UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *ex rel*. HARRY BARKO, Plaintiff-Relator, v. HALLIBURTON COMPANY, *et al*., Defendants.	Case No. 1:05-CV-1276 (JSG)

REPLY IN SUPPORT OF PLAINTIFF-RELATOR'S MOTION TO COMPEL

Plaintiff-Relator, Harry Barko, by and through counsel, hereby submits his reply to the KBR Defendants' opposition to Plaintiff-Relator's motion to compel dated February 3, 2014.

I. LEGAL STANDARDS AND SUMMARY OF REPLY ARGUMENT

In their opposition the KBR Defendants (hereinafter, "KBR") misstates the legal standards applicable to asserting the attorney-client privilege by a corporation in the context of an internal compliance investigation that is conducted pursuant to a corporate policy. Instead, KBR relies on cases in which attorneys for the company were conducting internal investigations either after litigation had commenced or in anticipation of litigation as opposed to internal investigations to carry out a corporate compliance function.

KBR's position is further undercut by the facts elicited on this matter. KBR relies heavily on *Upjohn v. U.S.*, 449 U.S. 383, 101 S.Ct. 677 (1981), but has failed to meet its burden to meet all of the required *Upjohn* factors to apply the attorney-client privilege to the internal corporate compliance investigations that are at issue here. Most notably, the Code of Business Conduct ("COBC") investigations would have been undertaken regardless of the involvement of

an in-house attorney because company policy required it. These were internal compliance investigations, and were not conducted to assist or prepare for litigation. Ex. 7.[1]

In addition, the investigations were not undertaken by an attorney but by the KBR Security Department. First, the security investigations were not closely supervised by an attorney for the primary purpose of providing legal advice to KBR; the investigations were rather delegated to the KBR Security Department. Second, according to KBR's Rule 30(b)(6) representative, the factual reports compiled by the security department did not contain any legal advice whatsoever. Third, KBR has failed to establish, as required by *Upjohn*, that the witnesses who were interviewed were clearly instructed that the interviews were necessary for KBR to obtain legal advice and that the security investigators were working for and at the direction of KBR's attorneys to obtain legal advice for KBR as opposed to conducting a compliance investigation pursuant to the COBC. Fourth, KBR's corporate representative confirmed there was no legal advice given to KBR as the COBC investigative reports were not written by a lawyer and contained only facts with no legal conclusions. Finally, the factual reports were given to an in-house attorney acting in his capacity as a company Vice President who only utilized the reports for explicit business purposes and to otherwise made business decisions as opposed to providing legal advice.

KBR makes a similar sleight of hand in arguing the legal standards applicable to protect attorney work product. Once again, KBR confuses cases involving materials relied upon or created by an attorney who is preparing for litigation or trial as opposed to those related to a required corporate business function such as an internal compliance investigation. Notably, this

[1] Plaintiff-Relator's exhibits are abbreviated as "Ex." KBR Defendants' exhibits are abbreviated as "Def. Ex." Ex. 1 to 13 were filed with the Motion to Compel and Ex. 14-18 are filed herewith.

critical distinction was noted in the cases cited by KBR. Purely factual material must be produced, particularly, where as here, the corporate investigations were not conducted following the initiation of a government investigation or in anticipation of litigation and were instead completed as part of a required internal corporate compliance function.

To the extent the work product doctrine does somehow apply to KBR investigative reports prepared by non-attorneys that contain only facts and witness statements signed by employees, they still must be disclosed for two reasons.

First, the work product doctrine can be overcome by substantial need and undue hardship, which exists here. Plaintiff-Relator has satisfied these factors to require production of the factual material notwithstanding KBR's assertion it is protected work product.

Second, KBR has waived any work product or attorney-client privileges that might apply to the COBC investigations. Waiver is demonstrated by (1) KBR designating an in-house as its Rule 30(b)(6) corporate representative about the substance of these COBC investigations; (2) KBR's relying on these factual investigations to defend against this action; (3) KBR's Rule 30(b)(6) corporate representative reviewing the COBC investigative reports in preparation for his testimony as KBR's designated corporate representative; and (4) KBR's selective disclosure of information from the COBC files it claims as privileged. All of these actions by KBR are inconsistent with the claim of privilege and constitute waiver.

II. COMMUNICATIONS PURSUANT TO THE COBC INVESTIGATIONS ARE NOT PRIVILEGED

A. KBR's COBC Investigations Are Not Subject to *Upjohn*.

KBR's almost exclusive reliance on *Upjohn* is misplaced. *Upjohn* concerns a

specialized[2] investigation initiated at the request of the client in response to a report of evidence of bribery by the company's independent accountants; it does not concern routine investigations conducted in the normal course of business. By contrast, the investigations at issue here were not specialized; they were part of a routine practice that had to be carried out in accordance with Halliburton's COBC policy which mandates that the investigations are being conducted to carry out required business functions. The routine nature of the investigations is evident from the "sheer volume" of the number of COBC investigations, with Mr. Heinrich responsible for managing more than a thousand separate COBC investigations on the LOGCAP contract alone. Ex. 14, Heinrich Depo., Tr. 134, 181. Once the allegation was logged, Halliburton's published COBC policy establishes that the "Policy Committee" of Halliburton's Board of Directors was the "client" for the purpose of deciding whether one of the thousands of COBC allegations was to receive specialized attention and accorded attorney-client protection. Ex. 7 at p. 9, para. B.2. Because *Upjohn* applies to individualized and specialized investigations, and the company had a policy in place to select investigations for specialized treatment, KBR's lament that Mr. Barko's interpretation eviscerated KBR's ability to carry out a privileged investigation is misplaced.[3]

However, KBR fails to carry its burden that the privilege applies to the routine COBC investigations at issue here, in part, because these investigations were routine to fulfill required business functions and they failed to utilize established corporate procedures to treat the COBC investigation in a specialized way, thus taking these COBC investigations out of the realm or

[2] The specialized nature of the investigation is the attorney's development of specific questions in the form of a questionnaire, and evidence that the investigation was undertaken purely for legal advice, as opposed, to business advice, and that the company self-reported the violations to the government following the conclusion of the investigation. *Upjohn,* at 387.

