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., ET AL.

From the United States District Court for the District of Columbia
the Honorable James S. Gwin (by designation), No. 1:05-cv-1276.

BRIEF OF RESPONDENT-RELATOR HARRY BARKO IN RESPONSE TO THE BRIEF OF THE AMICI CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, COALITION FOR GOVERNMENT PROCURMENT, AMERICAN FOREST & PAPER ASSOCIATION, AND ASSOCIATION OF CORPORATE COUNSEL

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April 10, 2014

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GLOSSARY

Abbreviation	Definition
ACC	Association of Corporate Counsel
Amici	The Chamber of Commerce of the United States of America, National Association of Manufacturers, Coalition for Government Procurement, American Forest & Paper Association, and Association of Corporate Counsel
Br.	Brief
CCO	Chief Compliance Officer
COBC	Code of Business Conduct
e.g.	Example
HSS	Health and Human Services
KBR	Petitioners Kellogg Brown & Root, Inc., Petitioners Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Petitioners Kellogg Brown & Root Engineering Corporation, Petitioners Kellogg Brown & Root International, Inc. (A Delaware Corporation), Petitioners Kellogg Brown & Root International, Inc. (A Panamanian Corporation), and Halliburton Company
OIG	Office of Inspector General
p.	Page
PWC	PriceWaterhouseCoopers
SA	Supplemental Addendum

Respondent-Relator Harry Barko hereby files his response to the Brief of *Amici Curiae* lodged on March 28, 2014.

ARGUMENT

I. *AMICI* MISCONSTRUE THE DISTRICT COURT'S ORDER AND THE MEANING OF "BUT FOR" CAUSATION

Amici committed significant errors in presenting their "but for" analysis. First, the district court correctly held as a matter of law and fact that KBR's compliance investigation "was not for the primary purpose of seeking legal advice, and it is not entitled to the protection of the attorney client privilege." Opinion and Order, at 6-7 (March 6, 2014) [Doc. #150]. The district court's use of the term "but for" is consistent with prior case law applying the "primary purpose" test. The district court neither pronounced a broad legal principle, nor departed from settled precedent holding that privilege determinations often turn on fine distinctions of fact. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 396-397 (1981) (privilege determinations made on "case-by-case basis").

Indeed, one of the *amici*, Association of Corporate Counsel ("ACC"), has published on its website the very same scholarship which strongly supports and advocates the use of the "but for" approach that *amici* now protest. *Compare Amici* Br. at 2 ("'but for' test is incorrect, unprecedented, and unwarranted"), with SA 68, Excerpts from ACC's re-publication of the law review article 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* regarding application of attorney-client privilege). Despite that one of the *amici* groups obviously believes this seminal law review is important enough to be republished on its website, *amici* continue to insist, in direct contradiction to the NYU Law Review, that a "'but for' test […] demands that a party prove that seeking legal advice was the *sole purpose* of such a communication," *Amici* Br. at 4-5 (emphasis in original).[1] Contrary to what *amici* argue here, a "but for" approach is clearly compatible with "unclear or mixed" motives or purposes. SA 69, Sexton, *supra* at 492 ("In such circumstances, the judge must decide, preferably *in camera*, whether a nonlegal motive would have sufficed to induce the communication.").

Second, *amici* ignored specific Supreme Court guidance on the meaning of the "but for" analysis in determining causation. This error is fatal to their argument. Contrary to what *amici* would like the Court to believe, in reality "[a] cursory search of the Federal Reporter reveals that but-for causation is not nearly the insuperable barrier [*amici*] makes it out to be." *Burrage v. United States,* 571 U.S. __, 134 S.Ct. 881, 891, 187 L.Ed.2d 715 (2014). *Amici's* assertion that "the District Court's 'but for' test […] demands that a party prove that seeking legal advice was the *sole purpose* of such a communication," *Amici* Br. 4–5 (emphasis in origi-

