No. _____

In The
Supreme Court of the United States

UNITED STATES EX REL. HARRY BARKO,

Petitioner,

v.

KELLOGG BROWN & ROOT, INC., *et al.,*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Stephen M. Kohn
Counsel of Record
Michael D. Kohn
David K. Colapinto
Kohn, Kohn & Colapinto, LLP
3233 P St., NW
Washington, DC 20007
(202) 342-6980
sk@kkc.com
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a party has an immediate appeal through a writ of mandamus in regard to a district court's non-final discovery order rejecting an attorney-client privilege and compelling production of documents in light of this Court's ruling in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009).

2. Whether a corporation may claim attorney-client privilege for internal audit reports when its investigators failed to adequately inform employees that the audit was being conducted for legal purposes, as required under this Court's decision in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

3. Whether the Appeals Court erred in applying the "substantial purpose" test instead of the long-established "primary purpose" test in determining legal intent, as required to preserve attorney-client privilege.

PARTIES

Harry Barko, *Plaintiff – Petitioner*

Daoud & Partners, former defendant dismissed through settlement

Halliburton Co., former parent company of Kellogg Brown & Root, Inc., *Defendant*

Kellogg Brown & Root, Inc., former subsidiary of Halliburton Co., *Defendant*

Kellogg Brown & Root Engineering Corporation, *Defendant*

Kellogg Brown & Root International Inc. (a Delaware Corporation), *Defendant*

Kellogg Brown & Root International Inc. (a Panamanian Corporation), *Defendant*

Kellogg Brown & Root Technical Services, Inc., *Defendant*

United States of America, Plaintiff (real party in interest)

TABLE OF CONTENTS

Question Presented i

Parties ii

Table of Contents iii

Table of Appendices v

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 3

Reasons For Granting The Petition 9

I. The Court's Decision Exacerbates Conflict and Confusion Among the Circuit Courts of Appeal 9

II. The Appeals Court Has Transformed the Standard for Mandamus and Sowed Confusion on an Important Threshold Issue, Contrary to this Court's Decisions in *Mohawk* and *In re Cheney* 13

A. *The Appeals Court's Dismissal of Post-Judgment Appeal Has Grave Implications for Mandamus Jurisdiction and Judicial Efficiency* 16

B. *The Appeals Court's Finding "Clear Legal Error" Conflicts with Decisions of Other Courts* 20

1. *The Appeals Court's finding of "legal error" was wrong* 20

2. *The District Court was correct in applying the primary purpose test* 24

C. *A writ of mandamus is not "appropriate under the circumstances"* 26

III. The Appeals Court's Decision Deepens a Conflict of Authority on an Important and Recurring Issue. 28

IV. The Appeals Court's Use of the "Substantial Purpose" Test Instead of the "Primary Purpose" Test Eviscerates Decades of Established Precedent and Creates Confusion on a Major Federal Issue 35

Conclusion 38

TABLE OF APPENDICES

Appendix A – Court of Appeals Order (June 27, 2014) 1a

Appendix B – District Court Opinion and Order (March 6, 2014)..... 24a

Appendix C – District Court Opinion and Order (March 11, 2014)..... 36a

Appendix D – Court of Appeals Order (September 2, 2014) 52a

Appendix E – Federal Rules of Civil Procedure (§1291 and §1292)..... 53a

Appendix F – Kellogg Brown & Root, Inc. Non-Disclosure Agreement..... 56a

TABLE OF AUTHORITIES

Cobbledick v. U.S., 309 U.S. 323, 325 (1940) 14

De Beers Consol. Mines, Ltd. v. U.S.,
325 U.S. 212 (1945) 17

Gutierrez v. Johnson & Johnson, No. 01-5302,
2003 U.S. Dist. Lexis 28603 (N.J. 2003) 23

Hernandez v. Tanninen,
604 F.3d 1095 (9th Cir. 2010) 12, 13

In re Cheney, 542 U.S. 367
(2004) 3, 13, 15, 16, 18, 20, 26

In re City of New York,
607 F.3d 923 (2d Cir. 2010) 18

In re County of Erie,
473 F.3d 413, 417 (2d Cir. 2007) 37

In re Lawson Software, Inc.,
494 Fed. Appx. 56 (Fed. Cir. 2012) 11

In re Pacific Pictures Corp. v. U.S. Dist. Ct.,
679 F.3d 1121 (9th Cir. 2012) 30

In re Shelbyzme LLC,
547 Fed. Appx. 1001 (Fed. Cir. 2013) 9, 11

In re Whirlpool Corp.,
597 F.3d 858 (7th Cir. 2010) 9, 10, 11

Int'l Brotherhood Of Teamsters,
119 F.3d 210 (2d Cir. 1997).....30-31

Loctite Corp. v. Fel-Pro, Inc.,
667 F.2d 577, 582 (7th Cir. 1981) 37

Mohawk Industries, Inc. v. Carpenter,
558 U.S. 100
(2009) 3, 10, 12, 13, 14, 16, 17, 18, 19, 26, 38

Perez v. U.S. Dist. Ct., Tacoma, #13-72195,
14 U.S. App. Lexis 7301 (9th Cir.)
(April 18, 2014).....12, 13

Roche v. Evaporated Milk Ass'n,
319 U.S. 21 (1943) 17

Upjohn Co. v. U.S., 449 U.S. 383 (1981)
.....4, 5, 8, 20-23, 27, 29, 30, 33, 34, 35, 37, 38

U.S. v. Copar Pumice Co.,
714 F.3d 1197 (10th Cir. 2013).....9, 10, 17, 28

U.S. v. Graf, 610 F. 3d 1148
(9th Cir. 2010) 30

U.S. v. Davis,
636 F.2d 1028 (5th Cir. 1981).....37

U.S. v. ISS Marine Servs.,
905 F.Supp. 2d 121 (D.C.D.C. 2012).....23

U.S. v. Nixon, 418 U.S. 683 (1974).....14

U.S. v. Ruehle,
583 F.3d 600 (9th Cir. 2009) 30, 31, 32, 33

U.S., ex rel Gohil v. Aventis Pharmaceuticals, Inc.,
387 Fed. Appx. 143 (3d Cir. 2010) 9, 11, 12

STATUTES AND REGULATIONS:

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 ..... 2, 14

28 U.S.C. §1292(b) 2

28 U.S.C. §1651(a) 2

False Claims Act 31 U.S.C. §3729 6

Fed. R. Civ. P. 26(a) 36

Federal Acquisition Regulations, Contractor Business Ethics, Compliance Program and Disclosure Requirements, Final Rule, 73 Federal Register 67064 (Nov. 12, 2008) 5

New York State Bar Association Committee on Professional Ethics, Opinion #650
(June 30, 1993) 32

Sarbanes-Oxley Act, Pub L., No. 107-204 (2002),
15 U.S.C. §78 j-1(m)(4) 4, 34

The Close the Fraud Loophole Act, Public Law 110-252, Title VI, Chapter 1 ..... 4, 34

U.S. Sentencing Commission Guidelines Manual, Section 8B2.1 .....5, 34

OTHER AUTHORITIES:

1 Restatement (Third) of the Law Governing Lawyers § 72, Reporter's Note (2000) 25, 37

Corporate Internal Investigations: Best Practices, Pitfalls to Avoid, Jones Day, Jan. 2013, http://www.jonesday.com/files/upload/CII%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf 23

Dunst, Lee G. and Daniel J. Chirlin, *A Renewed Emphasis on* Upjohn *Warnings*, Andrews Litigation Reporter, Sept. 2011, http://www.gibsondunn.com/publications/Documents/Dunst-ChirlinRenewedEmphasis OnUpjohnWarnings.pdf.....31

Margolis, Craig D. and Lindsey R. Vaala, *Navigating Potential Privilege Pitfalls in Conducting Internal Investigations:* Upjohn *Warnings, "Corporate Miranda," and Beyond*, Financial Fraud Law Report, Feb. 2011, http://www.velaw.com/uploadedfiles/vesite/resources/us_550903_1.pdf.....31

Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees, American Bar Association White Collar Crime Committee (2009), http://www.watergatecle.com/wp-content/uploads/2012/06/ABA_Upjohn_Task_Force.pdf.....23, 31

Volkov, Michael. "Redefining the Relationship of the General Counsel and Chief Compliance Officer." Transforming Compliance: *Emerging Paradigms for Boards, Management, Compliance Officers, and Government*. RAND Center for Corporate Ethics and Governance Annual Symposium 2014, http://compliancestrategists.com/pro/wp-content/uploads/2013/10/RAND-Volkov-WPprepub6.3.2014.pdf 21, 27-28, 31, 36

Wade Davies, *Upjohn Warnings: Best Practices and Tennessee Ethical* Requirements, Tennessee Bar Association, Oct. 27, 2010, http://www.tba.org/journal/upjohn-warnings-best-practices-and-tennessee-ethical-requirements 23

Wong, Michael Li-Ming and Asheesh Goel. *Beefing Up "Corporate Miranda Warnings" Averting Misunderstandings & Detrimental Consequences in Internal Investigations*, Wall Street Lawyer, Aug. 2009, http://www.ropesgray.com/~/media/Files/articles/2009/09/in-wall-street-lawyer-article-asheesh-goel-analyzes-corporate-miranda-warnings-in-internal-investigations.ashx.....31

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Harry Barko, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, No. 14-5055.

OPINIONS BELOW

The opinion of the court of appeals at issue in this petition is *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). The order of the District Court compelling document production is reported as *United States ex rel. Barko v. Halliburton Co.*, 1:05-CV-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014), and its order denying interlocutory appeal as *United States ex rel. Barko v. Halliburton Co.*, 1:05-CV-1276, 2014 U.S. Dist. Lexis 30866 (D.D.C. Mar. 11, 2014).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered its opinion and judgment in this matter on June 27, 2014. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1291 provides, in relevant part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

28 U.S.C. §1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

28 U.S.C. §1651(a) ("All Writs Act") provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The Court of Appeals for the District of Columbia Circuit expressly contradicted this Court's ruling in *Mohawk Industries, Inc. v. Carpenter* when it issued a writ of mandamus for an unpublished interlocutory District Court order compelling production of discoverable material. This decision warrants review for four primary reasons. *First*, in *Mohawk*, this Court expressly limited the use of mandamus to "extraordinary circumstances" where a court order works a "manifest injustice." *Mohawk*, 558 U.S. 100, 101 (2009). In contradiction to this ruling, the Court of Appeals granted mandamus review *without* a proper finding of manifest injustice and without stringent adherence to the three-part mandamus test set forth in *In re Cheney*. 542 U.S. 367 (2000). In so doing, the Court of Appeals joined the Ninth Circuit in deepening a Circuit split and sowing confusion on the important threshold issue of mandamus jurisdiction in light of this Court's decision in *Mohawk*.

Second, the Appeals Court's ruling sets a dangerous precedent by creating a new substantive rule of law on the attorney-client privilege through emergency writ, instead of through the Congressionally mandated final judgment rule. Such a precedent violates this Court's long-standing judicial preference for post-judgment appeal, raising an extremely important

question of law that this Court should resolve. In *Mohawk*, this Court ruled that the collateral order doctrine should not be employed in cases of discovery disputes adjudicating attorney-client privilege. However, the Court *did* indicate that mandamus could be permitted in exceptional cases. This mandamus exception has now created confusion in the lower courts and is raising a major issue concerning the piece-meal review of attorney-client discovery orders through units of mandamus.

