

Also, pursuant to FRAP 27(a)(3)(B) and Circuit Rule 27(c), Barko includes in this response a cross-motion for affirmative relief seeking the right to file a response to the brief of amici curiae if leave to file is granted, and for the Court to invite or appoint amicus curiae to represent the District Judge in support of his rulings that are the subject of the petition for writ of mandamus and to oppose the issuance of the writ. *See* Section III, below.

I. PROPOSED AMICI FAILED TO SEEK AN EXTENSION OF THE DEADLINE FOR REQUESTING LEAVE TO FILE A BRIEF OF AMICI CURIAE MORE THAN 30 DAYS LATE.

Proposed Amici's motion should be summarily dismissed because it was filed out of time. The timeliness requirements under the rules are not even addressed by the proposed amici's motion for leave which was filed more than 30 days late.

FRAP 29(e) provides that "an amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed." Our Circuit Rule states that "a brief for amicus curiae will be due as set by the briefing order in each..." or in "the absence of provision for such a brief in the order, the brief must be filed in accordance with the time limitations described in FRAP 29(e)." Circuit Rule 29(c). The Circuit's rules also require the timely filing of a motion for leave to participate as amicus

curiae where, as here, the participation of amici is opposed. Circuit Rule 29(b) and (c).

Under these rules, the proposed amici's motion for leave (or motion to extend that deadline) was due within 7 days from the filing of KBR's petition for writ of mandamus, dated December 19, 2014. On December 23, 2014, this Court issued a briefing schedule ordering Respondent Barko to file an Answer to KBR's petition, but the briefing schedule did not refer to amicus curiae. Accordingly, the proposed amici had to and including December 26, 2014, in which to file a motion for extension of time to file their proposed amici brief if they were unable to prepare and file a motion for leave and proposed amici brief within that time.

Instead of filing within 7 days of KBR's petition, the proposed amici waited 42 days, until January 30, 2015, to file their motion for leave to seek filing an amici curiae brief in support of KBR's petition. However, the proposed amici did not even mention the applicable deadlines set forth in FRAP 29(e) and Circuit Rule 29(c), nor alert the Court to the fact that their request was filed 35 days late.

More importantly, the proposed amici's late-filed motion for leave does not satisfy this Court's requirements for moving to extend time for filing motions, etc. Circuit Rule 27(h). Under this Court's rules, the late filed motion for leave must be denied because the proposed amici failed to timely file a motion to extend the

deadline for filing amicus briefs, and they also failed to file any request for an extension of the deadline.

First, this Court requires a motion to extend time to “be filed at least 5 days before” the expiration of the deadline. Circuit Rule 27(h)(1). The proposed amici did not comply with this requirement.

Second, the rules also state where a motion is “filed less than 5 days before the due date” it “*will be denied absent exceptional circumstances*, except that the clerk may grant unopposed late filed motions for extension of time for good cause shown.” *Id.* (emphasis added). In this case, there is not even a request to extend the time, let alone a pre-expiration expiration request, and the late-filed request for leave is opposed.¹ Circuit Rule 27(h)(1) does not permit the filing of a request to extend a deadline more than 30 days after it has expired; however, even if it did the proposed amici’s motion for leave failed to address Circuit Rule 27(h)(1)’s requirement of “exceptional circumstances” for late filed motions seeking to enlarge the 7-day deadline in FRAP 29(e) for filing amicus briefs. Accordingly, proposed amici waived that issue by failing to raise it in their motion and they

¹ Counsel for Barko alerted counsel for proposed amici that their request for leave to participate as amici curiae was late under the rules and that Barko would be filing an opposition to the motion for leave, in part, because amici were seeking to file this request so late. Nonetheless, proposed amici still ignored the timeliness requirements of FRAP 27(h) and 29(e) in their motion for leave.

cannot now raise new arguments to try to satisfy the “exceptional circumstances” standard in their reply.

Under Circuit Rule 27(h)(1), late filed requests, like that of proposed amici, that do not comport with these timeliness requirements “will be denied.”

II. THE PROPOSED AMICI CURIAE BRIEF MUST BE DENIED AS UNTIMELY.

Proposed amici’s motion for leave must be denied because it is untimely filed and there is “no good cause proffered for its late submission.” *See, e.g., Vill. of Benesville v. FAA*, No. 05-1383, Order, 2005 U.S. App. LEXIS 23277 (Oct. 25, 2005) (denying untimely motion for leave to participate as amicus curiae).

This is not the first go-around for KBR filing mandamus proceedings from the district court in this case and proposed amici asking to participate. However, unlike the first round, where most of these proposed amici filed a timely motion for leave within 7 days of KBR’s first writ of mandamus petition in March of 2014,² this time the amici failed to meet this mandatory deadline by a long shot.

