ORAL ARGUMENT SCHEDULED FOR MAY 7, 2014

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

IN RE KELLOGG BROWN & ROOT, INC., KELLOGG BROWN & ROOT SERVICES, INC., KBR TECHNICAL SERVICES, INC., KELLOGG, BROWN & ROOT ENGINEERING CORPORATION, KELLOGG, BROWN & ROOT INTERNATIONAL, INC. (A DELAWARE CORPORATION), KELLOGG, BROWN & ROOT INTERNATIONAL, INC. (A PANAMANIAN CORPORATION), and HALLIBURTON COMPANY, *Petitioners.*	Case No. 14-5055

KBR'S OPPOSITION TO RELATOR'S MOTION FOR LEAVE TO FILE A RESPONSIVE BRIEF TO THE BRIEF OF *AMICI CURIAE*
AND
KBR'S CONDITIONAL MOTION FOR LEAVE TO FILE A REPLY IF RELATOR'S MOTION IS GRANTED

Relator's request to file a response to the brief of the *Amici Curiae* is a transparent attempt to circumvent the briefing deadlines and page limits this Court established a month ago. Relator cites no legal support for his request, which is unsurprising, for the Federal Rules of Appellate Procedure do not contemplate a party filing a separate brief in response to an *amicus* brief. Furthermore, the brief that Relator has lodged with this Court amounts to little more than a belated and procedurally improper sur-reply in response to KBR's mandamus petition. Relator's motion to file the lodged brief should be denied.

In the alternative, if the Court grants Relator's motion, KBR requests that the Court grant KBR leave to file a brief in response to Relator's brief.[1]

1. Relator's motion is procedurally improper and without basis in this Court's rules. The Federal Rules of Appellate Procedure do not authorize a party to file a separate brief in response to an *amicus* brief. Instead, Relator, like every other responding party faced with an *amicus* brief supporting appellant or petitioner, was required to include any response to the *amicus* brief in his opposition to KBR's mandamus petition. Although Relator complains that he lacked sufficient time to prepare such a response, Relator's Mot. for Leave to File Responsive Br. 1-2 [Doc. 1487806], Relator had notice of *Amici*'s intent to file since March 17, 2014, *see infra* p. 4, and he gives no explanation for his failure to move for an extension of time to file his opposition. *See* Fed. R. App. P. 26(b); D.C. Cir. R. 28(e). Furthermore, Relator could have raised the issue of time constraints in opposing the *Amici*'s motion for leave to file their brief. *See* Fed. R. App. P. 27(a)(3). Relator could also have moved for reconsideration of the order granting *Amici* leave to file. *See* Fed. R. App. P. 27(b). Instead, Relator elected, for unstated reasons, to remain silent. Relator's failure to timely pursue any of his multiple remedies forecloses a finding of good cause to file a separate brief now.

[1] At approximately 10am today, KBR's counsel contacted Relator's counsel to determine Relator's position on KBR's conditional motion for leave to respond to Relator's lodged brief. As of 6pm today, Relator's counsel had not responded.

2. Relator's motion undermines the expedited briefing schedule that the Court set for this case and would grant Relator an unwarranted tactical advantage. KBR filed its mandamus petition and accompanying motion to stay on Wednesday, March 12, 2014. That same day, the Court ordered Relator to file a response by noon on Friday, March 21, and KBR to file a reply by noon on Tuesday, March 25. 3/12/14 Order [Doc. 1483679]. Relator, however, chose not to lodge his supplemental brief until April 10—22 days after *Amici* lodged their brief on March 19; 20 days after the March 21 deadline for Relator's brief; 16 days after KBR filed its reply brief; and 13 days after the Court's March 28 order granting *Amici*'s motion to file their brief. More time (13 days) passed between this Court's March 28 order and the lodging of Relator's brief than the Court granted Relator to respond to KBR's mandamus petition and stay motion (9 days). By contrast, KBR filed its mandamus petition *the morning after* the district court denied its request for a stay, and its mandamus reply only four days—or, to borrow Relator's idiosyncratic method for calculating time, "one full working day" (Monday)—after Relator filed his opposition. Relator's Mot. for Leave to File Responsive Br. 1.

Relator's suggestion of unfairness (*id.* at 1-2) is thus unpersuasive. *Amici* lodged their brief with the Court before noon on March 19. Relator thus had two days—not one, *id.* at 1—to formulate responses. Given the tight briefing schedule the Court set for this case, two days is a substantial amount of time, especially considering that the fifteen-page *amicus* brief primarily expands on, and provides *Amici*'s unique

perspective as nationwide trade and professional associations regarding, the arguments raised in KBR's mandamus petition. Furthermore, *Amici*'s brief was no surprise. *Amici*'s counsel contacted Relator's counsel on Monday, March 17—four days before the deadline for Relator's opposition—to seek Relator's consent to the filing of the *amicus* brief. *See* Mot. for Leave to File *Amicus* Br. 4 [Doc. 1484409] (noting that *Amici*'s counsel had "consulted with counsel for [Relator] prior to filing th[eir] motion" for leave).

In any event, if Relator had needed an extension to file his mandamus opposition due to *Amici*'s lodging, he could and should have sought one at the time. *See supra* p. 2. Relator failed to do so. The "interest[s] of justice" would be undermined by permitting Relator to file a supplemental brief written under a much more relaxed timeline than KBR has been required to observe. Relator's Mot. for Leave to File Responsive Br. 2. And by delaying this filing until long after KBR filed its reply brief, Relator risks depriving KBR of the opportunity to respond to Relator's arguments—an opportunity that this Court's rules ordinarily afford appellants and petitioners. *But see infra* p. 7 (requesting that the Court grant KBR an opportunity to file a responsive brief if the Court grants Relator's motion).