Third, the Court of Appeals' holding that the KBR Defendants' investigative process met the requirements for attorney-client privilege under *Upjohn Co. v. U.S.* directly contradicts this Court's decision in that case, as well as decades of subsequent case law. In so ruling, the Court vastly expanded the attorney-client privilege by wrongfully applying its protections when the Defendants expressly failed to meet basic *Upjohn* requirements, such as neglecting to notify employees of the legal nature of the investigation. 449 U.S. 383 (1981).

This Court's review of the Appeals Court's ruling in *Upjohn* raises a major issue because the invocation of this privilege during routine corporate compliance investigations is becoming increasingly prevalent; as such investigations are now required under federal law[1] and encouraged

---

[1] *See, e.g.*, Sarbanes-Oxley Act, Pub L. No. 107-204 (2002), 15 U.S.C. §78 j-1(m)(4); the *Close the Fraud Loophole Act*, Public Law 110-252, Title VI, Chapter 1, implemented by

under sentencing guidelines.[2] With this increase in attorney-run corporate compliance investigations comes the growing need for employees to be given proper warnings about the nature of such investigations, the possible consequences of their disclosures, and their protections under the law. The D.C. Circuit's opinion on such matters conflicts with the rules established in multiple Circuits, state bar association holdings on attorney ethics, numerous District Court decisions, and the overwhelming weight of other authorities on this matter, as further discussed below.

Fourth, the Court of Appeals' adoption of a newly created "substantial purpose test" completely eviscerates the well-established "primary purpose" test, which had long been the standard for measuring legal intent as required to claim attorney-client privilege. The Court's adoption of this new test directly conflicts with several Circuits that have consistently upheld the "primary purpose" test; created substantial confusion on an important legal question, particularly in the context of internal corporate investigation; and further highlights the need for this Court's clarification of the *Upjohn* and mandamus standards.

Federal Acquisition Regulations, Contractor Business Ethics, Compliance Program and Disclosure Requirements, Final Rule, 73 *Federal Register* 67064 (Nov. 12, 2008).

[2] U.S. Sentencing Commission Guidelines Manual, Section 8B2.1.

For these reasons, petitioner Harry Barko ("Barko") seeks a writ of certiorari so that the Court can resolve these conflicts cited above. Pertinent facts and procedural history are as follows.

1. Kellogg Brown & Root, Inc. ("KBR") conducted an internal Code of Business Conduct ("COBC") investigation following employee complaints of widespread bribery and other misconduct and contractor fraud during the Iraq War. Following the filing of a qui tam complaint under the False Claims Act, 31 U.S.C. §3729, et seq., KBR withheld a total of eighty-nine documents, including two investigative reports from discovery. The District Court conducted *in camera* review of the disputed documents and found that they were not privileged because they did not ask for or contain any legal advice, nor was there any reason to believe that they were prepared for any legal purpose. Appendix B, p. 29a. Rather, as stated in its March 6, 2014 opinion, the court found ample evidence that the COBC materials were prepared in the ordinary course of business as part of a routine compliance investigation required under Department of Defense contracting regulations. *Id*. The Court noted several factors in reaching this conclusion: that the employees who provided information for the investigation were not informed that it was to be used for any legal purpose; that the non-disclosure agreement the employees signed similarly lacked any indication of legal intent; and that the investigation was not conducted by

attorneys, among other findings. *Id*. at 30a-34a. For these reasons, the District Court held that the investigative reports were not privileged and were subject to disclosure.

2. Following the District Court order, the KBR Defendants asked the Court to certify this issue for interlocutory appeal. The Court denied their request, stating that the March 6th order did not contain a novel legal question, was not an issue of special consequence, and that such an appeal would prolong rather than hasten the termination of the litigation. Appendix C, p. 38a-40a. The District Court also provided a detailed clarification that the investigative reports were not protected by any privilege. As the court explained,

> "This Court's finding that the documents were not attorney client privileged or work product privileged was *not* a close question. . . . *Nothing suggests the reports were prepared to obtain legal advice*. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense. *In none of the documents is legal advice requested or offered*."

Id. at 38a (emphasis added). The Court further emphasized that the disputed reports may be vital in deciding the merits of the case. Noting that KBR's fear of producing the documents is "understandable" because they are "replete with

concrete evidence" and make "factual representations directly opposite its own COBC reports," all of which should be resolved in court. *Id*. at 37a. For these and other reasons, the District Court rejected the KBR Defendants' request for interlocutory appeal.

3. KBR filed a petition for a writ of mandamus to the Court of Appeals for the District of Columbia Circuit. Ignoring the District Court's extensive *in camera* review, the D.C. Circuit held in its June 27, 2014 opinion that the attorney-client privilege applied to the disputed COBC documents and granted a writ of mandamus accordingly. *See* Appendix A, p.1a. In reaching this conclusion, the Court of Appeals reasoned that KBR's confidentiality agreement and internal compliance process met the *Upjohn* procedural requirements; that no other adequate means of relief were available, including post-judgment appeal; and that a review of the issue is "appropriate under the circumstances." *Id*. at 4a-10a. We believe that these and other conclusions are legally erroneous and create a conflict with the law of other circuits, as discussed below.

REASONS FOR GRANTING THE PETITION

I. The Court's Decision Exacerbates Conflict and Confusion Among the Circuit Courts of Appeal.

Four circuit courts of appeal have found that waiver of attorney-client privilege is insufficient to issue a writ of mandamus under the *Mohawk* standard. *U.S. v. Copar Pumice Co.*, 714 F.3d 1197 (10th Cir. 2013); *In re Whirlpool Corp.*, 597 F.3d 858 (7th Cir. 2010); *In re Lawson Software, Inc.*, 494 Fed. Appx. 56 (Fed. Cir. 2012); *In re Shelbyzme LLC,* 547 Fed. Appx. 1001 (Fed. Cir. 2013); *U.S., ex rel Gohil v. Aventis Pharmaceuticals, Inc.*, 387 Fed. Appx. 143 (3d Cir. 2010).

In *Copar Pumice Co.*, defendants sought interlocutory appeal arguing that documents containing explicit legal advice were protected under the attorney-client and work-product privileges. 714 F.3d 1197 (10th Cir. 2013). Noting that mandamus "is not a substitute for appeal after a final judgment and is a drastic remedy invoked only in extraordinary circumstances," the Tenth Circuit denied the petition, reasoning that there are other forms of relief available and that post-judgment appeal is an adequate means of protecting the privilege. *Id.* The Court further explained that post-judgment appeal remains appropriate unless "disclosure of the allegedly

privileged or confidential information renders *impossible* any meaningful appellate review," an extremely high standard that the defendants failed to reach. *Id*. (emphasis added). In so ruling, the Court advanced the notion that even information protected under attorney-client privilege should wait for post-judgment appeal, unless "impossible" to do so.

This issue was also discussed in *In re Whirlpool Corp.*, a trademark infringement action in which a corporation sought a writ of mandamus reversing an order to produce communications between its attorneys and advertising agencies. 597 F.3d 858 (7th Cir. 2010). The Seventh Circuit Court of Appeals denied the petition on the grounds that mandamus review (as opposed to post-judgment appeal) is only justified if "the challenged district court order will be effectively unreviewable if the petitioner is forced to wait until the end of the case," similar to the high standard adopted in *Copar Pumice Co*. Furthermore, in discussing *Mohawk*'s suggestion that mandamus may be a "useful safety valve" in some cases, the Court clarified that this language refers *only* to serious judicial abuse that was not present in this case, particularly because the lower court had already considered all arguments fairly and adequately. *Id*. at 860 ("This is not such a case [that falls under *Mohawk*'s 'safety valve' language]. The district court carefully considered Whirlpool's arguments . . . [Defendants] fail to establish that the district court's rejection of Whirlpool's

position was patently erroneous or usurpative in character."). In so ruling, the Seventh Circuit upheld the notion that mandamus review is inappropriate absent clear and extraordinary judicial error, particularly when the lower Court has already considered all arguments thoroughly.

Similarly, in *In re Lawson Software, Inc.*, the defendant requested mandamus review in opposition to the District Court's order to produce documents that were supposedly protected by the work product and attorney-client privileges. 494 Fed. Appx. 56 (Fed. Cir. 2012). In denying the petition, the Federal Circuit Court of Appeals explained that mandamus review of attorney work product cases is "limited" under the *Mohawk* standard and that "[t]he justification for immediate appeal must be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Id*. at 58. The Court rejected the petitioner's argument that privilege would be irrevocably lost without immediate appeal, arguing that post-judgment appeal remains appropriate under *Mohawk*, even when privileged information is involved. The Federal Circuit followed similar reasoning in *In re Shelbyzme LLC*, where it held that mandamus was not appropriate even though the disputed documents contained legal advice because other adequate means of relief were available and that, per *Mohawk*, mandamus review is only appropriate in "extraordinary circumstances" far beyond typical attorney-client privilege disputes. 547 Fed. Appx. 1001 (Fed. Cir. 2013). Through

such rulings, the Federal Circuit has continuously held that mandamus review is not appropriate for cases concerning privileged documents.

Lastly, in a brief opinion in *U.S., ex rel Gohil v. Aventis Pharmaceuticals, Inc.*, the Third Circuit followed a similar line of reasoning in denying a writ of mandamus for a petitioner who objected to the Court's ordering production of potentially privileged disclosure statements. 387 Fed. Appx. 143 (3d Cir. 2010). The Court explained that, *even if* it were to assume that the documents truly fell under the attorney-client privilege, the court remained "far from convinced that there is no other adequate means to obtain relief, or that the writ is an appropriate remedy in this case." *Id*. at 147. In so ruling, the Third Circuit joined the aforementioned Seventh, Tenth, and Federal Circuits in holding that writs of mandamus should not be issued for orders implicating attorney-client privilege.

In conflict with the four circuits cited above, the Ninth and D.C. Circuits have held that a discovery order implicating the attorney-client privilege *is* appealable through a writ of mandamus. In particular, the Ninth Circuit has issued two opinions since *Mohawk* in which it adopted its own, lower standard for mandamus review. *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010); *Perez v. U.S. Dist. Ct., Tacoma*, No. 13-72195, 2014 U.S. App. Lexis 7301 (9th Cir., April 18, 2014). In *Hernandez*, the Ninth Circuit found that a writ of mandamus was

justified because the risk of divulging communications between a client and his lawyer was an "extraordinary circumstance" under the *Mohawk* standard, in direct opposition to the Circuit Courts cited above. Similarly, in *Perez*, the Ninth Circuit again granted a writ of mandamus to preserve attorney-client privilege, arguing that post-judgment appeal is not an adequate means of relief because "[o]nce the identities of the 250 anonymous employees are disclosed, they cannot be protected again by a successful appeal or otherwise." 2014 U.S. App. Lexis 7301 at *15. Such reasoning, also reflected in the D.C. Circuit's June 27, 2014, order at issue in this petition, demonstrates a split among the Circuits that has yet to be resolved. *See* Appeals Court ruling, Appendix A at 16a (citing *Hernandez*). Accordingly, this Court should grant certiorari to address this question directly.

