ORAL ARGUMENT SCHEDULED FOR MAY 7, 2014

No. 14-5055

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

From the United States District Court for the District of Columbia
the Honorable James S. Gwin (by designation)
Civil Action 1:05-cv-1276

REPLY OF PETITIONERS TO RELATOR'S RESPONSE TO THE BRIEF OF AMICI CURIAE

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Abbreviation	Definition
3/6 Order	March 6, 2014 Order of the District Court (Appendix A to the Petition)
App.	Appendix
Amici Br.	Brief for the Chamber of Commerce of the United States of America *et al.* as *Amici Curiae* Supporting Petitioner (Mar. 19, 2014)
COBC	Code of Business Conduct
Dep.	Deposition
KBR	Petitioners 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
Opp'n	Relator's Corrected Combined Response to Motion for Stay and Petition for Writ of Mandamus (Mar. 21, 2014)
Pet.	KBR's Corrected Petition for Writ of Mandamus (Mar. 12, 2014)
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SA	Supplemental Addendum to Brief of Respondent-Relator in Response to the Brief of the *Amici Curiae*
Supp. Br.	Brief of Respondent-Relator in Response to the Brief of the *Amici Curiae* (April 10, 2014)

ARGUMENT

I. Relator's Policy Materials Do Not Address the Privilege Question Before This Court

Claiming to have a better "[]understanding of the law and policy governing internal corporate compliance" (Supp. Br. 5) than a broad coalition of national trade associations whose thousands of members have extensive experience with internal investigations, Relator downplays the effects of the decision below. *Amici* do not overplay the decision's consequences. Denying privilege when counsel initiate investigations pursuant to corporate compliance programs would "*penalize* companies that have effective compliance policies," forcing a choice between retaining such policies and the privilege. *Amici* Br. 7. Legal advice from in-house counsel is especially important for investigations "required by regulatory law." *Id.* at 9. And forcing a company to leave a compliance program "in the hands of outside counsel" could "compromise[e] its effectiveness and value." *Id.* at 11-12; *see also* Reply 1 n.1.

Relator has no response to the first two concerns, mischaracterizes the third, and then offers 10 pages of policy arguments irrelevant to the legal questions at issue. Most of Barko's sources (including "whistleblower" literature authored in part by Relator's own counsel[1]) say *nothing at all* about privilege, instead debating whether separating compliance functions from the general counsel (e.g., a "chief compliance officer" who reports directly to the Board) is good corporate policy for reasons

[1] *See* RAND Center for Corporate Ethics & Governance, Conference Proceedings, *For Whom the Whistle Blows* at 8-10 (2001), *available at* http://goo.gl/uvJzyN.

unrelated to privilege. *See* Supp. Br. 5-11; SA 9, 11-12, 14, 30-31, 33, 35-36, 42-45, 50, 55-56, 59.[2] But organizational separation is *entirely irrelevant* to privilege under the District Court's "but-for" test: Whether employees communicate with a lawyer who is an independent "chief compliance officer," an assistant general counsel, or outside counsel, the mere fact that the investigation is undertaken *pursuant to a compliance program* disqualifies *any* invocation of privilege under the decision below, regardless of the corporation's need for legal advice.

None of Relator's sources contemplates this wholesale evisceration of privilege. They explain that compliance professionals are "commonly . . . attorneys" tasked with "augment[ing] legal compliance and reduc[ing] legal exposure to the company," SA 14, 38, and affirm that "privilege can be obtained either by involving in-house or outside counsel." SA 15-16. Relator's *own* "expert" (Supp. Br. 11) describes privilege as "a compliance officer's best friend."[3] Michael Volkov, *The Attorney-Client Privilege and Compliance,* Corruption, Crime & Compliance (Jan. 14, 2013), http://goo.gl/2WJSRm.

