Case No. 09-2245

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

v.

INTERBAKE FOODS, LLC,

Appellee.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF APPELLANT NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

The Appellant, National Labor Relations Board, appeals from an order entered by the United States District Court for the District of Maryland denying the Board's application for judicial enforcement of an administrative subpoena directed to the Appellee, Interbake Foods, LLC. (App. at 288.)[1] The order appealed from was entered by the district court on September 22, 2009. (*Id.*) The NLRB filed a timely notice of appeal on October 26, 2009. (App. at 289); *see* Fed. R. App. P. 4(a)(1)(B).

The district court had jurisdiction pursuant to Section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2) (2006). In addition, this Court has appellate jurisdiction to review the lower court's order pursuant to 29 U.S.C. § 1291 because an order granting or denying judicial enforcement of an agency subpoena is a "final decision[]" within the meaning of that provision. *See Reich v. Nat'l Eng'g & Contracting Co.*, 13 F.3d 93, 95-96 (4th Cir. 1993); *EEOC v. Packard Elec. Div., Gen. Motors Corp.*, 569 F.2d 315, 317 (5th Cir. 1978); *FTC v. Texaco, Inc.*, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977) (en banc).

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[1] Citations to "App." refer to the parties' Appendix.

STATEMENT OF THE ISSUES

1. Whether the district court committed legal error when it held that NLRB administrative law judges ("ALJs") categorically lack the authority to conduct *in camera* inspections to initially resolve privilege questions that arise in response to agency subpoenas.

2. Whether the district court properly concluded that Interbake met its burden of establishing that the subpoenaed materials, which an NLRB administrative law judge ordered Interbake to produce for the limited purpose of conducting an *in camera* inspection during a pending agency hearing, are privileged and therefore do not warrant *in camera* review.

STATEMENT OF THE CASE

The National Labor Relations Board ("NLRB," "the Board," or "the Agency") is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169 (2006). The Agency's primary duties are to prevent and remedy "unfair labor practices," as defined by Section 8 of the Act, *id.* § 158, and to conduct union representation elections under Section 9, *id.* § 159.

The NLRA, as amended, separates the Agency's prosecutorial and adjudicatory functions. Thus, Section 3(d) of the Act establishes the position of General Counsel and vests him with "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board." *Id.* § 153(d).[2] In addition, Section 3(a) of the Act, *id.* § 153(a), creates within the Agency a five-member Board, which is empowered by Section 10(a), *id.* § 160(a), to adjudicate unfair labor practice complaints brought by the General Counsel, and by Section 9, *id.* § 159, to process petitions for union representation elections and to certify the results of such elections.[3]

In support of these vested powers, Congress granted the Board the authority to issue administrative subpoenas in Section 11 of the Act. *Id.* § 161(1). In that same section, Congress provided district courts

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[2] The General Counsel has delegated this authority to the Agency's thirty-two Regional Directors, who exercise jurisdiction over defined areas of the country, subject to the General Counsel's ultimate supervision. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975) (citing 29 C.F.R. §§ 101.8, 102.10).

[3] The Board has designated the Agency's administrative law judges as agents to conduct evidentiary hearings in unfair labor practice cases. *See* 29 U.S.C. § 160(b); 29 C.F.R. § 102.34 (2009).

with the authority to enforce lawful Board subpoenas. *Id.* § 161(2). This case involves the Board's exercise of its Section 11 subpoena authority in an ongoing unfair labor practice case where Interbake Foods, LLC ("Interbake") is alleged to have committed numerous violations of the NLRA.

At the underlying agency-level evidentiary hearing, NLRB Administrative Law Judge John T. Clark ordered Interbake to submit three documents to him for *in camera* review so he could evaluate privilege claims that Interbake asserted in response to a Board subpoena duces tecum issued at the request of Counsel for the NLRB's General Counsel. (NLRB Hr'g Tr. 4022:18-19, July 30, 2009; App. at 122.) Interbake refused to submit the records, (7/30/09 NLRB Hr'g Tr. 4022:20-24; App. at 122,) and on August 7, 2009, the Board sought judicial enforcement of its subpoena by filing an application in the district court seeking an order requiring Interbake to submit the documents in question to Judge Clark for *in camera* inspection, (App. at 1-6). The application was fully briefed and argued before the Honorable Richard D. Bennett. (D. Ct. Hr'g Tr. 1-67, Aug. 21, 2009; App. at 214-80.) By order dated September 22, 2009, the district court denied the

Board's application and closed the subpoena enforcement proceeding. (App. at 288.) The Board filed a notice of appeal on October 26, 2009. (App. at 289.) Meanwhile, the underlying unfair labor practice proceedings against Interbake remain suspended during the pendency of this subpoena enforcement action. (7/30/09 NLRB Hr'g Tr. 4027:4-7; App. at 127.)

STATEMENT OF FACTS

A. NLRB Proceedings

Upon charges filed by the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 68 ("the Union"), the Regional Director for NLRB Region 5 issued an unfair labor practice complaint in 2008 alleging that Interbake violated several provisions of the NLRA at its Front Royal, Virginia facility. (*See* Answer of Interbake Foods to NLRB's Application for Subpoena Enforcement at 4; App. at 142.) A hearing on the complaint before Administrative Law Judge John T. Clark began in late October 2008 and lasted—on and off—until February 10, 2009.[4] (*See id.*)

[4] The hearing also involved challenges to and objections arising from an election that the Union lost in 2008 at the Front Royal facility.

