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 OPINION & ORDER [Resolving Docs. 135, 180, 181, 187, 188, 193, 194]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Plaintiff-Relator moves to compel the production of a series of internal investigative statements, reports, and emails. In support of his request, the Plaintiff argues that Defendants waived any work-product protection and attorney-client privilege over the documents. Plaintiff first argues that Defendants have put the contents of the documents at issue in the litigation. In a related argument, Plaintiff claims that he should be permitted to examine privileged documents that Defendants' Civil Rule 30(b)(6) witness reviewed before testifying at a deposition.

Plaintiff next says that the documents are subject to the crime-fraud exception to attorney-client privilege. Finally, Plaintiff says that any privilege has been waived because, in response to a Department of Defense Criminal Investigative Service ("DCIS") subpoena, Defendants did not produce documents that the subpoena required and did not provide a privilege log to identify documents Defendants were withholding.

For the following reasons, the Court **GRANTS** Plaintiff's motion to compel production of the discussed documents. Because Defendant may seek Court of Appeals review of this order, the Court also orders Plaintiff not to disclose the contents of the documents, and requires the Plaintiff

to file any briefing discussing the documents under seal.

I. Background

This is a qui tam case alleging that Defendants Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg, Brown & Root Engineering Corporation, Kellogg, Brown & Root International, Inc., and Halliburton Company (collectively "KBR") made false claims while serving as contractors in Iraq under the United States's LOGCAP III program. In general, Plaintiff Harry Barko claims that KBR presented inflated and fraudulent bills to the United States for work done by subcontractors who received preferential treatment from KBR despite their terrible on-the-ground performance.[1/]

Barko moved to compel production of interviews, reports, and documents that KBR prepared while investigating tips KBR had received that involved the same allegations found in Barko's complaint.[2/] KBR opposes the production, and argues that the documents are attorney-client privileged or work-product protected.[3/]

KBR investigated reports of kickbacks and contract steering under KBR's internal Code of

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[1/]For example, former KBR Subcontractor Administrator George Covelli's affidavit states:

> I had come to the conclusion that Mr. Gerlach was intentionally interfering with my ability to properly administer the B6 Man Camp subcontract. I reached this conclusion based not only on the events occurring on the B6 Man Camp occurring up to that point in time, but also on my observations before I moved to B6. I observed that Mr. Gerlach spent more time in Daoud's offices than in KBR's offices; that every time a bid came in on a contract action that was lower than D&P' s bid Mr. Gerlach would brow beat SCA into awarding the contract to D&P; and because no corrective action was taken on a D&P subcontract when it was apparent that D&P was in long-standing default. My observations caused me to conclude that Mr. Gerlach had established an improper relationship with D&P.

Doc. 180-2 at 4.

[2/]Doc. 135.

[3/]Doc. 139.

Business Conduct ("COBC"). KBR's investigation focused on allegations that two KBR subcontractors, Daoud & Partners, Inc. ("Daoud") and EAMAR Combined for General Trading and Contracting Company ("EAMAR"), received preferential treatment despite poor performance because they may have paid kickbacks to KBR employees.

The documents withheld include witness statements from employees at several contract sites, investigator reports to KBR attorneys summarizing facts and witness statements, and communications among KBR lawyers and investigators regarding their findings.[4/] The statements and reports provided KBR with background investigatory materials that KBR used to decide whether to report evidence of fraud or kickbacks.

Previously, after reviewing the documents *in camera*, the Court ordered all 89 of the COBC documents produced.[5/] The Court found that the documents were created to comply with anti-kickback requirements found in 48 C.F.R. § 52.203–7(c). This Court concluded that the documents were created to show compliance with fraud reporting requirements and were not created to obtain legal advice.[6/] Because this Court had found the documents not privileged as business records, the Court reserved ruling on whether, even assuming the documents were privileged, KBR had

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[4/] *Id*. at 23-24 ("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.").

[5/] Doc. 150.

[6/] Department of Defense contracting regulations require contractors to have internal control systems to "[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts." These regulations further require a "written code of business ethics," "internal controls for compliance," "[a] mechanism, such as a hotline, by which employees may report suspected instances of improper conduct," "[i]nternal and/or external audits," "[d]isciplinary action for improper conduct," "[t]imely reporting to appropriate Government officials," and "[f]ull cooperation with any Government agencies." 48 C.F.R.§ 203.7001(a) (10-1-2002 edition).

nonetheless waived any privilege over the documents.[7/]

Upon a petition for mandamus, the Court of Appeals ordered that the order compelling production be vacated. The Court of Appeals found the COBC documents to be attorney-client privileged. The Court of Appeals held that "[i]n the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy."[8/]

The Court of Appeals then remanded the case for further proceedings.

II. Proceedings After the Mandamus Order

Following the remand, this Court ordered several rounds of briefing for each side to make and respond to arguments regarding the potential waiver of attorney-client privilege.

In seeking to compel production of the COBC documents, Barko first argues that KBR waived any privilege by putting the contents of the COBC documents at issue. In a related argument, Barko argues that he should get access to the documents because they were used to refresh a witness's recollection before a 30(b)(6) deposition. Barko next argues that the documents are discoverable under the crime-fraud exception to the attorney-client privilege. Barko finally argues that KBR waived any privilege when it failed to produce or identify the COBC documents in response to a DCIS subpoena broadly seeking documents related to the contracts in this case.

[7/] Doc. 155 at 6.

[8/] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

In response, KBR first argues that Barko cannot make any waiver argument that he did not raise before KBR obtained a stay during the processing of its mandamus petition. KBR next argues that it did not put the contents of the COBC documents at issue, nor did its 30(b)(6) witnesses testify about privileged material from the documents the witness reviewed. KBR then denies that the crime-fraud exception to the attorney-client privilege has been established. Finally, KBR says that its failure to identify the COBC documents to the DCIS Inspector General should not waive the attorney-client privilege in this case.

Before reaching the substance of the waiver arguments, the Court first considers KBR's argument that the Court of Appeals decision on KBR's mandamus petition stops Barko from offering different arguments to support his position.

KBR maintains that "the plain text of the D.C. Circuit's mandamus decision precludes this Court from considering arguments regarding the documents at issue that Relator did not properly raise before the mandamus proceedings."[9/] For support, KBR points to the final lines of the Court of Appeals's opinion: "We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments."[10/]

To a large degree, KBR's argument on this issue is not important. Long before the mandamus petition had been filed, Barko had argued that KBR waived any attorney-client privilege by characterizing COBC documents to suggest that they supported KBR's defense that no fraud or

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[9/] Doc. 199 at 2.