II. The Appeals Court Has Transformed the Standard for Mandamus and Sowed Confusion on an Important Threshold Issue, Contrary to this Court's Decisions in *Mohawk* and *In re Cheney*.

The D.C. Circuit's June 27, 2014 order, in addition to the Ninth Circuit's prior orders, directly contradicts long-standing judicial standards on issuing writs of mandamus. The language in *Mohawk* describing mandamus as a "useful safety valve" to address serious error urgently requires this Court's clarification to prevent other Courts from improperly loosening

the standards for mandamus jurisdiction and to preserve Congressional intent favoring post-judgment appeal.[3] Furthermore, this Court's decision in *Mohawk* has tempted courts to freely substitute collateral order with mandamus, contrary to the narrow confines that Congress intended and creating further the need for this Court to clarify the mandamus exception discussed in *Mohawk*. The Ninth and D.C. Circuits have wrongfully construed *Mohawk*'s "safety valve" language as an expansion of mandamus jurisdiction, when, on the contrary, this language actually *limits* the use of mandamus strictly for extraordinary circumstances of irreparable harm. Therefore, the Ninth and D.C. Circuits have gravely misinterpreted this Court's decision in *Mohawk* and have failed to meet the traditional three-part test for issuing writs of mandamus.

---

[3] *See Cobbledick v. U.S.*, 309 U.S. 323, 325 (1940) ("Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from *only* when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and *not* a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself *against* enfeebling judicial administration") (emphasis added). *See also U.S. v. Nixon*, 418 U.S. 683 (1974) ("The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.").

As established in *In re Cheney*, "[t]hree conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have 'no other means to attain the relief he desires,' (2) the mandamus petitioner must show that his right to the issuance of the writ is 'clear and indisputable,' and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." 542 U.S. at 380-81 (2004). The D.C. Circuit Court of Appeals expressly misapplied this standard, unjustifiably broadening the criteria for mandamus and setting a dangerous precedent that could undermine judicial efficiency in the future. Specifically, the D.C. Circuit jettisoned the irreparable harm requirement in *Cheney* and ignored *Mohawk*'s teaching that an interlocutory attorney-client discovery order does *not* constitute irreparable harm. By watering down the irreparable harm standard, the D.C. and the Ninth Circuits have opened the door to parties seeking mandamus relief that are clearly not permitted under *Mohawk* and *Cheney*. The three components of the *Cheney* test are discussed below.

A. The Appeals Court's Dismissal of Post-Judgment Appeal Has Grave Implications for Mandamus Jurisdiction and Judicial Efficiency.

The first criterion of the *In re Cheney* test requires that the mandamus petitioner have "no other adequate means to attain the relief he desires." 542 U.S. 367 at 380. The most common alternative means of relief, which is most pressing for this petition, is ordinary post-judgment appeal. In its June 27, 2014 opinion, the Court of Appeals dismissed post-judgment appeal as inadequate, reasoning that such an appeal would come too late because the privileged materials will have already been released. Appendix A at p. 15a (noting that post-judgment appeal will "come too late because the privileged materials will already have been released."). Though *Mohawk* states that post-judgment appeals generally suffice in cases involving attorney-client privilege, the Court rejected this argument, reasoning that *Mohawk*'s "safety valve" language suggested the use of mandamus as an alternative means for relief. *Mohawk*, 558 U.S. at 111. The Court's interpretation of this portion of *Mohawk* is flawed for several reasons.

As a threshold matter, it is important to note that *Mohawk* does not recommend broad use of mandamus, but instead recommends it *only* in "extraordinary circumstances, i.e., when a disclosure amounts to a judicial usurpation of

power, or otherwise works a manifest injustice."[4] *Id*. (internal quotations omitted). For the Court of Appeals to issue a writ of mandamus in a case in which there is no irreparable harm and without making any legitimate showing of "extraordinary circumstance," "manifest injustice," or any other type of unjustified harm is a gross misinterpretation of *Mohawk* that would vastly expand the use of mandamus at great expense to the judicial system.[5] Although the disputed documents likely contain highly incriminating information showing proof of alleged bribery (as described by the District Court following its *in camera* review[6]), such information does not constitute the type of irreparable harm that would justify mandamus. Accordingly, the District Court's ruling that the materials were *not*

---

[4] The terms "extraordinary circumstances," "manifest injustice," and "usurpation of power" may be traced back to 1940's case law, in which courts consistently held that mandamus may only be granted if the court has exceeded its jurisdiction or has entirely thwarted the prospect of appellate review. *See, e.g. De Beers Consol. Mines, Ltd. v. U.S.*, 325 U.S. 212 (1945); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). We believe that neither of these conditions has been met here.

[5] *See, e.g., Copar Pumice Co.*, 714 F.3d at 1209 (noting the "inconvenience and cost of piecemeal review."). *See also Mohawk Industries, Inc.*, 558 U.S. at 101 (explaining that intermediate appeal brings "institutional costs" including "unduly delaying the resolution of district court litigation and needlessly burdening the courts of appeals.").

[6] *See* March 6, 2014 Opinion, Appendix B at 25a (District Court describing the investigative reports as "eye-openers" showing widespread illegal conduct, after having reviewed the documents *in camera*).

privileged, made after reviewing each document *in camera*, does not constitute the type of irreparable harm necessary to justify mandamus under either *Mohawk* or *Cheney*.[7]

To illustrate the lack of irreparable harm in this case, it is helpful to compare KBR's investigative reports to the types of documents that courts *have* found contained information so harmful that mandamus was justified. For example, in *In re City of New York*, cited by the KBR Defendants themselves, the petitioner sought disclosure of a police department's intelligence and field reports following allegations of improper conduct. 607 F.3d 923 (2d Cir. 2010). The court rightly held that post-judgment appeal was inadequate because disclosure would "risk undermining important NYPD investigatory procedures and thereby endangering the safety of law enforcement personnel and countless New York residents," a type of harm that is extremely "severe" and "difficult to remedy." *Id.* at 936. This level of risk, extreme enough to endanger the general public, is surely a type of irreparable harm not correctable on post-judgment appeal. Unlike the documents in *In re City of New York*, however, we have no reason to believe (and the Defendants have not claimed) that the KBR audit reports contain any information that would cause

---

[7] March 11, 2014 Opinion, Appendix C at 37a (District Court explaining, after its *in camera* review of the documents, that "KBR makes factual representations directly opposite its own COBC reports" that must still be resolved in court before reaching final judgment).

such an extreme degree of harm justifying mandamus, nor have they explained why such information could not be redacted.

For these reasons, the KBR Defendants fail to make a compelling argument as to why this matter must be addressed through immediate appeal when the option to vacate and remand for a new trial (with the protected material excluded) remains a viable option. *See Mohawk*, 558 U.S. 100 at 109 ("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.").

As this Court explained in *Mohawk*, courts often require litigants to wait for post-judgment appeal *even when* there is a highly pressing matter at hand. *Id*. at 108 ("We routinely require litigants to wait until *after* final judgment to vindicate valuable rights, *including* rights central to our adversarial system") (emphasis added). The Court goes on to explain that 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." *Id*. In other words, that the attorney-client privilege is significant in an abstract sense is not sufficient for mandamus; rather, the KBR Defendants must show that some vital interest is so imperiled that

immediate appeal is urgently necessary. KBR has made no such showing in this case, nor did the District Court find any such risk following its *in camera* review. Therefore, post-judgment appeal remains an adequate means of relief and the Appeals Court erred in granting a writ of mandamus in its June 27, 2014 order.

B. The Appeals Court's Finding of "Clear Legal Error" Conflicts with Decisions of Other Courts.

1. *The Appeals Court's finding of "clear legal error" was wrong.*

The second criterion for granting a writ of mandamus requires the petitioner to show that his right to the writ is "clear and indisputable." *In re Cheney*, 542 U.S. 367 at 380. To establish such a right, the petitioner must show that the lower court's order constituted "clear" legal error. In its June 27, 2014 order, the Appeals Court held that the District Court committed such error, reasoning that KBR's investigation met *Upjohn* standards and that the Court, therefore, erred in dismissing the privilege. Accordingly, the Appeals Court ruled that this supposed error provides petitioners a "clear and indisputable right" to a writ of mandamus. This interpretation is severely misguided.

The District Court did not commit any legal error, let alone a "clear" one, because the employees were *not* made sufficiently aware that

the investigation was for legal purposes as required under *Upjohn*, and thus the District Court was correct in denying privilege in part on that ground. *See* Appendix B, p. 36a ("[E]mployees who were interviewed were *never informed* that the purpose of the interview was to assist KBR in obtaining legal advice") (emphasis added). As stated in the first scholarly article published on this case, "KBR failed to take the steps, known to any first year law student, to preserve the attorney-client privilege," and thus the true error lied in KBR's procedural missteps, not in the District Court's application of the *Upjohn* standard. Michael Volkov, *Redefining the Relationship of the General Counsel and Chief Compliance Officer*, RAND Corp., 62 (2014). Additionally, the District Court was also correct in denying privilege on other grounds, including its detailed *in camera* review of the documents themselves, as clarified in its decision denying interlocutory appeal. Appendix C, p. 36a. By focusing solely on the District Court's argument that the KBR investigation was business-related because of its mandatory nature, the Appeals Court has ignored these other, more basic grounds for denying privilege.

Additionally, the non-disclosure agreement that employees signed during the audit does not bear even a passing resemblance to a proper *Upjohn* warning. Volkov, RAND Corp. at 63. While the agreement states that the investigation was "confidential," such statements do not show legal purpose as required under *Upjohn*, nor do

they communicate that legal counsel would conduct the investigation (which was actually carried out by the KBR security department) or would view the reports. *Id.*

Furthermore, while the D.C. Circuit reasons that "nothing in *Upjohn* requires a company to use magic words" to preserve privilege, that case *does* require that employees be sufficiently aware of the legal nature of the audit, a factor that is glaringly absent here. Similarly, the Appeals Court also reasoned that the investigators adequately showed legal intent because the non-disclosure agreement contained an instruction that employees may not discuss their interviews "without the specific advance authorization of KBR General Counsel." However, this analysis of the non-disclosure agreement misses the point. The employees were told that the interview was confidential and that they would need permission before discussing it, not because the company was obtaining legal advice, but because the investigation could harm the company's business interests. Tellingly, the language in the agreement focused solely on the *business* purpose of maintaining a strong reputation in the corporate world, as the agreement itself states that outside disclosure could "reflect adversely on KBR *as a company* and/or *KBR performance in the Middle East Region*." This business-focused statement did not inform employees that the interview was being conducted under the auspices of the attorney-client privilege or for the purpose

of obtaining legal advice for the company (which was nowhere mentioned).

