

ORAL ARGUMENT SCHEDULED FOR MAY 7, 2014

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioners.

No. 14-5055

**RESPONDENT-RELATOR HARRY BARKO'S MOTION FOR LEAVE  
TO FILE A RESPONSIVE BRIEF TO THE BRIEF OF *AMICI CURIAE***

For good cause shown, Respondent-Relator Harry Barko hereby moves this Court for leave to file the attached Brief in Response to Brief of *Amici Curiae* and the Supplemental Addendum in support of the Response Brief. Prior to filing this motion Respondent-Relator's counsel contacted counsel for Petitioner Kellogg Brown & Root, Inc. ("KBR") and *amici curiae* who stated that they oppose this motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to this Court's order, Respondent Harry Barko was required to file his opposition to the Petitioner KBR's Petition for Mandamus and Motion for Stay on or before 12:00 noon, March 21, 2014. On March 19, 2014, essentially one full working day prior to respondent's filing deadline, the United States Chamber of Commerce, the National Association of Manufacturers, the Association of Corporate Counsel, and other organizations, filed a consolidated motion for leave

to file a brief in support of KBR's petition. The expedited briefing schedule on the petition for writ of mandamus issued on March 12, 2014 did not provide a schedule for filing amicus briefs. Given the close proximity to Respondent-Relator's filing deadline, Mr. Barko did not have time to incorporate any substantive response to the additional arguments raised in the brief *amici* were seeking to have lodged before this Court, and it was unknown whether the Court would even entertain the filing of amicus briefs given the expedited briefing schedule previously issued on the petition for writ of mandamus.

On March 28, 2014, after Mr. Barko had filed his opposition to KBR's petition, this Court granted *amici's* motion and formally lodged their brief onto the record in this case.

It is in the interest of justice that Mr. Barko be permitted to file the attached brief responding to the arguments raised by the *amici*. While the *amici* raise a number of complex arguments that may appear on their face to be significant, upon closer examination they are not supported in law or in fact. For example, a major argument raised by the *amici* concerns the district court's alleged error in applying a "but for" analysis when ruling on KBR's privilege request. In putting forward this argument *amici* failed to inform this Court that the U.S. Supreme Court had recently issued a major decision defining the meaning of the "but for" analysis in determining causation. *See Burrage v. U.S.*, 571 U.S. \_\_\_, 134 S.Ct. 881, 891, 187

L.Ed.2d 715 (2014). The Supreme Court's decision in *Burrage* undermines *amici's* central claim and provides strong support for the decision issued by the district court.

Additionally, one of the *amici*, the Association of Corporate Counsel ("ACC") has published on its website the very same scholarship cited by Respondent-Relator which strongly supports the use of the "but for" approach that *amici* now protest. Other material published on the ACC website regarding advice to corporate counsel on how to properly invoke the attorney-client privilege during internal corporate compliance investigations is completely consistent with the district court's decision. In weighing the merits of *amici's* arguments it is imperative that this Court also be fully cognizant of the public position taken by one of the *amici*, a position that is fully supported in law and well documented on ACC's website. These materials from ACC's website are reproduced in the Supplemental Addendum ("SA") filed along with the attached responsive brief. See ACC, "Top Ten Safeguards When Interviewing Employees During Internal Investigations," reproduced at SA 71; John E. Sexton, *A Post-Upjohn Consideration of the Attorney-Client Privilege*, 57 N.Y.U.L. Rev.443, 491 ("but for" "is perhaps the most important" of requirements flowing from *Upjohn*), reproduced at SA 65.

Finally, the *amici* raise a number of public policy based arguments on the alleged negative impact of the district court's decision on the ability of corporations to conduct effective internal compliance investigations. These arguments are seriously flawed and not well taken. They were premised on an outdated law review article published in 1997, a pre-amended U.S. Sentencing Commission guideline that has been significantly modified, and a distortion of the actual factual record concerning internal compliance programs. As explained in the attached response brief, over the past ten years there has been a significant shift away from corporate General Counsel managing internal compliance programs, due to a perceived conflict of interest in the compliance function and the legal function. In a 2012 study, PriceWaterhouseCoopers found that 67% of corporations with annual revenues of more than \$1 billion had separated their legal and compliance function, and removed general counsel from the compliance department's reporting chain. PriceWaterhouseCoopers described this trend as "moving in the right direction" and consistent with requirements contained in the amended U.S. Sentencing Guidelines. Likewise, a leading trade organization representing compliance professionals, the Society of Corporate Compliance and Ethics, issued a study finding that "88% of compliance professionals" were "opposed to the corporate counsel serving as the compliance officer." In the wake of the U.S. Sentencing Commission's 2010 amendments that called for significant

independence for compliance departments, even the law firm of Gibson Dunn (an extremely experienced firm representing corporations in False Claims Act cases) published warnings to corporations about continuing the practice of compliance departments reporting to the General Counsel or law department, stating that this arrangement “could be problematic.”

Although the *amici* may still argue that there are strong benefits in having compliance departments controlled by corporate law departments in order to shield compliance investigations from outside review, this reasoning is not considered the majority view of well respected compliance experts. It is also not the current practice of the overwhelming majority of the major corporations. *Amici's* public policy arguments are not only without merit, they are counter to current “best practices” advocated or endorsed by numerous institutions and experts, including the U.S. Sentencing Commission, the viewpoint of the overwhelming majority of compliance professionals, the findings of institutions dedicated to studying compliance processes (such as the RAND Center for Corporate Ethics and Governance), and the best practices urged by various agencies of the U.S. government. While *amici's* arguments present the losing side of the public policy debate as to whether corporate compliance investigations should be privileged, they are also not germane to the central issue before this Court on KBR's petition for writ of mandamus, i.e., whether KBR carried its burden to establish that the

internal investigations at issue in this case are protected by the attorney-client privilege. Respondent-Relator's response to *amici's* arguments should be lodged in order to place those arguments in context and provide this Court with a balanced perspective of the issues raised by *amici*.

### CONCLUSION

For good cause shown, the attached Brief of Respondent-Relator Harry Barko in response to the Brief of the *Amici Curiae* and the Supplemental Addendum in support of the Response should be filed on the record in this matter.

Respectfully Submitted,

/s/ David K. Colapinto

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April 10, 2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to File a Responsive Brief to the Brief of Amici Curiae, together with the accompanying Brief in Response and Supplemental Addendum thereto, was served on this 10th day of April, 2014, by Federal Express on:

The Honorable James S. Gwin  
U.S. District Judge  
Carl B. Stokes United States Court House  
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Cleveland, OH 44113-1838

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