A-92-93, A-107-108, A-124-125, A-126; Heinrich Depo. Tr. 15-16, 80-81, 118-119, 127).[6]

All said and done, KBR seeks to create a privilege by simply passing its documented compliance efforts into the hands of an attorney. *See Anderson v. First Commodity Corp. of Boston,* 618 F. Supp. 262 (W.D. Wis. 1985) (attorney performing investigative, compliance or corporate management functions is performing business, not legal function); *SEC v. Gulf & Western Indus.,* 518 F. Supp. 675, 681-82 (D.D.C. 1981) ("A corporate client should not be allowed to conceal a fact by disclosing to the corporate attorney."); *see also Neuberger Berman Real Estate*

[6] The COBC directs that COBC investigative reports must be prepared and retained to "document its compliance efforts and results," and to make the results available to the Board of Directors or the Policy Committee. A-41-42.

Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 411 n. 20 (D. Md. 2005) ("corporate clients could attempt to hide mountains of otherwise discoverable information behind a veil of secrecy by using in-house legal departments as conduits of otherwise unprivileged information"); *Rossi v. Blue Cross and Blue Shield of Greater New York,* 540 N.E.2d 703, 705 (1989) ("[T]he need to apply [the privilege] cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure."); *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990) ("In-house counsel's law degree and office are not to be used to create a privileged sanctuary for corporate records") (internal quotation omitted); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) ("A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.").

That KBR is in search of a sanctuary to hide damaging compliance records can be inferred from the intended purpose of the Confidentiality Agreements KBR insisted its employees execute before making a statement in the course of a COBC investigation. A-28. In place of *Upjohn* warnings, *Upjohn Co. v. United States,* 449 U.S. 383, 394-95 (1981), KBR threatened its employees with termination if they revealed to any third party, including government regulators, anything pertaining to the 'subject matter' of the interview that could harm KBR's business dealings in

the Middle East Region. (A-28; Henrich Depo. at 156-157[7], 178-179).

B. KBR's Confidentiality Agreement was not An *Upjohn* Warning

In order to assert the privilege under *Upjohn,* KBR is required to demonstrate that the employees who were interviewed were expressly informed in writing that the purpose of the interview was to assist KBR in obtaining legal advice. *See Upjohn,* at 386-87; *Deel v. Bank of America,* 227 F.R.D. 456 (W.D. Va. 2005); *Lewis v. Wells Fargo & Co.,* 266 F.R.D. 433, 441-46 (N.D. Cal. 2010). KBR's "fatal flaw" is that, unlike the company in *Upjohn,* "it did not clarify to the employees" who were interviewed "that it needed the information to obtain legal advice." *Deel,* at 461-62. KBR has failed to meet this required element to support its *Upjohn* claim. The confidentiality agreement, which KBR alleges was provided to each employee who was to be interviewed during the course of a COBC investigation, did not attempt to clarify that the interview was conducted for the purpose of securing legal advice. A-28. The district court correctly observed that, "[t]he confidentiality agreement employees signed never mentions that the purpose of the investigation is to obtain legal advice" but instead "warns the employee of the possible adverse business impact unauthorized disclosure could have on KBR's work in the Middle East Region." Doc. # 150 at 6-7. The wording of KBR's Confidentiality Agreements demonstrates that KBR cannot meet the *Upjohn* requirements be-

[7] Mr. Heinrich incorrectly mentions that the agreements were labeled "attorney-client privileged." A-28.

cause it centered on threatening employees with termination if they discussed the "subject matter" of the interview with any third party, including government regulators.[8] As was recognized in *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89, 94 (2nd Cir. 1996),

> the behavior of employers to foist such restrictions on the employees through the guise of a choice does constitute adverse action with respect to an employee's rights to communicate with regulatory agencies. . . [T]his kind of discriminatory action, albeit more subtle in its form than the more obvious act of termination, can represent a significant threat to the statutory purpose of ensuring clear lines of communication between employees and regulatory agencies.