At the December 10, 2008 session of the hearing, Counsel for the General Counsel called Interbake employee Melissa "Missy" Jones as a witness. (*See id.*) During the course of her testimony, Jones revealed that she had secretly recorded several conversations with Interbake colleagues and supervisors at the Front Royal facility. (NLRB Hr'g Tr. 2175:7-10, Dec. 10, 2008; App. at 169.) In response, at the ongoing hearing two days later, counsel for Interbake expressed interest in appointing Jill Slaughter, a human resources representative at the company's Front Royal facility, to conduct an immediate internal investigation into the nature and extent of Jones's recording activities. (NLRB Hr'g Tr. 2490:20-25, Dec. 12, 2008; App. at 178.) However, Slaughter had previously testified at the hearing during Counsel for the General Counsel's case-in-chief, (12/12/08 NLRB Hr'g Tr. 2490:25, App. at 178,) and she could have been called again to testify during Interbake's defense (12/12/08 NLRB Hr'g Tr. 2493:25-2494:6; App. at 179). Therefore, communication with her about other witnesses' testimony—including Jones's—was prohibited by a standard witness sequestration order in effect at the time. *See generally* NLRB Div. of Judges Bench Book §§ 10-100 to -500 (2001), *available at*

http://www.nlrb.gov/nlrb/legal/manuals/01benchbook.pdf. Nonetheless, Judge Clark granted Interbake an exception to the sequestration order for the limited purpose of conducting an investigation into Jones's activities. (12/12/08 NLRB Hr'g Tr. 2491:16; App. at 178.) Counsel for the General Counsel vigorously objected and announced that he would take an interlocutory appeal of the judge's ruling to the Board. (Interbake Answer at 5; App. at 143); *see* 29 C.F.R. § 102.26. That appeal became unnecessary when the parties entered into a written agreement resolving the dispute. (App. at 195-96.) Pursuant to that agreement, dated December 12, 2008, Interbake promised that it would not "undertake any investigation into [the Missy Jones] incident nor any inquiry or contact of any employees concerning this incident until the instant unfair labor practice hearing closes." In addition, the agreement states that "notwithstanding the ALJ's ruling . . . authorizing an exception to the sequestration order . . . , the parties agree that the sequestration order will remain in full force and effect." (App. at 196.)

As stated, the hearing on the 2008 unfair labor practice complaint closed on **February 10, 2009**. (Interbake Answer at 4; App. at 142.) Per

the parties' stipulated agreement, at that point but not before, Interbake could inform Slaughter and others about Jones's testimony and could commence its investigation into Jones's activities.

Although much of what happened during Interbake's investigation is subject to dispute, the following is not: On or about February 20, 2009, Interbake fired Missy Jones. (*See* Interbake Answer at 6; App. at 144; *see also* Amended Unfair Labor Practice Compl. ¶ 6(b); App. at 30.) The Union swiftly filed an unfair labor practice charge with NLRB Region 5 alleging that Jones's termination violated the NLRA. (App. at 22-23.) Specifically, the charge alleges that Interbake's decision to fire Jones was unlawfully motivated by a desire to punish Jones either for her union activities or for providing testimony in the earlier NLRB proceeding or for both prohibited reasons. (*Id.*) The Regional Director for NLRB Region 5 found merit to the Union's new charge, and on May 28, 2009, issued another unfair labor practice complaint against Interbake. (App. at 24-28.)[5] The new complaint was consolidated with the original unfair labor practice case before Judge Clark, who had not yet rendered a decision in the first case. (Interbake Answer at 6; App.

[5] The complaint was subsequently amended on July 7, 2009. (App. at 29-34.)

at 144.) A multi-day hearing on the new complaint was scheduled to begin on July 28, 2009. (App. at 28.)

On July 10, 2009, in preparation for the scheduled hearing, the Board issued a trial subpoena at the request of Counsel for the General Counsel directed to Interbake's records custodian. (App. at 35.) As clarified by an accompanying attachment, the subpoena seeks, inter alia, various documents relating to Interbake's decision to discharge Missy Jones. (*See* App. at 37-45.) On July 20, 2009, pursuant to applicable law and regulations, *see* 29 U.S.C. § 161(1); 29 C.F.R. § 102.31(b), Interbake filed a petition to revoke the subpoena. (App. 49-87.) As relevant here, the petition argues that portions of the subpoena seek materials that are protected by the attorney-client privilege and/or the attorney work product doctrine. (*See* Interbake's Petition to Revoke Subpoena Duces Tecum ¶¶ 4-5; App. at 50.) In accordance with NLRB procedural rules, *see* 29 C.F.R. § 102.31(b), the Regional Director for Region 5 referred Interbake's petition to revoke the subpoena to Judge Clark for argument and ruling. (App. at 88.)

The petition to revoke was not immediately resolved at the July 28, 2009 unfair labor practice hearing. Instead, the hearing focused on

the presentation of other evidence relevant to the outstanding unfair labor practice complaint, and Counsel for the General Counsel called Jill Slaughter to testify. (*See* NLRB Hr'g Tr. 3584-87, July 28, 2009; App. at 184.) Slaughter, as noted, is the Interbake human resources representative whom counsel for the company had earlier identified as the likely investigator of Jones's recording activities. (12/12/08 NLRB Hr'g Tr. 2490:20-25; App. at 178.) During Slaughter's examination, she repeatedly testified that the earliest she communicated with anyone regarding the Missy Jones investigation was **February 13, 2009**, three days after the original proceeding against Interbake closed. (7/28/09 NLRB Hr'g Tr. 3586:17-3587:1; App. at 184.)

Yet, at that very same hearing—i.e., on July 28, 2009—Interbake responded to the Board's outstanding subpoena duces tecum by submitting a privilege log that was facially inconsistent with Slaughter's sworn testimony. (App. at 89-93.)[6] Among the entries on the privilege log are documents identified by Bates numbers IBF100113 and IBF100427. (App. at 89.) According to the log, those Bates

[6] Only Interbake's revised privilege log is in the record. However, for purposes of this paragraph, the revised privilege log is, in relevant part, identical to the original.

numbers correspond to e-mails sent by Jill Slaughter on **February 9, 2009**—while the sequestration order was still in effect—to four individuals, including two of Interbake's attorneys, regarding the "Missy Jones [i]nvestigation." (*Id.*) The log does not state that the purpose of these communications was to seek legal advice. (*Id.*) Nor is there any evidence that the e-mails were sent at the request or under the direction of an attorney because of pending or anticipated litigation. Rather, it simply asserts, without more, that those e-mails are protected by attorney-client privilege and work product doctrine. (*Id.*)

Counsel for the General Counsel—Patrick Cullen and Diana Embree—noticed the substantial discrepancy between Slaughter's testimony and the privilege log plus the absence of any explanation why the e-mails should be protected from disclosure. They therefore requested that Judge Clark review the materials corresponding to IBF100113 and IBF100427 *in camera* to determine whether those e-mails were, in fact, privileged. (7/28/09 NLRB Hr'g Tr. 3587:11-20; App. at 184.) However, Judge Clark deferred ruling on that request. (7/28/09 NLRB Hr'g Tr. 3593:11-12; App. 185.)