[3] A far different question would be before the Court had the Policy Committee requested a specialized investigation in accordance with established procedures "for obtaining legal counsel where appropriate," *see* Ex. 7 at p. 9, para. B.2.

reach of *Upjohn*. In other words, these COBC investigations were required to be performed as a normal business function and KBR did not treat them in a way to protect them as privileged under *Upjohn*.

Most significantly, in order to assert the privilege under *Upjohn,* KBR is also required to demonstrate that the employees who were interviewed were expressly informed in writing that the purpose of the interview was to assist KBR in obtaining legal advice. *See Upjohn,* at 386-87; *Deel v. Bank of America,* 227 F.R.D. 456 (W.D. Va. 2005); *Lewis v. Wells Fargo & Co.,* 266 F.R.D. 433, 441-46 (N.D. Cal. 2010). KBR's "fatal flaw" is that, unlike the company in *Upjohn,* "it did not clarify to the employees" who were interviewed "that it needed the information to obtain legal advice." *Deel,* at 461-62. KBR has failed to meet this required element to support its *Upjohn* claim. The confidentiality agreement (Def. Ex. 12) that KBR alleges was provided to each employee who was interviewed during the COBC investigations does not even mention the need to maintain a privilege or that confidentiality is needed to obtain legal advice. KBR informed employees that the information was "sensitive" and would be treated confidentially, but that did not convey that the information was privileged or would be reviewed by attorneys. Def. Ex. 12. KBR also stated that the unauthorized disclosure of the information could harm the review "and reflect adversely on KBR as a company and/or KBR performance in the Middle East Region." *Id*. While KBR advised employees about the possible adverse business impact resulting from unauthorized disclosure, it did not advise the employees that the review was being conducted for the purpose of seeking legal advice or that unauthorized disclosure could waive the company's attorney-client or work product privileges. *Id*. Additionally, KBR's confidentiality statement is silent as to who would review the information obtained from the investigation and interviews. *Id*. None of these statements could have "put [KBR] employees on

notice" that the interviews "would facilitate the company in obtaining legal advice." *Deel,* at 461-62. No other information as to the purpose of the investigation is provided in the KBR confidentiality statement. Def. Ex. 12.

KBR's confidentiality statement (Def. Ex. 12) is in stark contrast to the express written statement provided by the company in *Upjohn,* which revealed the legal as opposed to business or sensitive nature of the inquiry and explicitly stated in writing that the results would be reviewed by company legal counsel to obtain legal advice. *Upjohn,* at 386-87. The COBC investigative documents, reports and witness interview statements "are not covered by the attorney-client privilege because here, as in *Deel* [and *Lewis*], [KBR] did not take the sort of precautions that led the Court to conclude in *Upjohn* that the non-attorney communications were subject to the attorney-client privilege." *Lewis,* 266 F.R.D. at 445. KBR acknowledged that none of the published accounts of the functioning of the COBC program identifies that the investigations were subject to an attorney-client privilege. Ex. 14, Heinrich Depo. Tr. 174-175. *Also see,* Ex. 7-9. Mr. Barko confirmed that the investigations were conducted without any mention that they were subject to the attorney-cleint privilege. Ex. 10. Putting an attorney-client notation at the top of an affidavit an employee is asked to sign weeks after being interviewed and placing a similar statement on the cover of a the final report does not satisify the *Upjohn* notice requirement.

KBR also attempts to rely on two unpublished court opinions (one being under seal), to argue that courts have concluded the COBC investigations are protected by the *Upjohn* privilege. This argument has several flaws and the cases cited by KBR do not support their position that all COBC investigations generally, or that all of the withheld COBC documents in this case, are

protected by the attorney-client privilege. *Upjohn* rather held that each case must be separately evaluated on its own facts to determine application of the privilege. *Lewis,* at 442.

Significantly, the Order appearing at Def. Ex. 3 does not hold that there exists a blanket privilege with respect to COBC investigations generally. Rather, that court granted in part and denied in part KBR's protective order, and held that KBR failed to establish the attorney-client privilege or the work product privilege applied to three of the documents at issue.[6] Moreover, KBR failed to note in its brief the distinction drawn by the court between investigations conducted for compliance purposes as opposed to those in anticipation of litigation or for primarily obtaining legal advice. The court also held that the work product doctrine did not apply to documents related to an "internal compliance investigation that is conducted for purpose of compliance rather than after a government inquiry has commenced." Def. Ex. 3, Sealed Order, p. 2, citing *Lewis,* 266 F.R.D. at 440-41.[7] Additionally, the court distinguished one of the cases KBR principally relies upon here, *In Re Linerboard Antitrust Litigation,* 237 F.R.D. 373 (E.D. Pa. 2006), because that case involved an investigation that everyone agreed was conducted in anticipation of litigation as opposed to here where the investigation was for the purposes of internal compliance business functions.

Notably, in *United States v. Mazon,* the court also did not order blanket protection for KBR COBC investigations. Def. Ex. 4. Rather, the court noted that the factual investigative report by KBR investigators and interviews with the employee "have already been disclosed."

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[6] It is difficult to discern from the sealed record either the precise circumstances surrounding the COBC documents or the arguments of the parties that led to the ruling in Def. Ex. 3. These difficulties, however, simply do not support KBR's burden of proving the application of the attorney-client privilege and work product doctrine to all of the COBC documents in this case.

[7] "A generalized fear of litigation does not turn a compliance audit into attorney work product." *Lewis,* at 440.

Id., Order at p. 2 (Dec. 14, 2006).