3. Relator's motion also circumvents the page limits that the Court established for this case and the principles of proportionality reflected in the Court's briefing rules. In its March 12 order, the Court limited Relator's combined response to KBR's mandamus petition and stay motion to 30 pages, and the Clerk's Office

informed counsel for KBR that the reply should not exceed 15 pages. *Cf.* Fed. R. App. P. 32(a)(7) (reply brief is typically half the length of a principal brief). The brief Relator has lodged in response to *Amici*'s brief is 15 pages—half the length of Relator's opposition and the same length as KBR's mandamus reply brief (and the *amicus* brief itself). The Court should not allow Relator to unilaterally claim a 50% increase in his briefing space.

4. In addition, Relator's brief amounts to little more than a procedurally improper sur-reply in opposition to KBR's mandamus petition. *Amici*'s brief properly provided their "unique perspective" on the issues raised in this case, *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000), and "explain[ed]" the troubling "impact" that the district court's ruling threatens to have on the business community, *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (internal quotation marks omitted). *Amici*'s brief, however, primarily "elaborated upon" arguments made in KBR's mandamus petition, D.C. Cir. R. 29(a)—*i.e.*, that (1) the district court erred by using a "but for" test to determine whether an attorney-client communication is privileged, *see Amicus* Br. 2-5; Corrected Mandamus Pet'n 23-24, and (2) the district court's ruling would eviscerate *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and deny privilege to internal investigations at most public companies, *see Amicus* Br. 5-15; Corrected Mandamus Pet'n 12-23.

Indeed, aside from Relator's irrelevant assertions regarding materials posted on the Association of Corporate Counsel's website (Relator's Lodged Br. 1-2, 13 [Doc.

1487849])—a "top ten" list that expressly disclaims any intent to provide "legal advice" or a "definitive statement on the subject addressed," Lodged Supp. Add. SA-72 [Doc. 1487850], and an article that *criticizes* the rationale the district court adopted here, *see* Mandamus Reply 4 n.3—it is difficult to identify *any argument* in Relator's lodged brief that would not have been responsive to arguments made in KBR's mandamus petition. For example, Relator chastises *Amici* for "fail[ing] to inform this Court" of the Supreme Court's discussion of "but for" causation in *Burrage v. United States*, 134 S. Ct. 881 (2014). Relator's Mot. for Leave to File Responsive Br. 2. But the Supreme Court issued its opinion in *Burrage* on January 27, 2014, over a month before the mandamus proceedings here were even initiated. It was *Relator* who failed to cite the case in opposing KBR's mandamus petition, even though Relator now claims that the case has bearing on the *petition's* argument that the district court erred by applying a "but for" test. Corrected Mandamus Pet'n 23-24.[2] Even his efforts to downplay the challenges facing American corporations in conducting internal investigations (Relator's Lodged Br. 5-15) are responsive to KBR's argument that "no public company . . . c[ould] claim privilege over materials generated in internal investigations" if the district court's position were accepted, and that "[t]he chilling

[2] *Burrage* is at best inapposite, and at worst affirmatively harmful to Relator. *Burrage* invokes the rule of lenity to reach a defendant-friendly construction of a statutory phrase ("results from") not at issue here. *Burrage*, 134 S. Ct. at 887-92. Indeed, *Burrage* notes that courts have recognized the inadequacy of "but for" tests in precisely the circumstances present here—*i.e.*, "when multiple sufficient causes independently, but concurrently, produce a result." *Id.* at 890; Mandamus Reply 3-4.

effect from [it] . . . sharply undercuts the strong public policy favoring internal corporate controls . . . ." Corrected Mandamus Pet'n 1-2 (emphasis omitted).

Moreover, rather than focusing exclusively on the arguments raised by *Amici*, Relator's lodged brief also includes detailed factual arguments that are not conceivably responsive to the entirely legal argument set forth in the *amicus* brief. Relator's Lodged Br. 12-13 nn.9-11. Relator's brief thus can only be understood as a second bite at the apple of responding to KBR's mandamus petition, prepared at a schedule and of a length of Relator's own choosing. The Federal Rules of Appellate Procedure contemplate neither this form of self-help, nor the filing of sur-reply briefs. The Court should not allow Relator to file such a brief here.

5. For the reasons given above, Relator's motion should be denied. If the Court grants Relator's motion, however, it should also grant KBR leave to respond to the brief that Relator has lodged, consistent with the principle that the party challenging a district court decision is entitled to have the final word in the form of a reply brief. Fed. R. App. P. 28(c). The Court should not allow Relator to file at his leisure an unrebutted supplemental brief raising points that could and should have been asserted earlier in his opposition.

Granting KBR leave to respond to Relator's brief would not delay the proceedings in this case. KBR's counsel stand ready to file the brief promptly after the Court rules on Relator's motion and KBR's conditional motion.

* * *

The Court should deny Relator's motion for leave to file a brief responding to the *amicus* brief. In the alternative, if the Court grants Relator's motion, KBR respectfully requests that the Court grant it leave to file a brief of no more than seven-and-a-half pages responding to Relator's fifteen-page brief. *Cf.* Fed. R. App. P. 32(a)(7) (reply briefs are generally half the maximum length of principal briefs).

Dated: April 11, 2014

Respectfully submitted,

/s/John P. Elwood

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CERTIFICATE OF SERVICE

I certify that on this 11th day of April, 2014, a copy of the foregoing opposition and conditional motion was sent by first-class mail to:

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