A similar result was reached in *In re: JDS Uniphase Corp.*, 238 F. Supp. 2d 1127, 1136 (N.D. Cal. 2002) ("public policy underlying Sarbanes-Oxley whistleblower protection provision prevents employers from "muzzl[ing] their employees with overbroad confidentiality agreements"). Here, the agreements facially violate the False Claims Act ("FCA") and the Securities and Exchange Act. Pursuant to 31 U.S.C. § 3730(h), the FCA explicitly prohibits KBR from engaging in any action that could "threaten" employees for engaging in "lawful" activity of an employee

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[8] The agreement requires the employee to "acknowledge and agree that [...] the unauthorized disclosure of this information could cause irreparable harm to the review and reflect adversely on KBR as a company and/or KBR performance in the Middle East Region and [...] that the unauthorized disclosure of information may be grounds for [...] termination of employment." A-28.

engaged in efforts to "stop" fraud in government contracting.[9] Similarly, the secrecy agreements run afoul of provisions found in the SEC regulations, as KBR is prohibited from "impeding" any "person" from "communicating" with the SEC regarding a "possible securities law violation." 17 C.F.R. § 240.21F-17(a). The rule explicitly applied to "confidentiality agreements" that "threaten" employees who communicate information to the SEC. *See* 17 C.F.R. § 240.21F-17. Thus, where the confidentiality agreements do not provide *Upjohn* warnings, they do unlawfully restrain employees from telling government regulators and *qui tam* relators what they know. KBR is unable to explain why it chose to unlawfully interfere with the right of its employees to provide information to federal regulators in place of providing explicit *Upjohn* warnings. The end result is that the confidentiality agreement did not place employees on notice of an attorney-client relationship, and chilled them from communicating with federal regulators and third parties. Because the confidentially agreements are unlawful on their face, they are not proper *Upjohn* warnings.[10]

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[9] U.S. Senate Judiciary Committee, in its 1986 report on the FCA, explicitly made sure that the right of employees to provide information to Relators and the government regarding fraud could not be interfered with, and explained that all employees had the right to "assist" litigants, Relators and the United States. *See* Committee on the Judiciary, "The False Claims Act of 1985," Senate Report No. 99-345, p. 34 (July 28, 1986).

[10] "[I]t is a long-standing principle of general contract law that courts will not enforce contracts that bar a party – here the United States Army – from reporting

In any event, KBR's confidentiality statement stands in stark contrast to the express written statement provided in *Upjohn,* which revealed the legal as opposed to business or sensitive nature of the inquiry and explicitly stated that the results would be reviewed by company legal counsel for the purpose of obtaining legal advice. *Upjohn,* at 386-87. Informing employees that the information was "sensitive" and had to be treated confidentially so as not to disturb KBR's Middle East business dealings does not convey that the information was privileged, would be reviewed by attorneys, or was necessary for the purpose of obtaining legal advice. A-28. Moreover, as Mr. Barko confirmed, the investigations were conducted without any mention that they were subject to the attorney-client privilege. A-70-71. Putting an attorney-client notation at the top of an affidavit an employee is asked to sign weeks after being interviewed, and allegedly placing a similar statement on the cover of a final report, does not meet *Upjohn's* notice requirement.

C. The District Court Did Not Eviscerate KBR's Ability to Conduct a Privileged Internal Investigation

KBR claims that if the district court's ruling stands, "[i]t is no exaggeration to say that . . . no *public company*, given widespread internal-control and auditing requirements under laws such as Sarbanes-Oxley and the [FCPA] – can claim privilege over materials generated in internal investigations." Pet. at 1-2 (emphasis in

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another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution." *Fomby-Denson v. Department of Army,* 247 F.3d 1366, 1377-78 (Fed. Cir. 2001).

original). However, this claim is at odds with the COBC policy itself, which establishes how and when an otherwise "routine" corporate compliance investigation, Doc #150 at 6, may turn into a potentially privileged internal investigation. A-40.

KBR's COBC acknowledges that in the normal course of business, COBC investigative records constitute and must be retained as part of the company's required compliance records. A-41-42 ("Subject to the applicable document retention program, the Company shall document its compliance efforts and results to evidence its commitment to comply with the standards and procedures" that include the "evaluat[ing]" the "gravity and credibility" of an allegation, "initiat[ing] an informal inquiry or a formal investigation," and "prepar[ing] a report of the results of such inquiry or investigation" and "mak[ing] the results of such inquiry or investigation available to the Board of Directors or the Policy Committee for action (including disciplinary action [...])" and to "recommend changes in the [COBC] necessary or desirable to prevent further similar violations" and "[t]he Company may disclose the results of investigations to law enforcement agencies.").