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[2] Policy factors have not led corporate counsel to divest all compliance functions. "[S]ome within the field of ethics and compliance view th[e] dual role designation [of 'general counsel/chief compliance officer'] as a best practice." SA 14. And it is often impossible for small businesses to have separation, as the Sentencing Guidelines recognize. *See* U.S.S.G. § 8B2.1 cmt. 2(C)(iii) (2013). Direct reporting can, of course, be achieved if a dual General Counsel/Chief Compliance Officer reports to the Board.

[3] Michael Goldsmith & Chad W. King, *Policing Corporate Crime*, 50 Vand. L. Rev. 1 (1997), calls for *enhanced* protections for audit materials, explaining that weaknesses in privilege "undermine the law enforcement policies upon which the Sentencing Guidelines and comparable measures are premised: that corporate good citizenship can be induced through incentives that promote self-policing." *Id.* at 7-8.

The Justice Department affirms that privileged legal advice can "naturally have a salutary effect" by "facilitating . . . a corporation's effort to comply with complex and evolving legal and regulatory regimes." U.S. Attorney's Manual § 9-28.720(b).[4] And while the Sentencing Guidelines encourage "direct reporting" to the Board or Audit Committee in some circumstances, they do not speak to the privilege issues presented here. SA 45; U.S.S.G. §§ 8B2.1(b)(2)(C) (2013); 8C2.5(f)(3)(C).[5]

II. *Upjohn* Controls Over Distinguishable and Irrelevant Magistrate and District Court Decisions

A. Relator Mischaracterizes the District Court Decision and *Burrage*

Unwilling or unable to defend the District Court's *actual* rationale, Relator tries to reframe the decision as an application of the "primary purpose" test. Supp. Br. 1. But that reading is foreclosed by the text of the order, which plainly concluded that "the COBC investigative materials do not meet the 'but for' test because the

[4] Relator's quibbles about "*Upjohn* warnings" (Supp. Br. 13) miss the point: Under the District Court's but-for test, interviews conducted pursuant to a compliance program are *always* ineligible for privilege, regardless of *Upjohn* warnings. In any event, such warnings are not prerequisites to privilege. Reply 6-7; SA 71; Lee Stein & Elizabeth Kruschek, *The Importance of Robust* Upjohn *Warnings After* Ruehle, ABA Crim. Justice Section Newsletter, Winter 2010, *available at* http://goo.gl/d8FgMS. Relator's recycled arguments about KBR's "Policy Committee" (*Compare* Supp. Br. 11-13, *with* Opp'n 17-18) are wrong, *see* Reply 9-10. That Chris Heinrich "managed" a large number of COBC investigations (Supp. Br. 12 & n.9) is evidence that KBR consistently applied its COBC policy, not that an investigation directed by a lawyer cannot be privileged.

[5] It is irrelevant that some authorities are found in a document library on the website of the Association of Corporate Counsel ("ACC") (Supp. Br. 1-2, 13). The resources (including one-hundred-plus documents on privilege) are not representative of the views of the ACC. *See, e.g.*, http://goo.gl/BVZMEj.

investigations would have been conducted regardless of whether legal advice were sought," even if legal advice was itself a sufficient basis for the communications. 3/6 Order 6; accord *id.* at 5; Reply 3. Under the District Court's unprecedented rationale, where a corporation has adopted a compliance program (as virtually all public companies have done), it is difficult to foresee any circumstance in which Relator's and the District Court's test for privilege would be satisfied—regardless of attorney involvement in initiating, supervising, or conducting an internal investigation, or a purpose to obtain legal advice.