[10/] *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 764.

kickbacks occurred.[11/] Before KBR filed the mandamus petition, Barko had also argued that KBR waived the attorney-client privilege by having "KBR's Rule 30(b)(6) corporate representative review[ed] the COBC investigative reports in preparation for his testimony."[12/] Before KBR filed the mandamus petition, Barko had also argued that the COBC documents were discoverable under the crime-fraud exception.[13/]

After the Court of Appeals mandate, Barko did raise a new argument that KBR failed to respond to a DCIS subpoena and that this failure should waive the privilege. But for other reasons, Barko's argument regarding the DCIS subpoena fails anyway.

Neither the Court of Appeals's opinion, nor the case's background support KBR's limiting interpretation. The opinion says "[t]o the extent that Barko has timely asserted other arguments . . . the District Court may consider such arguments." Even if the "timely asserted" language is part of the mandate, it does not suggest that this Court can consider only arguments that Barko made before KBR petitioned for mandamus relief. Before the mandamus petition was filed, this Court had not set any deadlines for motions to compel. At the time the mandamus petition was filed, no Court order limited when motions or briefing should be filed. At the time the mandamus petition was filed, discovery was ongoing.

Under Rule 15, Barko could ask to amend any pleading with KBR's consent or with "the court's leave." And under Rule 15, "[t]he court should freely give leave when justice so requires."[14/]

[11/] Barko argued: "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." Doc. 143 at 16.

[12/] Doc. 143 at 3.

[13/] *Id*. at 17.

[14/] Fed. R. Civ. P. 15.

The Court finds Barko's additional arguments to be timely raised under the case management schedule earlier established for the case. The Court of Appeals's opinion should not be read to divest this Court of its authority to set deadlines and manage discovery.[15/]

The case background gives further support for this conclusion. KBR's petition for mandamus never sought relief from any case management ruling. Before the Court of Appeals, KBR and Barko argued over whether this Court erred when it found that the COBC documents were not privileged. KBR did not seek a ruling on what evidence or arguments could be considered on the waiver issue.[16/] Neither party briefed the issue to the Court of Appeals, although the Court's order compelling production had expressly reserved ruling on the waiver issue.[17/] Except for the concluding sentence, the Court of Appeals opinion does not discuss any limitations on waiver arguments that Barko could make.[18/]

This indicates that the Court of Appeals did not, in granting the petition for mandamus, also intend to freeze the arguments this Court could consider after the remand.[19/] This Court does not read

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[15/] *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, AFL CIO CLC*, 103 F.3d 1007, 1012 (D.C. Cir. 1997) ("Trial courts exercise considerable discretion in handling discovery matters . . . .").

[16/] KBR petitioned for mandamus relief from this Court's March 6, 2014 order. "KBR respectfully requests a writ of mandamus directing the district court to vacate its Order of March 6, 2014 (attached as sealed Appendix A), compelling disclosure of 89 documents related to KBR's COBC investigations." USCA Case 14-5055, Amended Petition at 3.

[17/] Doc. 155 at 7 ("[T]his Court makes no final conclusion whether KBR waived any attorney-client privilege . . . .").

[18/] See Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 4478.3 (2d ed.) ("The reach of the mandate is generally limited to matters actually decided . . . . Matters simply not considered also are likely to be outside the mandate.") (citations omitted).

[19/] The Court of Appeals issued its judgment and opinion on June 27, 2014. The Court of Appeals's judgment granted the only relief KBR had sought. In that judgment, the Court of Appeals: "ORDERED that the petition be granted, and the District Court's March 6, [2014,] document production order be vacated for the reasons stated in the opinion issued herein this date."

A leading treatise describes the relationship between the opinion, the judgment, and the mandate: "The opinion of the court is the statement of its reasons for deciding the case in a certain way. The opinion can be consulted to resolve ambiguities in the court's judgment, but does not of its own force require anyone to do anything. The court may incorporate its opinion into its mandate, however, in which case the opinion's language acquires directive force." Michael

the Court of Appeals opinion to grant KBR relief that KBR never requested.

Therefore, this Court can consider the arguments made in recent briefs regarding KBR's waiver of attorney-client privilege and work product protection. But repeating an earlier point, Plaintiff Barko had already made the waiver argument and the crime-fraud argument before KBR filed the mandamus petition.

III. Waiver Arguments.

A. Implied or At Issue Waiver

The doctrine of implied, or at issue waiver, is an extension of the axiom that privilege cannot be used both as a sword and a shield.[20] "[W]hile the sword stays sheathed, the privilege stands."[21] However, "litigants cannot hide behind the privilege if they are relying upon privileged

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E. Tigar and Jane B. Tigar, Federal Appeals Jurisdiction and Practice § 10:15 (3d ed.).

The Court of Appeals's judgment grants the petition for the mandamus writ "for the reasons stated in the opinion issued herein this date." The judgment incorporates the opinion regarding the mandamus writ directing this court to withdraw the order compelling discovery.

To be sure, "[n]o principle of law is better established that the rule that a District Court is bound 'by the decree of the Court of Appeals and must carry it into execution, according to the mandate.'" *United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 865 F. Supp. 2d 1, 5 (D.D.C. 2011) (quoting *Consarc Corp. v. Department of Treasury*, 71 F.3d 909, 915 (D.C. Cir. 1995)). But "[t]he reach of the mandate is generally limited to matters actually decided. A mere recital of matters assumed for purposes of decision and dicta are not part of the mandate." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 4478.3 (2d ed.) (citations omitted). "A corollary to the mandate rule . . . is that upon remand the trial court may consider matters not expressly or implicitly part of the decision of the court of appeals." *United States v. Tenzer*, 213 F.3d 34, 42 (2d Cir. 2000).

[20] The Court's analysis of at-issue waiver will apply to both the attorney-client privilege and work-product protection. KBR itself has suggested a combined analysis for these questions: "KBR has asserted that many of the COBC documents at issue are also protected by the work-product doctrine. This position paper thus refers both to attorney-client privilege and work-product protection. As relevant here, the waiver analysis for both is the same." Doc. 181 at fn. 2 (citing cases). The Court additionally relies upon Judge Bates' skillful analysis of this question in *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 252 53 (D.D.C. 2013) ("Based on these general principles, the Court finds that recognizing the attorney work-product privilege is not required to maintain a healthy adversary system when the proponent of the privilege has placed prior attorney work product squarely 'at issue' in the case. Indeed, allowing the privilege to shield documents at the heart of the proponent's case would undermine the adversary system, and would let the work-product privilege be used as a tool for manipulation of the truth-seeking process. The vast majority of federal courts to have considered this question have come to the same (or a similar) conclusion.") (internal quotation marks and citations omitted).

[21] *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005).

communications to make their case."[22/]

Although a party does not waive the privilege "merely by taking a position that the [privileged] evidence might contradict,"[23/] "[i]t is well established doctrine that in certain circumstances a party's assertion of factual claims can, out of considerations of fairness to the party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted."[24/]

"Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy."[25/] "A simple principle unites the various applications of the implied waiver doctrine. Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege."[26/] This Circuit has elaborated that:

> Implied waiver deals with an abuse of a privilege . . . . Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process . . . . [A party asserting attorney-client privilege] cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.[27/]

In a leading case, the court found an at issue waiver where "the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly

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[22/] *Id.*

[23/] *United States v. Salerno*, 505 U.S. 317, 323 (1992).