The Appeals Court's decision that the KBR non-disclosure agreement met the requirements of *Upjohn* is in direct conflict with numerous appeals courts holdings, scores of District Court rulings, requirements of state bar rules nationwide, and all scholarly articles on this matter. *See, e.g., U.S. v. ISS Marine Servs.*, 905 F.Supp. 2d 121 (D.C.D.C. 2012) (noting that privilege "depends on how the investigation is structured before it is even begun, what the employees are told is the purpose of the interviews. . . ."); *Gutierrez v. Johnson & Johnson*, No. 01-5302, 2003 U.S. Dist. Lexis 28603 (N.J. 2003) (discussing the importance of giving unrepresented employees proper notice of the legal nature of investigations); *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, American Bar Association White Collar Crime Committee (2009); Wade Davies, *Upjohn Warnings: Best Practices and Tennessee Ethical* Requirements, Tennessee Bar Association, Oct. 27, 2010 (noting that a failure to inform employee of the legal nature of the investigation may render the information unusable by the organizational client); *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid*, Jones Day, Jan. 2013, at 18 ("[*P*]*rior to* conducting the employee interview, the lawyer must sufficiently and unequivocally advise the

employee" of the legal nature of the audit and of the scope of the attorney-client privilege).

Unlike the company in *Upjohn*, KBR has failed to establish that the interviewed employees were adequately instructed that the interviews were necessary for KBR to obtain legal advice, or that the security investigators were working at the direction of KBR's attorneys to obtain legal advice, as opposed to conducting a routine compliance investigation pursuant to its Code of Business Conduct. Taken together, these shortcomings show that employees were not sufficiently aware that they were being questioned for the purpose of obtaining legal advice, as required by *Upjohn*.

2. The District Court was correct in applying the primary purpose test.

Additionally, the Appeals Court further reasoned that the District Court erred in applying the primary purpose test when determining whether the investigation had true legal purpose. This argument is gravely misinformed for several reasons. Prior to the Appeals Court's decision, the primary purpose test was a long-standing, widely accepted standard for determining whether employee statements in the context of an internal corporate investigation were privileged.[8] By eviscerating this long-established test, the Appeals Court broke with a long line of judicial

[8] See Section IV below for further discussion on the prevalence of this standard across the Circuits.

precedent and established a brand new standard for judging the application of the attorney-client privilege in the context of an internal corporate investigation.

The Court adopted a "substantial purpose test" for determining legal intent, a test that had never before been used by any court. The Court of Appeals' sole authority for using its mandamus jurisdiction to establish this new precedent and reject the overwhelming (if not unanimous) weight of existing authority was a Restatement that does not cite to a single source of judicial authority. *See* Appendix A, p.11a-12a (citing 1 Restatement (Third) of the Law Governing Lawyers § 72, Reporter's Note, 554 (2000), stating that "in general, American decision agree" on the substantial purpose test—with no citations to any such decisions). Accordingly, the District Court could not have erred in failing to apply a test that did not exist and has never been followed by any other court.[9]

---

[9] Another cause for these errors was the Court's decision to initially analyze this case as an ordinary merits appeal instead of carefully considering whether it had jurisdiction under mandamus. As reflected in the decision itself, the Court went straight to the merits of the decision. Before it even considered whether or not the district court's unpublished, interlocutory discovery order could be appropriately reviewed under Congress' statutorily required final judgment rule, the court addressed the merits of the discovery ruling and adopted a new legal standard for judging the privilege in the context of internal corporate investigations, i.e. the "substantial purpose test." This backwards approach toward deciding mandamus exasperated the risk that mandamus would be improperly

For these reasons, the District Court did not commit "clear" legal error as understood in the context of granting a writ of mandamus.

C. A Writ of Mandamus is Not "Appropriate Under the Circumstances."

Assuming *arguendo* that KBR met the irreparable harm standard, and in addition to the "clear and indisputable right" standard, the writ still should have been denied because KBR did not show that the writ was "appropriate under the circumstances." *In re Cheney*, 542 U.S. 367 at 381. In particular, there is nothing in this case that prevented KBR from seeking review through final order, or through the numerous alternative options for relief described in *Mohawk*. 558 U.S. at 110. Furthermore, the District Court denied KBR's application for interlocutory review, and there is nothing about an unpublished District Court decision, based on *in camera* review of the contested documents, that would warrant the extraordinary remedy of mandamus.

---

granted. Once a court rules on the merits of an issue, and establishes a new rule of law, it is difficult to see how the court would then reject hearing the case on procedural grounds, thereby rendering its merits ruling dicta. Furthermore, because the D.C. Circuit's local procedural rules on mandamus applied in this case were so truncated, the risk of error in treating a mandamus as a merits appeal was exasperated.

Acknowledging that this is a very broad standard, the Appeals Court reasoned that mandamus is "appropriate" in this case because the District Court ruling would "vastly diminish the attorney-client privilege in the business setting." Appendix A, p.17a. The Court goes on to explain that "many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations." *Id*. at 18a. As with the rest of the Appeals Court's decision, this argument conveniently ignores that following basic procedural requirements under long-established *Upjohn* doctrine would entirely eliminate any perceived harm to internal business investigations. Here, the KBR reports are subject to disclosure *not* because such documents cannot be protected in business settings, but because the KBR Defendants failed to follow basic procedures "known to any first year law student." Volkov, RAND Corp. at 63. As explained in a RAND white paper discussing this case,

> **"**KBR's argument [that the ruling would undermine corporations' ability to conduct internal investigations] assumed too much, and ignores the fact that *its own procedural missteps* have placed it in a situation where they have nothing left to argue but dramatic distractions from basic legal principles. KBR's attempt to expand the 'privilege' and keep clearly discoverable information away from the regulators and the public would be contrary to the public interest and to the

> purposes of the attorney-client privilege itself."

Id. at 65 (emphasis added). The Appeals Court's reasoning that mandamus is "appropriate" because the District Court's ruling would "vastly diminish" corporate investigations is entirely speculative and unfounded.

In fact, it is hard to imagine how one unpublished interlocutory discovery order based upon an *in camera* review, in the context of KBR's own failure to invoke the attorney-client privilege procedures established within its own compliance program, could have the negative impact the Court found. Additionally, the Appeals Court's expansion of mandamus jurisdiction would be detrimental to judicial efficiency and runs contrary to long-established preference for post-judgment appeal. *See, e.g., Copar Pumice Co.*, 714 F.3d at 1209 (noting the "inconvenience and cost of piecemeal review"). For these reasons, mandamus was not "appropriate under the circumstances."

III. The Appeals Court's Decision Deepens a Conflict of Authority on an Important and Recurring Issue.

In addition to the Appeals Court's misapplication of the mandamus standard, this Court should also grant certiorari because the Appeals Court's ruling that KBR's investigative process met the procedural requirements set in

Upjohn Co. v. U.S. directly contradicts decades of case law interpreting *Upjohn*.

In *Upjohn*, the company asked employees to fill out questionnaires following allegations of illegal bribery that would be provided to attorneys for review. This Court found that these communications were protected under the attorney-client privilege because they "concerned matters within the scope of the employees' corporate duties, and the employees themselves were *sufficiently aware* that they were being questioned in order that the corporation could obtain legal advice." *Id.* at 394 (emphasis added). The Court emphasized a number of facts in supporting this conclusion, all of which were absent in the KBR non-disclosure agreement.

Specifically, nowhere in the KBR agreement were the employees informed that the information was to be given to an attorney, where in *Upjohn*, this was made clear. *Upjohn Co.*, 449 U.S. at 394 (noting that the questionnaire specifically named the General Counsel conducting the investigation and made clear the legal implications of their disclosures). In so ruling, this Court held that corporate employees taking part in internal audits must be "sufficiently aware" that their disclosures would be used for legal purposes in order to claim attorney-client privilege. Fundamental to such awareness is the simple act of *telling* the employees that their disclosures would be given

to a lawyer, a very basic level of notice that is strikingly absent here.

In the decades following *Upjohn*, Courts have carefully reviewed both the ethical and legal requirements for a company to use the *Upjohn* precedent to invoke the attorney-client privilege. For example, in the oft-cited case of *U.S. v. Ruehle*, the Ninth Circuit outlined three components of a proper *Upjohn* warning as follows:

> "Such warnings [1] make clear that the corporate lawyers do not represent the individual employee; [2] that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and [3] that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure."

583 F.3d 600 (9th Cir. 2009). These criteria for an *Upjohn* warning are well established and have been referenced widely in the years since. *See, e.g., U.S. v. Graf*, 610 F. 3d 1148 (9th Cir. 2010) (referencing *Ruehle* in holding that the party asserting privilege has the burden of establishing the privileged nature of the communication); *In re Pacific Pictures Corp.*, 679 F.3d 1121 at n.4 (referencing *Ruehle* in noting that communications be made for the legal, not business, purposes). Similarly, in *Int'l Bd. of*

Teamsters, the Second Circuit affirmed the importance of *Upjohn* warnings by explaining that "attorneys in all cases are *required* to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as possible." 119 F.3d 210, 217 (2d Cir. 1997) (emphasis added).

Furthermore, the American Bar Association issued an influential report regarding *Upjohn* warnings based in part on the importance of attorney representation in balancing the ethical issues involved in internal corporate investigations. ABA White Collar Crime Committee (2009). The ABA report is completely consistent with the requirements set forth in *Ruehle*. *See also* Craig D. Margolis and Lindsey R. Vaala, *Navigating Potential Privilege Pitfalls in Conducting Internal Investigations:* Upjohn *Warnings, "Corporate Miranda," and Beyond*, Financial Fraud Law Report, Feb. 2011, at 121 (consistent with *Ruehle*); Lee G. Dunst and Daniel J. Chirlin, *A Renewed Emphasis on* Upjohn *Warnings*, Andrews Litigation Reporter, Sept. 2011 (consistent with *Ruehle*); *Beefing Up 'Corporate Miranda Warnings': Averting Misunderstanding & Detrimental Consequences in Internal Investigations*, Wall Street Lawyer, Aug. 2009 (consistent with *Ruehle*).

The KBR non-disclosure agreement, affirmed by the Court of Appeals, is completely counter to the decision in *Ruehle*.

Moreover, the requirements for appropriate *Upjohn* warnings are so significant that attorneys can subject themselves to discipline for failing to follow them. The New York State Bar states that a lawyer must clearly explain that he or she "is the lawyer for the corporation and not for the employee," and that the failure to do so may be grounds for discipline. Opinion #650, New York State Bar Association Committee on Professional Ethics (June 30, 1993). In this case, the D.C. Circuit's decision to uphold privilege despite KBR's procedural negligence is in conflict with *Ruehle*, the teachings of the ABA, and various ethical and bar disciplinary rules, such as the state of New York.

First, in *Ruehle*, the Ninth Circuit first held that corporate lawyers should make clear that they represent the corporation, not the individual employee. In KBR's case, the attorneys' involvement in the investigation was not made clear and there was no warning whatsoever that the individual employee was not being represented by the attorneys who were conducting (or supervising) the investigation.

Second, KBR's investigation failed to state anything about the attorney-client privilege, implicitly or explicitly. In fact, the words "attorney-client privilege" were not raised anywhere in the non-disclosure agreement, but instead, the need for confidentiality was stated as a business reason.

