**THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA *ex rel.* Harry Barko, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civ. Action No. 1:05-CV-1276 (JSG) |
| HALLIBURTON COMPANY, *et al.*, | ) | |
| Defendants. | ) | |

**KBR DEFENDANTS' OPPOSITION**
**TO RELATOR'S MOTION TO COMPEL**

February 12, 2014

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## Introduction

Noting that "[a]n uncertain privilege . . . is little better than no privilege at all," the Supreme Court more than thirty years ago settled a corporation's ability to safeguard its attorney-client privilege and work product when conducting internal investigations. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Since that time, public companies have established compliance programs that permit investigations to be conducted or supervised by internal or external counsel with the candor promoted by attorney-client privilege and work product. KBR's Code of Business Conduct ("COBC") program is no exception, as it has conducted scores of investigations directed by its Law Department, protected by its attorney-client privilege and the work product doctrine. Ex. 1, Heinrich Decl. ¶ 4; Ex. 2; Heinrich Dep. 121:20–122:7, 128:11–18, 134:5–13 (Feb. 5, 2014). The only two courts to have considered these issues finding that KBR COBC investigations are protected under *Upjohn*. *See* Ex. 3, *Kellogg Brown & Root Servs., Inc. v. United States*, No. 1:09-351C (Fed. Cl. Aug. 19, 2011 (filed under seal); Ex. 4, *United States v. Mazon*, No. 05-40024-01 (N.D. Ill. Dec. 14, 2006).[1]

[1] In both cases, courts refused to require production of documents from KBR COBC Files, including COBC Reports and emails among Chris Heinrich, KBR attorneys, and COBC investigators regarding the COBC investigations, as well as memoranda prepared by COBC investigators. In the prosecution of former KBR employee Jeff Mazon (with which KBR cooperated), the U.S. District Court for the Central District of Illinois granted KBR's motion to quash subpoenas issued by Mazon, concluding after an *in camera* review that "virtually all documents relate to KBR's internal investigation of its suspicion that Defendant Mazon may have solicited/accepted kickbacks," which the Court found "appear to be subject to either the 'attorney-client' or 'work product' privilege and are therefore immune from discovery." Ex. 4 at 1. In the second case, the Court of Federal Claims found, also after an *in camera* review, that documents from KBR's COBC Files, including two COBC Reports referred to as Document Nos. 8 and 24, were "protected from disclosure by the attorney-client privilege or the attorney-client privilege as recognized in Upjohn Co. v. United States, 449 U.S. 383 (1981)." Ex. 3 at 1. This Order remains under seal in the Court of Federal Claims and KBR has filed a motion to file it under seal in this case. KBR Motion to Seal [Dkt. 138].

Given the complete absence of evidence to support his fraud allegations,[2] and his virtual failure to conduct fact discovery,[3] it is perhaps unsurprising that Barko instead seeks to "piggyback" on COBC investigations conducted by KBR relating to certain "tips" that were received under its COBC program pertaining to KBR subcontractor Daoud & Partners ("D&P") and KBR (most frequently one of KBR's then procurement managers, Robert Gerlach). *See* Relator's Mot. to Compel [Dkt. 135] 2–3 ("Relator's Mot."). In so doing, however, Relator seeks to disregard the above bedrock *Upjohn* principles entirely, arguing that KBR's COBC investigation is a routine business audit devoid of privilege or work product protection. Following the Supreme Court's admonition to ensure the certainty and predictability of privilege protection over such internal investigations, this Court should deny Barko's motion to compel.

**Summary of the Facts**

The "tips" that Barko refers to each allege a potentially improper relationship between KBR (primarily through Mr. Gerlach) and D&P, including the potential for kickbacks, as well as potential procurement irregularities. *See* Relator's Mot. Ex. 5. As occurs with all COBC investigations, these tips were transmitted either directly to the Director of the Code of Business Conduct ("Director"), who is an attorney, or to other attorneys working on COBC matters. Ex. 1, Heinrich Decl. ¶¶ 4, 7.

KBR employees may report allegations of potential misconduct to the COBC in any number of methods, including through direct contact with the Law Department, through a third party-operated hotline, through a dedicated post office box, or through a dedicated email address.

[2] *See generally* KBR's Motion for Summary Judgment, filed February 10, 2014 [Dkt. 136].

[3] Barko had deposed only one witness by the close of summary judgment discovery, Cheryl Ritondale, who was designated by KBR under Fed. R. Civ. P. 30(b)(6). Two other depositions, including the deposition of Chris Heinrich – again pursuant to Rule 30(b)(6), took place after the summary judgment discovery period.

Ex. 5, Code of Business Conduct Summary 15–17 (2003); Ex. 1, Heinrich Decl. ¶ 7; Ex. 2, Heinrich Dep. 12:2–15. Tips may also be reported to a supervisor, who would then utilize one of the above methods to notify the Law Department. Ex. 1, Heinrich Decl. ¶ 7. In each instance, these "tips" are routed to the Director, who is an attorney (and at the time of the events of this case was Richard Mize) and determines whether to open a matter under the COBC for investigation. Ex. 1, Heinrich Decl. ¶ 7; Ex. 2, Heinrich Dep. 13:2–17. Investigations are made part of a COBC File by the Director. Ex. 1, Heinrich Decl. ¶ 7; Ex. 2 Heinrich Dep. 12:19–13:1. While COBC investigations usually focus on allegations involving current KBR employees, investigations may also be initiated and pursued even after an alleged employee participant has separated from KBR. Ex. 1, Heinrich Decl. ¶ 7.