[24/] *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003).

[25/] *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997). At-issue waiver most frequently, but not exclusively, arises in cases of legal malpractice or where advice of counsel is raised as a defense. *Minebea Co. v. Papst*, 355 F. Supp. 2d 518, 522 (D.D.C. 2005).

[26/] *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir.1982).

[27/] *Id.* at 807 (internal quotation marks and citation omitted).

unfair to the opposing party."[28/] Or, put another way, "[i]mplied waiver may be found where the privilege holder asserts a claim that in fairness requires examination of protected communications."[29/] Determining whether fairness requires disclosure is a case-by-case, context specific determination.[30/]

While a party need not intend to waive the privilege,[31/] privilege is not waived merely because the contents of the communication are relevant to the litigation, or of interest to the opposing party. The party asserting the privilege must put a communication at issue through some affirmative act.[32/]

i. Establishing At-Issue Waiver

According to Barko, KBR intentionally put the contents of the COBC investigation at issue when it represented that its internal investigation of Barko's allegations yielded no reasonable grounds to believe fraud may have occurred. Even before the mandamus petition, Barko argued that "KBR cannot place the substance and results of the investigation to support its defense and shield

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[28/] *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). The court in *United States v. Exxon Corp.*, 94 F.R.D. 246, 248 (D.D.C.1981) called *Hearn* "perhaps the most exhaustive treatment of this subject . . . ."

[29/] *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000) (internal quotation marks and citation omitted).

[30/] *Id.*

[31/] "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." *In re Sealed Case*, 676 F.2d at 807 (quoting 8 J. Wigmore, Evidence in Trials at Common Law § 2327 at 636 (J. McNaughton rev. 1961)).

[32/] *Rhone Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication."); *Feld v. Fireman's Fund Ins. Co.*, 292 F.R.D. 129, 141 (D.D.C. 2013) ("This Court agrees that relevance cannot be the sole benchmark for determining implied waiver. But it is not just relevance that counsels a finding of implied waiver here.") (applying D.C. law); *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 13 (D.D.C. 2010) ("I believe that the court of appeals for this Circuit would agree with the decisions of the Second and Third Circuits and with the courts and academics that have criticized Hearn and would conclude that a party must put the advice in issue before she forfeits the privilege. There is no such claim here . . . ."); *The Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 50 (D.D.C. 2009) (finding no at-issue waiver because "[a]lthough Defendants describe at length how privileged communications are relevant to the Navajo's claims, the undersigned has not located anything in the Navjo's pleadings to suggest that the Navajo affirmatively placed these communications at issue.").

the underlying investigative reports and facts contained in [sic] investigative record on the grounds of privilege."[33/]

Barko argues that KBR first put the contents of the COBC files at issue at a Rule 30(b)(6) deposition noticed and taken by Barko. The deposition notice required KBR to designate a representative to testify regarding a wide swath of the KBR contracts in Iraq as well as KBR's dealings with Daoud and EAMAR.

KBR presented Christopher Heinrich to testify. Heinrich serves as Vice-President, Legal for KBR. KBR (or its predecessor) has employed Heinrich since 1987. Heinrich had responsibility for KBR's federal government contracting activities, including the contracts involved with this case. Heinrich provided "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."[34/] Before testifying on KBR's behalf, Heinrich "reviewed the COBC Files at issue in this litigation."[35/]

Excerpts from Heinrich's February 5, 2014, deposition are attached to KBR's motion for summary judgment. This deposition is notable in two ways. First, after Heinrich testified that he had

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[33/] Doc. 143 at 16-17.

[34/] Doc. 139-1 at 2-3. A separate and complete copy of Heinrich's Rule 30(b)(6) deposition is found at Doc. 144-3.

[35/] Heinrich testified:

> Q What documents have you reviewed in preparation of your testimony for today?
>
> A I reviewed the privilege log, TIP sheets, and the complaint. And I reviewed --looked at the Code of Business Conduct, the investigative reports.
>
> Q And the investigative reports, did you say?
>
> A Well, the COBC investigative reports.

Doc. 144-3 at 4. *See also* Doc. 139-1 at 6.

reviewed the privilege log, the tip sheets and the investigative reports, KBR's attorney blocked each of Barko's attempt to question Heinrich regarding why KBR did not report potential kickbacks to the Department of Defense.[36/] Second, after stopping Heinrich from testifying regarding what reports and evidence supported KBR's decision not to give the Department of Defense notice of potential kickbacks or fraud, KBR's attorney took the unusual step of examining his own witness during a discovery deposition called by the Plaintiff.[37/]

KBR's attorney, Craig Margolis, took the following testimony from his own witness, Heinrich:

> Q [By KBR Attorney Margolis] So, Mr. Heinrich, are you looking now at Exhibit 11?
>
> A Yes.
>
> Q Do you recognize it?
>
> A Yes.
>
> Q What is it?
>
> A It is a Federal Acquisition Regulation Clause 52.203-7, known as the Anti-Kickback Act procedures.

[36/] As only one example of the Rule 30(b)(6) testimony:

> MR. KOHN: Was anyone disciplined as a result of the COBC investigation?
>
> MR. MARGOLIS: I'll allow you to answer that question. It's fine.
>
> THE WITNESS: No.
>
> MR. KOHN: What was the basis of that - how was that decision made?
>
> MR. MARGOLIS: Objection. Instruct the witness not to answer on the grounds of attorney-client privilege and attorney work product.

Doc. 144-3 at 54.

[37/] *Id*.

Q Was 52.203-7 incorporated into the LOGCAP III base contract between the government and KBR?

A. Yes.

* * *

Q And do you see there the source of the reporting obligation you have just described?

A Yes.

Q I'm going to read this, and you let me know if I've read it correctly. "When the contractor has reasonable grounds to believe that a violation described in paragraph B of this clause may have occurred, the contractor shall promptly report in writing the possible violation. Such report shall be made to the Inspector General of the contracting agency, the head of the contracting agency if the agency does have an Inspector General, or the Department of Justice. Did I read that correctly?

A That's correct.

Q Did KBR adhere to that contract clause?

A Yes, we did.

Q And were there instances where KBR did make disclosures pursuant to this FAR clause?

A Yes, we did.

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Q The COBC investigation reports, would those include findings of investigations typically?

A Yes.

Q Would it include, for example, whether or not the investigation -- excuse me, an allegation was substantiated or not substantiated?

A It would produce, you know, the facts that were related to it, and then, yes, allow us to determine whether or not a violation had occurred.

Q And, among other things, would that information be used to determine

whether or not the company should make a disclosure pursuant to the FAR clause that we just looked at?