The next day, July 29, 2009, Counsel for the General Counsel again renewed their request for *in camera* inspection. (NLRB Hr'g Tr. 3983:13-15, July 29, 2009; App. at 189.) In addition, they expanded their request to include a third document—namely, Interbake human resources representative Angie Otto's notes of a particular conversation. (7/29/09 NLRB Hr'g Tr. 3987:1-7; App. at 190.) The existence of Otto's notes had come to the attention of Counsel for the General Counsel during the hearing. They were *not* listed on the privilege log and had *not* been produced by Interbake in response to the subpoena duces tecum. (*See id.*) Also at the July 29th hearing, Counsel for the General Counsel brought to Judge Clark's attention a recent Board decision, *CNN America, Inc.*, 352 N.L.R.B. 448 (2008), which discusses and upholds the power of administrative law judges to conduct initial *in camera* inspections of purportedly privileged documents. (*See* 7/29/09 NLRB Hr'g Tr. 3983:15-17; App. at 189.) Judge Clark again deferred ruling on the request for *in camera* review. Instead, he requested that both parties review the *CNN* decision during the overnight recess and prepare appropriate arguments. (*See* 7/30/09 NLRB Hr'g Tr. 4009:21-25; App. at 109.)

On the final day of the hearing, July 30, 2009, Interbake submitted a revised privilege log, (s*ee* NLRB's Application for Subpoena Enforcement ¶ 10; App. at 4,) which added Otto's aforementioned notes as Bates number IBF100179. (*See* App. at 91.) Those notes are described as being related to the "Missy Jones Investigation – Advice of Counsel." (*Id.*) The revised log claims that this document is protected by attorney-client privilege and work product doctrine. (*Id.*) However, as with the privilege log entries for the Slaughter e-mails, the entry for Otto's notes simply asserts, without more, that the stated protections apply. No supporting affidavits or witness testimony were introduced into the record. In addition, the attorney who provided the "advice" is not identified. (*See id.*)

Also that day, Judge Clark heard argument on Interbake's petition to revoke. (7/30/09 NLRB Hr'g Tr. 4009:21-4021:14; App. at 109-21.) In light of the *CNN* decision, which affirms the Board's long-standing approval of *in camera* inspections to initially resolve or narrow disputed privilege questions, Judge Clark ordered Interbake to produce for *in camera* inspection the three requested documents—i.e., the two e-mails from Slaughter (IBF100113 and IBF100427) and Otto's notes

(IBF100179). (7/30/09 NLRB Hr'g Tr. 4021:15-4022:19; App. at 121-22.) Interbake refused to comply and did not seek special permission from the Board to appeal Judge Clark's ruling. (7/30/09 NLRB Hr'g Tr. 4022:20-24; App. at 122); *see* 29 C.F.R. § 102.26.[7] This brought the unfair labor practice case to a standstill, for although Counsel for the General Counsel was prepared to rest subject to the results of the instant subpoena enforcement action, (7/30/09 NLRB Hr'g Tr. 4023:7-9; App. at 123,) Interbake has flatly refused to proceed with its case until this litigation is resolved (7/30/09 NLRB Hr'g Tr. 4026:11-14; App. at 126).

B. District Court Proceedings

Due to Interbake's refusal to obey the subpoena and abide by the ALJ's order and because of the potential importance of the documents being sought, the Board filed an application for subpoena enforcement with the district court on August 7, 2009, pursuant to Section 11(2) of the NLRA. (App. at 1-6.) The application and supporting papers sought an order requiring Interbake only "to produce documents IBF100113, IBF100427, and IBF100179 . . . for an in camera inspection

[7] Nor did Interbake request before Judge Clark that a different ALJ perform the *in camera* review.

by Judge Clark." (App. at 6.) Notably, the relief requested by the Board would not require Interbake to automatically disclose the documents to Counsel for the General Counsel in the event that Judge Clark ultimately rejects the company's privilege claims. Rather, Interbake could refuse to produce any documents found to be not privileged, thus requiring the Board to seek further enforcement of its subpoena in district court.

Interbake filed a response—styled as an "answer"—opposing the Board's application. (App. at 139-196.) The response relied primarily on the Sixth Circuit's decision in *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999), to challenge the authority of an administrative law judge to initially attempt to resolve privilege disputes by conducting an *in camera* inspection of assertedly privileged records. (App. at 150-55.) Interbake also argued that even if Judge Clark had the authority to conduct such an inspection, *in camera* review was not justified under the facts of this case because Interbake had met its burden of showing that the documents in question were in fact privileged.[8] (App. at 155-

[8] Furthermore, Interbake disclosed—for the first time—that the Bates numbers corresponding to the Slaughter e-mails also encompassed replies to Slaughter's messages. (Interbake Answer at 2; App. at 140.)

59.) The Board filed a reply rebutting both lines of argument. (App. at 197-213.) In addition, the Board again emphasized that even if Judge Clark rejected Interbake's privilege assertions after conducting the *in camera* inspection, Counsel for the General Counsel would not be entitled to receive the documents over Interbake's objections unless the district court agreed with this assessment on a subsequent application for subpoena enforcement. (NLRB's Reply Br. at 9 n.6; App. at 205-06.) A hearing on the Board's application was held on August 21, 2009, before the Honorable Richard D. Bennett, United States District Judge. (App. at 214-80.)

