

**ORAL ARGUMENT NOT YET SCHEDULED
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. 14-5319

**OPPOSITION TO RELATOR'S MOTION FOR EXTENSION OF TIME
AND TO EXCEED PAGE LIMITS, AND ALTERNATIVE REQUEST FOR
RELIEF IF RELATOR'S MOTION IS GRANTED**

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Pursuant to Federal Rule of Appellate Procedure 27(a)(3) and D.C. Circuit Rules 21(e) and 27(h), Petitioners (“KBR”) oppose Relator’s motion seeking the extraordinary relief of (1) filing an answer nearly *double* the 30-page limit applicable to KBR’s mandamus petition, codified in the Federal Rules of Appellate Procedure, and reflected in this Court’s order, and (2) *tripling* (*i.e.*, extending by an additional 30 days) the 15-day deadline this Court set for Relator to file his answer to KBR’s mandamus petition and stay motion. *See* 12/23/14 Order (ordering Relator to file by January 7, 2015, a combined response of no more than 30 pages to KBR’s stay motion and mandamus petition). If granted, these requests would confer a distinct advantage on Relator, where KBR itself went to extraordinary lengths to file its mandamus petition and stay motion within the time and page limits prescribed by the rules. If the Court nevertheless grants Relator’s motion in whole or in part, KBR alternatively requests that (1) the page limit or maximum word count for KBR’s reply in support of its motion and petition be set at half that of Relator’s response, and (2) the deadline for KBR’s reply be extended by half the amount of any additional time Relator may receive. *Cf.* Fed. R. App. P. 31(a)(1) (ordinary 14-day period for filing reply briefs about half 30-day period for filing appellees’ briefs); Fed. R. App. P. 32(a)(7) (reply briefs ordinarily can be no more than half the maximum length of principal briefs). Relator consents to this request for alternative relief. KBR’s request for alternative relief should not be understood as diluting its opposition to, or suggesting there is any basis for, the extraordinary relief Relator seeks.

1. “Th[is] [C]ourt disfavors motions to exceed page limits; such motions will be granted only for extraordinarily compelling reasons.” D.C. Cir. R. 27(h)(3); *see also* D.C. Cir. R. 21(e) (“Motions to extend time for filing and to exceed page limits for [mandamus] petitions, answers, and replies are governed by Circuit Rule 27(h).”). Relator has come nowhere close to meeting that demanding standard. The 14,000 word brief Relator seeks leave to file, *see* Rel.’s Mot. 4, would contain roughly 6000 words more than KBR’s 8191-word mandamus petition, which was less than 30 pages long, as required by Federal Rule of Appellate Procedure 21(d). Under the plain language of Rule 21(d), which Relator ignores, Relator’s “answer” to KBR’s petition is also limited to 30 pages. *See* Fed. R. App. P. 21(d) (setting limits for “[a]ll papers” filed in mandamus proceedings).

Relator articulates no valid grounds for filing an answer nearly double the length of KBR’s mandamus petition. Relator’s request would violate the basic principle of symmetry reflected throughout the federal rules. *See id.*; *cf.* Fed. R. App. P. 32(a)(7)(A), (B) (in direct appeals, opening and response briefs are subject to same page or word limit); Fed. R. App. P. 27(d)(2) (“A motion or a response to a motion must not exceed 20 pages . . .”); Fed. R. App. P. 5(c) (petition for leave to appeal and answer both limited to 20 pages). Relator’s conclusory assertion that he cannot “adequately address” the issues KBR has raised within the 30-page limit set by this Court, Rel.’s Mot. 4, does not provide an “extraordinarily compelling reason[]” for increasing that limit, D.C. Cir. R. 27(h)(3). KBR was able to address those issues

within its 30-page mandamus petition (considering the substantial overlap between the petition and KBR's stay motion, *see infra* pp. 3-4). Thirty pages should similarly suffice for Relator's response, especially considering that the response only needs to restate the issues presented, the case's facts and procedural history, and the applicable standards of review if Relator is "dissatisfied" with KBR's presentation. Fed. R. App. P. 28(b).