A Yes.

* * *

Q Now, I've permitted you [sic] testify here today of the fact that certain hotline complaints or tips relating to Mr. Gerlach and Daoud & Partners were investigated pursuant to the COBC Program, is that correct?

A That's correct.

Q And that there were reports of investigation that were done relating to those tips, is that correct?

A That's correct.

Q And those were assigned -- excuse me, were sent to you. Is that correct?

A That's correct.

Q Now, you've testified that in other instances where there were COBC investigations those COBC investigations have resulted in disclosures to the DoD IG pursuant to the Anti-Kickback Act FAR clause, correct?

A That's correct.

Q And, in some instances, have resulted in credits being offered to the United States Government pursuant to the LOGCAP contract, correct?

A Correct.

Q And as we have shown you earlier today, the trigger under the FAR clause is whether there is reasonable grounds to believe that there has been a violation or disclosure, is that correct?

A That's correct.

Q With respect to the matters that we have testified about and that are indicated on the privilege log, did KBR make a disclosure to the Department of Defense Inspector General that there was reasonable grounds to believe that a kickback had been paid or received?

A No.

Q Did KBR offer or tender any credit to the United States Government relating to the COBC investigations about which you have -- well, excuse me, that are listed on the privilege log and that there has been some testimony about here today?

A No.[38/]

After stopping Heinrich from being questioned regarding the COBC statements and reports, KBR then had Heinrich testify that KBR's normal practice and contract terms required it to report any reasonable evidence of kickbacks; however after investigating the allegations in this case, KBR made no report and gave the Department of Defense no refunds.

On February 10, 2014, five days after Heinrich's deposition, KBR moved for summary judgment.[39/] In doing so, KBR attached a document titled "Statement of Material Facts as to Which There Is No Genuine Dispute." This statement again stated that KBR reports kickback allegations when any reasonable grounds supporting these allegations exist, but KBR made no report in this case. The Statement says, in part:

> When a COBC investigation provides reasonable grounds to believe a violation of 41 U.S.C. §§ 51-58 ("the Anti-Kickback Act") may have occurred requiring disclosure to the Government under FAR 52.203-7, KBR makes such disclosures. KBR has made reports to the Government when it has reasonable grounds to believe that a violation of the Anti-Kickback Act may have occurred. KBR conducted COBC investigations related to D&P and Gerlach, and made no reports to the Government following those investigations.[40/]

KBR used Heinrich's testimony to support this statement of material fact.

In the text of its motion for summary judgment, KBR made essentially the same point. KBR

[38/]Doc. 136-3 at 283-285, 289, 294-296 (emphasis added).
[39/]Doc. 136.
[40/]*Id*. at 44.

argued that it reports potential fraud or kickbacks whenever there are any reasonable grounds to believe a violation has occurred. KBR again said that, after investigation, KBR made no report here. KBR argued:

> KBR has an internal Code of Business Conduct ("COBC") investigative mechanism that provides a means of identifying any potentially illegal activities within the company. When a COBC investigation reveals reasonable grounds to believe that a violation of 41 U.S.C. §§ 51- 58 (the "Anti-Kickback Act") may have occurred requiring disclosure to the government under FAR 52.203-7, KBR makes such disclosures. Stmt. ¶ 27. KBR has made reports to the Government when it had reasonable grounds to believe that a violation of the Anti-Kickback Act occurred. Id. KBR intends for these investigations to be protected by the attorney-client privilege and attorney work product privilege (indeed, they are not even given to the Government as part of disclosures), but has not asserted privilege over the fact that such investigations occurred, or the fact of whether KBR made a disclosure to the Government based on the investigation. Therefore, with respect to the allegations raised by Mr. Barko, KBR represents that KBR did perform COBC investigations related to D&P and Mr. Gerlach, and made no reports to the Government following those investigations.[41/]

KBR again used Heinrich's testimony to support this summary judgment argument.[42/]

KBR also made use of the same inference to oppose Barko's February 3, 2014, motion to compel production of the COBC documents.[43/] KBR opposed the motion to produce, arguing that COBC reports were attorney-client privileged.[44/] Although the attorney-client privilege argument had no apparent connection with Heinrich's COBC file review, KBR again interjected the inference that

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[41/] *Id*.

[42/] In a similar vein, KBR used the affidavit of Cheryl Ritondale, KBR's Global Director of Procurement, to support its motion for summary judgment. With her affidavit, Ritondale suggested the inference that the Army had approved $3.3 million payment to Daoud on the B-6 Mancamp with knowledge of 1) how Daoud received the B-6 Mancamp contract and 2) with knowledge of Daoud's contract performance on that project. KBR suggested that the Army received "documents regarding the competition and award of the B6 Mancamp subcontract, the quality of D&P's workmanship, the percentage of work completed by D&P, and KBR's settlement with D&P." After the Army knew the details of the B-6 Mancamp contract with Daoud, KBR says "KBR was [then] authorized to invoice the Government the $3,326,832.24." Doc. 136-2 at 8 (emphasis added).

The Army received many documents describing Daoud's poor performance on the B-6 Mancamp but did not receive any of the COBC documents and reports.

[43/] Doc. 135.

[44/] Doc. 139.

the COBC files showed no reasonable ground to believe there had been a violation of the Anti-Kickback Act:

> 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 it had reasonable grounds to believe that a violation of the Anti-Kickback Act occurred. 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 . . . . With respect to the COBC investigations subject to the present motion to compel, these practices were followed . . . . .At the close of the investigations, two separate COBC Reports were generated. 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.[45/]

KBR carefully used the inference that the COBC documents do not support any reasonable belief that fraud or kickbacks may have occurred. KBR has, on multiple occasions, advanced a chain of reasoning. First, whenever KBR has reasonable grounds to believe that a kickback or fraud had occurred, its contracts and federal regulation required it to report the possible violation. Second, KBR abides by this obligation and reports possible violations. Third, KBR investigated the alleged kickbacks that are part of Barko's complaint. Fourth, after the investigation of the allegations in this case, KBR made no report to the Government about an alleged kickback or fraud.