On September 22, 2009, the district court issued an order denying the Board's application and closing the instant subpoena enforcement case. (App. at 288.) In a separate memorandum opinion, (App. at 281-87,) the district court first framed the question presented as "whether this Court has the *exclusive* authority to determine if certain documents subpoenaed by the National Labor Relations Board are privileged." (App. at 283 (emphasis added).) Next, the court recited principles recognizing the role of federal courts in assessing privilege claims raised

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Those replies were not separately listed in the revised privilege log submitted to the Board. (*See* App. at 89-93.)

in response to administrative subpoenas. (App. at 284.) But, because "the Fourth Circuit ha[d] not addressed whether an ALJ can determine privilege issues," (App. at 285,) the district court turned to the Sixth Circuit's decision in *Detroit Newspapers* for specific guidance. In that case—the only one of its kind—the Sixth Circuit rejected a similar Board application seeking *in camera* review by an administrative law judge and held, in the words of the court below, "that an Article III district court may not abdicate its responsibility to determine privilege issues and delegate it to an ALJ." (*Id.*) In addition, the district court analogized the *Detroit Newspapers* result to this Court's holding in *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965). (App. at 286.) In the *Harvey* case, a district court refused to enforce a Board subpoena issued during a pre-complaint investigation—that is, during the stage of an NLRB proceeding when no administrative law judge has been assigned to the case—on the ground of attorney-client privilege. On review, this Court vacated the lower court's disposition and directed the district court on remand to conduct an evidentiary hearing to resolve the privilege claim.

Thus, relying chiefly on *Detroit Newspapers* and the result in *Harvey*, the district court concluded "that only an Article III court may determine whether subpoenaed documents are protected by the attorney-client or attorney work-product privileges." (*Id.*) Moreover, in a brief, two-sentence footnote, the district court determined that it did not need to conduct an independent *in camera* review of the documents at issue in this case because "Interbake has met its burden of establishing that the documents are privileged under Federal Rule of Civil Procedure 26(a)(5)(A), and the NLRB has not articulated a good faith basis for doubting Interbake's claim of privilege." (*Id.*) Accordingly, the district court entered an order denying the Board's application, (App. at 288,) from which order the Board presently appeals, (App. at 289).

SUMMARY OF ARGUMENT

The focus in this litigation is not on the merits of the Missy Jones unfair labor practice complaint but on a narrow question arising during the administrative hearing of that case: Does the NLRA allow an administrative law judge to attempt to resolve a privilege dispute—not conclusively, but rather *in the first instance*—by means of conducting

an *in camera* inspection? Despite the narrow focus of the question, the answer has far-reaching consequences that might apply to *any* executive or independent regulatory agency or department that relies on federal courts for the enforcement of its administrative subpoenas.

The correct answer to this question, at least with respect to the NLRA, is that ALJ's are so empowered. This result is compelled by the text and structure of Section 11 itself, which distinguishes between the Board's power to "receive evidence" and "revoke . . . subpoena[s]" in subsection (1) and the judiciary's power to enforce—or deny enforcement to—Board subpoenas in subsection (2). It would make little sense for Congress to empower the Board to decide whether a subpoena should be revoked, yet deny to the Board one of the most efficacious tools assisting in that inquiry—that is, the authority to conduct *in camera* review. The Board's administrative law judges are qualified to make, and routinely make, determinations on the admissibility of documents, including those claimed to be privileged from disclosure. In their neutral, independent, and quasi-judicial role, ALJs are particularly well positioned to initially evaluate claims of privilege during ongoing administrative proceedings.

Here, however, the district court erred by answering the question in the negative. The problems with the district court's analysis begin with its initial, mistaken premise—i.e., that authorizing *in camera* review by Board ALJs would be akin to "delegating" the judiciary's exclusive authority to finally resolve privilege disputes arising in response to agency subpoenas. The NLRB seeks no such result. Indeed, the Board has always acknowledged the supremacy of federal courts in resolving privilege disputes arising in administrative proceedings and repeatedly emphasized to Interbake and to the court below that the company retained the right, even after Judge Clark's *in camera* inspection, to withhold the documents in question from the prosecuting Counsel for the General Counsel unless and until a district court ordered their production. Nevertheless, the district court followed its faulty "delegation" premise to the erroneous conclusion that only an Article III court possesses the authority to conduct an *in camera* review of assertedly privileged documents.

In reaching this result, the district court adhered to the reasoning of the Sixth Circuit in *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999). However, that decision finds no support in the text of the

National Labor Relations Act. Instead, *Detroit Newspapers* relies primarily on an inapposite Ninth Circuit decision that (i) affirmed the *appropriateness* of the Section 11 procedure for the initial resolution and ultimate enforcement of Board subpoenas, and (ii) rejected as inappropriate the Board's decision in that case to forego subpoena enforcement and instead enter a preclusion order against a party refusing to comply with a subpoena.

The court below also relied on the inapplicable decision of this Court in *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965). There, this Court remanded to the district court a subpoena enforcement proceeding for a full evidentiary hearing on the applicability of the attorney-client privilege, which was raised in response to a Board investigatory subpoena. Nothing in *Harvey* "suggests," as the district court here concluded, that "the Fourth Circuit would reach the same conclusion as *Detroit Newspapers*," (App. at 286,) which arose in the entirely different procedural circumstances surrounding a Board trial subpoena. More to the point, in *Harvey*, this Court was not asked to and did not even consider whether it would be appropriate to remand

the matter to the NLRB, rather than to the district court, for initial fact-finding on the applicability of the privilege.

In addition, the district court erred when it held that Interbake's privilege log adequately established that Slaughter's e-mails and Otto's notes were privileged. With respect to Slaughter's e-mails (and the unlisted replies, which might or might not have been written by counsel), Interbake did not assert, let alone prove, that the purpose of those messages was to seek (or provide) legal advice. As the proponent of the attorney-client privilege, Interbake could not rely solely on the fact that the author or recipient of the document was an attorney to establish that the document was created for the purpose of facilitating legal advice. Furthermore, work product protection has not been established with respect to those e-mails because Interbake made no statement and provided no proof that the sender of the message created the e-mail at the request of an attorney "because of" actual or anticipated litigation. Moreover, although the log entry for Otto's notes contains a bare assertion that the notes contain attorney "advice," Interbake has failed to adequately carry its burden of proving that either of the stated protections applies. Notably, Interbake did not

identify the attorney who provided the "advice," nor did the company submit any affidavits or other evidence to substantiate its attorney-client privilege claim. In addition, Interbake has not established work product protection for Otto's notes because the law is clear that a general allegation of privilege or protection, without more, is insufficient.