[1] Nowhere in the March 6, 2014 opinion and order does the district court use a "sole purpose" formulation to apply the privilege. In fact, the term "sole purpose" does not appear in any of the district court's orders on the privilege issue.

nal), runs contrary to the Supreme Court's analysis of the applicability of "but for" analysis in contexts less demanding than the "primary purpose" test. To this end, *Burrage* explains that "courts regularly read phrases like 'results from,'" "based on," "by reason of," and "because of" as requiring (or otherwise fully consistent with) the application of "but-for-causality." *Id.,* 134 S.Ct. at 888–889 (internal quotation marks and citations omitted). For example, in the civil setting, the Supreme Court pointed to its recent interpretation of 42 U.S.C. § 2000e-(3)(a) ("[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . *because* he has opposed any practice made an unlawful employment practice"), stating that this language essentially equates to "[a] but-for cause of the challenged employment action." *Id.,* at 889-890, quoting *University of Tex. Southwestern Medical Center v. Nassar,* 133 S.Ct. 2517, 2528 (2013). It is difficult to accept that the "primary purpose" test does not equate to "but for" causation when "because of," "results from," "based on," or "by reason of," do.

Third, *amici* ignore numerous cases that also use the "but for" terminology in evaluating the application of the privilege, including *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Crown Trust No. 1B*, 230 F.R.D. 398, 410 (D. Md. 2005)—a case prominently featured in the parties' briefs. They also fail to inform this Court of other cases that used the "but for" terminology. *See*, *e.g.*, *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 373 (D.N.J. 1994); *Leonen v. Jones-Manville*,

135 F.R.D. 94, 99 (D.N.J 1990); *Flo Pac, LLC v. NuTech, LLC*, 2010 U.S. Dist. LEXIS 131120, 16 (D. Md. Dec. 9, 2010); *Accounting Principals, Inc v. Manpower, Inc.*, 2009 U.S. Dist. LEXIS 66428, 28 (N.D. Okla. July 28, 2009); *Colt Indus., Inc. v. Aetna Cas. & Sur. Co.*, 1989 U.S. Dist. LEXIS 4922 (E.D. Pa. Apr. 28, 1989). The two cases *amici* cite (*Komoulis* and *Philips*) as "recognizing the unprecedented nature of the 'but for' test" and "declin[ing] to follow it," *Amici* Br. 3, simply do no such thing.

Komoulis neither discusses nor rejects a "but for" test and cites with approval a case applying the "but for" standard. *Koumoulis v. Indep. Fin. Mktg. Group,* 295 F.R.D. 28, 37 (E.D. N.Y. 2013) (reports prepared by attorney not protected because drafts were not created primarily to provide legal advice, but 'for the purpose of generating the Report, which indisputably did not provide legal advice.'") (citing *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 104 (S.D.N.Y. 2007). *Komoulis* is instructive in other ways, observing that, while "[a] primary purpose of a company's human resources program is to ensure *compliance* with [a] myriad of laws […,] *like other business activities with a regulatory flavor*, [it] is part of the day-to-day operation of a business." 295 F.R.D. at 44 (emphasis added), and that attorney status "does not transform what would otherwise be human resources and business communications into legal communications" and that "investigation summaries and updates are not legal advice." *Id.* at 46 (citation omitted).

The *Philips* case explains that "the Ninth Circuit had not expressly ruled that the 'because of' test has supplanted the 'primary purpose' test," and that the "because of" standard "does not look at whether litigation was a *primary* or *secondary motive*" but rather asks "if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* litigation." *Phillips v. C.R. Bard, Inc.,* 290 F.R.D. 615, 629 (D. Nev. 2013) (emphasis in original, internal quotation removed, citation omitted). However, in light of *Burrage,* the "because of" formulation simply amounts to another way of expressing "but for" causation. It is therefore not surprising that *Philips* concludes "that the court's main focus is to look at the extent to which the communication solicits or provides legal advice," *id.,* at 629, and rejects the argument that the need for regulatory compliance shielded all related communications from disclosure, *id.,* at 630-631.