KBR's message is obvious: KBR's COBC reports – which are a privileged investigation of Barko's allegations – contain no reasonable grounds to believe a kickback occurred. And KBR gives a second message: do not worry about the production of the COBC documents because they show nothing. KBR does not state this conclusion explicitly. It does not need to. KBR's statements make itspreferred conclusion both unspoken and unavoidable. The following exchange, already listed

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[45/] *Id.* at 10-11.

above, captures this point:

> Q [by KBR Attorney Margolis] "With respect to the matters that we have testified about and that *are indicated on the privilege log*, did KBR make a disclosure to the Department of Defense Inspector General that there was reasonable grounds to believe that a kickback had been paid or received?
>
> A No."[46/]

In his questioning, KBR's attorney makes a direct reference to privileged communications. The question is virtually identical to "Did KBR's privileged internal investigation find reasonable grounds that a kickback was paid?" Heinrich's deposition and KBR's use of his testimony puts the COBC investigation at issue.

ii. KBR's Response

KBR advances several arguments to counter the finding of an at-issue waiver. Most centrally, KBR somehow argues that it had never implied the COBC documents did not contain evidence of fraud or kickbacks: "KBR further has not impliedly waived attorney-client privilege or work product protection by contesting fraudulent intent or by raising – in a footnote in its summary judgment brief – the clearly non-privileged facts that KBR conducted an investigation and did not make a self-report to the Government."[47/]

But, of course, KBR did more than simply say that it had conducted a COBC investigation and had not reported fraud to the Department of Defense. With each use of the investigation and non-report, KBR joined the argument that, under its contracts and practices, KBR reports possible infractions when a COBC investigation raises any reasonable evidence that fraud or kickbacks had

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[46/]Doc. 136-3 at 295 (emphasis added).

[47/]Doc. 181 at 1.

occurred. And KBR consistently argued that it reported any reasonable evidence of kickbacks to the Department of Defense even when doing so cost KBR money.

KBR first states that KBR is only "denying it committed fraud or knowingly violated the law."[48/] KBR states that it has disclosed only non-privileged facts, the disclosure of which cannot give rise to an at-issue waiver.[49/] KBR relies heavily on this Circuit's opinion in *United States v. White*, noting that "[a] general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the attorney-client privilege."[50/]

A closer reading of *White*, however, cuts against KBR's argument. In *White*, criminal defendants appealed their convictions on charges of conspiracy to defraud the United States. Defendant White objected to the introduction of evidence that his attorney had told him a certain consulting arrangement was illegal. The court found that the district court erred when it admitted this evidence: the district court had conflated "[Defendant] White's denial of criminal intent with a reliance-on-advice-of-counsel defense, which would have waived the privilege."[51/]

KBR's potential waiver of attorney-client privilege is not, however, based on the advice of counsel defense, nor does it arise in the criminal context. The *White* Court stated that "[t]o be acquitted for lack of criminal intent, White did not need to introduce any evidence of communications to and from [his lawyer], and he did not do so."[52/] KBR could have generally denied that it made false claims, and filed its summary judgment motion without making extended and repeated references to the end results of its privileged internal investigation. That KBR chose to make

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[48/] Doc. 187 at 4.
[49/] Doc. 181 at 2.
[50/] 887 F.2d 267, 272 (D.C. Cir. 1989).
[51/] *Id.* at 270.
[52/] *Id.*

extended and repeated references to the results of its privileged internal investigation makes a comparison to *White* inapt.

White does state that "[a]n averment that lawyers have looked into a matter does not imply an intent to reveal the substance of the lawyers' advice."[53/] However, the *White* Court is clear that anything more than a statement that an attorney has looked into a matter can result in a waiver.[54/] KBR has done far more than state that its attorneys looked into the matters underlying Barko's allegations. As described above, KBR has made repeated reference to the fact that its internal investigation, which was supposed to identify and report reasonably substantiated allegations of fraud, yielded no such report.

In *White*, the court found that the Defendant had not waived any privilege because he "never released any substantive information about his attorney's review of the arrangement," nor did he "refer to any particular instance of review."[55/] KBR has done precisely the opposite: it has, in effect, revealed the substantive conclusion of its COBC investigations and referred to this finding on multiple occasions. Barko is certainly prejudiced by this conduct: KBR lays out an inference in its favor based on evidence that it forbids Barko from examining.

Second, KBR argues that its references to the results of the COBC investigation are not grounds for a waiver. KBR contends its characterization of the COBC investigation are minimal, and merely in response to Barko's repeated efforts to gain access to the reports. KBR argues that its statements are "literally marginal" and that it "does not rely" on them in moving for summary

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[53/] *Id.*

[54/] *Id.* at 271 ("Where a defendant neither reveals substantive information, nor prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver.").

[55/] *Id.*

judgment.[56/] KBR maintains that it "makes no representations whatsoever regarding the contents of the COBC documents" and that a footnote in its summary judgment motion "is simply too thin a reed" to find an implied waiver.[57/]

KBR's statements are not rendered unimportant by being placed in a footnote. The Court is additionally unpersuaded that KBR does not rely on the passages outlined above in moving for summary judgment: one passage comes from the summary judgment motion itself, another from a statement of *material* undisputed facts, and another from a deposition attached to the summary judgment motion. As important, KBR suggested the same inference to stop the production of the COBC documents. The inference – that Barko's claims were long ago investigated and discredited – is not marginal, but rather goes to the thesis of KBR's motion for summary judgment. KBR labels Barko a "highly biased, amateur auditor" and generally alleges that he lacks the knowledge, context, and expertise to question KBR's contracting decisions after the fact.[58/] The conclusion that the same claims have been thoroughly investigated and not substantiated helps KBR establish an absence of genuine issue of material fact.

Furthermore, these references and suggested inferences are from KBR's own filings. While Barko obviously sought the COBC documents, KBR did not need to use the contents of the COBC documents to respond to Barko's document production effort. And most important, KBR injected the COBC contents into the litigation by itself soliciting Heinrich's Rule 30(b)(6) testimony. KBR's own counsel solicited Heinrich's testimony in Barko's Rule 30(b)(6) cross-examination. KBR's

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[56/] Doc. 181 at 3.
[57/] *Id.* at 12.
[58/] Doc. 136 at 1.

argument that Barko put the COBC reports at issue is therefore unavailing.[59] KBR's filings constitute affirmative acts, for KBR's own benefit, that use the otherwise privileged materials to make KBR's case.

KBR is correct that Barko has aggressively sought to discover the contents of the COBC reports. KBR argues that "fairness dictates that KBR should be granted some latitude to discuss its investigative procedures without risking a broad waiver."[60] Perhaps this is so, but KBR has far exceeded whatever latitude it might be entitled to. The Court will not repeat its earlier discussion, but again finds that KBR did far more than discuss its investigative procedures in a general or defensive fashion.

Finally, KBR argues that if this Court finds a waiver, KBR should be allowed to amend its pleadings to strike the sections creating the waiver. KBR cites to a Ninth Circuit opinion for the proposition that "[t]he court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials if it wishes to go forward with its claims implicating them."[61]

A complete reading of the cited opinion reveals that the court is not permitting parties to strike certain *statements*. Rather, if a waiver is found, the Ninth Circuit allowed parties to drop entire claims or causes of action instead of turning over documents.[62]

Under KBR's interpretation, a party can retract statements that create an implied waiver with virtually no consequence. The Ninth Circuit's *Bittaker's* decision would only suggest that KBR can

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[59] *Id.* at 13.
[60] *Id.* at 15.
[61] *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003).
[62] *Id.*

default instead of disclosing the documents it has otherwise waived privilege over.