While KBR was deployed to support the military under the LOGCAP III contract, investigations pertaining to Iraq (or other locations supported by LOGCAP) were referred by Mr. Mize to Chris Heinrich, Vice President of Legal for Infrastructure, Government, and Power, who was the lead counsel at KBR responsible for the government contracting business.[4] With a long tenure at KBR, Mr. Heinrich wrote its original Code of Business Conduct and is well-familiar with the handling of such investigations. Ex. 1, Heinrich Decl. ¶ 3; Ex. 2, Heinrich Dep. 123:8–125:3. Mr. Heinrich would coordinate and manage the investigations, which are conducted by security investigators (most of whom are former law enforcement) working under the direction

[4] For the period pertinent to this lawsuit, KBR was owned by Halliburton Co. and they operated under the same COBC. Ex. 1, Heinrich Decl. ¶ 3; Ex. 2, Heinrich Dep. 124:6–21. Mr. Mize was a Halliburton employee and Mr. Heinrich worked for KBR. Ex. 1, Heinrich Decl. ¶¶ 2, 4; Ex. 2, Heinrich Dep. 13:5-8. From the initial inception of the LOGCAP program in the 1990s, in consultation with Mr. Mize during the time period at issue in this case, Mr. Heinrich was responsible for providing legal advice to KBR in connection with COBC investigations regarding allegations of kickbacks, bribery, fraud or other potential COBC violations involving KBR employees and its subcontractors. Ex. 1, Heinrich Decl. ¶ 5; Ex. 2, Heinrich Dep. 13:11-17.

of the Law Department. Ex. 1, Heinrich Decl. ¶¶ 5-7; Ex. 2, Heinrich Dep. 14:11–20, 18:2–19:2, 126:11–127:4. These investigators are not permitted to disseminate information related to a COBC investigation, except at the direction of an attorney responsible for the COBC investigations. Ex. 1, Heinrich Decl. ¶¶ 5-6. If new issues are reported during the course of an investigation, the investigator would contact the COBC attorney to disclose the new issue and receive further instructions. Ex. 2, Heinrich Dep. 127:5–14.

COBC investigators interview personnel with potential knowledge of the allegations, and obtain witness statements that are typically marked "attorney-client privilege" and are accompanied by a separate confidentiality statement indicating that the employee is not to discuss the interview without the approval of KBR's General Counsel.[5] Ex. 1, Heinrich Decl. ¶ 11; Ex. 2, Heinrich Dep. 156:13–158:10. From time to time, investigations also require the assistance of subject matter experts, such as procurement compliance personnel, and such persons are tasked by Mr. Heinrich to assist in particular investigations; however, procurement and other KBR personnel do not become involved in COBC investigations in the ordinary course of business. Ex. 1, Heinrich Decl. ¶ 6; Ex. 2, Heinrich Dep. 147:16–149:17.

COBC investigators communicate their findings and information gathered over the course of the investigation to Mr. Heinrich through a COBC Report, which is transmitted via the regional Security Manager and is marked "attorney–client privilege." Ex. 1, Heinrich Decl. ¶ 10; Ex. 2, Heinrich Dep. 96:17–97:1. The assigned COBC attorney (which for all government

[5] Barko has produced to KBR a copy of his own statement, made as part of one of the COBC investigations at issue. Exhibit 6, Barko Statement (Nov. 22, 2004). Printed at the top of the document is the label "Attorney-Client Privileged Information." *Id.* Notwithstanding his protestations that he did not understand his statement to be privileged (Relator's Mot. 7–8), as a law school graduate, although not a practicing attorney, Ex. 7, Barko Dep. 209:8-210:3, Mr. Barko must have been familiar with the contours of attorney-client privilege and aware of the implications of these words.

contracting business was Mr. Heinrich), in consultation with the Director of COBC, would determine based on the COBC Report whether a COBC violation had been substantiated. Ex. 1, Heinrich Decl. ¶ 10. If the investigation reveals a legal liability or disclosure obligation requiring further action from within the company, the COBC attorney advises KBR senior management and makes a recommendation for further action. Ex. 1, Heinrich Decl. ¶ 10; Ex. 2, Heinrich Dep. 127:15-128:10. Given potential liability for KBR under the Anti-Kickback Act, 41 U.S.C. §§ 8701–07, and the False Claims Act, 31 U.S.C. §§ 3729 *et seq*., among other statutes, COBC investigations are conducted in anticipation of the prospect of future of litigation with the U.S. government or relators.[6] Ex. 1, Heinrich Decl. ¶ 9.

KBR takes several measures to preserve the confidentiality of COBC investigations, including storing the COBC Reports and all attached witness statements and exhibits in locked file cabinets in a locked room at KBR headquarters in Houston, to which only COBC attorneys have access. Ex. 1, Heinrich Decl. ¶¶ 8, 12; Ex. 2, Heinrich Dep. 112:18–113:2, 136:22–138:12. The COBC Reports are maintained under the control of COBC attorneys.

At all times relevant to the lawsuit, KBR had the obligation under LOGCAP III to report to the Department of Defense Inspector General ("DoD-IG") or the Department of Justice where

[6] KBR's concern is not idle speculation. KBR has faced twenty-two fraud suits from relators and the government related to its work on the LOGCAP III contract. In one, after an eleven day trial, KBR won a complete victory on fraud claims brought by the Government. *Kellogg Brown & Root Servs., Inc. v. United States*, No. 1:09-351C (Fed. Cl. Aug. 19, 2011 (False Claims Act, Anti-Kickback Act, and common law fraud suit). In another Government-initiated False Claims Act suit, the Government voluntarily dismissed the case after engaging in extensive discovery. *United States v. Kellogg Brown & Root Servs., Inc.*, No. 1:10-cv-00530-RCL (D.D.C. Nov. 14, 2012 (False Claims Act and breach of contract suit). Twelve of the twenty-two cases have been dismissed and the remaining cases are either stayed or pending. While KBR has settled ancillary employment claims, it has not settled a fraud claim in these cases and has not been found liable for fraud.