II. *AMICI* MISREPRESENT THE LAW AND POLICY GOVERNING INTERNAL COMPLIANCE PROGRAMS

The *amici* predicate their policy argument on a fundamental misunderstanding of the law and policy governing internal corporate compliance. They argue that allowing the District Court's decision to stand would "impose a Hobson's choice on corporations and their in-house lawyers" resulting in a "waiver of the privilege" if "in house counsel" remained in control of compliance departments, "thereby compromising its effectiveness and value to the company**."** *Amici* Br. 12.

They showcase an *outdated* 1997[2] law-review article that parades a list of horribles that might result in an effort to "avoid aggressive self-analysis" if confidentiality of compliance investigations is lost.[3] *Amici* Br. 13. However, concerns raised in the 1997 Gruner article evaporated over time and the "Hobson's choice" hypothesized by *amici* has not occurred. Instead, decoupling compliance from legal department has resulted in enhanced compliance. The federal government and most private corporations now recognize the benefits derived from decoupling the legal department from internal compliance. In the words of PriceWaterhouseCoopers, such decoupling represents a "mov[e] in the right direction":

> Reporting relationships for compliance departments are moving in the right direction as well. Fewer compliance officers report on a daily basis to the general counsel (35 percent in 2012, compared to 41 percent last year. . . . This falls in line with the U.S. Sentencing Guidelines' revisions from 2010, which favor an independent compliance function that preferably reports to the audit committee and board.

SA 63, PriceWaterhouseCoopers ("PWC"), "Broader perspectives; Higher performance. State of Compliance: 2012 Study," *Compliance Week* (June 2012), at 16.

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[2] By 1997 it was already understood that "[u]nder present law […] compliance program and audit materials are rarely confidential." Michael Goldsmith and Chad W. King, *Policing Corporate Crime.* 50 Vand. L. Rev. 1, 5 (1997) (arguing for new, statutory immunity for corporate compliance materials).

[3] According to *amici: "*Absent the control over confidentiality that the involvement of counsel implies, firms might avoid aggressive self-analyses of internal corporate misconduct (and forego the reforms that such evaluations might identify as being necessary) due to the threat of disclosure of the resulting evaluations.' Richard S. Gruner, *General Counsel in an Era Of Compliance Programs and Corporate Self-Policing*, 46 Emory L.J. 1113, 1176 (1997)." *Amici* Br. 13.

The PWC 2012 survey concluded that 67% of corporations with annual revenues over $1 billion had already separated their legal and compliance functions, and that their general counsel was not in the compliance department's reporting chain. SA 61-64. PWC's phrasing the trend against general counsel managing compliance programs as "moving in the right direction," despite the so-called confidentiality concerns raised by *amici*, is consistent with corporate studies. For example, a highly respected internal compliance consulting company, Corpedia/Ethisphere,[4] studied the very issues raised by *amici*, and concluded:

> Although it is natural to want to protect information about your ethics and compliance program from third-party view, maintaining a combined general counsel/chief compliance officer position for this purpose is contrary to the goals of open and honest allegiance to ethics and compliance.

SA 15, Corpedia/Ethisphere, *The Business Case for Creating a Standalone Chief Compliance Officer Position,* at 8, available at http://goo.gl/GA650U. The report explains that "the dual general counsel/chief compliance officer role does not afford the necessary independence for serving as the individual responsible for an organization's ethics and compliance program." *Id.* at 11.[5] A similar finding is re-

[4] At the time its report was issued, Corpedia provided compliance-related advice to corporations in 150 countries, including Walmart, Time Warner, OfficeMax, Dun & Bradstreet and PepsiCo. SA 19.