In summary, KBR's filings affirmatively use the COBC contents and create an implied waiver. KBR has placed the contents of the documents in question through its own actions; KBR has actively sought a positive inference in its favor based on what KBR claims the documents show.

The Court finds that the appropriate scope of the at-issue waiver to include all 89 documents considered to be COBC files. Heinrich's deposition refers to the COBC files collectively, and thus puts all of them at issue. The purpose of an at-issue waiver is to reestablish fairness regarding discovery in a case. Therefore, fairness dictates that all the documents in question be produced so that Barko be able to examine the documents to challenge whether the withheld documents actually support the inferences that KBR attorneys suggested to this Court.

iii Waiver based on use of documents by 30(b)(6) witness.

In a related argument, Barko says KBR waived any attorney-client privilege when Heinrich examined the COBC documents to refresh his recollection before testifying as KBR's Rule 30(b)(6) witness. Heinrich did not use the documents to refresh his recollection at the deposition but he examined the documents beforehand.[63/]

Barko argues that "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 . . . ."[64/] Rule 612 allows an opposing party to inspect writings a witness used to refresh his memory. If the writing was examined before the testimony, the opposing party may examine the writing "if the court decides that

[63/] Doc. 144-3 at 4.
[64/] Doc 143 at 23.

justice requires" this outcome.[65] "This rule has been extended to deposition proceedings where documents otherwise protected by the qualified work product privilege are used to refresh a witness's recollection."[66]

As outlined above, the Court is not persuaded by KBR's argument that "[n]either Ms. Ritondale nor Mr. Heinrich testified as to the results of the COBC investigations, the substantive findings of those investigations, or any other privileged element having to do with those investigations."[67] Additionally, the Court is unpersuaded that KBR had been presented "an impossible choice" between offering an unprepared 30(b)(6) witness or waiving attorney-client privilege because the witness reviewed privileged materials.[68] KBR stopped all testimony regarding the COBC documents but then solicited conclusions that the COBC documents showed no evidence of fraud or kickbacks.

A leading treatise notes that "[w]hile Rule 612 recognizes rights in the adverse party to writings used to refresh memory, the rule does not make clear the extent of those rights where the writings are protected by a privilege or the work-product doctrine."[69] Most courts balance the rights of adverse parties under Rule 612 against the interest in preserving work-product protection and attorney-client privilege, and analyze a series of factors in doing so.[70]

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[65] Fed. R. Evid. 612.

[66] *Eckert v. Fitzgerald*, 119 F.R.D. 297, 299 (D.D.C. 1988) (citing cases).

[67] Doc. 187 at 23. KBR also directed the Court to its proposed sur-reply to Barko's motion to compel, in which it argued "KBR did not waive privilege because Mr. Heinrich's Rule 30(b)(6) testimony did not rely on the privileged contents of the files." Doc. 144-2 at 4.

[68] Doc. 187 at 23.

[69] Privilege and Work-Product Limits on Adverse-Party Rights, 28 Fed. Prac. & Proc. Evid. § 6188 (2d ed.).

[70] Factors which act in favor of disclosure to the adverse party include the inability of the party to gain access to the information by other means, the absence of opinion work-product, discrepancies between a witness' testimony and the contents of the writings used, and heavy reliance on a particular document. Factors in favor of non-disclosure include review of documents before, rather than during, testimony and indications that the request for the document is merely a fishing expedition. *Id*.

Among those factors, several support disclosure. The majority of the COBC documents are investigatory statements and summaries of those statements. Also, major discrepancies exist between Heinrich's testimony and the contents of the writings Heinrich had reviewed. Third, Heinrich necessarily relied upon the COBC documents for his testimony because he had no personal, first-hand knowledge of whether fraud or kickbacks occurred, even though he supervised KBR's COBC investigations and reporting..[71/]

Several factors do not support disclosure under Rule 612. Heinrich examined the COBC documents before, but not at the Rule 30(b)(6) deposition. And, Barko arguably has some ability to otherwise discover the evidence.

At its essence, this analysis requires a context-specific determination about the fairness of the proceedings and whether withholding the documents is consistent with the purposes of attorney-client privilege and work-product protection.[72/] This analysis is effectively the same as the one the Court has already gone through regarding at-issue waiver.

As a result, this Court finds that similar fairness considerations support disclosure. Heinrich reviewed the COBC documents before testifying. The COBC documents have almost no attorney opinion materials; instead investigator-taken statements and investigator reports predominate. Given Heinrich's and KBR's testimony and repeated suggestion that the documents contain nothing,

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[71/] *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 468 (D. Md. 1998) ("There is a greater need to know what materials were reviewed by expert and designee witnesses in preparation for deposition since the substance of their testimony may be based on sources beyond personal knowledge."); *see also* *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 242 (D. Md. 2010).

[72/] With regard "to Rule 612, the relevant inquiry is not simply whether the documents were used to refresh the witness's recollection, but rather whether the documents were used in a manner which waived the attorney-client privilege." *Suss v. MSX Int'l Eng'g Servs., Inc.*, 212 F.R.D. 159, 164 (S.D.N.Y. 2002); "[B]efore Rule 612 is applicable with respect to documents reviewed by a witness to prepare for a deposition . . . the court must determine that, in the interest of justice, the adverse party is entitled to see the writing.." *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 468 (D. Md. 1998).

fairness requires disclosure.

While disclosure under Rule 612 will be required, this should not be understood as a blanket rule. In most cases, Rule 30(b)(6) witnesses who have examined privileged materials before testifying will not waive the privilege.

B. Crime Fraud Exception

Plaintiff-Relator additionally makes a convoluted argument that the COBC documents are not protected by the attorney-client privilege because of the crime-fraud exception. In summary, Barko argues "the crime-fraud waiver applies here because KBR used its attorney-client privilege to 'whitewash' the content of the COBC investigative reports by burying evidence of fraud in its reports and not reporting it to the government, and then overtly misled this Court."[73/]

Attorney-client communications are not privileged if they "are made in furtherance of a crime, fraud, or other misconduct."[74/] Finding a crime-fraud waiver requires "a prima facie showing of a violation sufficiently serious to defeat the privilege."[75/] The movant must "establish some relationship between the communication at issue and the prima facie violation. A prima facie violation is shown if it is established that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme."[76/] Barko repeatedly argues that he has shown "some relationship" between privileged communications and alleged crime or fraud.