As it was Interbake's burden to show the applicability of these privileges, the facial inadequacy of its showing in the privilege log, combined with Interbake's failure to submit supporting evidence, means that Judge Clark's *in camera* review order was proper. However, even if Interbake had met its initial burden, the Board has shown a reasonable basis for conducting an *in camera* inspection because the testimony of Interbake's own human resources representative undermines representations made in the log.

Accordingly, the order of the district court denying enforcement to the Board's subpoena was erroneous as a matter of law. This Court should vacate that decision, and the case should be remanded with instructions for the district court to enter an order requiring Interbake

to submit the documents in question to Judge Clark for an initial *in camera* inspection.

ARGUMENT

I. Standard of Review

Ordinarily, the Fourth Circuit applies an abuse of discretion standard of review to district court orders disposing of federal agency applications for subpoena enforcement. *NLRB v. Carolina Food Processors*, 81 F.3d 507, 510 (4th Cir. 1996). However, where the district court's rulings in an agency subpoena enforcement case are based on the legal conclusion that the agency "lacked the authority to make the demands," this Court reviews the district court's order de novo. *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986). Moreover, the Fourth Circuit reviews resolutions of privilege disputes de novo where, as here, "the district court did not hinge its conclusion on factual findings." *Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998).

II. Congress Intended That the Board Evaluate Privilege Objections to Production of Subpoenaed Documents in NLRA Administrative Proceedings, with Judicial Review Available Only After Objections Are Considered and Denied by the Board.

A. It is clear from the structure and text of the NLRA that Congress intended that evidentiary determinations in unfair labor practice proceedings—including privilege objections to the production of subpoenaed documents—should *first* be made by the Board or its agents, with judicial procedures available only after the objections are considered and denied by the Board. Accordingly, Interbake's insistence that a federal district court, not the Board, be the first to fully evaluate its privilege objections is precisely the reverse of what Congress intended.

Section 11(1) of the NLRA—entitled "Documentary evidence; summoning witnesses and taking testimony"—provides that the Board "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1). The statute further provides that the Board shall have the authority to issue subpoenas

"requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation" and that any person served with a subpoena "may petition the Board to revoke" the subpoena. *Id.* Upon the filing of such a petition, the Board may revoke or limit the subpoena in question. *Id.* Furthermore, the Board has delegated its authority to rule upon a petition to revoke filed during an unfair labor practice evidentiary hearing to the Agency's administrative law judges, subject to further review before the Board. *See* 29 C.F.R. § 102.31(b). Finally, the statute provides that the Board "or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and *receive evidence*." 29 U.S.C. § 161(1) (emphasis added).

Section 11(2) of the NLRA—entitled "Court aid in compelling production of evidence and attendance of witnesses"—gives federal district courts "upon application by the Board" and "[i]n case of contumacy or refusal to obey a subpena issued to any person," jurisdiction "to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, *there* to produce evidence if so ordered, or *there* to give testimony touching the matter

under investigation or in question." 29 U.S.C. § 161(2) (emphasis added). The statute further provides that "any failure to obey such order of the court may be punished by said court as a contempt thereof." *Id.*

Read in tandem, Sections 11(1) and (2) define the respective and distinct roles of the Board and the federal district courts. In Section 11(1), Congress authorized the Board to issue administrative subpoenas, revoke such subpoenas when, in its opinion, the subpoena seeks improper evidence, and to receive evidence in administrative proceedings. By contrast, in Section 11(2), Congress authorized the federal district courts—when a subpoenaed party has refused to comply with the initial determination of the Board as to the production of subpoenaed evidence, and when the Board has applied for enforcement of its subpoena—to examine the Board's ruling and to either enforce the subpoena or deny enforcement. That the district court's role is one of judicial enforcement and review of the Board's rulings on objections to the administrative subpoena, and not one in which the court is authorized to insist on being the first to rule on evidentiary disputes, is confirmed by (i) the express statutory provision for the Board to receive

evidence and to consider and rule on petitions to revoke, and (ii) the notable omission of any statutory language in Section 11(2) authorizing the district court to "receive evidence" or to "revoke" Board subpoenas, which Section 11(1) expressly gives to the Board. This is further confirmed by the express language in Section 11(2) mandating that all evidence is to be produced "before the Board." By providing the Board with such broad authority, Congress necessarily intended for the Board to rule—initially, though not exclusively—on issues that arise when the Board exercises this authority. Thus, Section 11 "contemplates Board action on a motion to revoke a subpena *before* the jurisdiction of a district court, with its underlying contempt sanction, be invoked in an enforcement proceeding." *Hortex Mfg. Co. v. NLRB*, 364 F.2d 302, 303 (5th Cir. 1966) (emphasis added).

B. By insisting that a federal district court be the first—and essentially exclusive—forum to rule on privilege objections, Interbake and the court below reverse this statutory procedure and void the authority Congress provided to the Board in Section 11(1) to make initial evidentiary rulings necessary to rule on petitions to revoke subpoenas, subject to potential judicial enforcement in the federal

district courts under Section 11(2). This argument was rejected in a similar context where Congress likewise provided for a non-Article III forum to issue and revoke subpoenas and to receive evidence, subject to judicial review in the federal district courts. *See Odfjell ASA v. Celanese AG*, 348 F. Supp. 2d 283 (S.D.N.Y. 2004), *further proceedings*, 380 F. Supp. 2d 297 (S.D.N.Y.), *aff'd sub nom.*, *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005). In *Odfjell*, which involved arbitration subpoenas issued pursuant to Section 7 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 7, the district court held that "objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable," and dismissed the subpoenaed party's district court motion to quash "as unripe." *Id.* at 288. While that case did not concern Section 11 of the NLRA, *Odfjell*'s rationale is equally applicable here.[9] The court correctly concluded that "there is no reason for the Court to

[9] Section 7 of the FAA is in all material respects analogous to Section 11(1) of the NLRA and provides in relevant part that arbitrators "may summon in writing any person to attend before them or any of them as a witness in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7. Furthermore, Section 7 of the FAA, like Section 11(2) of the NLRA, similarly provides that federal district courts have jurisdiction to compel compliance with such subpoenas. *Id.*

decide these [privilege] issues, at least in the first instance, since one of the very reasons for making these subpoenas returnable before one or more members of the arbitration panel is so that the *arbitrators* can rule on preliminary issues of admissibility, privilege, and the like." *Id.* at 287 (emphasis added). "Indeed," the court continued, "section 7 would make no sense if it provided the arbitrators with the power to subpoena witnesses and documents but did not provide them the power to determine related privilege issues." *Id.*; *see also Stolt-Nielsen SA*, 430 F.3d at 579 ("Arbitrators may also need to hold a preliminary hearing to decide . . . issues of privilege, authenticity, and admissibility.").