KBR relies on *Daniels v. Hadley Mem. Hosp.,* 68 F.R.D. 583, 585 (D.d.C. 1975) and *Gucci Am., Inc. v. Guess?, Inc.,* 271 F.R.D. 58, 71 (S.D.N.Y. 2020), for the unremarkable proposition that investigators working for an attorney, and gathering statements from employees *can* be protected by the attorney-client privilege. However, that principle alone does not satisfy the *Upjohn* factors and does not make internal compliance functions privileged.

Perhaps recognizing the weakness in its failure to provide explicit notice to employees that the purpose of the COBC investigations at issue were to obtain legal advice KBR attempts to cloak its entire COBC process under the attorney-client privilege. However, KBR's corporate counsel is by far not the only place KBR directs its employees to report business ethics and compliance violations. For example, KBR's Government Operations – Procurement Policy & Practice Manual, Ex. 15, identifies "local management" as the first place an employee may go with a COBC concern.[8] The fact that an employee may choose to contact the law department instead of pursing one of the other avenues of reporting a concern does not satisfy the express notice requirements in *Upjohn*. Indeed, it is undisputed that the phrases "attorney-client privilege" or "attorney work product" do not appear in any of the published COBC policy statements or brochures, Ex. 14, Heinrich Depo. Tr. 174-175, 189-190; Ex. 7-9, nor does it appear in the KBR confidentiality agreement executed before the interview begins, Def.. Ex. 12. That the heading "attorney-client privilege" ends up at the end of the process, *i.e.,* on the final report or on a signed employee statement prepared written by the investigator after conducting an

[8] The Manual provides in relevant part: "The Halliburton Code of Business Conduct policy requires that we conduct ourselves ethically and fairly . . . If, at any time, this policy is perceived as being compromised in any way, personnel are required to promptly raise the concern through one of the following available channels: contact your local management, KBR Corporate Counsel, the Halliburton Ethics Helpline or the VP, Procurement KBRS. We will promptly address all concerns with care, respect, and confidentiality." Ex. 15.

interview in which Mr. Barko was never told that the interview was being conducted at the direction or KBR's legal counsel. Ex. 10, Barko Declaration, ¶¶ 6-7. Placing a caption on the final report and or on statements prepared after the interviews were conducted does not satisfy notice requirement. It is simply too little, too late.

Nothing prevents a company from handling an investigation by attorneys in anticipation of litigation, but that type of investigation is separate from the business function described in the COBC. *Cf.* Def. Mem, n. 14. The COBC policy identified a separate process to be employed in such circumstances. *See* Ex. 7, COBC Policy at Para. B.2. Remarkably, there is no evidence that KBR received or requested any legal advice as a result of the COBC investigations at issue here. *Cf.* Def. Mem., p. 14. To the exact contrary, Mr. Heinrich acknowledged that the Policy Committee was *not* involved with any individual COBC investigation. Ex. 14, Heinrich Depo., Tr. 21-22, 185, 173; that he did not share the witness statements with anyone, *id.,* Tr. 112; that the investigative results were not shared with the compliance department, *id.,* Tr. 101-104, 148-149; that Mr. Heinrich did not know about the existence of any particular DCAA audit, *id.,* at Tr. 151-152, so his review of the investigative reports were not associated with any government audit. Ultimately, Mr. Heinrich, alone, was responsible for rendering determinations on behalf of the company as to whether a violation of the COBC occurred and whether employees would be subjected to discipline. *Id.,* Tr.183, *see also* Tr. 64-65.

Finally, KBR claims that the identity of witnesses interviewed are protected and not required to be disclosed by an attorney. However, in this case, Mr. Heinrich testified that he did not interview anyone and no other attorneys conducted the interviews. Rather, every allegation was logged, and Mr. Heinrich would then contact KBR's Security Department manager who was responsible for assigning a security investigator who would to investigate the logged allegation

without input from Mr. Heinrich. *Id*., Tr. 15-16, 81, 127. The interviews were not done at direction of corporate counsel; the witnesses to be interviewed were not chosen by counsel, and Mr. Heinrich did not prepare a questionnaire or script governing the interview. *Id.,* Tr. 80. The witness statements and the report simply reflect factual information obtained by a KBR security department investigator (Mr. Ervin) that were first shared with a KBR Security Manager (Willaim Rice) and only then sent off to Mr. Heinrich. *Id.,* Tr. 118-119; Ex. 6, (Privilege Log) at Nos. 11, 25, 56, 64. Indeed, the lack of Mr. Heinrich's involvement with the actual investigations is obvious from the fact that Mr. Heinrich could not recall having ever spoken to Mr. Ervin, *Id.,* Tr. 115, could not recall who was responsible for conducted one of the investigations, *id*., Tr. 93, and, according to KBR's Opposition to the Motion to Compel at fn 9, did not know if two or three separate investigative reports had been prepared.

B. KBR Has Failed To Show How the COBC Investigation Is Legal As Opposed to Business Advice.

The COBC reports were not legal advice or written for the purpose of obtaining legal advice. They were not prepared by lawyers but were factual reports gathered for a required business purpose. The reports lacked legal opinion or conclusions. Ex. 14, Heinrich Depo. Tr. 182-183. Instead, the purpose of the reports were to enable Mr. Heinrich to function as the corporate decision-maker as to whether a violation of the COBC took place and who was to be disciplined. *Id..,* Tr.183, *also* Tr. 64-65. Mr. Heinrich acknowledged that whether disciplinary measures would be imposed "was a goal of the investigation" that he rendered "based on the factual determinations obtained during the investigation." *Id*., Tr. 19-20. Mr. Henrich's job was

not to advise the Policy Committee whether violations had occurred but rather to make business decisions on behalf of the company.[9]

Mr. Heinrich also confirmed at his deposition that his role in the company is not purely legal. He gives mixed business and legal, attends business meetings, and performs business functions. Ex. 14, Heinrich Depo., Tr. 7-10.