[5] Senator Charles Grassley, the principal sponsor of the 1986 amendments to the False Claims Act, put it more bluntly: "Apparently, neither Tenet nor (its General Counsel) saw any conflict in her wearing two hats as Tenet's General Counsel and

ported in a 2013 RAND Center for Corporate Ethics and Governance paper:

> In sum, when members of the C-suite view the compliance obligation in overly legalistic or opportunistic terms, then the essence of ethical practice is at risk of being lost, and the likelihood of executive misbehavior or a serious compliance breach becomes magnified. This was also noted by several symposium participants as a powerful reason not to subordinate the compliance function to the general counsel because, "when you put compliance into the law department, the threshold judgment [often] becomes, at what point will we get convicted?"

SA 31, Excerpts from *Culture, Compliance, and the C-Suite How Executives, Boards, and Policymakers Can Better Safeguard Against Misconduct at the Top*, 17, available at http://goo.gl/53LGTa.

Also, contrary to the view articulated by *amici,* corporate compliance professionals *overwhelmingly* support a strict separation between the compliance function and a corporation's general counsel. The 2013 survey conducted by the Society of Corporate Compliance and Ethics found that "88% of compliance professionals are opposed to the corporate counsel serving as the compliance officer, and 80% oppose having compliance report to the corporate counsel's office." SA 34, Society of Corporate Compliance and Ethics, *Should Compliance Report to the General Counsel?*, available at http://goo.gl/xKG0Do. According to the survey results, the respondents "particularly focused on a conflict of interest" between the compliance function and General Counsel, and provided the following comments:

Chief Compliance Officer . . . .It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement." SA 21.

> the 'vigorous defense' mission of corporate counsel is, at times, at odds with the 'detect, disclose, remedy' mission of a compliance officer.
>
> Legal's role is to protect and defend. Compliance's role is to uncover weaknesses, develop controls and mitigate risks. Uncovering weaknesses often poses a conflict within legal's role to protect.

Id. 4; SA 35.

Likewise, numerous government agencies require or otherwise encourage companies to ensure that their compliance programs are independent from General Counsel.[6] It is now commonplace for deferred prosecution agreements entered into under the False Claims Act to require the company's compliance department to be fully independent from General Counsel.[7]

In 2010, the Sentencing Guidelines related to internal corporate compliance programs were amended to require that compliance departments report directly—

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[6] For example, HHS Office of Inspector General warned hospitals against having compliance officials report to general counsel: "The OIG believes that there is some risk to establishing an independent compliance function if that function is subordinate to the hospital's general counsel […] By separating the compliance function from the key management positions of general counsel […] a system of checks and balances is established to more effectively achieve the goals of the compliance program." Department of Health and Human Services, Office of Inspector General, *OIG Compliance Program Guidance for Hospitals, Vol. 63*, Fed. Reg. 8987, 8993 n. 35 (Feb. 23, 1998).

[7] Tenet, Pfizer, and Bayer, entered into settlement agreements providing that their Chief Compliance Officer would not be subordinate to the general counsel. SA 43, RAND Center for Corporate Ethics and Governance, Conference Proceedings, *For Whom the Whistle Blows: Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank* (2011), at 56 n. 13, available at http://goo.gl/MZHs36.

without filter—to a corporate body's top decision-makers, such as the Audit Committee or the Board of Directors. U.S. Sentencing Commission, *Guidelines Manual*, § 8B2.1(b)(2)(B). This requirement directly impacts the role General Counsel previously played in the compliance program area. In particular, post-2010 reporting requirements:

> could be problematic for corporations that vest overall responsibility for compliance in a senior member of management (e.g. the general counsel), while delegating operational responsibility to a subordinate. The new requirement may not allow the senior officer (e.g. the general counsel) to act as a filter in deciding which conduct warrants reporting (and when) to the audit committee.

SA 45, Gibson Dunn, *U.S. Sentencing Commission Amends Requirements for an Effective Compliance and Ethics Program* (Apr. 13, 2010), available at http://goo.gl/JrtGJM.