Odfjell's logic has equal application here. One of the very reasons for making the administrative subpoenas returnable before the Board is so that *the Board* can have an opportunity to first rule on preliminary issues such as privilege. Section 11(1) would make no sense if it provided the Board with the power to subpoena documents, and to revoke improper subpoenas, but did not provide it the power and sufficient means to initially decide concomitant privilege objections to producing the subpoenaed documents. Indeed, it is difficult to

understand how the Board could exercise its statutory authority in Section 11(1) to "receive evidence" if that authority did not implicitly include the power to rule on a party's objections to the production of subpoenaed evidence in the first instance. "Certainly preliminary rulings on subpoena questions are as much in the purview of a hearing officer as his rulings on evidence and the myriad of questions daily presented to him." *NLRB v. Duval Jewelry Co.*, 357 U.S. 1, 8 (1958). Any other reading would effectively render Section 11(1) meaningless.[10]

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[10] The Board confirmed its understanding of administrative law judges' Section 11 authority to conduct *in camera* review of assertedly privileged materials in *CNN America, Inc.*, 352 N.L.R.B. 448 (2008). Because Section 11 of the NLRA does not precisely address the issue of *in camera* inspection and because the Board's interpretation of its powers under that provision is permissible, the Board's position, as expressed in *CNN* and repeated here, is entitled to deference under the well-known test of *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See Resolution Trust Corp. v. Walde*, 18 F.3d 943, 948 (D.C. Cir. 1994) (applying *Chevron* test to resolve agency's statutory authority to issue subpoena). Alternatively, at the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of judicial deference owed to agency actions having persuasive authority. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

C. Contrary to the structure and text of the NLRA as well as the intuitive logic of *Odfjell*, the court below relied heavily on the Sixth Circuit's decision in *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999), to rule that the Board and its ALJs are effectively powerless to examine and rule on privilege objections to Board subpoenas.[11] As did the court below, the court in *Detroit Newspapers* wrongly framed the issue as "whether the district court had the discretion to refuse to review the [subpoenaed] documents to determine whether they were privileged, and to delegate that decision making responsibility to the ALJ hearing the underlying labor dispute." 185 F.3d at 604. Wholly overlooking *Congress's* delegation of authority to the Board in Section

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[11] The disclosure of allegedly privileged documents *in camera* to an NLRB administrative law judge is not, as Interbake repeatedly suggested in the court below, (*see, e.g.*, 8/21/09 D. Ct. Hr'g Tr. 16:11-15; App. at 229,) the equivalent of producing the documents to the Board or the Agency's General Counsel. The Board's ALJs, whose role in the NLRB is analogous to that of a trial judge, operate independently both from the five-member Board and from the Office of the General Counsel. *See* 29 U.S.C. § 154(a). Indeed, there is no legitimate reason to suspect that Judge Clark would fail to protect the documents during *in camera* review or would share the information revealed during such an inspection with Counsel for the General Counsel. Any suggestion to the contrary "is not only baseless; it is offensive." *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981); (*see also* 8/21/09 D. Ct. Hr'g Tr. 14:13-15; App. at 227 ("THE COURT: You're not suggesting the ALJ then makes that information available to the adverse litigants from the NLRB?")).

11(1) to make initial evidentiary rulings on the enforceability of the subpoenas, the Sixth Circuit concluded that "[t]he district court does not have the discretion to delegate an Article III responsibility to an Article II judge." *Id.* at 606. Supported by scant analysis, the *Detroit Newspapers* court reasoned that simply because "Congress specifically reserved to the federal courts the authority to provide for enforcement of subpoenas" in Section 11(2), "[w]e believe it is implicit in the enforcement authority Congress has conferred upon the district court . . . that the district court, not the ALJ, must determine whether any privileges protect the documents from production." *Id.* at 605-06. As shown below, there are three fundamental flaws in *Detroit Newspapers* that undermine its persuasive authority.

First, by focusing solely on the judiciary's ultimate subpoena enforcement authority in Section 11(2), which of course includes the authority to *review* (and potentially reject) Board rulings on asserted privileges, the *Detroit Newspapers* court entirely ignored Congress's delegation of initial authority in Section 11(1) to the Board to receive evidence and to consider granting or denying petitions to revoke subpoenas based on its own evidentiary determinations. In so doing,

the court misidentified the issue as the district court's discretion to delegate *its* ultimate *enforcement* authority to the Board. But, as here, the Board in that case sought no such result. Indeed, the *Detroit Newspapers* court overlooked that Congress delegated to *the Board* the authority in Section 11(1) to make *initial* evidentiary rulings, including rulings on petitions to revoke, subject to enforcement proceedings in the federal district courts. Thus, contrary to the reasoning in *Detroit Newspapers*, which the court below wholly adopted, allowing Judge Clark to review the assertedly privileged documents in the first instance would not constitute an impermissible delegation of an Article III responsibility to an Article II tribunal.[12] Rather, such a course

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[12] Insofar as *Detroit Newspapers* and the lower court hold that *only* Article III judges have the authority to rule on questions of privilege, they ignore that bankruptcy judges, federal magistrates, and special masters—all non-Article III judges—routinely rule on claims of privilege. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981) (magistrate ruling on attorney-client/attorney work product privileges); *See also* 28 U.S.C. § 636(a) (giving magistrates power to "determine" pretrial discovery matters); *In re O.P.M. Leasing Servs., Inc.*, 670 F.2d 383, 385 (2d Cir. 1982) (bankruptcy judge ruling on claim of attorney-client privilege); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791-92 (E.D. La. 2007) (special master appointed to review documents and rule on claims of privilege). While such persons exercise authority delegated from Article III courts, as noted above, Interbake would not actually be required to produce assertedly privileged documents to the NLRB attorneys prosecuting the Missy Jones case

would follow and effectuate the statutory subpoena revocation procedure as Congress prescribed in Section 11(1) by enabling the Board to make initial evidentiary rulings, with judicial review and enforcement available as necessary under Section 11(2) in the federal district courts.