Concurrently, the COBC Policy recognized that in certain special circumstances, an investigation may need to proceed for the specific purposes of obtaining legal advice as contemplated under *Upjohn*. A-40. In those circumstances, the COBC Policy *expressly* provided how and when to do so. A procedure had to be followed before a particular COBC investigation could be conducted for the pur-

pose of "obtaining advice of legal counsel where appropriate." *Id.* However, KBR failed to do this. Mr. Heinrich acknowledged that he had absolutely no communication with the Policy Committee (A-98-99, A-145, A-155, Heinrich Depo. at 21-22, 185, 173), and he had no understanding who was responsible for ensuring compliance with the procedures for obtaining legal advice (A-117-119, Heinrich Depo. at 104-106). Instead, the investigation simply proceeded in the ordinary course of business with Mr. Heinrich functioning as a go-between. This reality was confirmed by the district court's careful review of the entire COBC investigative record and that the investigations in question were "routine" and "[i]n contrast [to] the Upjohn internal investigation [which] was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation." Doc. #150 at 6.

Because *Upjohn* applies to individualized and specialized investigations, and because KBR had a policy in place to select investigations for specialized treatment—which it chose to ignore—KBR's lament that the district court's order eviscerates its ability to carry out a privileged investigation is misplaced. The district court's finding that KBR failed to establish that the investigation was "for the purpose of *primarily* either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding," *id.* at 5, quoting *United States v. ISS Marine Servs., Inc.*, 905 F.Supp. 2d 121, 127 (D.D.C. 2012), quoting *United States v. Nixon,* 418 U.S.

683, 710 (1974), is sound.

D. KBR Failed to Demonstrate that the Investigations in Question Were Carried Out Primarily for the Purpose of Obtaining Legal Advice

Nowhere in KBR's brief does it provide a specific factual basis for why the COBC investigations at issue were carried out primarily for securing legal advice as opposed to business advice.[11] Instead, KBR seeks to argue that the "privilege issue turns on a pure legal question," Pet. at 11, and does so to avoid jumping over a factual threshold it cannot satisfy. *Upjohn* makes clear that privilege cases turn on the specific facts of each case. 449 U.S. at 396-97. Arguing that COBC investigations are inherently entitled to privileged status because, otherwise, "*most public companies* [will be prevented] *from* undertaking confidential internal investigations," Pet. at 19 (emphasis in original), is simply unsupported and defeated by the

[11] The "party claiming privilege, and resisting discovery, has the burden of establishing the existence of the privilege in all respects." *United States v. Davis*, 131 F.R.D. 391, 402 (S.D.N.Y. 1990). Where legal and business purpose are mixed, the legal purpose must predominate. *Neuder v. Battelle Pac. N.W. Nat'l Lab.*, 194 F.R.D. 289, 292-93 (D.D.C. 2000). "[E]ven if a business decision can be viewed as both business and legal evaluations, 'the business aspects of the decision are not protected simply because legal considerations are also involved.'" *Complex Sys., Inc. v. ABN AMRO Bank N.V.*, 279 F.R.D. 140, 150 (S.D. N.Y. 2011), *quoting NXIVM Corp. v. O'Hara*, 241 F.R.D. 109 (N.D.N.Y. 2007); *see also Johnson v. Bd. of Pensions of the Evangelical Lutheran Church*, 2012 U.S. Dist. LEXIS 174230 (D. Minn. 2012) (privilege applies only to communications whose primary purpose is legal, not business); *Kramer v. Raymond Corp.,* 1992 U.S. Dist. LEXIS 7418, 1992 WL 122856 (E.D. Pa. 1992) (narrow construction of privilege especially apt when in-house involved); *Great Plains Mutual Ins. Co. v. Mutual Reinsurance Bureau,* 150 F.R.D. 193, 197 (D. Kan. 1993) ("when the legal advice is merely incidental to business advice, the privilege does not apply").