Writing in *Compliance Today*, Michael Dowell—a Partner and member of the Health Care Law Group of Hinshaw & Culberstson, LLP—commented that, based on the 2010 amendments, "A health care organization in which the compliance officer reports to the general counsel […] rather than the board or a committee of the board will be considered an ineffective structure under the new Guidelines." SA 51, Dowell, *New Federal Sentencing Guidelines Requirements for an Effective Compliance Program*, Compliance Today, at 31 (Sept. 2010).

These trends completely undermine the validity of the parade of horribles predicted by the *amici* should compliance programs be managed outside of attor-

ney-client protection. Donna Boehme, an expert in the compliance field and former Chief Compliance and Ethics Officer for two leading multinational corporations, wrote that the demand within the compliance profession for complete separation from general counsel "has grown from a whisper to a roar."[8] As Michael Volkov, also expert in the field of compliance, and a former federal prosecutor, acknowledges:

> [The] old model of having the general counsel wear two hats as the chief legal officer and chief compliance officer is quickly fading into the recesses of the medieval guild system […]. Healthcare companies and oil and gas companies have embraced change and have recognized the importance of separating the general counsel from the CCO [Chief Compliance Officer] […]. JP Morgan, Goldman Sachs Groups, HSBC and Barclays all changed their compliance structures […].

SA 58-59, Michael Volkov, *Empowering the Chief Compliance Officer*, Corruption, Crime and Compliance Blog, April 5, 2013, available at http://goo.gl/ObFblB.

Applying standard rules governing attorney-client privilege to materials required to be created under federal law as part of a compliance program does not pose a "Hobson's choice" for corporations. Instead, interpreting the attorney-client privilege in the manner suggested by the *amici* is counter to public policy and the clear intent of Congress to ensure that compliance activities are not only performed

[8] Ms. Boehme identified that the shift in opinion was fueled by "corporate scandals" that "continue to illustrate the potential weaknesses of the G[eneral] C[ounsel]-controlled model and spotlight issues such as conflicts of interest, competing mandates and filtering of vital information from the governing body." SA 55, Boehme, *Five Essential Features of the Chief Ethics and Compliance Officer position*, Compliance Today, at 23 (Dec. 2012), available at http://goo.gl/Sk2vus.

in the most effective manner, but are carried out in a manner to avoid the natural tendency to conceal wrongdoing. The purpose and intent of *Upjohn* is not to turn routine-required compliance functions into privileged attorney-client communications, but to provide a meaningful avenue to permit privileged investigations to proceed on a case-by-case basis in compliance with a company's Code of Business Conduct ("COBC").[9] Under KBR's COBC program, it was up to the "Policy Committee" of Halliburton's Board of directors who was to function as the client and indicated when and if a routine, non-privileged COBC investigation required specialized attorney-client treatment. A. 98-99; A. 145, 155. *Amici* simply ignore that, under the company's own procedures, a COBC investigation could have been designated for specialized attorney-client treatment for the purpose of obtaining legal advice, but KBR chose not to do so in this case.[10] Here, the required compliance investigation happened to unearth facts the company would prefer to conceal, not because the investigation was initiated for the purpose of obtaining legal advice, but simply because two out of the thousand-plus LOGCAP-related investigations include factual information the company would rather sweep under the rug than allow it to be unearthed in civil discovery.

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[9] The routine nature of the investigations at issue here is evident from the "sheer volume" of COBC investigations Mr. Heinrich managed on the LOGCAP contract alone – numbering a thousand or more. A. 128, 151 (Heinrich Depo. Tr. 134, 181).

[10] Mr. Heinrich acknowledges that he never met with nor had any interaction with the Policy Committee. A. 103-104, 145, 154 (Heinrich Depo. Tr. 45-46, 173, 185).