it had reasonable grounds to believe that a violation of the Anti-Kickback Act occurred.[7] *See* FAR 52.203-7(c). Ex. 2, Heinrich Dep. 130:20-131:1. KBR has in the past made such disclosures, which were preceded by COBC investigations, and where warranted has tendered credits to the U.S. government where there was evidence that potential misconduct may have resulted in an overcharge under LOGCAP. Ex. 1, Heinrich Decl. ¶ 10; Ex. 2, Heinrich Dep. 161:18–162:12. KBR also cooperates in subsequent investigations by the Department of Justice and other investigative agencies, such as the DoD-IG, but has always maintained a strict policy of refusing to waive privilege over its COBC investigations. Ex. 1, Heinrich Decl. ¶ 10; Ex. 2, Heinrich Dep. 133:16–133:17. Where KBR discloses facts to government agencies, it always withholds the COBC Reports themselves under attorney–client privilege and attorney work product, instead making disclosures in the form of a letter summarizing the allegations. Ex. 1, Heinrich Decl. ¶ 10; Ex. 2, Heinrich Dep. 132:10–133:2.

With respect to the COBC investigations subject to the present motion to compel, these practices were followed. Mr. Mize received the tips through various channels (including the helpline, the mailbox, and the P.O. Box) and referred them to Mr. Heinrich for investigation.[8]

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[7] In 2008, long after the events at issue in this case, Congress passed the Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, tit. VI, ch. 1 6106, 122 Stat. 2323, 2386 (2008) (incorporated into the FAR at FAR 52.203-13), which created a new obligation to disclose credible evidence of potential violations of federal criminal law or the False Claims Act. FAR 52.203-13. The Act's requirements were not incorporated into LOGCAP III until 2009. Ex. 8, LOGCAP III Basic Contract Modification P00037 at 6 (Dec. 10, 2009).

[8] Many tips were conveyed through a confidential third-party service, The Network, Inc., and delivered to the Director via the dedicated COBC email address termed "FHOUCODE," as were the tips produced at KBR-BARKO-032716, KBR-BARKO-032712, KBR-BARKO-032715, and KBR-BARKO-036653. *See* Relator's Mot. Ex. 5. There were also two identical letters (KBR-BARKO-032714 and KBR-BARKO-032711) that were mailed to the COBC P.O. Box accessible only by COBC attorneys, and directly to Mr. Mize, respectively. *Id.* The emails originally sent to then KBR Project Manager Remo Butler from the whistleblower "Fred Flintstone" address (KBR-BARKO-032706) were forwarded upon receipt to Michael Hatch, a KBR attorney who reported to Chris Heinrich. *Id.*

Ex. 1, Heinrich Decl. ¶ 12; Ex. 2, Heinrich Dep. 16:15-19. A security investigator in Iraq, Richard Ervin, was assigned, and several of the tips were consolidated into particular investigations due to the common subject matter. Ex. 1, Heinrich Decl. ¶ 12; Ex. 2, Heinrich Dep. 96:12-16. Mr. Heinrich and Mr. Mize directed certain procurement compliance personnel to assist the COBC investigation as subject matter experts. Ex. 1, Heinrich Decl. ¶ 12. At the close of the investigations, two separate COBC Reports were generated. *See* Relator's Mot. Ex. 6.[9] Unlike in some other instances as noted, at the close of these investigations, KBR neither made a report under the Anti-Kickback Act nor tendered credits to the Government. Ex. 1, Heinrich Decl. ¶ 12; Ex. 2, Heinrich Dep. 162:13; 163:5.

**Argument**

The Relator raises a series of objections that appear to challenge the long-settled principles of *Upjohn* (a case he barely cites, much less distinguishes) and questions the holdings of prior courts on this very same COBC investigative process.[10] The Relator broadly suggests that detecting corruption is a business practice that is untethered from any legal internal investigation, and therefore is not subject to privilege. Relator's Mot. 8–14. Second, the Relator contends that federal disclosure requirements under the Sarbanes–Oxley Act, which applies to all public corporations, and the FAR, which apply to federal contractors, destroy privilege. *Id.* at 14–16. Taken seriously, these arguments would suggest that, notwithstanding *Upjohn*, no public company subject to federal securities laws or government contractor under the FAR could

[9] Mr. Heinrich testified that he believed there may have been three COBC Reports (Ex. 2, Heinrich Dep. 96:2-10), but there were only two unique COBC Reports identified on the privilege log. *See* Relator's Mot. Ex. 6. Each COBC Report appears on the log more than once because they were incorporated into more than one COBC File. One unique COBC Report is listed as items 25, 56, and 64, while the other unique COBC Report is listed as items 11 and 85.

[10] We informed Barko of these prior cases and he acknowledged receipt (Ex. 9. E-mails Between Michael D. Kohn and Tirzah Lollar (Jan. 17, 2014)), but he fails to address them in his Motion to Compel.

conduct an internal investigation subject to attorney-client privilege or attorney work product protection. As discussed below, Relator cites no compelling authority for these sweeping assertions, with his lead case one in which the company deliberately structured its investigation to *avoid* the involvement of counsel. *United States v. ISS Marine Servs.*, 905 F. Supp. 2d 121, 124–25 (D.D.C. 2012).