COBC itself. A-40-42. Not only can KBR obtain outside counsel to conduct a confidential internal investigation as it chooses at any time, but, as shown above, the COBC policy expressly provides a mechanism for conducting privileged investigations, which KBR did not employ.[12] This case turns on KBR's failure to satisfy Section B.2 of the COBC, coupled with the fact that the district court reviewed all relevant documents and determined that no legal advice was ever sought or obtained. Claiming the sky is falling on most public companies—when it is clearly not—wastes judicial resources.

KBR promised its clients, the Government, and shareholders that it would investigate reports of fraud and promised that it would take disciplinary action against any of its employees if they were found to have violated the COBC. A-39-42. This is the overarching purpose of COBC investigations in the first place. The COBC policy provided for the precise situation where legal advice could be sought in conjunction with a COBC investigation. A-40. That KBR failed to comply with those requirements leaves ordinary business as the primary motivation for the investigations. The underlying factual investigations were inevitable and would have occurred regardless of whether attorneys were involved because KBR:

[12] That "KBR['s] Law Department [may] rel[y] upon the COBC Reports and Files to provide legal advice to KBR relating to potential legal exposure and litigation," Pet. at 14, is no different than KBR's legal department relying on a myriad of unprivileged compliance tracking and reporting mechanisms when providing legal advice. Why COBC reports should be entitled to special treatment is ill-explained.

> had a clear business motivation to conduct the internal investigation . . . it had a contractual obligation to return any overpayments to the Government […]. The fact that [KBR] had an obvious and compelling business purpose to conduct an internal audit to ascertain any overpayments further militates in favor of concluding that the privilege does not apply because it suggests that the [documents] would have been created even if [KBR] was not seeking legal advice

ISS Marine Servs., 955 F. Supp. 2d at 132. KBR could not "simply s[i]t on its hands" because "any responsible business organization would investigate allegations of fraud, waste, or abuse in its operations." *Id.,* 137-138 (citing *In re Kidder Peabody Sec. Litig*., 168 F.R.D. 459, 465 (S.D.N.Y. 1996).

E. The District Court's 'But For' Inquiry is an Established Formulation of This Circuit's Primary Purpose Test

In its March 6 Order, the district court explicitly stated that, "[i]n order to prevail on an assertion on the attorney-client privilege, the party invoking the privilege must show the communication is for the purpose of securing *primarily* [legal advice]." Doc. #150 at 5 (internal citation omitted). The district court's statement accords with this Circuit's standard for attorney-client privilege. *See In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007). Next, the order explained, "[i]n order to *determine the primary purpose*, the 'but for' *formulation* is used," whereby a party "must show the communication would not have been made 'but for' the fact that legal advice was sought." Doc. #150 at 5 (emphasis added), quoting *ISS Marine Servs.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012).

The court discussed *Upjohn* and the relevant factual aspects of the KBR's

investigation and COBC policy, *Id.* at 5-7, and then concisely summarized its finding: "the COBC investigation was not for the *primary purpose* of seeking legal advice," and therefore "is not entitled to the protection of the attorney-client privilege." *Id.* at 7 (emphasis added). The district court's order therefore leaves no doubt that this Circuit's primary purpose standard was applied.

Nonetheless, the district court's but-for analysis—employed as a means of determining whether KBR's primary motivation was to obtain legal advice, [Doc. #150 at 5-7]—is not a wholly separate inquiry, but rather a "formulation of the primary purpose standard." *ISS Marine Servs.*, 905 F. Supp. at 128, quoting *In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir 1998) (explicitly taking into account "this Circuit's guidance that 'the attorney-client privilege must be strictly confined within the narrowest possible limits consistent with the logic of its principle.'"). As cogently explained in *ISS Marine*, "[i]f a communication would have been made even if legal advice were not explicitly being sought, then it is difficult to say that that communication's primary purpose was to seek legal advice." *Id.* This inquiry focuses specifically on a particular communication—if that *same communication* would have been made for other reasons, then legal advice did not play a predominant role with respect to *that communication. See Fisher v. United States*, 425 U.S. 391, 403 (1976).