Burrage v. United States, 134 S. Ct. 881 (2014), lends no support to the District Court's "but-for" test. *Burrage* interpreted a phrase from the Controlled Substances Act, raising the criminal penalty for distribution of unlawful drugs where "death . . . results from the use of such substance," *id.* at 885, holding it generally requires a showing of "but for" causation. But the Court based its conclusion on the particular language Congress used ("results from") in a "criminal statute subject to the rule of lenity," *id.* at 887-92. That is vastly different than the "primary" or "predominant" purpose test for attorney-client privilege, whose very name *presupposes* the existence of other purposes. *Burrage* expressly recognized the inadequacy of a "but for" test in precisely the circumstances here—*i.e.*, "when multiple sufficient causes independently, but concurrently, produce a result." *Id.* at 890, 892. The multiple-sufficient-cause situation regularly arises in corporate internal investigations, where other motivations

for a communication may exist beyond seeking legal advice. Reply 3-4; *Amici* Br. 4.[6] Under the District Court's reasoning, that disqualifying "other motivation" would include following a corporate compliance program, even if an investigation conducted under that program was initiated by a lawyer for the provision of legal advice.

B. Relator's Smattering of Unpublished Magistrate and District Court Decisions Are Distinguishable and Irrelevant

This case is materially indistinguishable from *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which upheld attorney-client privilege and work product protection for communications during an internal investigation, directed by counsel, into allegations of misconduct. Pet. 12-20. The seven unpublished magistrate orders and few district court decisions Relator cites do not demonstrate otherwise.[7]

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[6] Although Relator relies on a 32-year-old law review article (*but cf.* Supp. Br. 6 (criticizing 1997 article as "outdated")), he fails to note that the article itself explains that "[t]o deny the protection of the privilege to those who are under some obligation to speak . . . would have wide-ranging and undesirable effects," and would deny privilege on *Upjohn*'s own facts, "contradict[ing] the unanimous decision of the United States Supreme Court." John E. Sexton, *A Post*-Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 493 n.157 (1982).

[7] Many of the cases cited are facially inapposite. The cited portions of *Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379, 380 (N.D. Ga. 2001) (Supp. Br. 14 n.12) and *Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228, 232 (S.D.N.Y. 2000) (Supp. Br. 14 n.13), involve not attorney-client privilege or work product protection, but the controversial "self-critical-analysis privilege," not at issue here. *Cruz also* denied attorney-client privilege for an "investigative audit" involving interviews "conducted indiscriminately with [company] employees and non-employees alike." *Id.* at 231. Relator cites snippets of a law professor's Special Master report (Supp. Br. 14 n.12), but it squarely states that the relevant test "is whether counsel was participating in the communications *primarily for the purpose* of rendering legal advice or assistance." *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 798 (E.D. La. 2007) (emphasis added).

Relator fails to note that many of his cases apply *state* privilege law, which can diverge significantly from federal law. *See Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) (magistrate) (holding that "attorney client privilege [issue] is governed by New Jersey law" and noting that "[w]hile the federal attorney-client privilege is absolute, the New Jersey state privilege is qualified"); *see also Allied Irish Banks, p.l.c. v. Bank of Am., N.A.*, 240 F.R.D. 96, 102 (S.D.N.Y. 2007) (magistrate) ("New York privilege law"); *Accounting Principles, Inc. v. Manpower, Inc.*, No. 07-cv-636, 2009 U.S. Dist. LEXIS 66428, at *8 (N.D. Okla. July 28, 2009) (magistrate) ("Oklahoma law").[8]

The remaining cases are readily distinguishable and provide no support for the district court's blanket disclosure order. Relator's assertion (Supp. Br. 3) that *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 372-73 (D.N.J. 1994) "used the 'but for' terminology" conceals that the magistrate was addressing "work-product," not privilege. *Reich upheld* privilege for a report entitled "Attorney Directed Kenvil Plant Inspection" and acknowledged that internal "safety-audit" reports might also be privileged if (as here) prepared "at the request of [in-house] counsel." *Id.* at 372. The 25-year-old magistrate opinion in *Colt Industries, Inc. v. Aetna Casualty & Surety Co.*, No. 87-cv-4107, 1989 U.S. Dist. LEXIS 4922 (E.D. Pa. Apr. 28, 1989), denied discovery based on