Relator refers only in passing to KBR's stay motion, filed contemporaneously with the mandamus petition. Rel.'s Mot. 3. But there was substantial overlap between the mandamus petition and stay motion. This overlap reflects the fact that the stay motion and mandamus petition both seek relief from the same set of orders; in particular, the stay motion seeks temporary relief pending the resolution of the mandamus proceedings, while the mandamus petition seeks permanent relief through vacatur of the orders at issue and reassignment of this case to a different District Judge. The stay motion's 1265-word "Statement of the Case," Stay Mot. 5-10, is an abridged version of the mandamus petition's "Statement of Facts," Mandamus Pet. 3-9. There is also substantial similarity between the motion's discussion of the stay factors—likelihood of success on the merits, irreparable injury, potential harm to Relator, and the public interest—and the petition's discussion of the mandamus factors—no other adequate means of relief, clear right to relief, and mandamus is appropriate under the circumstances. *Compare* Stay Mot. 10-19, *with* Mandamus Pet. 9-

30. The Court itself recognized this overlap in ordering Relator to file a “combined response” to KBR’s motion and petition. 12/23/14 Order.

Given the overlap between the stay motion and the mandamus petition, Relator has no need for additional pages to respond to the motion. But even if he had established such a need, the appropriate relief would be to allow Relator to file a separate response to KBR’s stay motion, subject to (1) Federal Rule of Appellate Procedure 27(d)(2)’s 20-page limit, and (2) KBR’s right to file a separate 10-page reply in support of its motion, *see* Fed. R. App. P. 27(a)(4), (d)(2). Relator should not be allowed to circumvent Rule 21(d)’s 30-page limit for answers to mandamus petitions by using extra pages in a “combined response” to oppose KBR’s request for mandamus relief. 12/23/14 Order.

2. Relator seeks to extend the deadline for filing his response to February 6, 2015—30 days after the January 7 deadline set by this Court; 45 days after this Court’s December 23 briefing order; and 49 days (*i.e.*, seven weeks) after KBR filed its mandamus petition and stay motion. Simple fairness to KBR—and consistency with principles of rough symmetry reflected elsewhere in the federal rules—demands that the Court deny this request, for which Relator has again failed to carry his burden of showing “good cause.” Fed. R. App. P. 26(b); *cf.* D.C. Cir. R. 28(e) (in ordinary appeals, this Court “disfavors . . . motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons”).

At 7:54 p.m. on Wednesday, December 17, the district court entered an order denying KBR's motions for reconsideration, certification of an interlocutory appeal, and a stay, and requiring KBR to produce the assertedly privileged and work-product protected documents at issue here by 4:00 p.m. on Friday, December 26, 2014. Dkt. 227 at 8-9; *see also* KBR's Emergency Stay Mot. 1. Shortly thereafter, the district court entered a *second* order requiring disclosure of portions of the documents based on an alternative rationale; this order also set a production deadline of 4:00 p.m. on December 26. Dkt. 228. D.C. Circuit Rule 27(f) provides that an emergency stay motion "must be filed at least 7 days before the date by which court action is necessary or counsel must explain why it was not so filed." To ensure compliance with this rule, KBR filed its emergency stay motion and mandamus petition with this Court on Friday, December 19, less than 48 hours after the district court entered its December 17 orders.

Given the time restrictions with which KBR was required to comply, the 15-day period (December 23 to January 7) that this Court's briefing order grants Relator is more than fair. In ordinary appeals, appellees have *less* time than appellants to file their briefs. *See* Fed. R. App. P. 31(a)(1) (establishing 40-day period for appellants' briefs and 30-day period for appellees' briefs). Fairness to KBR precludes granting Relator an additional 30 days to file his answer (for a total of 45 days), where KBR had less than two days to file its stay motion and mandamus petition.