Third, the Relator contends that whenever corporate knowledge or intent is at issue, privilege is waived as to any investigation into those facts. Relator's Mot. 16–19. Given that all fraud statues, including the False Claims Act, impose liability based at least in part on a violator's alleged scienter or *mens rea*, Barko's argument would mean that any company, simply by denying fraud liability, would waive attorney-client privilege and attorney work product protection. Again, there is no authority for this incredible assertion; instead, the "at issue" waiver doctrine is fairly limited to instances where a party raises its "good faith" or legal advice as an affirmative defense or the equivalent. Barko also argues that work product protection is unavailable for legal advice given in anticipation of litigation if that litigation is not immediately foreseeable, a result rejected by precedent. *Id.* at 23–25. And lastly, the Relator says that he has a substantial need of attorney work product and that he faces an undue hardship in obtaining the same information, notwithstanding that he has conducted virtually no fact discovery in this case (aside from attempting to gain access to KBR's privileged investigation). *Id.* at 24. For the reasons explained below, this Court should deny the motion to compel.

## I. Applicable Legal Standards

### A. Attorney–Client Privilege

*Upjohn* protects as privileged communications by any employee with corporate counsel undertaking an internal investigation if the communication occurred "at the direction of corporate superiors in order to secure legal advice from counsel." *Upjohn*, 449 U.S. at 394. The

Supreme Court explained that the attorney–client privilege protects both the attorney providing advice to the client and the client (there, the company's employees) "giving . . . information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. The Court emphasized that the "vast and complicated array of regulatory legislation confronting the modern corporation" made it necessary for corporations to "constantly go to lawyers to find out how to obey the law." *Id.* at 392 (internal quotation marks omitted). The Court rejected a standard that would fail to protect attorney communications with low-level employees because that test made "it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem [and] also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.*[11]

**B. Work Product Protection**

The work product doctrine protects from disclosure "documents and tangible things that are prepared in anticipation of litigation or for trial" unless the party seeking disclosure "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3). "Generally, documents created as part of an internal investigation . . . are considered to be made in anticipation of litigation for the purposes of the work product doctrine." *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 381 (E.D. Pa. 2006) (citing *Upjohn*, 449 U.S. at 398).

[11] This privilege also applies to communications with former employees. *See, e.g.*, *In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997) (holding that *Upjohn* protection applies to communications with former employees); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (*Upjohn* privilege applies to former employees because "[f]ormer employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties").

The law recognizes two forms of work product—"opinion" work product and "fact" work product. "'Core' or 'opinion' work product, which consists of mental impressions, conclusions, opinions, or legal theories of an attorney, is afforded almost absolute protection." *Id.* (internal quotations and citation omitted); *see also* Fed. R. Civ. P. 26(b)(3)(B). "There is considerable authority in support of the proposition that an attorney's recollection of witness interviews constitutes opinion work product." *Linerboard*, 237 F.R.D. at 386. In fact, in this Circuit, courts will not require the disclosure on a privilege log of the individuals whom counsel interviewed. *Clemmons v. Academy for Educ. Dev.*, No. 10-cv-911, slip op. at 4-5 (D.D.C. Nov. 11, 2013) [Dkt. 50] (copy attached at Ex. 10) ("[B]ecause Defendant is not entitled to learn the identity of which witnesses Plaintiff's counsel thought important enough to interview or communicate with, this method of alphanumeric identification [of interviewed witnesses on a privilege log] is appropriate."). The work product doctrine also covers what questions were asked as part of an investigation. "[T]he facts elicited from an investigation may be, in some contexts, necessarily reflective of an attorney's focus in a case." *United States v. Clemens*, 793 F. Supp. 2d 236, 245 (D.D.C. 2011). Finally, even signed witness statements are considered "fact" work product. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

## II. Communications Pursuant to KBR's COBC Investigations Are Privileged

### A. KBR's COBC Investigations are Subject to *Upjohn.*

The internal investigation at issue in *Upjohn* is similar in all material respects to those conducted by KBR pursuant to its COBC, and there is no reason for them to be treated differently. Indeed, the two courts that have considered this question both concluded that KBR's COBC investigations are protected by *Upjohn* privilege. *See* Ex. 3, *Kellogg Brown & Root Servs., Inc. v. United States*, No. 1:09-351C (Fed. Cl. Aug. 19, 2011; Ex. 4, *United States v. Mazon*, No. 05-40024-01 (N.D. Ill. Dec. 14, 2006). In *Upjohn*, independent accountants discovered evidence of foreign bribery and notified the company's general counsel, who initiated an internal investigation. *Upjohn*, 449 U.S. at 386. The investigating attorneys prepared questionnaires to be sent to employees under the signature of Upjohn's chairman of the board. *Id.* The questionnaires described themselves as "highly confidential," but there is no reference in the opinion that they were marked as privileged. *Id.* at 387. Three months after the investigation began, the company self-reported to the SEC, and the government then subpoenaed the employee questionnaires as well as notes of interviews. *Id.* at 387–88. The company declined to produce these documents, claiming both privilege and work product protection. *Id.* at 388. The Supreme Court agreed that these types of materials deserved protection, and in particular held that the employee questionnaires and other records of employee communications with counsel were privileged. *Id.* at 394-95.

Relator barely cites, much less distinguishes, *Upjohn*. Indeed, under his theories, the *Upjohn* result would have been different—particularly given the self-report by a public company of a potential securities law violation and the absence of explicit privilege markings on the

questionnaires.[12] KBR's COBC investigations too were handled by an attorney with the assistance of trained security investigators. The involvement of investigators (or other personnel to assist an attorney's investigation) do not vitiate the privilege. *Daniels v. Hadley Mem. Hosp.*, 68 F.R.D. 583, 585 (D.D.C. 1975) ("It is well-settled that a statement by a party to an agent or representative of the party's attorney is protected by the attorney–client privilege."); *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 71 (S.D.N.Y. 2010) ("Factual investigations conducted by an agent of the attorney, such as gathering statements from employees, clearly fall within the attorney–client rubric." (internal quotation marks omitted)).[13]