Third, *Ruehle* says that employees should be told that the waiver of privilege is at the sole discretion of the company. KBR's non-disclosure agreement failed to state this; rather, it stated only that employees must seek permission from company lawyers before discussing any underlying facts of the fraud with anyone else. Such a restriction does not communicate the risks of potential legal exposure, but instead simply instructs the employees to remain silent for business purposes.

Furthermore, there was no mention that the employee may consult with an attorney, and this important right that was not even implied because the employees were not informed that the investigation was being conducted by an attorney or under the auspices of the Office of General Counsel.

The Court of Appeals' June 27, 2014 decision expressly violates this Court's opinion in *Upjohn* and unjustifiably threatens to undermine decades of established case law, in addition to upholding an *Upjohn* warning that is inconsistent with numerous bar rules. Certiorari is justified because the D.C. Circuit mandamus opinion now conflicts with the majority of other Circuits, and the question of what a lawyer is required to say in order to maintain privilege under *Upjohn* is of vital importance.

Furthermore, given the growth of voluntary and mandatory internal compliance

programs, most of which have some involvement by attorneys, it is imperative that this Court resolves the conflicts caused by the Appeals Court ruling on both *Upjohn* warnings and the substantial purpose test. Among the laws which now require or encourage corporate compliance programs are the Close the Fraud Loophole Act, Public Law 110-252, Title VI, Chapter 1 (requiring compliance programs under most government contracts), the Sarbanes-Oxley Act, 15 U.S.C. §78 j-1(m)(4) (requiring publically traded companies to have employee concerns programs), and the U.S. Sentencing Commission Guidelines Manual, Section 8B2.1 (encouraging corporations to adopt voluntary compliance programs). Given the proliferation of corporate compliance programs since this Court's decision in *Upjohn* it is important that the warnings given employees satisfy the now well established rules reflected in numerous court decisions and the ethics guidance from the ABA, all of which are in conflict with the Appeals Court's decision upholding the KBR non-disclosure agreement as an appropriate *Upjohn* warning.

Taken together, the many factors described above demonstrate that the employees were not sufficiently aware that the information disclosed would be used for any legal purpose, as required to claim privilege under *Upjohn*. The KBR Defendants failed to meet standard procedural requirements and this Court should grant certiorari to correct this drastic deviation from long-standing judicial standards.

IV. The Appeals Court's Use of the "Substantial Purpose" Test Instead of the "Primary Purpose" Test Eviscerates Decades of Established Precedent and Creates Confusion on a Major Federal Issue.

The Appeals Court's errors in misinterpretations of both the mandamus and *Upjohn* standards are further compounded by its wrongful use of a "substantial purpose test" instead of the "primary purpose test" in determining whether the investigative documents were produced for legal purposes. In its June 27, 2014 decision, the Appeals Court held that the "primary purpose" test is inappropriate because it supposedly requires that the *sole* purpose of the privilege be to obtain or provide legal advice, and thus fails to accommodate communications that have both legal and business purposes. Appendix A, p. 10a-11a. Reasoning that it is "not correct for a court to presume that a communication can have only one primary purpose," the Court then adopted the "substantial purpose" test extending the privilege to any communication in which providing or obtaining legal advice is a "substantial" purpose. *Id*.

Not only is the Appeals Court's interpretation of the primary purpose test incorrect, its adoption of this vague new standard severely weakens the requirements for attorney-client privilege and risks extending its protections to communications that are not truly legal in

nature. As the Appeals Court explains, a communication is privileged under this "substantial purpose" test if obtaining or providing legal advice was "*one of* the significant purposes of the communication." Appendix A at 11a (emphasis added). Such a low, vague standard fails to adequately define "significant" or "substantial," two very broad terms that can encompass a wide range of material that may very likely have only a small legal component, creating the legal conundrum that "when everything is privileged, nothing is privileged." Volkov, RAND Corp. at 66 (warning against wide-ranging "blanket" privileges will severely weaken corporate investigation). By adopting such a broad test with no specific parameters, the Appeals Court's decision opens the door to floods of frivolous attorney-client privilege claims in which any party can likely argue that at least *one of* a communication's purposes was related to legal advice, given the low threshold and lenient standards of this test. Such an outcome is expressly contrary to judicial preference for thorough discovery,[10] threatens to hinder efficiency in the courts, and further demonstrates the pressing need for proper *Upjohn* warnings.

In addition to the substantive errors associated with this approach, the Appeals Court's adoption of the "substantial purpose" test also involves a number of grave procedural errors.

---

[10] *See, e.g.,* Fed. R. Civ. P. 26(a) (noting that the Federal Rules of Civil Procedure "strongly favor full discovery whenever possible.").

As discussed in section II-B-2 above, the use of this test unjustifiably contradicts decades of established case law in which several Circuits have upheld the "primary purpose" test as the proper means of measuring legal intent. *See, e.g., U.S. v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981) (noting that privilege applies if "the primary motivating purpose behind the creation of the document was to aid in possible future litigation."); *In re County of Erie*, 473 F.3d 413, 417 (2d Cir. 2007) (affirming that the primary purpose test is appropriate in determining scope of attorney-client privilege); *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) ("[O]nly where the document is primarily concerned with legal assistance does it come within the privilege"). To make matters worse, the Appeals Court supported this new standard without referencing a single source of judicial authority, citing only to a Restatement that does not describe any case or authority adopting this approach. The Court further erred in granting this decision through emergency writ, which is simply not the proper vehicle through which to set such sweeping precedent on a major federal issue.

Together, these errors threaten to cause substantial confusion on the vital matter of attorney-client privilege, particularly in the context of internal corporate investigation. Such confusion on an important legal question highlights the need for this Court's clarification of the *Upjohn* warning standard, and further

demonstrates the folly in establishing such wide-ranging precedent through a truncated, emergency order.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this Petition. This Court should grant the Petition to resolve the conflict among the courts of appeals as to whether a district court's discovery order finding waiver of the attorney-client privilege and compelling production of privileged information is immediately appealable through a writ of mandamus in light of *Mohawk Industries, Inc. v. Carpenter*. Furthermore, this case provides an opportunity for the Court to reaffirm the standards for preserving attorney-client privilege as set forth in *Upjohn Co. v. U.S.* and to establish whether the "primary purpose" or "substantial purpose" test is the appropriate means of determining legal intent for purposes of the attorney-client privilege.

Respectfully submitted,

Stephen M. Kohn
(Counsel of Record)
Michael D. Kohn
David K. Colapinto
KOHN, KOHN AND COLAPINTO, LLP
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980
(202) 342-6984 (Fax)
Email: sk@kkc.com

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5055
D.C. Docket No. 1:05-CV-1276

In re KELLOGG BROWN & ROOT, INC., et al.,

Petitioners.

[Decided June 27, 2014]

On Petition for Writ of Mandamus

John P. Elwood argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were John M. Faust, *Craig D. Margolis, Jeremy C. Marwell, and Joshua S. Johnson*.

Rachel L. Brand, Steven P. Lehotsky, Quentin Riegel, Carl Nichols, Elisebeth C. Cook, Adam I. Klein, Amar Sarwal, and *Wendy E. Ackerman* were on the brief for amicus curiae Chamber of Commerce of the United States of America, et al. in support of petitioners.

Stephen M. Kohn argued the cause for respondent. With him on the response to the petition for writ of mandamus were *David K. Colapinto* and *Michael Kohn*.

Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

I

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S.

Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents *in camera,* the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.,* No. 05-cv-1276, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3.

KBR vehemently opposed the ruling. The company asked the District Court to certify the

privilege question to this Court for interlocutory appeal and to stay its order pending a petition for mandamus in this Court. The District Court denied those requests and ordered KBR to produce the disputed documents to Barko within a matter of days. *See United States ex rel. Barko v. Halliburton Co.,* No. 1:05–cv–1276, 2014 WL 929430 (D.D.C. Mar. 11, 2014). KBR promptly filed a petition for a writ of mandamus in this Court. A number of business organizations and trade associations also objected to the District Court's decision and filed an amicus brief in support of KBR. We stayed the District Court's document production order and held oral argument on the mandamus petition.

The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course inappropriate. If the District Court's ruling was erroneous, the remaining question is whether that error is the kind that justifies mandamus. *See Cheney v. U.S. District Court for the District of Columbia,* 542 U.S. 367, 380–81 (2004). We address those questions in turn.

II

We first consider whether the District Court's privilege ruling was legally erroneous. We conclude that it was.

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law—as interpreted by United States courts in the light of reason and

experience." Fed.R.Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. See 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000); *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

In *Upjohn*, the Supreme Court held that the attorney-client privilege applies to corporations. The Court explained that the attorney-client privilege for business organizations was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (internal quotation marks and citation omitted). The Court stated, moreover, that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the

lawyer to enable him to give sound and informed advice." *Id.* at 390. That is so, the Court said, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. In *Upjohn* the communications were made by company emplotees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's "compliance with the law." *Id.* at 392; *see id.* at 394. The Court ruled that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

First, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel,

whereas here the investigation was conducted in-house without consultation with outside lawyers. But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case*, 737 F.2d at 99. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. c, at 551.

Second, the District Court noted that in *Upjohn* the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. See FTC v. TRW, Inc., 628 F.2d 207, 212 (D.C. Cir. 1980); see also 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted.").

So that fact, too, is not a basis on which to distinguish *Upjohn*.

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in Upjohn employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn*, 449 U.S. at 387 (Upjohn's managers were "instructed to treat the investigation as 'highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *3 n.33 (D.D.C. Mar. 6, 2014).

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of

Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney- client communications may have had both legal and business purposes. *See id*. at *2; *see also In re Sealed Case*, 737 F.2d at 98-99. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. 2014 WL 1016784, at *2. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than

for the purpose of obtaining legal advice." *Id.* at *3; *see id.* at *3 n.28 (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Underthe District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney- client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant

swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." Upjohn, 449 U.S. at 392. We reject the District Court's but-for test as inconsistent with the principle of Upjohn and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American

decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation – "one of the significant purposes" – as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation – although required by law – does not transform quintessentially legal advice into business advice.").

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to

obtain or provide legal advice into business advice."). In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal advice, the District Court applied the wrong legal test and clearly erred.

III

Having concluded that the District Court's privilege ruling constituted error, we still must decide whether that error justifies a writ of mandamus. *See* 28 U.S.C. § 1651. Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). In keeping with that high standard, the Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (quoting and citing *Kerr v. United States*

District Court for the Northern District of California, 426 U.S. 394, 403 (1976)). We conclude that all three conditions are satisfied in this case.

A

First, a mandamus petitioner must have "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380. That initial requirement will often be met in cases where a petitioner claims that a district court erroneously ordered disclosure of attorney-client privileged documents. That is because (i) an interlocutory appeal is not available in attorney-client privilege cases (absent district court certification) and (ii) appeal after final judgment will come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

The Supreme Court has ruled that an interlocutory appeal under the collateral order doctrine is not available in attorney- client privilege cases. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106-13 (2009); *see also* 28 U.S.C. § 1291. To be sure, a party in KBR's position may ask the district court to certify the privilege question for interlocutory appeal. *See* 28 U.S.C. § 1292(b). But that avenue is available only at the discretion of the district court. And here, the District Court denied KBR's request for certification. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv- 1276, 2014 WL 929430, at *1-3 (D.D.C. Mar. 11, 2014). It is also

true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an "adequate" means of relief in these circumstances. *See In re Sealed Case*, 151 F.3d 1059, 1064-65 (D.C. Cir. 1998); *see also In re City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (same).