Nothing prevented KBR from creating procedures required under its COBC policy to transform a routine COBC investigation into an attorney-client privileged one, and nothing prevented KBR's counsel from ensuring that the *Upjohn* warning requirements were thereafter strictly followed.[11] *Amici* simply ignore that KBR did neither. Notably, the district court properly evaluated the facts presented by the parties and determined, after full briefing and an *in camera* review of the withheld documents, that KBR failed to give the required *Upjohn* warnings and that failure, together with other facts surrounding the employee interviews, supported the conclusion that KBR's COBC investigation "was not for the primary purpose of seeking legal advice…" Opinion and Order, at 6-7 (March 6, 2014) [Doc. #150]. Once again, information published by one of the *amici*, ACC, demonstrates that these required *Upjohn* warnings are necessary to safeguard the privilege, and further underscores how KBR failed to meet its burden to show that its investigation was for the "primary purpose of seeking legal advice." *Compare Id.,* with SA 71, ACC Legal Resources, Keith Markel and Deborah Ringel, "Top Ten Safeguards When Interviewing Employees During Internal Investigations" (Oct. 15, 2010).

While *amici* identify the many roles in-house counsel may serve in corporations today, *Amici* Br. 4, that involvement is no reason to expand the privilege to

[11] Gagging employees with non-disclosure agreements that, on their face appear to be unlawful is a far cry from implementing a proper *Upjohn* warning. *See* Respondent's Combined Response, at 13-16; and A. 28, Confidentiality Statement.

everything in-house counsel touch.[12] Requiring KBR to comply with its COBC policy if it wished to consider a particular compliance investigation a privileged attorney-client communication is a far cry from the Hobson's choice *amici* claim. *Amici* seemingly argue for a change in the law, seeking to expand the scope of the attorney-client privilege in the corporate context.[13] It is currently understood that, while "[e]valuations of corporate compliance and liability prepared by or under the direction of corporate counsel *may* be shielded […,] [a]t minimum, counsel must have substantial involvement in compliance efforts before the attorney-client privilege is even *arguably* applicable" and "if counsel is involved in a compliance re-

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[12] To the contrary: "While this expanded role of legal counsel within corporations has increased the difficulty for judges in ruling on privilege claims, it has concurrently increased the burden that must be borne by the proponent of corporate privilege claims relative to in-house counsel." *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 799 (E.D. La. 2007). Corporations "cannot reasonably conclude from the fact of pervasive regulation that virtually everything sent to the legal department, or in which the legal department is involved, will automatically be protected by the attorney-client privilege." *Id.* at 800–801; *see also Phillips*, 290 F.R.D. at 630–631 (rejecting argument that need for regulatory compliance shielded all related communications from disclosure).

[13] Expanding any privilege justifying non-disclosure of information related to compliance investigations, even those managed by attorneys, is not supported under case precedent. *Cruz v. Coach Stores, Inc.,* 196 F.R.D. 228, 232 (S.D.N.Y. 2000) ("A company has an obvious economic interest in engaging in self-evaluations . . . The public interest would hardly be served by cloaking the fruits of those inquires with privilege simply on the ground of encouraging [the employer] to make an inquiry that it necessarily would have made in any case."). *Also see Reid v. Lockheed Martin*, 199 F.R.D. 379, 387 (N.D. Georgia, 2001)("chilling effect" on corporate behavior caused by disclosure of documents would be "*de minimis*" where creation of the materials was "mandated by law."

view but acts only as a fact finder or source of business advice, there is little chance that the privilege will apply." Gruner, *supra*, at 1177–78 (emphasis added); *see also Amco Ins. Co. v. Madera Quality Nut LLC*, 2006 U.S. Dist. LEXIS 21205, 23 (E.D. Cal. Apr. 10, 2006) (where there is "evidence that the regular course of business involved the use of counsel to engage in routine fact-finding," the attorney-client privilege does not apply, even when the findings raises legal issues).

Amici's argument that compliance programs should be subordinated to the authority of a company's general counsel is flawed and inconsistent with well-established "best practices." If adopted it will create a disincentive for companies to continue in the "right direction" towards more meaningful, independent and effective compliance.

CONCLUSION

For the reasons set forth herein, the arguments of *amici* are without merit and KBR's Petition for Mandamus should be denied.

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