While KBR claims "[o]ther courts have rejected a ['but-for' formulation of

the primary purpose standard]," Pet. at 23, KBR's cited authority—*Neuberger Berman*—shows just the opposite. Employing reasoning mirroring that of *ISS Marine*, the *Neuberger* court concluded that, of the various approaches taken to determine whether legal advice predominates other purposes, "the 'but for' formulation is more consistent with the Fourth Circuit's narrow interpretation of the attorney-client privilege." *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 410 (D. Md. 2005).

Although not all courts explicitly engage in a but-for analysis, many courts implicitly engage in similar analyses to determine the contours of the privilege. The *Neuberger* court, for example, noted that a contemporaneous decision also applied a but-for approach, albeit "restating it in the converse: the communication will not be privileged if the client would not have made the communication but for a business purpose." *Neuberger Berman, supra.,* citing *United States v. Cohn*, 303 F. Supp. 2d 672, 684 (D. Md. 2003) ("any communications that would have been made because of a business purpose even if there had been no additional interest in securing legal advice" not privileged); *McCaugherty v. Siffermann*, 132 F.R.D. 234, 238 (N.D. Cal. 1990); *cf.* Doc. #150 at 6 ("the [COBC] investigations would have been conducted regardless of whether legal advice [was] sought").[13] The Supreme

[13] Before the district court, Barko cited many more cases for the proposition that in the corporate context the courts must determine whether the communications are

Court itself has held that the privilege "protects only those disclosures - *necessary* to obtain informed legal advice - which *might not have been made* absent the privilege." *Fisher*, 425 U.S. at 403 (emphasis added); a*ccord, Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-63 (D.C. Cir. 1980). If a communication would have been made regardless of whether legal advice was sought, then it was not necessary to obtaining legal advice. Put another way, seeking legal advice was not the primary reason the communication was made.

Moreover, use of a but-for formulation of the primary purpose standard is hardly novel. Both *ISS Marine* and *Neuberger* are predated by *First Chicago Int'l v. United Exch. Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989). Scholars, too, have long noted the relevance of a but for inquiry in the context of the attorney-client privilege.[14] Considering the purposes of the privilege in a corporate context, one commentator has argued "an inquiry into causation is necessary," because "[i]f the information-holder will communicate with the attorney even if the privilege does not exist, or *if a nonlegal objective is sufficient to stimulate communication* with the attorney, then there is no reason for the privilege to attach." John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57

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for a business purpose as opposed to seeking legal advice. Doc. # 135 at 8-15, 19-21, 23-24; Doc. #143 at 5-7, 13-15.

[14] *See, e.g.*, Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 918-24 (1980).

N.Y.U.L. REV. 443, 491 (1982) (emphasis added). Therefore, "to invoke the privilege, the claimant must demonstrate that the communication would not have been made *but for* the pursuit of legal services." *Id.* at 492 (emphasis added).

V. THE DISTRICT COURT'S ORDER DOES NOT RAISE NOVEL OR IMPORTANT ISSUES.

The district court's application of the attorney-client and work product privileges in the corporate setting are neither novel nor important issues. KBR simply does not present an issue of first impression as this Court and the Supreme Court has addressed the application of the privilege in the corporate setting. *Upjohn, supra.; Periman Corp. v. United States,* 665 F.2d 1214 (D.C. Cir. 1981); *United States v. Phillip Morris, Inc.,* 314 F.3d 612 (D.C. Cir. 2003); *United States v. Phillip Morris, Inc.,* 347 F.3d 951. This Court has denied petitions for mandamus review presenting far more important issues than those presented here.[15]

KBR has manufactured an issue that simply does not exist based on the facts of this case. As explained above, KBR's compliance program had a specific process for which investigations could be conducted under an attorney-client relationship. KBR chose not to conduct the investigations at issue pursuant to their own

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[15] *In re Executive Office of the President,* 215 F.3d at 23-24 (denying mandamus review of an order compelling discovery from the Deputy Counsel to the President regarding matters that were claimed to be protected by the attorney-client, work product and deliberative process privileges); *In re: Kessler,* 100 F.3d 1015 (D.C. Cir. 1996) (denying mandamus review of discovery order compelling the deposition of the Commissioner of FDA).

attorney-client privilege process. That was KBR's decision. Based on these facts, there is no novel issue.