The deposition testimony of Mr. Heinrich further establishes that the manner and method in which Halliburton carried out investigations of alleged COBC violations was done with the intent to cloak necessary compliance functions and business audits under the guise of privilege in order to secret factual information otherwise required to report to the government.[10] Halliburton's COBC acknowledges that it constitutes a "specific Corporate Polic[y] adopted by the Board of Directors that relate to legal and ethical standards of conduct" and "govern[s] the conduct of business by the Company." Ex. 7 (COBC Policy), p. 7. The COBC policy was filed with the Securities and Exchange Commission in compliance as part of its published compliance policy in response to Section 406 of the Sarbanes-Oxley Act of 2002. Halliburton was duty-bound to comply with its published policy in the manner and method proscribed therein. To this end the COBC policy mandated that Halliburton's "Policy Committee" was responsible for establishing formal procedures, had to be involved with the investigation and review of COBC

[9] KBR's assertion at page 5 of its brief that Mr. Heinrich made his determinations in "consultation with the Director of COBC" and that he "advises KBR senior management and makes recommendations for further action" misconstrues his deposition testimony. Mr. Heinrich testified that it was specifically up to him to determine whether a violation of the COBC occurred and that once that decision was reached the offending employee had to be terminated. *Id.,* Tr. 183, 155-156.

[10] Christopher Heinrich is the KBR Defendants' designated FRCP 30(b)(6) witness on "[a]ny investigation or inquiry, internal or external, formal or informal," including any COBC investigations. *See* Ex. 16, Revised Rule 30(b)(6) Notice of Deposition, at Topics Q and V. At his deposition, Mr. Heinrich identified three (3) COBC investigative reports related to this matter, Ex. 14 Heinrich Depo. Tr. 96, and acknowledging having reviewed them in preparation of his testimony. *Id.,* Tr. 10.

violations, and was responsible for auditing and monitoring company compliance with the COBC policy. To begin with,"[t]he Policy Committee shall be responsible for the administration of the Code of Business Conduct" and "shall establish such procedures as it shall deem necessary" and that "[s]uch procedures shall provide for obtaining legal counsel where appropriate," and "shall take reasonable steps to monitor and audit compliance." *Id.,* p. 10.

The Policy Committee, however, never established a procedure for obtaining legal counsel in connection with the investigation of a COBC violation. Ex. 14, Heinrich Depo., Tr. 43-46. The COBC also mandated that the Policy Committee "shall" establish procedures for conducting "an informal inquiry or a formal investigation" and procedures for "prepar[ing] a report of the results of such inquiry or investigation." Ex. 7, COBC Policy at pp. 10-11. Mr. Henrich confirmed that no such procedures were ever established by the Policy Committee. Ex. 14, Heinrich Depo., Tr. 13-17, 19. "Pursuant to procedures adopted by it, the Policy Committee shall determine whether violations of the Code of Business Conduct have occurred" and "shall determine the disciplinary measures to be taken" for violations of the COBC. Ex. 7, COBC Policy at p. 11. Mr. Heinrich confirmed that no such procedures were ever adopted by the Policy Committee and that determinations of whether a COBC violation occurred and the disciplinary measures taken were never presented to the Policy Committee but were instead made by Mr. Heinrich. Ex. 14, Heinrich Depo., Tr. 18, 20-22, 183-185. All said and done, "ownership" of the entire COBC process was placed with Halliburton's Law Department in violation of Halliburton's COBC Policy.[12] *Id.,* Tr. 142.

[12] It can be inferred that no meaningful monitoring or auditing of the COBC occurred by the Policy Committee given Mr. Heinrich's central role in the COBC process and his professed lack of knowledge of any steps taken to monitor or audit compliance of the COBC. Ex. 14, Heinrich Depo., Tr. 105-106; *also see* KBR's Brief at 5 (only the COBC attorneys had access to the COBC reports which were kept under lock and key, rendering monitoring and auditing of how

While placing "ownership" of the COBC exclusively is in the hands of Halliburton's Law Department is not dispositive of the privilege issue, the failure of KBR to follow its own policy to create procedures to obtain legal advice with respect to COBC investigations defeats KBR's *Upjohn* privilege claim. Regardless of whether the COBC is housed under the Law Department, the KBR Defendants are not permitted to cloak required business functions, such as the COBC, under the guise of privileged communications. Pltf. Mem., pp. 8-14, 18-20, 23-24 (Feb. 3, 2014). *Also see Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980); *In re Sealed Case*, 237 737 F.2d 94 (D.C. Cir. 1984); *SEC v. Gulf and Western Industries, Inc.,* 518 F. Supp. 675 (D.D.C. 1981). While the KBR Defendants claim they have "business personnel in roles such as Government and Procurement Compliance whose task it is to help respond to audits" and that these activities fall outside of the privileged communications of the COBC investigations, *see* Def. Br., p. 17, that is misleading at best as all of the reported COBC violations are kept out of the hands of those who KBR alleges were tasked with helping respond to audits. This is accomplished as a result of the Policy Committee's failure to establish procedures in order to conceal the business function, business advice and compliance activity under the guise of attorney-client communications. To this end mangers and employees alike are strictly forbidden from undertaking any form of independent investigation of a suspected COBC violation. Ex. 14, Heinrich Depo. Tr. 33. Instead, as a matter of unwritten policy, all allegations that a COBC violation occurred are funneled to the law department with all 1000 or more of the allegations related to the LOGCAP III contract sent to Mr. Heinrich to manage. Ex. 14, Heinrich Depo. Tr. 13, without him either overseeing the course of the investigation or deciding who would be interviewed. *Id.,* Tr. 16, 44, 134. Instead, Mr. Heinrich functioned as the repository of

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the investigations were conducted by the Policy Committee without Mr. Heinrich's knowledge unlikely).