[8] The *Accounting Principles* investigation was conducted by a non-lawyer corporate "ombudsman," 2009 U.S. Dist. LEXIS 66428, at *16-*19. Although the court cited but-for language from one 25-year-old case, its analysis addressed whether the communications were "made for the *primary purpose* of seeking legal advice." *Id.* at *28 (emphasis added). Unlike the District Court here, that court adopted no sweeping legal rule, and upheld some documents as privileged. *Id.*

Upjohn; the propriety of a "but for" test was not at issue, because the court held the documents privileged under that standard. *Flo Pac, LLC v. Nutech, LLC*, No. WDQ-09-510, 2010 U.S. Dist. LEXIS 131120, at *15-16 (D. Md. Dec. 9, 2010), involved not an internal investigation but a discussion in the presence of a third party not covered by privilege; the court squarely applied the "'primary purpose'" test.

The *publicly released* report in *Allied Irish* (New York law) was prepared by a "banking expert" hired to "make recommendations for changes" for business purposes. 240 F.R.D. at 99, 104. The company hired counsel to "assist the [non-lawyer's] investigation," *id.* at 101, unlike KBR's lawyer-directed investigation. *Allied Irish* affirmed that a communication can be privileged if "primarily or predominantly of a legal character," *id.* at 103; the magistrate applied a but-for standard, at most, for work-product. *Contra* Supp. Br. 4 (suggesting *Allied Irish* applied "but for" test to privilege).[9] Apart from one passing reference, *Leonen* (New Jersey law) gives no indication of applying a but-for standard; the court's analysis consisted of one conclusory sentence, and it found many documents privileged. 135 F.R.D. at 99.

Relator wrongly suggests that *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013) "did no[t]" "declin[e] to follow" a but-for test. Supp. Br. 4-5. The magistrate

[9] In assessing whether a document was prepared "because of the prospect of litigation" and thus protected as work product, this Court focuses on whether the document's creator "had a subjective belief that litigation was a real possibility" and whether "that belief [was] objectively reasonable." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (internal quotation marks omitted).

"adhere[d] to the 'primary purpose' test" for privilege, refusing to import a "'because of' standard utilized . . . [for] the work product doctrine"—a standard that asks whether a document "would not have been created in substantially similar form *but for* the prospect of . . . litigation." 290 F.R.D. at 629 (emphasis added). *Koumoulis v. Independent Financial Marketing Group, Inc.*, 295 F.R.D. 28, 37 (E.D.N.Y. 2013), also applied the "'predominant purpose'" test. The court's fact-specific application of that rule does not support Relator, particularly as those defendants (unlike here) "provided little explanation" about the "role," "scope or purpose" of attorneys. *Id.* at 35.

In sum, Relator's plumbing of Westlaw and Lexis's depths has uncovered only a handful of largely unpublished district court and magistrate decisions, which provide no real support for the stringent but-for test applied here. After decades of widespread corporate internal investigations, Relator can cite *no* court of appeals decision applying a but-for test to attorney-client privilege, nor can he cite *any* opinion adopting the sweeping rationale articulated below, which denies privilege to all internal investigations "resulting from the . . . need to comply with government regulations" or "corporate policy." 3/6 Order 6. That novel, pernicious rule is irreconcilable with *Upjohn*. Pet. 12-23. Mandamus is warranted.[10]

CONCLUSION

The Court should direct the district court to vacate its March 6, 2014 order.

[10] The District Court's ongoing commentary on these proceedings, and gratuitous statements about the disputed documents' contents in response to a *joint scheduling motion*, further underscore the need for mandamus. *See* App. A; Reply 15 & n.12.

Respectfully submitted,

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Dated: April 18, 2014

CERTIFICATE OF SERVICE

I certify that on this 18th day of April, 2014, a copy of the foregoing *Reply of Petitioners to Relator's Response to the Brief of Amici Curiae*, was served by Federal Express on:

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