Compounding this legal error, they also did not attempt to explain why they waited until January 30, 2015 -- 42 days after the filing of KBR’s petition. The only

² In *In re KBR*, No. 14-505, Doc. #14844, Motion for Leave to File Amici Curiae Brief (March 19, 2014), the amici timely filed their motion for leave and proposed brief 7 days after KBR’s first petition for writ of mandamus was filed on March 12, 2014. Five of the six proposed amici in this proceeding appeared in the earlier mandamus case.

reference to timing in the late-filed motion for leave in this proceeding is the unsupported claim that proposed “Amici are filing this brief as early as reasonably practicable given the fast-developing nature of this mandamus proceeding and amici’s desire to ‘join in a single brief’...” Motion for Leave, p. 5.

This hardly constitutes good cause, especially given the close relationship between the proposed amici and KBR and the fact that these proposed amici groups have closely followed the developments in the underlying case.

If amici were able to meet the 7-day deadline of FRAP 29(e) in the first mandamus proceeding, the lack of any explanation for taking 42 days to file the proposed amici motion for leave and proposed brief in this proceeding is particularly glaring. This mandamus proceeding is on a related issue concerning the same documents that were at issue in the first mandamus case.

If anything, these proposed amici should have been even more alert to the proceedings in the district court proceedings following remand given their recent participation as amici in the earlier mandamus proceeding and due to ongoing publicity concerning the district court’s rulings on privilege and waiver post-remand. The proposed amici were on notice that other privilege issues related to the documents at issue in *In re KBR* were likely to be considered on remand, and the district court’s post-remand proceedings were extensively covered in the media and legal community. That proposed amici knew or should have known about

these issues months before KBR filed its second mandamus petition is supported by the following facts.

First, in its earlier ruling granting KBR's first mandamus petition, this Court specifically noted that on remand the district court might still consider "other arguments" as to "why these documents are not covered by either the attorney-client privilege or work product protection." *In re KBR*, 756 F.3d at 764.

Second, even before the first mandamus proceeding was commenced, the parties before the district court had briefed the issue of waiver and the district had indicated in a published opinion that there was merit to Barko's waiver argument, even though the district court had not made a final conclusion as to whether KBR had waived the privilege. *United States ex rel., Barko v. Halliburton*, 4 F. Supp.3d 162, 168 (D.D.C. 2014).

Third, following remand, the district court in public orders asked for further briefing on the waiver and work product issues that are the subject of KBR's second mandamus case. *See U.S. ex rel. Barko*, Doc. #175, Order, pp. 2-3 (Sept. 15, 2014); Doc. #184, Order (Oct. 10, 2014); Doc. #210, Order (Nov. 24, 2014).

Fourth, developments on the waiver and work product issues in the post-remand proceedings in the district court and the possibility of KBR filing a second mandamus petition received wide-spread publicity in the Fall of 2014. *See* Alison Frankel, "In notorious KBR whistleblower case, Privilege is Again at Issue,"

Reuters (Dec. 8, 2014) (“KBR’s reconsideration motion suggested that if Gwin does not reverse himself ... KBR will file another mandamus petition.”); Nate Beck, “Judge Orders KBR to Disclose Docs to Whistleblower,” *National Law Journal* (Dec. 18, 2014) (“Gwin granted a seven-day stay of enforcement of his order to allow KBR to file an emergency appeal...”); Jonathan Slack, “The Barko v. KBR Privilege Battle Continues,” *Forbes* (Dec. 17, 2014) (³. *Also see*, www.law360.com: “Barko Muzzled, But Attorney-Client Info Remains At Risk” (Aug. 26, 2014); “KBR, Whistleblower Trade Blows Over Privileged Docs” (Oct. 21, 2014); “KBR Fights Latest Bid For Documents in FCA Row” (Nov. 5, 2014); “KBR Granted Reprieve On Whistleblower Doc Turnover Order” (Nov. 24, 2014); “Judge Snubs KBR’s ‘Old Args’ On Privilege In Kickbacks Row” (Dec. 18, 2014). One of the proposed amici, Association of Corporate Counsel (“ACC”) also published articles on a blog site closely following the district court’s post-remand rulings on waiver and work product that are at issue here, ACC Lexology blog, “The Barko v. KBR privilege battle continues” (Dec. 15, 2014),⁴ and even “predicted” that the district court would order waiver of the privilege. *See* ACC Lexology blog, “Barko v. Halliburton: the next (and final?) chapter,” Jan. 6, 2015

³ <http://www.forbes.com/sites/insider/2014/12/17/the-barko-v-kbr-privilege-battle-continues/>.

⁴ Available at: <http://www.lexology.com/library/detail.aspx?g=8b1bbf48-b157-402a-94dd-c486a3a48c89>.

(“*As predicted in our earlier posts on Barko v. Halliburton, Judge James Gwin has ruled that KBR waived the attorney-client privilege ...*”) (emphasis added).⁵

Fifth, KBR’s filing of a second petition for writ of mandamus should have come as no surprise to the proposed amici because KBR publicly stated on November 21, 2014, that it “will promptly file” a second petition for writ of mandamus. *U.S. ex rel., Barko*, Doc. #208, KBR Motion for Reconsideration, p. 2 (Nov. 21, 2014).