factual information that was kept secret as a result of designating the reports for Mr. Heinrich's eyes only, *id.,*Tr. 111-113. As a matter of standard practice, the auditing and compliance departments were kept in the dark about the existence or resolution of an allegation, *id.,* Tr. 101-104, even if the allegation was initiated by the compliance department itself.[14] *Id.,* Tr. 151-152. Mr. Heinrich's ability to function as the sole company repository of information pertaining to fraud investigations occurring under the LOGCAP contract allowed KBR's official auditing and compliance departments to remain in the dark and avoided the company having to reveal evidence obtained during the course of its compliance efforts. This was accomplished by establishing Mr. Heinrich as the sole repository of the factual information of any fraud allegations, and by his own admission, Mr. Heinrich was kept in the dark about the status or course of any ongoing DCAA audit, *id*., Tr. 151-152 ("Most of the time, frankly, I don't even know [the DCAA audit is] going on"),[15] as well by requiring all of the company witnesses to the fraud to sign confidentiality agreements notifying the employee that they could expect to be terminated if they fail to remain silent about the underlying substantive facts. Def. Ex. 12; Ex. 14, Henrich Depo. Tr. 156-157, 178-179.[17]

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[14] Had the compliance group been allowed to investigate a concern it would not be subject to privilege. Ex. 14, Heinrich Depo., Tr. 155.

[15] In the final analysis Mr. Heinrich's say so is final. At his own choosing, he may decide to "generally discuss" his decision with Mr. Mize, or someone else, but there is no requirement that he do so. Ex. 14 Heinrich Depo., Tr. 183.

[17] The conduct of KBR in requiring employees to sign the Confidentiality Statement (Def. Ex. 12), which prohibits the disclosure of substantive violations of the COBC and federal law outside the company, violated, *inter alia,* the False Claims Act. Contractors, such as KBR, are explicitly prohibited from taking action that could "threaten" employees for engaging in "lawful" acts on behalf of "other" employees who have filed FCA claims and/or other employees who are seeking to "stop" fraud in government contracting. *See*, 31 U.S.C. § 3730(h). The Confidentiality Statement (Def. Ex. 12) unquestionably "threatens" employees with severe adverse action if they assist other employees who have filed FCA claims. It also "threatens" employees who may want

Mr. Heinrich functions as the client, not the attorney, rendering the attorney-client privilege inoperable. In order for the privilege to apply, the attorney receiving a communication must be acting as an attorney and not simply as a business advisor. *See, In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984) (in-house counsel who also had duties outside legal sphere bears the burden to show that advice is given in a legal capacity). The communication must be for the primary purpose of soliciting legal, rather than business, advice. *Coastal States Gas Corp., supra.*; *SEC v. Gulf and Western Industries, Inc., supra*. With respect to the COBC investigations at issue, there is no assertion or indication that he actually provided legal advice to the Policy Committee, or to KBR management concerning the COBC investigations at issue. In doing so, Mr. Heinrich performed essential and required business functions that, according to the COBC policy itself, should have been undertaken by Halliburton's Policy Committee.[22]

C. Corporate Compliance Programs Established Under Sarbanes-Oxley Act and the FAR Are Business Functions That Are Not Subject to Privilege

In the age of *Sarbanes-Oxley,* intentionally conducting an investigation in violation of a published COBC policy does not provide a basis to sweep thousands of such internal compliance investigations under the rug simply because the results were reported to a lawyer. The courts have simply not recognized the general corporate privilege that KBR asserts whenever corporate

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to work jointly with other employees in "stopping" violations of federal law. Such agreements violate public policy and the law. *See, Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89 (2nd Cir. 1996) (upholding right of employee to sue company over proposed secrecy agreement).

[22] At best, Mr. Heinrich was responsible for simultaneous legal and nonlegal review as he was directly responsible for deciding for the company whether a violation of the COBC had occurred and whether disciplinary action would be initiated. That dual nature of his review necessarily renders it unprivileged. *See North Carolina Electric Membership Corp. v. Carolina Power & Light Co.,* 110 F.R.D. 511, 514 (M.D.N.C. 1986)(corporate documents prepared for simultaneous review by legal and nonlegal personnel are not entitled to be privileged because they are not communications made for the primary purpose of seeking legal advice).

compliance programs are headed by attorneys or report to the law department. What other companies may or may not do with respect to their compliance programs is not germane to the narrow privilege issues raised in this case.

There is nothing to prevent a corporation from conducting a proper *Upjohn* investigation if it follows the appropriate safeguards and procedures that are required by *Upjohn*. However, the courts have long recognized after *Upjohn* that the mixing of business and legal functions does not make communications privileged. Corporate in-house attorneys provide a wide range of services for companies (both business and legal functions). In light of these multiple corporate roles and functions it is KBR's burden to establish that legal advice was sought and that the COBC investigations were conducted primarily for the purpose of securing legal advice as opposed to carrying out a business function. *See* Section II.B, *supra*.; Pltf. Mem., pp. 8-14, 18-20, 23, 24 (Feb. 3, 2014). KBR has failed to meet that burden in this case.

D. KBR Has Waived Its Asserted Privileges By Placing the COBC Investigations At Issue.

It is not KBR's mere denial that KBR submitted any false claims to the Government that waives the privilege. Rather, it is KBR's raising defenses and affirmative defenses that place its reasonableness at issue, together with KBR's reliance on the COBC investigations as proof that it did not act recklessly or commit violations of the FCA, that waives the privilege. To this end KBR places the substance of the investigation at issue in its summary judgment motion by claiming that it investigated the allegations and the investigations did not result in a finding of wrongdoing that was reported to the Government, Def. Mem., p. 4 n. 5 [Doc. #136 at 10], Def. Stmt. of Facts, ¶ 27 [Doc. #136 at 44-45], and vows to use this fact at trial, *See* Opp. to Mtn. to Compel, pp. 7, 20. As such, KBR has waived the privileged status of its investigation. KBR cannot place the substance and results of the investigation to support its defense and shield the

underlying investigative reports and facts contained in investigative record on on the grounds of privilege. KBR cannot use the attorney-client privilege or work product doctrine as both a sword and a shield. *See* Pltf. Mem., pp. 16-18 (Feb. 3, 2014).[23]

Not only has KBR waived the privilege by placing the substance of the reports and results of the COBC investigation at issue, the COBC reports may rather reflect a sham investigation geared at covering up misconduct instead of revealing the truth. To this end "communications made with a view to covering up past acts of misconduct are in fact made with the purpose of perpetrating a crime or fraud, and hence are not privileged." Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual* 620 (6th ed. 1994) (citing *In re Sealed Case*, 244 U.S. App. D.C. 11, 754 F.2d 395, 402 (D.C. Cir. 1985))." *United States v. Skeddle,* 989 F. Supp. 890, 904 (N.D. Ohio 1997).