Determining whether a prima face case exists is within the sound discretion of the trial

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[73/] Doc. 180 at 8.
[74/] *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985).
[75/] *Id.*
[76/] *Id.*

court.[77] The weight of case law suggests that a movant must show more than a mere connection between a communication and an alleged crime: otherwise, far too many attorney-client communications would yield to the crime-fraud waiver. The relationship required is one where a privileged communication is made or received in order to further a criminal or fraudulent scheme.[78] "[T]he exception does not apply even though, at one time, the client had bad intentions."[79]

Barko's first argument is that the crime-fraud exception applies because KBR mischaracterized the findings of the COBC reports. Barko asserts that there is "a scheme to ask the Court to grant KBR's motion for summary judgment based on false factual assertions and inferences that the KBR defendants have asked this Court to draw."[80]

With knowledge of what the COBC documents actually show, KBR and its counsel went to great effort to suggest that the COBC documents showed no reasonable evidence of fraud or kickbacks. Whether KBR's suggestion was true, or untrue, does not create a prima facie showing that the COBC reports were drafted to further a crime or fraud.

At best, even if Barko shows that KBR misrepresented the COBC documents, this does not mean that the COBC documents were created to further any crime-fraud. The COBC interview notes and reports were created years before this case was filed. Nothing suggests any connection between the creation of the COBC reports and later arguments to this Court. To the contrary, the COBC statements and reports work against a crime or fraud.

Barko's second argument is that the COBC documents are subject to the crime-fraud

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[77] *Id.*
[78] *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007).
[79] *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997).
[80] Doc. 180 at 9.

exception because KBR, in its motion for summary judgment, made reference to a certified claim submitted to the Government for work done by one of the subcontractors at the center of the case.[81/] In its motion for summary judgment, KBR argued that the Government approved payment to Daoud on the B-6 Mancamp subcontract, with knowledge of how and why KBR gave the contract to Daoud and with knowledge of the deficiencies in the subcontractor's work.

Barko states "KBR made several extremely serious material misrepresentations aimed at deceiving the government to accept that D&P's performance was not so poor as to keep the government from paying $3.3 million on the claim" and then used this fact in support of summary judgment.[82/]

Barko's claim is largely illogic. Barko appears to be saying that the COBC documents work against KBR's efforts to receive payment on the Daoud B-6 Mancamp contract. While the failure to share the substance of the COBC reports with the Defense Department arguably furthered false claims, the creation of the COBC reports did not.

Again, Barko's claim does not establish that the COBC reports were made in furtherance of this alleged fraud. Barko does not create a sufficient showing for the crime-fraud exception to apply.[83/]

Barko's final argument is that KBR's documents are subject to the crime-fraud exception because KBR allowed Robert Gerlach, a KBR employee at the center of the alleged kickbacks, to resign instead of firing him. Barko argues that "the intent to cover up Mr. Gerlach's improper

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[81/]Doc. 180 at 11.
[82/]*Id*.
[83/]*Id.* at 15.

relationship with D&P can be inferred" from the decision to allow his resignation.[84/]

As above, even if the Barko can show the COBC documents undercut KBR's decision to allow Gerlach to resign, this does not show that the COBC reports were created to further any scheme to let Gerlach resign. Barko does not establish a prima facie case that KBR's attorney-client privileged documents were created in order to further these allegedly criminal or fraudulent schemes.

C. DCIS Subpoena

Barko further says KBR waived the attorney-client privilege and work-product protection when it responded to a March 2007 DCIS subpoena. At the time the subpoena was issued, Barko's complaint had been filed, but not unsealed. KBR says the Defense Department Inspector General likely served the DCIS subpoena to decide whether the United States should take over the prosecution of this case.

The subpoena required KBR to produce documents related to the contracts involved with this case. The Defense Department told KBR that KBR was required to produce "notes, memoranda, or other documents initiating or overseeing services to be performed . . . by the Subcontractors. "[85/] Subcontractors was defined to include Daoud and EAMAR. The subpoena also requested that KBR list any responsive documents withheld, and the reasons for withholding them.[86/]

In producing documents responsive to the subpoena, KBR did not produce a privilege log,

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[84/] *Id.* at 17.
[85/] Doc 181-1 at 17.
[86/] *Id.*

nor did it produce or even acknowledge the existence of the COBC documents.[87/] KBR appears not to have produced or identified documents created by a third-party vendor that KBR hired to receive "tips" of potential fraud or kickbacks.[88/]

The COBC documents are filled with "notes, memoranda or other documents . . . overseeing services" that Daoud and other subcontractors performed and were within the scope of the DCIS subpoena. KBR never told DCIS that it was withholding documents based on attorney-client privilege.[89/]

Barko argues that the nature of this response itself merits the finding that attorney-client privilege has been waived over the documents. Barko argues that if KBR was going to object to the production of its COBC investigative reports, it was required to submit written objections. Barko's argument says the failure to do so is fatal to KBR's privilege claim because none of KBR's responses to the subpoena identify the existence of the COBC investigations, object to production of any documents on privilege grounds, or claim the subpoena was over-broad.[90/] Barko seems to argue that

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[87/] KBR argues that this Court should not, *sua sponte*, have required parties to produce document to help decide the waiver issue. But Civil Rule 26(b)(1) says "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1).

Any disclosure to the Government of kickbacks involved with this case and any response to the Government's subpoena were closely related to the waiver issue this Court needed to decide. Although KBR had disclosed the subpoena to Barko, it did not provide Barko a copy of its response to the subpoena. Barko had requested production of KBR's communications and production to the DCIS subpoena. KBR produced some, but not all of the documents that it had provided the Inspector General but did not produce any of KBR's communications with the DCIS about the subpoena.

Against this backdrop, the Court asked KBR to describe what disclosures it had made to the Government and asked the United States to describe whether KBR had produced the COBC documents or had described documents it had refused to provide the Defense Department under some privilege claim. KBR complains that the Court could not direct the discovery request to the United States after the United States had declined to prosecute this case.

The Court understood that the United States Attorney's Office had continued an inactive appearance in the case. On December 13, 2013, an Assistant United States Attorney had entered an appearance in this case. Doc. 132. And on October 2, 2014, the United States filed a consent to the proposed settlement with Daoud. Doc. 178. The Court's requests seem obviously relevant to determining the waiver issue. And although KBR received notice of this Court's request to the United States, KBR made no objection until after the United States had responded.

[88/] Doc. 200 at 9.

[89/] Doc. 190.

[90/] Doc. 194 at 7.

KBR, under holdings interpreting Civil Rules 25(b)(5) and 45(e)(2), waived any privilege as to the documents not produced or identified in a privilege log. Barko seems to argue that the failure to fully produce or identify withheld COBC documents waived privilege claims as to both DCIS and Barko.