Second, the primary case relied on by the *Detroit Newspapers* court is inapposite and, therefore, lends no support to its rationale. In *NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110 (9th Cir. 1981), the Board's General Counsel, in lieu of commencing subpoena enforcement proceedings in federal district court, responded to the employer's refusal to produce subpoenaed documents by persuading the ALJ to enter a preclusion order barring the employer from rebutting the General Counsel's evidence on the issue for which the records had been subpoenaed. On review of the Board's final remedial order under Section 10 of the NLRA, 29 U.S.C. § 160, the Ninth Circuit held only that the Board does not have the authority to bypass the Section 11(2) statutory method for enforcing its subpoenas and instead to impose sanctions for noncompliance, which the court

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unless and until, on a renewed application for subpoena enforcement, an Article III court concurs that the documents are not privileged.

equated with the usurpation of a federal district court's Article III authority to *compel compliance* with Board subpoenas. 640 F.2d at 1116.

In both this case and *Detroit Newspapers*, by contrast, the Board did not attempt to bypass the district court's ultimate enforcement authority, but instead sought to invoke the precise statutory procedure that Congress provided in Section 11(1) for initially ruling on objections to Board subpoenas. Moreover, *International Medication* was not a subpoena enforcement case. It did not hold—or in any way suggest—that the Board is powerless to initially rule on evidentiary objections to subpoenaed documents when the Board *is*, in fact, seeking to enforce its subpoenas. We further note that other circuits have expressly criticized *International Medication* and have sustained the Board's imposition of sanctions in similar circumstances.[13] In any event, regardless of whether the Fourth Circuit agrees with *International Medication*, that

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[13] *See, e.g.*, *Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1985) (disagreeing with *International Medication* and noting that "[w]e have sustained, indeed required, the drawing of adverse inferences against persons not complying with discovery orders in adjudicatory proceedings before the National Labor Relations Board."); *Hedison Mfg. Co.*, 643 F.2d at 34-35 (1st Cir. 1981); *NLRB v. Am. Art Indus., Inc.*, 415 F.2d 1223, 1229-30 (5th Cir. 1969).

decision does not lead to the conclusion that the Board is precluded from ruling on claims of privilege in the first instance pursuant to Section 11(1), which is simply step one in a two-step process to invoke the district court's Article III authority under Section 11(2) to consider enforcement of Board subpoenas.

Finally, the *Detroit Newspapers* decision cannot be reconciled with the well-settled legal principles requiring the exhaustion of administrative remedies prior to seeking judicial relief. Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). *Detroit Newspapers* undermines each of these purposes.

By denying the Board the opportunity to initially rule on privilege claims, *Detroit Newspapers* is contrary to the Supreme Court's teaching "that agencies, not the courts, ought to have *primary* responsibility for the programs that Congress has charged them to administer." *Id.* (emphasis added). "[E]xhaustion principles apply with special force when"—as is the case here—"frequent and deliberate flouting of administrative processes could weaken an agency's effectiveness by encouraging disregard of its procedures." *Id.* (quotation marks and

citation omitted). *See, e.g.*, *EEOC v. Cuzzens of Ga., Inc.*, 608 F.2d 1062, 1063 (5th Cir. 1979) (enforcing EEOC's administrative subpoena in case involving Section 11 of the NLRA because subpoenaed party failed to exhaust administrative remedies); *see also Maurice v. NLRB*, 691 F.2d 182 (4th Cir. 1982) (requiring party resisting NLRB subpoena to exhaust administrative remedies before the Board).[14]

Detroit Newspapers also results in judicial inefficiencies because, if the Board is afforded an opportunity to first find whether the subpoenaed documents are privileged, "a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *McCarthy*, 503 U.S. at 145.[15] Accordingly, if the Board were to uphold Interbake's

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[14] Upholding a similar principle, the Supreme Court recently held that a district court discovery order requiring disclosure of assertedly privileged materials was not eligible for immediate review under the collateral order doctrine because other adequate means exist to protect the rights of the privilege holder. *See Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009).

[15] Indeed, Board ALJs routinely rule on privilege claims, *see, e.g., Nat'l Football League Mgmt. Council*, 309 N.L.R.B. 78, 97 (1992) (ALJ conducted *in camera* review regarding claims of attorney-client privilege and work product protection), and courts routinely review such rulings, *see, e.g., NLRB v. Indep. Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 145 (2d Cir. 1978) (reviewing ALJ's initial determination of whether statements were protected by attorney-client privilege). In fact, in a related proceeding involving Detroit Newspapers, the ALJ

privilege claims after *in camera* inspection by an ALJ, then the controversy would be over—and the resources of the judiciary saved—as to those documents.[16] "And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* This is particularly true for judicial review of the application of the attorney-client privilege, which often requires a factual inquiry. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 125 (2d Cir. 2006) (remanding to district court to conduct the "fact-specific inquiry as to whether (1) the contested documents are subject to attorney-client privilege, and (2) defendants waived the privilege by placing in issue the contents of the privileged

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granted a petition to revoke on privilege grounds. *See Detroit Newspaper Agency*, 326 N.L.R.B. 700, 751 n.25 (1998), *petition for review granted on other grounds sub nom. Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000).

[16] Stated differently, the NLRB's resolution of privilege claims is "final" only as to the Board's General Counsel, who is bound to accept and apply the decisions of the Board. By contrast, an ALJ (and the Board) can *never* conclusively resolve privilege claims against a subpoenaed party. Such parties, like Interbake, can refuse to abide unfavorable privilege rulings and are entitled to await judicial enforcement of the Board's subpoena before they must produce *any* document to their litigation adversaries.

information."); *see also NLRB v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965). Thus, the Board must be given an opportunity to make the requisite initial factual findings necessary to rule on the privilege claims in Interbake's Section 11(1) petition to revoke, and thus create a record available for court review upon any necessary further application for subpoena enforcement under Section 11(2).