In *In re John Doe Corp*., 675 F.2d at 482 (2d Cir. 1982) the Court observed that the "use of the fact of an investigation to allay the concerns of third parties about possible criminal acts, to create the appearance of compliance with laws requiring disclosure, or to cover up a crime disclosed through a protected communication in the course of an investigation will cause the corporation to lose the privilege." *Id.,* 492. Evidence indicating the sham nature of the COBC investigations exists. First is Mr. Gerlach's sworn affidavit wherein he asserts he was never questioned about specific allegations related to his receipt of financial rewards from D&P, *see* KBR's Motion for Summary Judgment, Ex. 7, ¶ 7 [Doc. #136-3, p. 24]. Second is KBR's failure to follow its COBC corporate policy requiring that violators of the COBC be terminated and not

[23] This principle was also recognized by the court in the order cited by KBR. Def. Ex. 3, Order, p. 3 (ordering KBR to disclose whether it intends to present evidence about its investigation, and warning that KBR cannot claim privilege over matters it intends to present as part of its case).

allowed to resign.[24] Ex. 14 (Heinrich Depo.) Tr. 156. Third, Mr. Heinrich's admitted that he didn't know that Mr. Gerlach had been forced to resign after management concluded he had engaged in COBC violations. Ex. 14, Heinrich Depo. Tr. 168-69, 171.[25] Fourth, is allowing Mr. Gerlach to address Mr. Barko and the other subcontract administrators who were about to be just interviewed and instruct that they not volunteer information during the course of the interview. Ex. 10 (Barko Declaration) at para. 4. Fifth, is the investigator interviewing Mr. Barko asking Mr. Barko to sign a statement based on what could have happened which contradicted what Mr. Barko recognized had occurred when he eventually gained access to the documents locked away in Mr. Gerlach's office.[26] Def. Ex. 7 (Barko Depo.) Tr. 26. Sixth is the way in which Mr.

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[24] The COBC investigation was initiated on or about June 26, 2004, Ex. 5 at KBR-BARKO-032712, with Mr. Gerlach resigning in lieu of termiation six months later on January 9, 2005. *See* Ex. 18 at KBR-BARKO-035466. The resignation of Mr. Gerlach followed KBR's Procurement and Supply Manager for Iraq, Paula Battles, visit to the B1 site between December 17-21, 2004 during which time she looked into allegations of wrongdoing on the part of Mr. Gerlach. At the conclusion of that visit Ms. Battles submitted a report calling for the termination of Mr. Gerlach. Ex. 18 at KBR-BARKO-035467. This report was reviewed by a "Senior Manager" in KBR's Houston headquarters, *id.,* at KBR-BARKO-035468, who acknowledged "a pattern to [Gerlach's] actions which are not inline with company code of business conduct" and directed that the removal of Mr. Gerlach proceed but that he was to be given the opportunity to resign in lieu of termination. *Id*. The removal was considered a success because it was accomplished without KBR having to be "too specific" about its reasons for requiring Mr. Gerlach to resign *id.* KBR then accepted a letter of resignation from Mr. Gerlach that addressing their mutual "friendship." *Id*., at KBR-BARKO-035466.

[25] Had Mr. Heinrich truly acted in a role of an in-house attorney providing legal advice, rather than performing a business-compliance function, the KBR Defendants would have at least consulted Mr. Heinrich for legal advice before making a determination to terminate Mr. Gerlach for apparent violations of the COBC.

[26] KBR argues at fn. 5 to its Opposition to Relator's Motion to Compel that Mr. Barko's "protestations that he did not understand that the statement he made during the course of his interview to be privileged" are unbelievable as the draft of the statement he signed bears the heading "Attorney-Client Privileged Information." This argument is misleading at best. Mr. Barko did not see or sign the statement that was ultimately prepared by the investigator well after the interview was conducted. Mr. Barko recalls being interviewed in or about late October 2004, Ex. 10, Barko Declaration at para. 4. However KBR refuses to produce a copy of the signed statement which will reflect that it was not created until much later. Mr. Barko's

Covelli was treated after initiating a COBC report. After initiating the COBC report Mr. Covelli repeatedly attempted to provide further details of his allegation and expressly wanted to develop his concern about how KBR was in the process of defrauded and mischarged the government out of millions of dollars. Ex. 17 (Covelli Declaration), ¶¶ 7-9. Instead of allowing Mr. Covelli to provide the information he had amassed he was intentionally ignored and never interviewed after repeated requests to be contacted. *Id.* Seventh is Halliburton's practice of silencing all of its employees who were interviewed during the course of any COBC investigation through the use of nondisclosure agreements that threatened termination if an employee spoke out. Def. Ex. 12. Taken together, these facts present powerful evidence of an orchestrated attempt to create a deceitful COBC record. "Indeed, KBR at trial intends to rely solely on non-privilleged information – that it received tips, investigated them, and ultimately did not make a disclosure to the government" as evidence that the allegations investigated lack merit. KBR's Opposition to Motion to Compel, at p. 20. But the silencing of employees with confidentiality agreements, the obvious failure to inquire of Mr. Gerlach whether he accepted financial reward from D&P; orchestrating Mr. Gerlach resignation outside of the purview of the COBC investigation; intentionally disregarding additional information of an ongoing fraud Mr. Covelli attempted to report; instructing witnesses before the COBC investigation not to volunteer information, the intentional failure to comply with the COBC policy in the manner and method in which the COBC was carrying out, asking employees to sign statements based on what could be the truth instead of reviewing the underlying documents demonstrating otherwise amounts to a substantial body of evidence that the COBC investigation was a sham rendering the investigation

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declaration is clear that at no time during the course of the interview was there intimation that the interview would be conducted as or would be considered an attorney-client communication. Ex. 10, ¶¶ 7-8. KBR remains unable to refute this statement of fact.

unprivileged. *See In re John Doe Corp, supra, at 492; also see Duttle v. Bandler & Kass.,* 127 F.R.D. 46, 54-55 (S.D.N.Y. 1989) (Attorney-client communications concerning the termination of employees who raised fraud allegations are not privileged).