As in *Upjohn*, KBR made clear to employees the COBC summaries that the purpose of its program was to ensure ethical and legal compliance, and that questions on the program should be referred to the Law Department. Ex. 11, KBR Code of Business Conduct (2003) at KBR-BARKO-032272 (directing employees to report to "the Ethics Helpline, the General Counsel or any representative of the Law Department"). As noted above, a typical practice (including in these COBC investigations) was to mark witness statements with an "attorney-client privilege" header. *See, e.g.*, Ex. 6, Barko Statement (Nov. 22, 2004). In fact, Barko testified that he himself signed a witness statement, and produced during discovery that statement, which has "Attorney–Client Privilege Information" written at the top of the page. Ex. 7, Barko Dep. 26:3–13 (discussing Ex. 6). To bring the point home, witnesses also executed Confidentiality Statements, which stated:

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[12] Tellingly, Relator cites to *Upjohn* only once, and that for the undisputed statement that underlying facts are not privileged. Relator's Mot. 13.

[13] There are numerous other cases pointed out by *Gucci*, 271 F.R.D. at 71: *United States v. McPartlin*, 595 F.2d 1321, 1335–36 (7th Cir. 1979); *Sanchez v. Matta*, 229 F.R.D. 649, 660 (D.N.M. 2004); *Welland v. Trainer*, No. 00-cv-0738, 2001 WL 1154666, at *3 (S.D.N.Y. Oct. 1, 2001); *Carter v. Cornell Univ.*, 173 F.R.D. 92, 95 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1345 (2d Cir. 1998) (summary order).

> 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*.

Ex. 12, COBC Confidentiality Statement (Redacted) (emphasis added). Express statements of "privilege" are not necessary, as *Upjohn*'s "highly confidential" labeling demonstrates, but its marking on the witness statement is another indicator that the interview was for the purpose of providing information to company attorneys so that they could provide legal advice.[14] And, just as in *Upjohn*, KBR faces securities disclosure requirements and has certain self-disclosure

[14] At Mr. Heinrich's deposition, Relator's counsel ascribed totemic importance to the fact that "attorney-client privilege" never appears in the COBC or the accompanying summary. Ex. 2, Heinrich Dep. 174:3-175:10, 189:13-190:11. Even the investigative materials in *Upjohn* apparently did not invoke this phrase—they were instead labeled "highly confidential"— and courts have emphasized that the word "privilege" has no talismanic significance, as its presence does not automatically confer privilege nor does its absence withhold privilege. *See*, *e.g.*, *Ledgin v. Blue Cross & Blue Shield of Kansas City*, 166 F.R.D. 496, 499 (D. Kan. 1996) (presence of "Attorney Work Product" did not render a document protected); *Upjohn*, 449 U.S. at 395 (label of "highly confidential" did not render a document not privileged). Such a marker is simply an indicator of privilege. Moreover, a brief survey of the compliance programs of several prominent public companies also shows that they too do not explicitly invoke attorney-client privilege in their employee manuals. *E.g.*, Ford Motor Company, Code of Conduct Handbook (2007), *available at* http://corporate.ford.com/doc/corporate_conduct_standards.pdf (no reference to privilege but referencing importance of contacting Ford's attorneys); Apple, Business Conduct (2012), *available at* http://files.shareholder.com/downloads/AAPL/2955619979x0x443008/5f38b1e6-2f9c-4518-b691-13a29ac90501/business_conduct_policy.pdf (same); IBM, Business Conduct Guidelines (2011), *available at* https://www.ibm.com/investor/pdf/BCG2014.pdf (same); General Motors, Winning with Integrity (2011), *available at* http://www.gm.com/content/dam/gmcom/COMPANY/Investors/Corporate_Governance/PDFs/Winning_With_Integrity.pdf (same); Wells Fargo Team Member Code of Ethics and Business Conduct (2012), *available at* https://www08.wellsfargomedia.com/downloads/pdf/about/team_member_code_of_ethics.pdf (same). Barko's theories, if adopted, would deprive many prominent public companies of privilege protection over their internal investigations.

obligations. Accordingly, *Upjohn* compels the result in this case, requiring denial of the motion to compel.

Rather than argue *Upjohn*, the Relator relies virtually entirely upon *ISS Marine Services* (Relator's Mot. 10, 12-13, 18, 19, 21, 23-25), which is entirely distinguishable. *Upjohn* and *ISS Marine Services* began similarly enough—with audit employees raising fraud allegations, but there the cases diverged markedly. Unlike in *Upjohn*, where lawyers were brought into the process virtually from the inception, in *ISS Marine Services*, the company deliberately decided after an initial legal consultation to cut the lawyers out of the subsequent investigation process, leaving the investigation to an internal auditor unaffiliated with the legal department. *ISS Marine Servs.*, 905 F. Supp. 2d at 124–125. Two months after the audit's conclusion, the corporation sent a copy of the audit report to outside counsel, but did not appear to receive legal advice based upon it. *Id.* at 125. Given the total absence of lawyer involvement or supervision, the district court's later conclusion that the audit was not privileged is not surprising. The court did, however, note three factors which could have granted the investigation privileged status: (1) had an attorney played more than a *de minimis* consulting role, *id.* at 129–30; (2) had the employees had any idea whatsoever that their communications to the auditor were destined for an attorney, *id.* at 130-31; or (3) had the investigation resulted in legal advice. *Id.* at 131–32.

KBR's COBC investigations—including those conducted here—are entirely different. The investigations from their inception are managed by lawyers, here Mr. Heinrich. E-mails reflected on the privilege log demonstrate that Mr. Heinrich was in contact with the investigators and security managers handling the investigation, and was consulted by the Director on the determination of whether the allegations were substantiated. Relator's Mot. Ex. 6. Mr. Heinrich and other KBR counsel conferred to determine whether the COBC tips here had been

substantiated, or whether the associated investigations should be closed, including items number 4–7, 16, 30. Ex. 1, Heinrich Decl. ¶ 12. ISS's investigation in almost no way resembled either the *Upjohn* investigation or the one that was conducted by KBR here.