Again, Relator's mere assertion that he needs a 30-day extension "to adequately address" the issues KBR has raised, Rel.'s Mot. 4, does not demonstrate "good cause" for such an extension, Fed. R. App. P. 26(b). That the issues here were "subject to extensive briefing in the district court," Rel.'s Mot. 3, militates *against* granting an extension. Relator should not need more time to prepare responses to arguments that he has already researched and briefed. As for the holiday travel plans of Relator's counsel, Rel.'s Mot. 4-5, counsel does not specify what those plans are or explain how they preclude attention to this matter during the 15-day period already provided. Such unelaborated assertions do not constitute "good cause" for an extension. Fed. R. App. P. 26(b).

Moreover, contrary to Relator's contention, Rel.'s Mot. 4, there is a real risk of prejudice to KBR resulting from the long delay sought. Discovery is ongoing in the district court, the course of which may be distinctly affected by the continuing uncertainty surrounding KBR's claims of privilege and work-product protection over the internal-investigation documents at issue here. Indeed, Relator has sought once again to depose Chris Heinrich—the KBR attorney who supervised the privileged investigations at issue, *see* Mandamus Pet. 3—and to schedule the deposition within the extended time limit that Relator seeks for filing his response. KBR anticipates that Relator will attempt to pose a series of questions once again designed to attack its privilege and work-product claims. Relator should not be permitted to "play for time," extending the deadline for his response to the mandamus petition while

potentially compounding the errors in the district court relating to privilege and the work-product doctrine.¹

3. Alternatively, if the Court grants Relator's motion in whole or in part, KBR requests that (1) the page limit or maximum word count for KBR's reply in support of its stay motion and mandamus petition be set at half that of Relator's response, and (2) the deadline for KBR's reply be extended by half the amount of any additional time Relator may receive. This approach would accord with the rules governing ordinary, non-mandamus appeals, under which (1) reply briefs are limited to half the maximum length of principal briefs, Fed. R. App. P. 32(a)(7), and (2) the 14-day period for filing reply briefs is about half the 30-day period for filing appellees' briefs, Fed. R. App. P. 31(a)(1).

4. Relator's motion further demonstrates that KBR is entitled to a stay pending resolution of these mandamus proceedings and that the issues KBR has raised are potentially worthy of mandamus relief. Although he made precisely the opposite representation to the district court in successfully opposing certification of an interlocutory appeal, Relator has now (belatedly) recognized that KBR is raising "difficult," "serious and complex issues," that "could set important precedent." Rel.'s Mot. 3-5; *cf.* Dkt. 213 at 14 (Relator's brief arguing that "there are no substantial

¹ KBR is contemplating moving in the district court for a general stay of discovery and district-court proceedings pending resolution of these mandamus proceedings. KBR previously requested Relator's agreement to a consent motion for such a stay, which he rejected.

questions of law” or issues of “first impression” at stake in this case and that the district court’s production order is “based on well-settled and controlling law”). These concessions, along with Relator’s claimed need for more time and pages to respond to KBR’s arguments, underscore that KBR has satisfied the stay prerequisite of likely success on the merits, *see* Emergency Stay Mot. 11-15, and that mandamus is appropriate here because the district court’s orders raise novel, potentially precedent-setting issues, *see* Mandamus Pet. 25-27.

* * *

For the foregoing reasons, KBR respectfully requests that the Court deny Relator’s motion for an extension of time and to exceed the page limit set by this Court’s December 23 briefing order. Alternatively, KBR requests that (1) the page limit or maximum word count for KBR’s reply in support of its stay motion and mandamus petition be set at half that of Relator’s responsive brief, and (2) the deadline for KBR’s reply be extended by half the amount of any additional time Relator may receive.²

² Although not relevant to Relator’s motion, KBR notes that the “Certificate as to Parties” attached as an addendum to the motion incorrectly states that the United States “has not made a decision whether or not to intervene in this proceeding.” Rel.’s Mot. 7. In 2009, the United States filed a notice that it is not intervening in this matter. *See* Dkt. 37.

Dated: December 30, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 30th day of December, 2014, a copy of the foregoing opposition was served by Federal Express on:

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On this day, a copy of the foregoing opposition was served by Federal Express on:

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On this day, a copy of the foregoing opposition was served electronically via the Court's CM/ECF system on:

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