A discovery order does not meet the "legal-importance test" unless "it presents a claim of clear-cut legal error and not merely a challenge to the district judge's factual determinations or the application of a settled legal rule to the particular facts." *United States v. Billmyer,* 57 F.3d 31, 35 (1st Cir. 1995). KBR has badly misconstrued the district court's "core holding." Pet. at 29. The district court did not hold that "companies with formal internal controls mandated by law or company policy *cannot* claim attorney-client privilege over investigatory reports and materials." *Id.* Instead, the district court held—on the basis of the facts before it and *in camera* review—that "KBR fail[ed] to carry its burden to demonstrate that the attorney-client privilege applies *to the COBC documents*." Doc. #150 at 5 (emphasis added). The order below simply does not establish a bright-line rule with respect to all investigatory reports and materials resulting from internal controls.

The district court's decision does not raise any novel or 'special' legal issues beyond those in ordinary privilege determinations. Indeed, its normalcy is evident by comparison with *Leamon*, where a district court reviewing a different set of KBR's COBC files concluded that witness statements contained within them were not covered by the attorney client privilege, that "[t]he [COBC] investigations were conducted *in the ordinary course of business*," and that "the [COBC] policy

itself contemplates that such investigations will be conducted *whenever* an allegation comes to light, without mention of whether the allegation is deemed likely to result in litigation." Pet. A-88-89 (emphasis added); *cf.* Doc. #150 at 6 ("The COBC investigation was a routine, and apparently ongoing, compliance investigation required by regulatory law and corporate policy.").[16]

While KBR may vehemently disagree with the outcome, the district court's order is limited to the case before it, and therefore comports with *Upjohn*, wherein the Supreme Court "decline[d] to lay down a broad rule or series of rules to govern all conceivable future questions," in favor of a "case-by-case" approach to determining the boundaries of the attorney-client privilege. 449 U.S. at 386, 396.

Because the district court's privilege determination is fact-based, like all ordinary privilege determinations, it does not have the sweeping effect appellants urge. *See Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 123 (4th Cir. 1994) ("The district court's conclusions as to the non-existence of any attorney-

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[16] With respect to other investigative files, the *Leamon* court—which did not appear to apply a primary purpose standard—found the privilege applied because "many of the files" were communications to counsel "in pursuit of legal advice, notes and memorand[a] made *by counsel* regarding interviews, and other documentation prepared in anticipation of possible litigation." Pet. A-28 (emphasis added). Rather than reflecting differing *legal* standards, the divergent outcomes are due to *factual* differences in the underlying communications themselves. In this case, the district court found "[n]othing suggests the reports were prepared to obtain legal advice," and the "final memorandum [...] does not request legal advice." Doc. #150 at 4. Essentially, the documents were largely not prepared by counsel, and "no legal advice was requested or offered." *Id.*

client privilege [...] rest essentially on determinations of fact, which we review for clear error."); *United States v. Mackin*, 561 F.2d 958, 961 (D.C. Cir. 1977) (waiver of privilege is "question of fact"). Even different sets of KBR's own COBC documents may have different outcomes.[17]

The determination at issue falls squarely within the wheelhouse of district courts' ordinary, routine management of discovery disputes. *United States v. Philip Morris, Inc.*, 347 F.3d at 955, citing *Food Lion, Inc. v. United Food and Commercial Workers Int'l Union*, 103 F. 3d 1007, 1012, (D.C. Cir. 1997) ("It should be for the district court to decide [the privilege issues].").

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[17] This is further evidenced by examining the several cases--in addition to *Leamon*--that KBR contends relate to their COBC investigations: *Kellogg, Brown & Root*, *Mazon*, and *Fischer*. Pet. at 1, 15-16. While it is not clear the *Fischer* court ever analyzed the issue of whether the attorney-client privilege applied, *see* Pet. A-42-47 (discussing crime-fraud exception and selective waiver), its opinion on the work product protection concerns a factually distinguishable internal investigation. In *Fisher*, Halliburton's Law Department initiated an internal investigation under its Health and Safety Plan following the death of its employees. In contrast with the COBC, which contemplates investigation of all tips received, *see* Pet. A-89, Halliburton's HSP specifically limited investigations to "serious incidents," expected to "result in [...] possible legal action." Pet. A-51. Even so, the court ordered a number of documents produced, particularly where the only basis for privilege was "the fact that they were forwarded to an attorney." Pet. A-53. In *Kellogg, Brown & Root v. United States*, the court's order was, like the order below, confined to documents submitted for in camera review, and the court found that, while most of the reviewed documents were privileged, others were not. *Id.* In *Mazon*, the court noted that the COBC investigative report and witness statement had already been produced by KBR, so the COBC report and witness statements were not the subject of that order. Pet A-36-37.