III. KBR HAS FAILED TO CARRY ITS BURDEN TO ESTABLISH THE WORK PRODUCT DOCTRINE.

KBR has failed to demonstrate that the work product doctrine applies to the withheld COBC documents. There was simply no Government investigation underway or any anticipated litigation at the time the COBC investigations at issue in this case were conducted. Generalized fears of future litigation simply do not suffice to establish protection. *Lewis, at* 440; *United States v. ISS Marine Servs.,* 905 F. Supp. 2d 121, 133-134 (D.D.C. 2012). In order to determine whether a particular document was prepared in anticipation of litigation, the D.C. Circuit applies 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.'" *Id.,* at 133-134, quoting, *United States v. Deloitte, LLP,* 610 F.3d 129, 137 (D.C. Cir. 2010) and *In re Sealed Case,* 146 F.3d 881, 884 (D.C. Cir. 1998). As noted by the district court in *ISS Marine Servs.,* "'[f]or a document to meet this standard, the lawyer must at least have had a subjective believe that litigation was a real possibility, and that belief must have been objectively reasonable.'" *Id.,* quoting *In re Sealed Case,* 146 F.3d at 884. As shown, the investigations were conducted as part of a normal compliance function, not at the behest of attorneys to prepare for litigation. KBR also bears a heavier burden to establish work product protection for "multi-purpose" documents because the "privilege has no applicability to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes." *Id.,* citing *In re Sealed Case,* 146 F.3d at 887. *See also, Janicker v. George Washington Hosp.,* 94 F.RD. 648, 650 (D.D.C. 1982) ("The mere contingency that litigation may

result is not determinative. If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is producible in civil pretrial discovery."). KBR does not meet this standard to assert the work product privilege over the COBC documents.

Even if the work product doctrine applied, KBR has not successfully refuted Plaintiff-Relator's substantial need for the information and undue hardship to overcome assertion of the work product doctrine. See FRCP 26(b)(3); *In re Sealed Cases,* 676 F.2d 793, 809 (D.C. Cir. 1982). KBR asserts that Plaintiff-Relator should be required to first depose more witnesses to establish there exists substantial need and undue hardship. That would be impractical and impossible given the limits of discovery, the large number of potential witnesses with discoverable information that KBR has only partially disclosed and the fact that KBR's corporate representative testified that KBR employees who were interviewed by COBC investigators were prevented from disclosing any information about the underlying substantive facts of wrongdoing to anyone, including counsel for a FCA relator.[28] On January 24, 2014, KBR partially identified for the first time 168 potential witnesses who were KBR employees during the 2003-2006 time frame, but KBR did not state what these witnesses know or provide any contact information as requested by Plaintiff-Relator. See, Ex. 2, Excerpt of KBR Response to Interrogatory No. 1.[29] KBR did not make prior Rule 26(a)(1) disclosures to Plaintiff-Relator before KBR responded to

[28] KBR's confidentiality agreement (Def. Ex. 12) prevents KBR employees from answering questions, such as "Did Mr. Gerlach accept a bribe," or other questions about wrongdoing. Ex. 14, Heinrich Depo., Tr. 178-179. This prohibition imposed by KBR creates substantial need and undue hardship for Plaintiff-Relator justifying production of the COBC files because employees or former employees are barred by KBR from discussing the subject matter of any wrongdoing if that was covered in a COBC interview. *Id.*

[29] While Ex. 2 is an excerpt from KBR's response to Interrogatory No. 1, it shows that 168 persons were identified as potential KBR employee witnesses. KBR did not provide more details about the other witnesses not reflected on Ex. 2.

the interrogatory. KBR's contention there is no substantial need or undue hardship because Plaintiff-Relator must first depose over 100 witnesses, whose addresses and contact information has not been disclosed by KBR, *id.,* about matters that took place 10 years earlier is rather remarkable. The passage of time – given the unique procedural posture of this case -- and the lack of information from KBR about these witnesses who KBR claims may have first hand information satisfies the substantial need and hardship test. The KBR investigative reports and witness statements from the COBC investigations contain the only contemporaneous written record of what was reported to KBR, what KBR employees stated about the matters under investigation, and what action, if any, KBR took in response to the concerns of wrongdoing regarding government contracting at the Al Asad B-sites, which is the focus of Plaintiff-Relator's FCA action. There is no practical "alternative source" for the requested COBC information. *Eckert v. Fitzgerald*, 119 F.R.D. 297, 300 (D.D.C. 1988).

KBR's reliance on the *Clemons* case (Def. Ex. 10) is misplaced because the court there denied production of a "draft" affidavit prepared by counsel on grounds of work product. That case did not concern the production of factual witness statements by employees during the course of an internal compliance investigation conducted by Security Department investigators that were signed by the employees, and did not include the mental impressions of an attorney. *Cf., Janicker, supra.*

IV. KBR WAIVED ITS CLAIM OF PRIVILEGE BY INTRODUCING TESTIMONY BY MR. HEINRICH AND BY MR. HEINRICH'S REVIEW OF SOME OF THE DOCUMENTS TO PREPARE FOR THE RULE 30(b)(6) DEPOSITION.