The Relator places great weight on the fact that non-lawyer investigators conducted the fact-gathering in KBR's investigations (Relator's Mot. 9), but communications with attorneys' agents, including investigators, have long been protected by attorney–client privilege. *Daniels*, 68 F.R.D. at 585; *Gucci Am.*, 271 F.R.D. at 71. The cases upon which the Relator relies to reach the opposite conclusion address situations far off point. *FTC v. TRW, Inc.*, 628 F.2d 207, 211–13 (D.C. Cir. 1980), for instance, addresses a document produced by an unaffiliated third-party of the corporation to "enable [counsel] to advise [the company] on the status of its procedures" for a credit report system. *Id.* at 213. Research reports produced by an unaffiliated third-party with little direct supervision by counsel as to the scope and nature of the investigation are distinct from the more typical case of an investigator tasked by counsel. And even in *TRW*, the D.C. Circuit merely said it lacked sufficient evidence to make a privilege determination and so erred on the side of not affording privilege. *Id.* KBR's investigations, in contrast, are conducted by investigators (many of whom are former law enforcement), are supervised by counsel, and create investigation COBC Reports clearly marked "attorney-client privilege" directed to counsel for the purpose of the counsel's providing legal advice. The investigators (and other KBR personnel—such as procurement personnel who were enlisted by the Law Department to assist in the investigation) were acting as an extension of the Law Department and therefore are subject to KBR's claim of attorney-client privilege. Ex. 1, Heinrich Decl. ¶ 6.

### B. A Privileged Internal Investigation is Not the Mere Provision of Business Advice.

If, as the Relator suggests, KBR's investigation is mere business advice (Relator's Mot. 8–14, 20–21), with all that KBR's investigation process shares in method and purpose with that in *Upjohn*, the Relator's argument would eviscerate the *Upjohn* privilege. The *Upjohn* investigation was conducted to analyze the legal risks and decide how to address the allegations of corrupt behavior. Barko says that KBR's legal investigation reflected primarily concerns about "accounting practices, efficiency, client development and client relations, as well as other ordinary, essential business imperatives" (Relator's Mot. 13), but the tips, and subsequent investigations, reveal different facts: that KBR received allegations of a potential improper relationship between a KBR employee or employees and a subcontractor, and that KBR promptly investigated those allegations. There is simply no basis for Relator's argument that the privileged COBC investigations here involved the mere provision of "business advice."[15]

The Relator also relies on clearly inapposite cases where an insurance company attempted to claim privilege over investigations that it conducted in the role as an insurance adjuster. Relator's Mot. 12. Those cases, however, stand for the principle that where the attorney's main role is to make or assist in making a business decision, such as how to properly adjust an insurance claim, related factual investigations are not privileged. But, as the Fourth Circuit explained, "even . . . cases [addressing this limitation to privilege] did not suggest . . . that investigation can never constitute legal work." *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997). Quoting an opinion upon which the Relator relies, the Fourth Circuit emphasized that

[15] Relator's citation to *ISS Marine Services* for this point is again unavailing—there the company made what was clearly a business decision to conduct a business audit of the practices at issue—essentially excluding counsel from the process. *ISS Marine Servs.*, 905 F. Supp. 2d at 124–25. As noted above, that is a far cry from what transpired here.

these courts "carefully instructed that only '[t]o the extent' attorneys acted as claims adjusters, a 'pure, ordinary business function,' was their investigation 'outside the scope of the asserted privileges.'" *Id.* (quoting *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986)). KBR is not in the "business" of investigating COBC allegations—it is a government contractor—and, like all government contractors, must periodically investigate claims of misconduct, particularly under the exigent circumstances of operating in a war theater. These cases simply do not apply.

It is also important to note that KBR is not attempting to cloak mere business audits in privilege. As Mr. Heinrich testified at deposition, KBR has business personnel in roles such as Government and Procurement Compliance whose task it is to help respond to audits, such as those initiated by the Defense Contract Audit Agency, or to conduct its own audits, and this work is not typically privileged. Ex. 2, Heinrich Dep. 149:18–155:11. This work becomes subject to privilege only to the extent the Law Department specifically enlists the aid of such personnel to assist with a privileged investigation or with litigation. *Id.,* 152:17-153:17. The Relator's comparison is not apt, and again the comparison with *Upjohn* holds force—the investigation there was no more a business audit than was KBR's COBC investigation.

While business decisions—such as those relating to discipline or whether to tender credits to the Government—may result from COBC investigations, this common-sense principle does not render non-privileged the underlying investigation and legal advice. Mr. Heinrich has testified that when a violation of the COBC is substantiated, he will inform senior KBR management and recommend a course of action. Ex. 1, Heinrich Decl. ¶ 10; Ex. 2, Heinrich

Dep. 127:17–128:10.[16] "The attorney–client privilege does not protect business advice, even when the advice is given by an attorney, but it does protect an attorney's legal advice about a business decision." *Perius v. Abbott Labs.*, No. 07-C-1251, 2008 WL 3889942 at *7 (N.D. Ill. Aug. 20, 2008) (citing *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000)).