On the other hand, appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, "the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). As this Court and others have explained, post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. *See id.*; *see also In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) ("a remedy after final judgment cannot unsay the confidential information that has been revealed") (quoting *In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987)).

For those reasons, the first condition for mandamus – no other adequate means to obtain relief – will often be satisfied in attorney-client privilege cases. Barko responds that the Supreme Court in *Mohawk*, although addressing only the availability of interlocutory appeal under the collateral order doctrine, in effect also barred the use of mandamus in attorney-client privilege cases. According to Barko, *Mohawk* means that the first prong of the mandamus test cannot be met in attorney-client privilege cases because of the availability of post-judgment appeal. That is incorrect. It is true that *Mohawk*

held that attorney-client privilege rulings are not appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109. But at the same time, the Court repeatedly and expressly reaffirmed that *mandamus* – as opposed to the collateral order doctrine – remains a "useful safety valve" in some cases of clear error to correct "some of the more consequential attorney-client privilege rulings." *Id.* at 110-12 (internal quotation marks and alteration omitted). It would make little sense to read *Mohawk* to implicitly preclude mandamus review in all cases given that *Mohawk* explicitly preserved mandamus review in some cases. Other appellate courts that have considered this question have agreed. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010); *In re Whirlpool Corp.*, 597 F.3d 858, 860 (7th Cir. 2010); *see also In re Perez*, 749 F.3d 849 (9th Cir. 2014) (granting mandamus after *Mohawk* on informants privilege ruling); *City of New York*, 607 F.3d at 933 (same on law enforcement privilege ruling).

B

Second, a mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by

the district court on attorney-client privilege matters. In this case, for the reasons explained at length in Part II, we conclude that the District Court's privilege ruling constitutes a clear legal error. The second prong of the mandamus test is therefore satisfied in this case.

C

Third, before granting mandamus, we must be "satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. As its phrasing suggests, that is a relatively broad and amorphous totality of the circumstances consideration. The upshot of the third factor is this: Even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify mandamus.

In this case, considering all of the circumstances, we are convinced that mandamus is appropriate. The District Court's privilege ruling would have potentially far-reaching consequences. In distinguishing *Upjohn*, the District Court relied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most importantly, the District Court's distinction of *Upjohn* on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices. Because defense contractors are subject to regulatory requirements of the sort cited by the District

Court, the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney- client privilege to protect internal investigations undertaken as part of a mandatory compliance program. *See* 48 C.F.R. § 52.203-13 (2010). And because a variety of other federal laws require similar internal controls or compliance programs, many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations. *See, e.g.*, 15 U.S.C. §§ 78m(b)(2), 7262; 41 U.S.C. § 8703. As KBR explained, the District Court's decision "would disable *most public companies* from undertaking confidential internal investigations." KBR Pet. 19. As amici added, the District Court's novel approach has the potential to "work a sea change in the well-settled rules governing internal corporate investigations." Br. of Chamber of Commerce et al. as Amici Curaie 1; *see* KBR Reply Br. 1 n.1 (citing commentary to same effect); Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶108 (Apr. 9, 2014) (assessing broad impact of ruling on government contractors).

To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge. But prudent counsel monitor court decisions closely and adapt their practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the

uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the privilege context, for the Supreme Court has told us that an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). More generally, this Court has long recognized that mandamus can be appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). Other courts have granted mandamus based on similar considerations. *See In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) (granting mandamus where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege") (quotation omitted); *In re Seagate Technology, LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (same). The novelty of the District Court's privilege ruling, combined with its potentially broad and destabilizing effects in an important area of law, convinces us that granting the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In saying that, we do not mean to imply that all of the circumstances present in this case are necessary to meet the third prong of the mandamus test. But they are sufficient to do so here. We therefore grant KBR's petition for a writ of mandamus.

IV

We have one final matter to address. At oral argument, KBR requested that if we grant mandamus, we also reassign this case to a different district court judge. *See* Tr. of Oral Arg. at 17-19; 28 U.S.C. § 2106. KBR grounds its request on the District Court's erroneous decisions on the privilege claim, as well as on a letter sent by the District Court to the Clerk of this Court in which the District Court arranged to transfer the record in the case and identified certain documents as particularly important for this Court's review. *See* KBR Reply Br. App. 142. KBR claims that the letter violated Federal Rule of Appellate Procedure 21(b)(4), which provides that in a mandamus proceeding the "trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."

In its mandamus petition, KBR did not request reassignment. Nor did KBR do so in its reply brief, even though the company knew by that time of the District Court letter that it complains about. Ordinarily, we do not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. *See Ligon v. City of New York*, 736 F.3d 118, 129 & n.31 (2d Cir. 2013) (collecting cases), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is "so extreme as to display clear

inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (en banc). Nothing in the District Court's decisions or subsequent letter reaches that very high standard. Based on the record before us, we have no reason to doubt that the District Court will render fair judgment in further proceedings. We will not reassign the case.

***

In reaching our decision here, we stress, as the Supreme Court did in *Upjohn*, that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Barko was able to pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files. As the *Upjohn* Court stated, quoting Justice Jackson, "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 396 (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. Indeed, as

the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn*, 449 U.S. at 389).

We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

D.C. Docket No. 1:05-CV-1276

UNITED STATES OF AMERICA
ex rel. HARRY BARKO,

Plaintiff-Relator,

v.

HALLIBURTON COMPANY, et al.,

Defendants.

[March 6, 2014]

OPINION & ORDER
Resolving Docs. [135, 139, 143, 144, and 145]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this qui tam case, Plaintiff-Relator Harry Barko moves for an order compelling Defendants Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg, Brown & Root Engineering Corporation, Kellogg, Brown & Root International, Inc., and Halliburton Company (collectively "KBR Defendants") to produce certain documents relating to KBR's Code of Business Conduct ("COBC") investigations.[1] The KBR Defendants oppose the motion.[2] The motion is ripe.

I. BACKGROUND

A. Discovery Requests

On November 14, 2013, Plaintiff-Relator Barko served his First Request for Production of Documents to the KBR Defendants requesting documents relating to internal audits and investigations of the subject matter of the First Amended Complaint.[3] Plaintiff-Relator Barko's further discovery requests asked for more information regarding KBR's investigations into the alleged misconduct.[4]

On December 23 and 24, 2013, the KBR Defendants filed their written responses to

---

[1] Doc. 135.
[2] Doc. 139.
[3] Doc. 135-4, Exhibits 1 and 2.
[4] *Id*. Exhibit 2.

Plaintiff Relator's discovery requests[5] and later confirmed documents responsive to Plaintiff-Relator's requests were being withheld. Defendants based their non-production on attorney-client privilege and on the attorney work-product doctrine.[6]

On January 16, 2014, the parties concluded their meet and confer obligations.[7] KBR then produced information regarding seven reports made pursuant to COBC investigations. [8]

On February 3, 2014, Plaintiff-Relator Barko filed his motion to compel the production documents relating to KBR's COBC investigations.[9] After opposition was filed, this Court ordered KBR to produce the claimed privilege documents for *in camera review*.[10]

The Court has reviewed KBR's COBC Reports and theyare eye-openers. KBR's investigator found Daoud: "received preferential treatment." The reports include both direct and circumstantial evidence that Daoud paid off KBR employees and KBR employees steered business to Daoud. And the KBR investigation "reported a trend that D&P would routinely submit bids after proposals from other companies had been received." The reports suggest some KBR employee or employees fed information about

---

[5] *Id*. Exhibits 1 and 2.
[6] *Id*. Exhibit 3.
[7] *Id*. Exhibit 3-4
[8] *Id*. Exhibit 5.
[9] Doc. 135.
[10] Doc 148.

competitor bids to Daoud to allow Daoud to submit a late bid undercutting the competitors.

More expensive to the United States, the reports say Daoud continually received contracts despite terrible completion performance and despite regular attempts to double bill. In one case, KBR gave Daoud a contract despite Daoud's bid being twice another bid from a competent contractor. KBR gave Daoud the job, supposedly because Daoud could quickly complete the work. Then Daoud failed to [] complete the job on time KBR still paid the contract price.

In most cases, KBR completed Daoud's incomplete and late work and then approved paying Daoud's full bill. A quality assurance employee described: "D&P does very sub-standard work and have to be stood over every minute and watched. In most cases, KBR has had to step in and finish the work as outlined in the contract. D&P continues to provide sub-standard work and sub-standard goods to the Company."

The reports also describe contracts where Daoud was the low bidder but KBR supervisors, including Gerlach allowed unbid change orders that ballooned the cost. With change orders, a rental of water trucks mushroomed from $45,000 to $195,000 even though Daoud's contract performance was bad.

B. Summary Code of Business Conduct Procedure

COBC investigations typically begin when KBR receives a report of a potential COBC violation from an employee who either contacts

the Law Department directly or sends a tip to a dedicated P.O. Box, email address, or a third-party operated hotline.[11]

Once received, these "tips" regarding potential misconduct are routed to the Director of the Code of Business Conduct ("Director").[12] The Director then decides whether to open a COBC File to investigate the matter.[13] Subsequent investigation documentation is then made part of the COBC File by the Director.[14] As part of the investigation, COBC investigators interview personnel with potential knowledge of the allegations, review relevant documents, and obtain witness statements.[15] Once the investigation is complete, COBC investigators write a COBC Report.[16] The COBC Report is then transmitted to the Law Department.[17]

II. LEGAL STANDARD

Rule 26 of the Federal Rules of Civil Procedure limits the scope of discovery to "any non-privileged matter that is relevant to any party's claim or defense" and "any matter relevant to the subject matter involved in the action."[18] Parties may petition the court for an

---

[11] Doc. 139-1 at 3.
[12] *Id.* at 4.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Fed. R. Civ. P. 26(b).

order compelling disclosure or discovery.[19] The rule also provides for sanctions against parties that do not cooperate with discovery.[20]

III. ANALYSIS

The KBR Defendants say the COBC investigation materials are protected from disclosure by the attorney-client privilege or the work product doctrine.[21] The Court will address each in turn.

A. Attorney-Client Privilege

"The attorney client privilege is the oldest of the privileges for confidential communications known to the common law."[22] The privilege is designed to "encourage full and frank communication between attorneys and their clients."[23] However, like all privileges, the attorney client privilege is "not lightly created nor expansively constructed, for [it is] in derogation of the search for truth."[24]

In order to prevail on an assertion of the attorney-client privilege, the party invoking the privilege must show the communication is "'for the purpose of securing *primarily* either (i) an

---

[19] Fed. R. Civ. P. 37.
[20] *Id.*
[21] Doc. 139.
[22] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[23] *Id.*
[24] *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)).

opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.'"[25] In order to determine the primary purpose, the "but for" formulation is used. The party invoking the privilege must show "the communication would not have been made 'but for' the fact that legal advice was sought."[26]

"Although 'complications in the application of the privilege arise when the client is a corporation,'" the Supreme Court held in *Upjohn Co. v. United States* that the privilege applies in the same manner "as long as '[t]he communications at issue were made by [company] employees to counsel for [the company] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.'"[27]

The Court finds that KBR fails to carry its burden to demonstrate that the attorney-client privilege applies to the COBC documents. Most importantly, the Court finds that the COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.