KBR designated Mr. Heinrich to testify as its corporate representative under Rule

30(b)(6) about the COBC investigations and COBC program.[30] In preparation for his role as corporate representative and Rule 30(b)(6) witness, Mr. Heinrich testified that he reviewed the COBC investigative reports over which KBR asserts the attorney-client privilege and work product doctrine. Ex. 14, Heinrich Depo., Tr. 10.

However, Mr. Heinrich relinquished his advocacy role when he was designated as KBR's Rule 30(b)(6) witness. *Eckert,* at 299. Moreover, prior to testifying about the facts he relied on the withheld COBC investigative reports to prepare for the Rule 30(b)(6) testimony on behalf of KBR and to refresh his recollection of events that occurred more than 10 years ago. Accordingly, Mr. Heinrich is no different from any other witness, and the COBC reports that he testified he reviewed are discoverable pursuant to Fed. R. Evid. 612, which provides in pertinent part that:

> if a witness uses a writing to refresh his memory for the purpose of testifying . . . . *before testifying*, if the court in its discretion determines *it is necessary in the interest of justice,* an adverse party is entitled to have the writing produced at the hearing to inspect it, to cross-examine the witness thereon . . . .

Fed. R. Evid. 612 (emphasis added).

This rule applies to depositions through FRCP 30(c), *The Coryn Group, II, LLC v. O.C. Seacrets, Inc.,* 265 F.R.D. 235, 240 (D.Md. 2010); *Eckert, supra.*, and has been "extended to deposition proceedings where documents otherwise protected by the qualified work product privilege are used to refresh a witness's recollection." *Eckert,* at 299, citing *Marshall v. U.S. Postal Serv.,* 88 F.R.D. 348, 350 (D.D.C. 1980); *Barrer v. Women's National Bank,* 96 F.R.D. 202, 204-05 (D.C.C. 1982). Where, as here, the review of the documents occurred prior to the deposition, there "is a greater need to know what materials were reviewed" by a Rule 30(b)(6) "designee witness in preparation for deposition since the substance of their testimony may be

[30] KBR designated Mr. Heinrich to testify on behalf of KBR with respect to topics Q, and U-W, in the Rule 30(b)(6) deposition notices. *See* Ex. 16, Notice , p. 5(dated 1/14/14), and Revised Notice, pp. 5-6 (dated 1/21/14).

based on sources beyond personal knowledge." *Nutramax Labs., Inc. v. Twin Labs, Inc.,* 183 F.R.D. 458, 469 (D. Md. 1998); *The Coryn Group II, LLC,* at 242 (the element of Rule 612 to refresh recollection is met if the designee reviewed the documents in order to testify as to corporate knowledge). Accordingly, a testimonial waiver of the privilege occurs when a Rule 30(b)(6) witness reviews privileged material and testifies on the topic.[31]

In this case, Mr. Heinrich testified about the results of COBC investigations that were conducted approximately nine or ten years ago. KBR Mem., p. 4 n. 5 [Doc. # 136 at 10]; KBR Stmt. of Facts, ¶ 27, pp. 10-11 [Doc. #136 at 44-45]. He also testified that there have been as many as 1,000 or more COBC investigations about KBR's activities in Iraq under LOGCAP III between 2003-2010, that he was not personally involved in conducting the investigations or preparing the reports and he was not present during the interviews of employees. Ex. 14, Heinrich Depo., Tr. 16, 80-81, 133-134, 168, 181-182. Accordingly, the record strongly supports that Mr. Heinrich necessarily relied on his review of the COBC reports to prepare for and give testimony at the Rule 30(b)(6) deposition about the COBC investigations and the results of those investigations.

Additionally, by electing to call Mr. Heinrich as its Rule 30(b)(6) witness and using his testimony about the COBC investigations to support KBR's motion for summary judgment, KBR waived its privileges through testimonial use of the information. *See e.g., United States v. Nobles,* 422 U.S. 225, 239-40, 95 S.Ct. 2160 (1975). Mr. Heinrich gave testimony about the results of the COBC investigations in response to KBR's counsel's questions, *see* Doc. #136 at 10 (Def. Mem., p. 4 n. 5); *Id.,* at 44-45 (Def. Stmt. Facts, ¶ 27), which resulted in a subject

[31] The Rule 30(b)(6) deposition notices requested production of documents. *See* Ex. 16. The COBC reports that Mr. Heinrich reviewed to prepare for the deposition are responsive to that request as well as Plaintiff-Relator's other document requests that are the subject of the motion to compel.

matter waiver of both the attorney-privilege and work product doctrine. *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989) (both inadvertent and deliberate disclosure of privileged information waives the privilege); *In re Sealed Case,* 676 F.2d at 809 (the waiver extends to all communications relating to the same subject matter). This is further supported by KBR's use of Mr. Heinrich's testimony and information concerning the results of the COBC investigations in its motion for summary judgment. See Doc. #136 at 10 (Def. Mem., p. 4 n. 5); *Id.,* at 44-45 (Def. Stmt. Facts, ¶ 27). KBR is asserting these privileges over the reports and other COBC documents, but at the same time intentionally producing testimony about the results of these investigations after Mr. Heinrich (KBR's Rule 30(b)(6) representative) testified after reviewing the reports. KBR has waived these privileges because its disclosure of information about the COBC investigations is inconsistent with maintaining these reports as privileged.

CONCLUSION

For the foregoing reasons, Plaintiff-Relator's motion to compel should be granted.

Respectfully submitted,

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February 18, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply in support of Plaintiff-Relator's motion to compel was served on all counsel of record via the Court's ECF system on this 18th day of February, 2014.

_/s/ David K. Colapinto_____

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY under pains and penalties of perjury that a copy of the foregoing reply brief in support of Plaintiff-Relator's motion to compel is produced in a 12 font typeface and does not exceed the 25 page limitation set forth in Local Civil Rule 7(d).

February 18, 2014 _/s/ David K. Colapinto_____