### C. Neither the Sarbanes–Oxley Act Nor the Federal Acquisition Regulation Destroys Corporate Privilege.

The Relator also appears to conflate legal disclosure obligations with privilege waiver. Relator's Mot. 14–16. Once again, the analogy between KBR and *Upjohn* stands. Upjohn Co. also faced disclosure requirements as well to the SEC and investors, which it complied with through the filing of a Form 8-K, which Upjohn Co. copied to the IRS. *Upjohn*, 499 U.S. at 387. Despite these disclosure requirements and the eventual disclosure of the underlying facts, Upjohn's investigative materials remained privileged and protected by work product. As in *Upjohn*, KBR has periodically made factual disclosures to the government related to allegations of misconduct, but has consistently maintained its privilege in doing so. Ex. 1, Heinrich Decl. ¶¶ 9-11; Ex. 2, Heinrich Dep. 132:6–133:2.

The laws cited by the Relator, including Sarbanes–Oxley, do not prescribe waiver of privilege as a condition of compliance with disclosure requirements, and Relator has cited no authority to the contrary. Indeed, the Department of Justice and, to a lesser degree, the Securities and Exchange Commission have both withdrawn from their earlier view that corporations must waive privilege in order to obtain the benefit of cooperation in sentencing.[17] The Department of

[16] On this point, Barko incorrectly suggests that Mr. Gerlach was "terminated" as a result of a COBC investigation. Relator's Mot. 8. As Mr. Heinrich has testified, and as Mr. Gerlach's personnel file demonstrates, Mr. Gerlach resigned. Ex. 2, Heinrich Dep. 163:8-16.

[17] Memorandum from Paul J. McNulty, Deputy Att'y General, to Heads of Department Components and United States Attorneys 8–11 (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; U.S. Secs. & Exch. Comm'n, Enforcement Manual 93–95 (2013).

Defense does not require waiver or privilege under its Contractor Standards of Conduct. *See* 48 C.F.R. § 203.7000–.7001. And the FAR expressly protects privilege while requiring disclosures.

> Full cooperation . . . does not require—
>
> . . . A Contractor to waive its attorney–client privilege or the protections afforded by the attorney work product doctrine; or
>
> . . . Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and
>
> . . . Does not restrict a Contractor from—
>
> Conducting an internal investigation . . . .

FAR 52.203-13(a).[18]

As with his other arguments, the Relator here again strikes at the core of *Upjohn* and corporate attorney–client privilege. A great many large corporations have COBC programs exceedingly similar to KBR's COBC. *See supra* note 14. They make clear that the organizations intend to disclose misdeeds, cooperate with government investigations, and comply with laws. Businesses implement investigative compliance processes with an eye towards reducing general legal risk at the time of the implementation of the policy and with specific legal risks in mind at the commencement of each investigation. If the language quoted from KBR's COBC about legal and ethical compliance is enough to destroy privilege, then every

[18] Relator's only proffered case for this proposition, *In re Syncor ERISA Litig.*, 229 F.R.D. 636 (C.D. Cal. 2005), is again distinguishable. There the company conducted its investigation with the express intent of turning over its work product to the government. *Id.* at 640–41. There is also reason to question whether *Syncor* was correctly decided, given that the court relied on cases where giving documents to the government waives privilege with respect to third-parties *after* a privilege agreement with the government is signed. *United States v. Bergonzi*, 216 F.R.D. 487, 493–94 (N.D. Cal. 2003); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 300–04 (6th Cir. 2002). In any event, *Syncorp* is simply inapposite as KBR neither intends to nor does it disclose the materials and communications produced as part of its investigations. Ex. 2, Heinrich Dep. 132:6–133:2.

major corporate COBC has inadvertently waived it simply by attempting to induce compliance. This is the very risk identified by the Supreme Court in *Upjohn*—an uncertain privilege that will induce companies to hesitate in ensuring compliance by conducting thorough and candid investigations.

### D. The Fact of a Knowledge Element Does Not Put a Legal Investigation "At Issue."

KBR has not, as the Relator argues, put its investigation at issue merely by disputing that it possessed knowledge necessary for a violation of the False Claims Act. The "at-issue" or "issue injection" cases concern situations where a claim or defense rests upon a party's knowledge or intent as a result of legal advice. For instance, in *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37 (D.D.C. 2009), the Navajo Nation had waived privilege as to attorney advice about back taxes and a tax waiver by claiming that it did not know of its legal obligations. *Id.* at 44. And in *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981), Exxon waived privilege by invoking as a defense its good faith reliance upon its counsel's legal interpretation of a representation by the government. *Id.* at 248–49.

The mere fact that KBR disputes that it knowingly submitted a false or fraudulent claim does not put its COBC investigation at issue. Indeed, KBR at trial intends to rely solely on non-privileged information—that it received tips, investigated them, and ultimately did not make a disclosure to the Government. It will not discuss the substance of its investigation.[19] Were the Court to adopt the Relator's argument, then any time a party disputes the knowledge element of a

[19] As noted above, Barko testified that he signed a witness statement, and produced that statement during discovery, which has "Attorney–Client Privilege Information" written at the top of the page. *See* Ex. 7, Barko Dep. 26:3–13 (discussing Ex. 6, Barko Statement (Nov. 22, 2004)). It is possible that KBR would use Barko's statements for impeachment purposes – as they are inconsistent with his later fraud allegations – and would make them available to Barko under Federal Rule of Civil Procedure 26(b)(3)(C), should the Court rule that KBR would not waive subject matter privilege over the investigation file by providing them to Barko.

fraud claim or crime, that party will have waived its privilege. Given that all fraud offenses require proof of culpable intent or scienter, it would be impossible to defend an allegation without putting intent "at issue."