Based on the public record and coverage of the district court’s post-remand proceedings, as well as proposed amici ACC’s own articles on the district court’s post-remand rulings, these proposed amici either knew or should have known no later than late November of 2014 about the issues that are the subject of KBR’s second writ of mandamus petition in this case. There is no reason why the proposed amici could not have filed a timely request under Circuit Rule 27(h) to extend the time for filing a motion for leave and proposed amici brief, and there is no justification for proposed amici waiting 42 days to file a motion for leave that failed to seek an extension of the already expired deadline. Obviously, proposed amici failed to address the “exceptional circumstances” test that is required for extending the 7-day deadline for filing an amicus brief in this case because they can’t meet that standard. Rather, proposed amici simply ignored providing any

⁵ Available at: <http://www.lexology.com/library/detail.aspx?g=ae554387-0323-491d-ac5d-ffc6e8ab420f>.

reasons that could be exceptional circumstances under the Circuit Rules or even good cause for permitting such a late-filed motion for leave to file an amici brief.

Moreover, the issues on which the proposed amici seek to be heard can be adequately addressed and considered without their participation. Ordinarily, leave should be denied where a proposed amicus curiae brief covers the same ground as argued by the parties. *See* Circuit Rule 29(a); FRAP 29, Notes of Advisory Committee on 1998 Amendments, Note to Subdivision (b) (“An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.”). *Also see, Ryan v CFTC*, 125 F3d 1062 (7th Cir. 1997); *Choices v Ill. Bell Tel. Co.*, 339 F3d 542 (7th Cir. 2003). In this case, KBR is represented by able counsel and KBR has already raised in its petition the very issues that the proposed amici seek to brief.

If the proposed amici’s motion for leave is granted it will result in delay both in this proceeding and in the underlying district court case. This Court has already entered two briefing orders, and Barko has already submitted his Answer to the petition. Barko would have to devote additional time and resources to respond to the proposed amici curiae brief if leave were to be granted, causing further delay. In addition, the district court proceedings below would be adversely affected if

leave is granted requiring an extension of discovery and trial deadlines for a case that has already been pending almost 10 years.

III. CROSS-MOTION FOR AFFIRMATIVE RELIEF.

In the alternative, if the motion for leave is granted, then Barko requests that this Court: (1) invite amicus curiae to represent the District Judge in opposition to KBR's petition; and (2) grant Barko 21 days from the date of the order granting proposed amici's motion for leave in which to file a response to the amici curiae's brief.

First, if KBR's petition is not denied outright without further proceedings, as a matter of fairness to District Judge Gwin, this Court should appoint amicus curiae to represent Judge Gwin's views in response to KBR's second petition for writ of mandamus. *See* FRAP 21(b)(4) (permitting the court of appeals to invite an amicus curiae to address the petition on behalf of the trial court judge); *Also see* FRAP 28. Given KBR's position in its petition that the District Judge committed judicial misconduct in the form of bias to warrant his removal from the case, the Court should appoint amicus curiae to represent the District Judge to respond to KBR's petition if there are going to be further proceedings to consider the merits of the petition. While Barko attempted to respond to KBR's argument for judicial reassignment, FRAP 21(b)(4)'s provision to invite amicus curiae to respond on behalf of the District Judge is fully applicable here where the District Judge is

directly challenged by the petitioner as biased. Moreover, because KBR has based, in part, its call for the District Judge's removal on his alleged impermissible conduct as an adversary or litigant, it is even more important for the Court to appoint an amicus curiae who can advocate the District Judge's position without exposing him to further accusations of bias. *See* FRAP 21, Notes of Advisory Committee on 1996 amendments, Note to Subdivision (b) ("Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an amicus curiae to provide a response to the petition."). This case calls out for amicus curiae participation to represent the views of the District Judge in response to KBR's petition even if proposed amici's motion for leave is denied.

Second, if leave is granted, then the court's order granting leave must specify a time for Barko to file a response to the amici brief. FRAP 29(e). In this case, given the disruption to the current schedule in this court and in the district court that will occur if leave is granted, the deadline for Barko's response to proposed amici's brief should be set 21 days from the date of any order granting the proposed amici's motion for leave. Barko's counsel needs this amount of time to respond to the amici, as they have specific conflicts in their schedule and after no party filed a timely motion for leave to file an amici brief, counsel assumed no

such brief would be filed, and Barko's counsel structured their schedule accordingly.

CONCLUSION

For the foregoing reasons, the late filed motion for leave by proposed amici should be denied and their proposed brief stricken from the record. In the alternative, if the motion for leave is granted then Barko should be permitted to file a response to the proposed amici brief within 21 days from the date of any order granting the motion for leave.

Additionally, the Court should appoint an amicus curiae to represent District Judge Gwin in response to KBR's petition pursuant to FRAP 21(b)(4).

Respectfully submitted,

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February 11, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing opposition and cross motion was served on this 11th day of February, 2015, electronically via the Court's ECF system on all counsel who have appeared in this action, and upon:

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