Department of Defense contracting regulations require contractors to have internal control systems such as KBR's COBC programs to "[f]acilitate timely discovery and disclosure of improper conduct in connection with Government

---

[25] *Id.* at 128 (internal citation omitted).
[26] *Id.*
[27] *ISS Marine*, 905 F. Supp. 2d at 127-28 (quoting *Upjohn*, 449 U.S. at 389, 394).

contracts."[28] These regulations further require a "written code of business ethics," "internal controls for compliance," "[a] mechanism, such as a hotline, by which employees may report suspected instances of improper conduct," "[i]nternal and/or external audits," "[d]isciplinary action for improper conduct," "[t]imely reporting to appropriate Government officials," and "[f]ull cooperation with any Government agencies."[29]

KBR's COBC policies merely implement these regulatory requirements.[30] The COBC investigation differs from the investigation conducted in *Upjohn*. The COBC investigation was a routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy. In contrast, the *Upjohn* internal investigation was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation.[31] As such, the COBC investigative materials do not meet the "but for" test because the investigations would have been conducted regardless of whether legal advice were sought. The COBC investigations resulted from the Defendants need to comply with government regulations.

That employees who were interviewed were never informed that the purpose of the interview was to assist KBR in obtaining legal advice

---

[28] Doc. 135-7 at 35, 48 C.F.R.§ 203.7000-203.7001(a) (10-1-2001 edition).
[29] *Id.*
[30] Doc. 135-6.
[31] See *Upjohn*, 449 U.S. at 386-7.

further supports that the purpose of the investigation was for business rather than legal advice.[32] The confidentiality agreement employees signed never mentions that the purpose of the investigation is to obtain legal advice.[33] Rather the confidentiality statement emphasizes the "sensitive" nature of the review and warns the employee of the possible adverse business impact unauthorized disclosure could have on KBR's work in the Middle East Region.[34] Moreover, "employees certainly would not have been able to infer the legal nature of the inquiry

---

[32] See *ISS Marine*, 905 F. Supp. 2d at 130 (discussing the importance of what the employees are told is the purpose of the interview).

[33] "Due to the sensitive nature of this review, I understand that the information discussed during this interview is confidential. I further understand that the information that I provide will be protected and remain within the confines of this review and only authorized personnel will have access to the information contained in this report.

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the specific advance authorization of KBR General Counsel.

I acknowledge and agree that I understand 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 therefore, I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment." Doc. 139-12.

[34] *Id*.

by virtue of the interviewer, who was a non-attorney."[35]

Therefore, because the COBC investigation was not for the primary purpose of seeking legal advice, it is not entitled to the protection of the attorney client privilege.

Therefore, because the COBC investigation was not for the primary purpose of seeking legal advice, it is not entitled to the protection of the attorney client privilege.

B. Work-Product Doctrine

KBR's Defendants also say that the COBC investigation documents are protected from disclosure by the work-product doctrine. Work-product doctrine protects and attorney's "mental impressions, conclusions, opinions, or legal theories" prepared in anticipation of litigation.[36] To determine whether a particular document was prepared in anticipation of litigation, this Circuit uses the "because of test" asking "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[37] "For a document to meet this standard, the lawyer must at least have had a

---

[35] *ISS Marine*, 905 F. Supp. 2d at 131.

[36] Fed. R. Civ. P. 26(b)(3)(B).

[37] *ISS Marine*, 905 F. Supp. 2d at 133-34 (quoting *United States v. Deloitte, LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010) (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998))).

subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable."[38] "[A] party bears a heavier burden when seeking work-product protection for a multi-purpose document because the D.C. Circuit has also recognized that 'the [work-product] privilege has no applicability to documents prepared by lawyers 'in the ordinary course of business or for other non-litigation purposes.'"[39]

As the Court already discussed in the application of the attorney-client privilege, KBR conducted this COBC internal investigation in the ordinary course of business irrespective of the prospect of litigation. KBR would not have "simply sat on its hands in the face of these allegations" because "any responsible business organization would investigate allegations of fraud, waste, or abuse in its operations."[40] Moreover, government regulations required KBR to investigate potential fraud.

The timing of the investigation compared to the actual unsealing of the lawsuit further supports the conclusion that the investigation was not conducted "in anticipation of litigation." The investigation was conducted from 2004-2006. However, the complaint in this litigation was not unsealed until 2009. Finally, the fact that the investigation was conducted by non-attorney investigators makes it harder for KBR to assert the documents were prepared in anticipation of

---

[38] *Id.* (quoting *In re Sealed Case*, 146 F.3d at 884).
[39] *Id.* (quoting *In re Sealed Case*, 146 F.3d at 887).
[40] *Id.* at 137.

litigation. While documents produced by non-attorneys can be protected under the work-product doctrine, the fact that non-attorneys are conducting the investigation is another indication that the documents were not prepared in anticipation of litigation.[41]

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff-Relator Barko's motion to compel. The Court further **DENIES** the KBR Defendants' motion for leave to file a sur-reply. As such, the Court orders the KBR Defendants to produce all 89 documents relating to the COBC investigation to the Plaintiff-Relator. The Court will continue its *in camera* review and issue separate orders on the remaining documents redacted or withheld by the KBR Defendants and the Plaintiff-Relator on privilege grounds.

IT IS SO ORDERED

Dated:
March 6, 2014

s/ James S. Gwin
James S. Gwin
United States District Judge

[41] *Id*. at 138.

APPENDIX C

UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

No. 14-5055
D.C. Docket No. 1:05-CV-1276

UNITED STATES OF AMERICA ex rel. HARRY BARKO,

Plaintiff-Relator,

v.

HALLIBURTON COMPANY, et al.,

Defendants.

[March 11, 2014]

OPINION & ORDER
Resolving Docs. [151 and 152]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In its March 6, 2014 Opinion and Order, the Court granted Plaintiff-Relator Barko's motion to compel the production of 89 documents. The KBR Defendants had withheld the documents on the basis of attorney-client privilege or attorney work-product protection grounds.[42] In ordering the production, the Court found that these documents were ordinary business records and were created to satisfy United States defense contractor requirements. The Court found the documents were not created to obtain or receive legal advice.[43]

The KBR Defendants now ask the Court to certify this issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay the March 6 Order pending appellate review.[44] In the alternative, the KBR Defendants request that this Court stay its March 6 Order pending the filing and disposition of a petition for writ of mandamus to the U.S. Court of Appeals for the District of Columbia Circuit—or, at a minimum, until the D.C. Circuit rules on an emergency motion to stay pursuant to Federal Rule of Appellate Procedure 8(a).[45] The KBR Defendants also ask the Court to seal its March 6 Opinion and Order.[46]

---

[42] Doc. 150.
[43] *Id.*
[44] Doc. 152.
[45] *Id.*
[46] Doc. 151.

KBR's fear of producing the documents is understandable. Before being ordered to produce the documents for *in camera* review, KBR filed a motion for summary judgment and filed a statement of facts that KBR represented could not be disputed.[47] But KBR's COBC business documents are replete with contrary evidence. In its motion for summary judgment, KBR makes factual representations directly opposite its own COBC reports.

A. Motion for Certification for Interlocutory Appeal

In granting a request for an interlocutory appeal, a district court must certify that the order involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[48] The Supreme Court in *Mohawk Industries, Inc. v. Carpenter* said that these conditions are "most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence."[49]

The Court finds that defendants fail to satisfy the high standard required for an interlocutory appeal. "Mere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for difference of opinion

---

[47] Doc. 136.
[48] 28 U.S.C. § 1292(b).
[49] *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009).

sufficient to satisfy the statutory requirements for an interlocutory appeal."[50]

First, the KBR Defendants fail to show the order involves a "new legal question or is of special consequence."[51] The issue of whether the attorney-client privilege or the work product doctrine applies to documents created as part of an internal compliance investigation is not new or novel.[52] Rather, as the Supreme Court stated in *Upjohn Co. v. United States*, the outcome in any particular circumstance must be determined on a "case-by-case basis" and depends on the particular circumstances of the case.[53]

Moreover, the issue is not one of "special consequence." This case concerns discrete issues related to a long-passed KBR contract and the administration of that contract. This Court's finding that the documents were not attorney client privileged or work product privileged was not a close question. But even if the issue had been difficult, attorney client privilege decisions

---

[50] *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (internal citations and quotation marks omitted).

[51] *Mohawk*, 558 U.S. at 111.

[52] *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Solis v. Food Emp'rs Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981); *Wultz v. Bank of China*, Ltd., ___ F. Supp. 2d ____, 2013 WL 5797114 (S.D.N.Y. Oct. 25, 2013); *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012); *United States v. Dish Network, LLC*, 283 F.R.D. 420 (N.D. Ill. 2012); *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280 (D. Del. 2008).

[53] *Upjohn*, 449 U.S. at 396 (internal quotation marks omitted).

are fact-dependent. Nothing makes review of the privilege decision especially important to other cases. Each attorney-client privilege ruling turns on its own facts. The KBR may be embarrassed by what its own business records show does not make this Court's ruling of "special importance."

Second, there are not substantial grounds for difference of opinion. The most important documents are memoranda from an investigator to members of KBR's general counsel's office. The investigation prepared the documents to comply with government contractor regulations, specifically the Department of Defense regulation requiring contractors to discover and report improper conduct regarding Government contracts.[54] Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.

At the end of the investigation, the investigator drafter a final memoranda and submitted it to the General Counsel's office. But the memorandum does not request legal advice, and it does not identify possible legal solutions for further review. Instead the memoranda was created to help KBR decide whether it needed to report kickbacks or contractor fraud to the United States.

Other documents include emails asking for updates on investigations of certain cases and e-mails discussing hotline calls.

---

[54] 48 C.F.R.§ 203.7000-203.7001(a) (10-1-2001 edition).

In none of the documents is legal advice requested or offered. Because no legal advice was requested or offered, the Court concluded that the primary purpose of the investigations was to comply with federal defense contractor regulations, not to secure legal advice. The Court is confident that other courts conducting a similar *in camera* review would come to the same conclusion.

The KBR Defendants represent that two other federal courts found other COBC investigation documents were privileged. However, this is not the case.

The Federal Court of Claims order did not hold that COBC investigation documents are always privileged. Rather, that court both granted in part but also denied in part the KBR Defendants' motion for a protective order. The Federal Court of Claims held that the KBR Defendants failed to establish that the attorney-client privilege or the work product privilege applied to some of the documents at issue. Consistent with this Court's ruling, the Federal Court of Claims ordered the production of documents produced for "purposes of compliance.[55]

KBR also mischaracterizes the other case that it relies upon.[56] *Mazon* was a criminal case where a criminal defendant subpoenaed KBR records. In response to the subpoena, KBR argued Mazon's document requests: "are duplicative of

---

[55] Doc. 138-1.