## III. Attorney and Investigator Notes, Communications, and Memoranda Are Privileged Work Product

### A. This Circuit Does Not Require a "Specific Claim" to Support Work Product Protections and the Relator Has Failed to Show Undue Hardship

KBR attorneys and investigators produced fact and opinion work product in the form of interview notes, memoranda, and e-mail exchanges about ongoing COBC investigations. Ex. 1, Heinrich Decl. ¶ 7. Privileged communications from employees to counsel triggered the investigative mechanism, and from that point forward counsel and investigators operated on the assumption they were investigating the basis of a potential claim or litigation. These communications synthesize important factual findings, identify legal and factual areas of concern to the attorneys, and provide legal evaluations of the results. As discussed above, KBR relies upon the investigations to advise the Company as to potential legal liability, and KBR faces the very real prospect of litigation resulting from matters under COBC investigation, including under the False Claims Act and the Anti-Kickback Act. Ex. 1, Heinrich Decl. ¶ 9.

The Relator believes that because there often is a lag between KBR's investigations and "specific claims," the Court should conclude that the COBC documents were not "prepared in anticipation of litigation." Relator's Mot. 23. That simply is not the law in this Circuit, which has limited the application of the "specific claim" requirement. "It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur." *In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998); *see also ISS Marine Servs.*, 905 F. Supp. 2d 135–36. A "specific claim" might only be required to form the basis of work product protection in the context of government

prosecutions and investigations where there is the potential for attorney as regulator to become muddied with attorney as litigator. *Sealed Case*, 146 F.3d at 885–86 (discussing government attorney role). For other cases, where lawyers acted as "legal advisors protecting their [client] from the possibility of future litigation," but where there was no specific claim, the court protected attorney work product. *Id.* at 885. "Discouraging lawyers from engaging in the writing, note-taking, and communications so critical to effective legal thinking would, in *Hickman*'s words, 'demoraliz[e]' the legal profession, and 'the interests of the clients and the cause of justice would be poorly served.'" *Id.* at 886–87 (quoting *Hickman*, 329 U.S. at 511).

What remains of the Relator's attack upon KBR's work product is limited. The Relator complains that the fact that KBR's counsel investigate "every submission received" somehow entitles him to see the fruits of those investigations. Relator's Mot. 23. It is unclear the basis of Relator's claim here as he offers no explanation nor any case citation that would support it. *Id.* KBR's commitment to investigate allegations does not vitiate its work product protection – otherwise, there would be a disincentive to conduct such investigations. The Relator then returns to the same argument that these investigations were business processes, which KBR has addressed above. Indeed, here Relator concedes that non-attorneys can produce work product at the direction of attorneys (Relator's Mot. 23-25), as happened here, leaving nothing to dispute on that point. "[W]ork product created by non-attorneys can also be protected if it is 'so intertwined with the legal analysis as to warrant protection.'" *ISS Marine Servs.*, 905 F. Supp. 2d at 134 (quoting *United States v. Deloitte LLP*, 610 F.3d 129, 139 (D.C. Cir. 2010)).

Finally, the Relator makes a conclusory assertion that even if KBR investigative materials are work product, the Relator has a substantial need for these materials, but he makes absolutely no showing of need for what he incorrectly suggests is only fact work product.

Relator's Mot. 24-25. The law distinguishes between opinion work product—reflecting the attorney's mental impressions and conclusions—and fact work product, which is theoretically entitled to lesser protection. For example, signed witness statements, such as those at issue in *Hickman* remain protected fact work product that is still not subject to production absent a showing of need. *Compare Hickman*, 329 U.S. at 511 (protecting written witness statements as fact work product), *with* Ex. 1, Heinrich Decl. ¶ 11 *and* Ex. 2, Heinrich Dep. 156:13–158:10.

Relator is not allowed simply to "piggyback" on KBR's investigation, but must first use the tools available to him to discover facts. Instead, Relator has done virtually no investigative work. The Relator could obtain information by deposing KBR employees with first-hand knowledge of the events in question. Instead, the Relator has only conducted three depositions since discovery began in August 2013, two of which were Rule 30(b)(6) witnesses designated by KBR, and only one of which he conducted during the summary judgment discovery period. The Relator complains that it would take an "enormous effort" to conduct its own investigation, but as the Supreme Court said in *Hickman*, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman*, 329 U.S. at 516 (Jackson, J., concurring); *Linerboard*, 237 F.R.D. at 387 (protecting attorney work product concerning an investigation where "witnesses [were] made available" and "there [was] no issue [of a] lack [of] an alternative source of this information").

### B. Attorney and Investigator Communications and Memoranda Concerning Investigations Are Work Product

The vast majority of documents comprising a COBC File are communications among counsel and investigators. These communications document the attorney management of COBC investigations, summarizing and analyzing tips from employees, assigning investigations, checking in on the progress of investigations, directing investigators to perform certain tasks, and

discussing the findings of investigations. The COBC File may often contain handwritten notes reflecting the thoughts of attorneys as they reviewed and reacted to the documents in the file. After the conclusion of investigations, KBR attorneys (particularly Mr. Heinrich) review the investigative COBC Reports to determine whether there are potential legal claims or disclosure obligations. Ex. 2, Heinrich Dep. 127:15-128:7. The COBC Report includes detailed summaries of evidence gathered as well as impressions from the investigators and therefore are protected opinion work product. *Linerboard*, 237 F.R.D. at 385-87 (noting that "[i]t is hard to conceive of a circumstance in which an attorney's mental impressions would be more 'thoroughly intertwined' with facts than in counsel's recollection of an internal investigation," and that selections of which witnesses to interview "constitute core work product"). In the case of COBC investigations, COBC Reports contain recollections and impressions of the investigator (formed according to criteria set out by counsel), as well as details of each investigation, including which witnesses were interviewed and the investigator's impressions of those witnesses. These COBC Reports reflect the focus and recollections of the investigator and attorney and thus are protected work product.

**Conclusion**

For the foregoing reasons, KBR respectfully requests that the Motion to Compel be denied.

February 12, 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of February, 2014, I filed the foregoing KBR Defendants' Opposition to Relator's Motion to Compel (with supporting exhibits) using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

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