VI. THE DISTRICT COURT'S OPINION ON WAIVER IS NOT CLEARLY ERRONEOUS.

The district court's March 11, 2014 opinion and order stating that KBR may have waived the privilege by placing the results of its COBC investigations at issue is not clearly erroneous and certainly does not support granting KBR's petition. Doc. #155 at 6-7. KBR's disagreement with the district court's opinion and order does not mean the district court abused its discretion or committed clear error. By electing to call Mr. Heinrich as its Rule 30(b)(6) witness and using his testimony about the COBC investigations to support KBR's motion for summary judgment, KBR waived its privileges through testimonial use of the information. *See e.g., United States v. Nobles,* 422 U.S. 225, 239-40 (1975). Mr. Heinrich gave testimony about the results of the COBC investigations in response to KBR's counsel's questions, *see* Doc. #136 at 10 (Def. Mem., p. 4 n. 5); *Id.,* at 44-45 (Def. Stmt. Facts, ¶27), which resulted in a subject matter waiver of both the attorney-privilege and work product doctrine. *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989) (both inadvertent and deliberate disclosure of privileged information waives the privilege); *In re Sealed Case,* 676 F.2d 793, 809 (D.C. Cir. 1982) (the waiver extends to all communications relating to the same subject matter). This is further supported by KBR's use of Mr. Heinrich's testimony and information concerning the results of the COBC investigations in its motion for summary judgment. *See* Doc. #136 at 10 (Def. Mem., p. 4 n. 5); *Id.,* at 44-45 (Def. Stmt. Facts, ¶ 27). KBR

is asserting these privileges over the reports and other COBC documents, while at the same time intentionally producing testimony about the results of these investigations after Mr. Heinrich (KBR's Rule 30(b)(6) representative) testified after reviewing the reports. KBR has waived these privileges because its disclosure of information about the COBC investigations is inconsistent with maintaining these reports as privileged.

VII. KBR's REQUEST FOR A STAY SHOULD BE DENIED.

KBR has failed to meet its burden for issuance of a stay and there is no likelihood of success on the merits of its petition for issuance of a writ. *Kessler,* 100 F.3d at 1016. Additionally, as set forth above, KBR will not be irreparably harmed by denial of a stay. If the stay is lifted KBR can comply with the March 6 and 11, 2014 orders without suffering harm by producing the COBC documents pursuant to the protective order already in place (Doc. #155, p. 10), and seeking review in this Court following postjudgment appeal. *Mohawk Indus.,* 558 U.S. at 108-112.

Conclusion

For the foregoing reasons, KBR's motion for stay and petition for writ of mandamus should be denied.

Respectfully submitted,

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March 21, 2014

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent-Relator Harry Barko, by and through counsel, hereby certifies:

1. Parties and *Amici*

All parties appearing before the district court and in this Court are listed in the Petition for Kellogg, Brown & Root, Inc., *et al.*

All *amici* moving for leave to participate as *amici* in this Court are listed in the Amicus Brief for the American Forest & Paper Association, *et al.*

2. Rulings Under Review

References to the ruling at issue appear in the Petition for Kellogg, Brown & Root, Inc., *et al.*

3. Related Cases

Undersigned counsel is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Respectfully submitted,

_/s/ *David K. Colapinto*_______
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March 21, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Combined Response to Motion for Stay and Petition for Writ of Mandamus, together with the accompanying Addenda and Certificates, was served on this 21st day of March, 2014, by hand on:

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and by Federal Express on:

The Honorable James S. Gwin
U.S. District Judge
Carl B. Stokes United States Court House
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