[56] *United States v. Mazon*, No. 05-40024-01 (C.D. Ill. Dec. 14, 2006)

material previously provided by KBR to the government and made available to Mazon in discobery, and are otherwise unreasonable and oppressive. Moreover, Mazon has made no showing of relevance, specificity, or admissibility of the documents he seeks."[57] KBR additionally argued that the burden of production outweighed any relevance in light of the "substantial volume of documents previously produced by KBR and provided to [Mazon]."

While KBR offered an additional throwaway argument that some documents might be privileged, KBR mostly said it had already produced the documents and the criminal defendant should get the documents from the prosecutor. Apparently Mazon filed no opposition to KBR's motion to quash. The district court's one page order gives no indication it dealt with the same issue presented to this Court. More important, attorney-client privilege determinations rise and fall upon the specific documents and the circumstances of the documents production.

Finally, the Court finds that if the interlocutory appeal is permitted, it would prolong rather than hasten the termination of the litigation. If the Court of Appeals disagrees with Court's order, it 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

---

[57] *Id*. Doc. 76 at 1.

material and its fruits are excluded from evidence."[58] To pause litigation so close to the end of discovery and so near the deadline for summary judgment briefing would waste judicial resources.

II.

In addition, a substantial question exists whether KBR put the contents of the COBC investigation at issue.

KBR filed its motion for summary judgment before this Court ordered the COBC documents be produced *in camera* inspection. With the motion, KBR attached a "statement of material facts as to which there is no genuine dispute." Neither the motion for summary judgment nor the statement of undisputed material facts fairly reflect the evidence produced or the findings of KBR's own internal investigation.

But more important to the waiver issue, the KBR Defendants themselves put the COBC documents at issue when they argued that the COBC documents showed no evidence of improper conduct. With the KBR Defendants' motion for summary judgment, the Defendants said,

> When a COBC investigation reveals reasonable grounds to believe that a violation of 41 U.S.C. §§ 51-58 (the "Anti-Kickback Act") may have occurred requiring disclosure to the government

[58] *Mohawk*, 558 U.S. at 109.

> under FAR 52.203-7, KBR makes such disclosures. . . . [W]ith respect to the allegations raised by Mr. Barko, KBR represents that KBR did perform COBC investigations related to D&P and Mr. Gerlach, and made no reports to the Government following those investigations.[59]

"Courts need not allow a claim of [attorney-client or work-product] privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege."[60]

The KBR Defendants represented that 1) as a matter of policy, KBR reports possible violations of law when a COBC investigation discovers reasonable grounds to believe a violation occurred; 2) KBR conducted a COBC investigation of the facts underlying this case; and 3) after conducting a COBC investigation of the issues in this case, the KBR Defendants did not report any violation to the United States. KBR asks this Court to draw the inference that the COBC investigation documents showed nothing.

---

[59] Doc. 136 at 10 n.5; *see also id*. at 44 ¶ 27 (statement of material facts) (similar language).

[60] *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); see also *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003) ("It is well established doctrine that in certain circumstances a party's assertion of factual claims can, out of considerations of fairness to the party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted.").

When a party represents facts drawn from argued privileged communications, it cannot hide behind attorney-client privilege claims to avoid allowing the other side to test those facts. "In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party."[61]

By making that assertion, the KBR Defendants may have waived any claim of privilege to the investigation documents that they represented as supporting their decision not to report this matter to the federal government.

Although this Court makes no final conclusion whether KBR waived any attorney-client privilege, it gives another reason to find no substantial ground to appeal the order to produce the COBC documents. The KBR Defendants cannot show that a decision in Defendants' favor at the Court of Appeals would be "controlling" as to whether the documents must be produced.

For the foregoing reasons, the Court **DENIES** the KBR Defendants' motion for certification of an interlocutory appeal.

B. Motion to Stay the March 6 Order Pending Appellate Review

---

[61] *Chevron Corp. v. Donziger*, 2013 WL 6182744 *2 (S.D.N.Y. Nov. 21, 2013), quoting *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir.2000).

"The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay."[62]

"A stay is not a matter of right, even if irreparable injury might otherwise result."[63] Instead, it is "an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case."[64] The party seeking a stay bears the burden of justifying the exercise of that discretion.[65]

First, the KBR Defendants have not shown a likelihood of success on the merits. As discussed above, the question of whether the COBC documents were subject to the attorney-client privilege or the 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

---

[62] *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

[63] *Nken v. Holder*, 556 U.S. 418, 419 (2009) (internal quotation marks omitted).

[64] *Id.* at 433 (citation and internal quotation and alteration marks omitted).

[65] *Id.* at 433-34.

reports and conducted the interviews to comply with federal defense contracting regulations, not to secure legal advice.

Further, KBR enjoys no right to appeal a discovery ruling. Instead, KBR says it will ask the Court of Appeals to allow a discretionary review of a discovery ruling. Presumptively, the Court of Appeals has more important issues to spend its time on.

For good reason, Congress adopted the final judgment rule to stop the inefficiencies attending sequential appeals of interim rulings. Even where Constitutional protections are involved, parties generally receive no right to avoid discovery.[66] In seeking discretionary review, KBR would need convince the court of appeals that businesses should never be required to disclose internal investigations that the businesses perform to comply with government contracting requirements. KBR's hope that the Court of Appeals will take this case for interlocutory appeal is fanciful.

The Court therefore concludes the KBR Defendants have not shown a likelihood of success on the merits of its mandamus petition.

Second, the Court finds a stay is unnecessary to prevent irreparable harm. The KBR Defendants claim that irreparable harm will result if they forced now to produce the

---

[66] *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009); *Maness v. Meyers*, 419 U.S. 449, 458–461 (1975) (no interlocutory appeal of order refusing to quash subpoena for materials that arguably violated subpoenaed party's Fifth Amendment privilege against self-incrimination).

documents. But, as the Supreme Court stated in *Mohawk*, any subsequent review that somehow finds the documents protected could be easily remedied. The Court of Appeals could simply vacate and remand for a new trial where the protected material and its fruits are excluded from evidence.[67] The KBR Defendants have not demonstrated that irreparable harm will occur.

Third, a stay may harm the Plaintiff-Relator. As the KBR Defendants mention, Plaintiff-Relator Barko filed his amended complaint on June 13, 2007, and more than six years passed during preliminary proceedings and initial discovery.[68] If the stay is granted, the Plaintiff-Relator Barko will suffer another delay, resulting in a postponement of the scheduled trial. This Court does not consider such harm to be negligible.

Finally, the public interest lies in denying the stay. Little suggests that the attorney-client privilege and the work product doctrine will be impacted by the disclosure of eight year old investigator interview notes and reports. The public has an interest in the prompt and final determination of this litigation.

Thus, after considering the factors, the Court **DENIES** the KBR Defendants' motion for a stay of the Court's March 6 Order.

With the obvious relevance of the documents to the Relator's ability to respond to the pending summary judgment motions, the

---

[67] Mohawk, 558 U.S. at 108-12.
[68] Doc. 152 at 15.

Court orders KBR to produce the documents by **March 17, 2014**.

KBR says it may seek mandamus relief with the Court of Appeals. This Court orders Plaintiff-Relator and Relator's counsel to keep the produced documents confidential. Until otherwise ordered by this Court, Plaintiff-Relator and Relator's counsel may share the documents only with expert witness and only after those expert witnesses confirm in writing their agreement not to disclose the documents. Relator may use any of the documents to oppose summary judgment but must file any opposition that uses the documents under seal. Similarly, Plaintiff-Relator must file any other pleading that uses the produced documents under seal unless otherwise ordered by this Court.

C. Motion to Seal the March 6 Opinion and Order

The KBR Defendants also move to seal the Court's order compelling the production of the 89 COBC investigation documents.[69]

Essentially, the KBR Defendants argue that because they still think the documents are protected by the attorney-client privilege and attorneywork-product protection and that they believe "'sensitive information'" is exposed to the public, the Court should seal the order.[70]

This Court operates as a public forum "that best serve[s] the public when [it] do[es] [its]

---

[69] Doc. 151.

[70] *Id*. at 1-2 (quoting *Mohawk*, 558 U.S. at 112).

business openly and in full view."[71] Although the Court may seal documents, it must do so in light of certain factors, including "the strength of the property and privacy interests involved."[72] A "strong presumption in favor of public access to judicial proceedings" exists.[73]

The Court finds that the KBR Defendants have not shown any privacy interest that should close the public's right to open courts. First, there are no requests for legal advice or communications of legal advice in the materials. The only information revealed in the March 6, 2014, Opinion and Order and in this order is the result of a factual investigation made for the KBR Defendants' records.

Second, the investigation took place over seven years ago. The KBR Defendants do not point to any continuing business relationships that may be harmed or any trade secrets that may be disclosed. The only privacy interests at issue appear to be an interest in secrecy for secrecy's sake or KBR's embarrassment that its internal investigation raised major suggestions of bribery, raised major questions whether KBR employees were steering contracts to favored contractors, raised major questions whether KBR improperly approved change orders that sometimes doubled the cost of agreed contracts, and raised major questions why additional

---

[71] *E.E.O.C. v. Nat'l Children's Center, Inc.*, 98 F.3d 1406, 1408 (D.C. Cir. 1996).

[72] *Johnson v. Greater Se. Comty. Hosp. Corp.*, 951 F.2d 1268, 1277 n.14 (D.C. Cir. 1991).

[73] *Id.* at 1277.

contracts were given to contractors who had miserably failed to complete earlier work.

Therefore, the Court **DENIES** the KBR Defendants' motion to seal the Court's March 6 Opinion and Order.

IT IS SO ORDERED

Dated:
March 11, 2014

s/ James S. Gwin
James S. Gwin
United States District Judge

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5055
D.C. Docket No. 1:05-CV-1276

In re KELLOGG BROWN & ROOT, INC., et al.,

Petitioners.

[Filed On September 2, 2014]

On Petition for Hearing En Banc

BEFORE: Garland, Chief Judge, and Henderson*, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett*, Pillard, and Wilkins, Circuit Judges

* Circuit Judges Henderson and Millett did not participate in this matter.

ORDER

Upon consideration of the petition of Harry Barko for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Jennifer M. Clark
Deputy Clerk

APPENDIX E

Federal Rules of Civil Procedure

Excerpts from §1291 and §1292

---

§1291. Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...

§1292. Interlocutory Decisions

(**a**) Except as provided in subsection (c) and (d) of this section, the court of appeals shall have jurisdiction of appeals from:

> (**1**) Interlocutory orders of the district courts of the United States...or of the judges thereof, granting, continuing modifying, refusing or dissolving injunctions, or refusing to dissolve or

modify injunctions, except where a direct review may be had in the Supreme Court;

(**b**) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereinafter shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge or thereof shall so order.

APPENDIX F

Kellogg Brown & Root, INC.
Non-Disclosure Agreement

Confidentiality Statement

Due to the sensitive nature of this review, I understand that the information discussed during this interview is confidential. I further understand that the information that I provide will be protected and remain within the confines of this review and only authorized personnel will have access to the information contained in this report.

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the specific advance authorization of KBR General Counsel.

I acknowledge and agree that I understand 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 therefore, I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.