KBR makes several unsupported arguments as to the background of its production to DCIS. KBR first argues that a privilege log was not required despite the DCIS's cover letter telling KBR to identify any withheld or not produced documents. Next, KBR argues that the scope of the DCIS subpoena was not broad enough to included the COBC documents. Finally, KBR argues that it had redacted portions of some documents that were produced to DCIS. Having made partial redactions in the produced documents, KBR says the DCIS must have known that KBR was withholding hundreds of pages of other statements and reports.[91/] These arguments seem to defy common sense and the language of the subpoena.[92/]

KBR first argues that "KBR was not asked for, nor did it provide the Government with, a privilege log."[93/] This argument is not plausible. The cover letter that accompanied the DCIS subpoena said: "If for any reason any portion of the required materials is not furnished. provide a written explanation as to the location of each item and the reason for non production." The subpoena and accompanying letter told KBR to identify any document that was not being produced.[94/]

KBR next argues: "KBR does not concede that its COBC files are or ever were responsive

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[91/] Doc. 200.
[92/] Doc. 193 at 11-12.
[93/] *Id*. at 4.
[94/] Doc. 188-1 at 17.

to the subpoena."[95/] This argument is also not plausible.[96/] The subpoena required production of "internal . . . documents relating to [subcontracts] . . . including, but not limited to . . . notes, memoranda, or other documents initiating or overseeing services . . . ."[97/] The withheld COBC files are almost all "notes, memoranda, or other documents" "overseeing [Daoud and other subcontractors's] services."[98/] The COBC files were easily within the scope of the DCIS subpoena.

Further, KBR contends the DCIS investigators explicitly or implicitly agreed that the COBC documents would not need to be produced: "The Government was fully aware that KBR was withholding certain information, as evidenced by redactions in the productions made to the Government."[99/] Apparently, KBR is arguing that some of the documents it produced had redacted portions. From this, KBR seemingly reasons that the DCIS would have known that KBR was withholding hundreds of pages of responsive documents on privilege grounds.

This argument, of course, makes no sense. The DCIS subpoena directions directed KBR to provide "a written explanation as to the location of each item [that was not being produced] and the reason for non production." Also, KBR never explains how the DCIS could have tacitly agreed to the non-production of documents the DCIS apparently never knew existed.

Finally, KBR suggests that after receiving the DCIS subpoena, its attorneys communicated with DCIS investigators about the production and KBR says its communications with the DCIS

[95/] Doc. 193 at 4.

[96/] The subpoena broadly described the documents to be produced, which included "any and all internal and/or external documents relating to KBR Subcontracts for the period of January 1, 2003, to the date of this subpoena, including, but not limited to, the following: all . . . notes, memoranda, or other documents initiating or overseeing services to be performed or product to be sold by the Subcontractors . . . ." Doc. 188-1 at 19 (emphasis added).

[97/] *Id*. (emphasis added).

[98/] *Id*. at 20.

[99/] Doc. 193 at 4.

investigator "demonstrates that KBR and the DCIS agent managing the subpoena (Michael Alexander) conferred after the subpoena was received, and agreed to narrow its scope as the process of production continued."

But the letters KBR relies upon to suggest the DCIS agreed to forgo the COBC documents do not support KBR's argument. KBR first relies upon an April 23, 2007, letter from KBR counsel Michael Buxton and Alden Atkins to DCIS Investigator Michael Alexander. Contrary to KBR's argument that the letter reflects an agreement to narrow the production, Buxton's letter simply advises DCIS that additional time might be required to complete the rolling production. Buxton's letter also says that the number of requested employee personnel files would be huge and says "We discussed the possible narrowing of this list as a first prioritization of this task. You advised that you will discuss some prioritization with your colleagues."[100/] The document KBR relies upon does not support its suggestion that the DCIS agreed to allow KBR not identify or produce the most relevant COBC documents.

In suggesting that the DCIS explicitly or implicitly agreed to forgo production of the COBC documents, KBR also relies upon a July 30, 2007, letter from KBR's attorney Christine Durney to DCIS Agent Michael Alexander.[101/] This letter offers even less support for KBR's argument.

Instead, Durney's letter says nothing about KBR withholding documents required by the DCIS subpoena. Instead, Durney provides Alexander with some portion of the subpoened documents and tells DCIS: "KBR is continuing to gather and review other documents that may be responsive to the subpoena, and will produce any additionally responsive documents as soon as possible."[102/]

[100/] Doc. 191-2 at 12 (emphasis added).
[101/] *Id*. at 13-14.
[102/] *Id*. at 14.

KBR has produced some, but not all of its attorneys's communications with DCIS about KBR's response to the subpoena. Contrary to KBR's suggested inference, its attorneys's letters to DCIS do not tell DCIS that it was withholding documents. Apart from waiver, many of the COBC documents may have been privileged. But KBR should have identified withheld documents if it wanted to claim the documents as privileged.

In general, a party's failure to provide a privilege log in civil litigation can waive any claim of privilege to the documents not produced or identified in a privilege log.[103/] Waiver serves as a penalty when a party has failed to identify requested documents.

However, the Court here considers KBR's failure to identify withheld documents required to be produced under an administrative subpoena. The Court finds no authority using waiver as a sanction for a failure to comply with an administrative subpoena. Presumptively, a failure to comply with an administrative subpoena could be sanctioned by contempt. But penalizing noncompliance of an administrative subpoena with a waiver sanction does not seem to fit.

Barko seems to generally argue that KBR's failure to provide a privilege log waived any attorney client privilege as to DCIS. Continuing this argument, Barko then claims that any waiver to the DCIS stops KBR from recovering the privilege.

KBR correctly argues that "Relator cites no case imposing the 'penalty' of waiver based on

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[103/] Fed. R. Civ. P. 45(d)(2)(A); Fed. R. Civ. P. 26(b)(5)(A); Charles Wright & Arthur Miller, Federal Practice and Procedure, § 2464 ("Federal Courts consistently have held that such a party is required to produce a document index or privilege log and that the failure to produce a log of sufficient detail constitutes a waiver of the underlying privilege or work product claim."). *See also* *SEC v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 157-58 (S.D.N.Y. 2014) ("[A] party's failure to comply with the requirements of Fed.R.Civ.P. 26(b)(5) or Local Civil Rule 26.2 may result in a waiver of privilege. *See* Fed. R. Civ. P. 26(b)(5), Advisory Committee Notes ("To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.").

a failure to provide a privilege log, where the *subpoenaing party* never requested that penalty."[104/] Moreover, KBR's argument seems especially true when the production or identification of withheld documents involves an administrative subpoena.

The question of whether a failure to provide a privilege log in response to an investigative subpoena could later waive privilege for a civil litigant appears to be an issue of first impression. The Court will not head into this uncharted territory.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Barko's motion to compel production of the 89 COBC documents. Previously, KBR appealed the compelled production of these documents when the Court ordered production on other grounds. The Court nonetheless intends to direct this case towards resolution. For that reason, the Court orders Barko not to disclose the contents of the documents. If Barko uses or refers to the documents in subsequent filings in this case, the Court orders that such filings be made under seal. This order will remain in effect unless modified or lifted by the Court.

KBR will produce the documents by November 25, 2014.

IT IS SO ORDERED

Dated: November 20, 2014

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

[104/] Doc. 199 at 6 (emphasis in original).