D. The district court also erred in assuming that this Court's decision in *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965), supports the conclusion that only an Article III court can initially resolve privilege questions by means of conducting an *in camera* inspection. In *Harvey*, a district court denied enforcement to a Board investigatory subpoena on the ground of attorney-client privilege. On appeal, this Court found that a fuller evidentiary record was needed to make the necessary privilege determination. It therefore vacated the lower court decision and remanded the case to the district court for further proceedings. Notably, this Court was not asked to and did not even consider whether it would be appropriate to instead remand the matter to the NLRB for further fact-finding proceedings before an administrative law judge. Accordingly, *Harvey* cannot be read to hold that an NLRB

administrative law judge lacks the authority to conduct the necessary proceedings to facilitate the initial resolution of privilege disputes arising in response to Board subpoenas. The question simply was not presented.

E. Left undisturbed, the district court's decision can have far-reaching and damaging effects on the administration of federal law. Many independent agencies and executive departments employ administrative law judges to assist in law enforcement efforts. The use of *in camera* review by administrative law judges to initially resolve privilege questions is a longstanding and widely accepted practice throughout the Federal Government. *See, e.g., Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1255 (3d Cir. 1993) (Department of Labor); *Hsieh v. PMC – Sierra, Inc.*, 2003 WL 1440487, at *1-*2 (Executive Office for Immigration Review Feb. 4, 2003) (Department of Justice); *Harris Trust & Sav. Bank v. Marshall*, No. 79-3002, 1979 WL 279, at *7 (N.D. Ill. Aug. 3, 1979) (Federal Trade Commission); *Horizon v. FTC*, No. 76-2031, 1976 WL 1343, at *1 (D.D.C. Nov. 18, 1976) (same); 42 C.F.R. § 93.512(d)(2) ("The ALJ may order a party to produce the requested documents for in camera inspection to evaluate the

merits of a motion to compel or for a protective order.") (Department of Health and Human Services); 47 C.F.R. § 1.325(a)(3) ("In resolving any disputes involving the production of documents or access to property, the presiding officer may direct that the materials objected to be presented to him for in camera inspection.") (Federal Communications Commission).

Congress endowed many of these same agencies and executive departments with the subpoena power to assist in their administration of federal law. Those administrative subpoenas, like the Board's, require judicial enforcement when the subpoenaed party is contumacious or refuses to obey. *See, e.g.*, 29 U.S.C. § 657(b) (DOL – OSHA, as in *Martin*); 8 U.S.C. § 1324b(f)(2) (DOJ – Immigration and Nationality Act, as in *Hsieh*); 15 U.S.C. § 49 (FTC, as in *Harris Trust* and *Horizon*); 47 U.S.C. § 409(g) (FCC). Yet, under the district court's reasoning, the conferral of subpoena *enforcement* authority to federal district courts serves to prohibit the agencies themselves from performing *in camera* inspections when considering privilege claims. Accordingly, the lower court's decision here calls into question, if not invalidates, a host of case law and administrative regulations upholding

a common practice employed by the Executive Branch and independent regulatory agencies. This highly disruptive result, which is not supported by either precedent or logic, further emphasizes the need to correct the district court's faulty analysis.

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In sum, the district court glossed over the text and structure of Section 11 of the NLRA, which should have served as the foundation of its analysis. Instead, the court relied on a flawed Sixth Circuit opinion that reversed a lower court decision in "a matter of first impression." 185 F.3d at 606. A proper examination of the NLRA's statutory text and due recognition of Congress's desire to promote effective administrative procedures point forcefully to the conclusion that NLRB administrative law judges are empowered to initially resolve privilege questions by conducting *in camera* inspections. The district court's conclusion to the contrary is therefore in error.

III. *In Camera* Review Is Appropriate Here Because Interbake Has Failed to Meet Its Burden of Establishing the Essential Elements of the Attorney-Client Privilege and the Attorney Work Product Doctrine.

The district court committed further legal error when it held in a two-sentence footnote, devoid of any factual findings, that Interbake

had adequately established the privileged nature of the documents in question so as to obviate the need for *in camera* inspection. As shown below, Interbake did not meet its burden to establish a prima facie case of attorney-client privilege or attorney work product protection. Indeed, to the extent Interbake's privilege log contains support for its privilege claims, the NLRB has posited a sufficient basis for questioning the reliability of those assertions. As a result, the Board's modest request for *in camera* review before Judge Clark is wholly justified and proper.

A. It is beyond dispute that "[t]he burden is on the proponent of the attorney-client privilege to demonstrate its applicability." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam). Under the "classic test" adopted by this Court:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)). Moreover, to invoke the work product privilege, "[t]he document must . . . [have been] prepared because of the prospect of litigation;" "materials prepared in the ordinary course of business . . . or for other non-litigation purposes" are not protected. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (emphasis in original).

"To facilitate its determination of privilege, a court may require 'an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps.'" *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (quoting *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993)). Accordingly, a privilege log should:

> identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between . . . individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony. Even under this approach, however, if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.

Id. (alteration in original) (quoting *Bowne*, 150 F.R.D. at 474). Indeed, "[t]he standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. The focus is on the specific descriptive portion of the log, and not on the conclusory invocations of the privilege or work-product rule, since the burden of the party withholding documents cannot be 'discharged by mere conclusory or ipse dixit assertions.'" *Bowne*, 150 F.R.D. at 474 (alteration in original). Applying this exacting standard, it is clear that Interbake has failed to establish the essential elements of either the attorney-client privilege or the work product doctrine.

B. Interbake has chosen to rely exclusively on its revised privilege log, without any supporting affidavits or other documentation. Those logs are facially deficient because their cursory and conclusory descriptions provide insufficient bases to ascertain whether each element of the attorney-client privilege and work product doctrine has been met.

For example, Interbake presumes that the attorney-client privilege protects Slaughter's two e-mails dated February 9, 2009, and

all associated replies, simply because two attorneys were among four named recipients of Slaughter's messages. (*See* 7/29/09 NLRB Hr'g Tr. 3985:18-22; App. at 190.) But the law of privilege is otherwise. *See, e.g.*, *Navigant Consulting, Inc. v. Wilkinson,* 220 F.R.D. 467 (N.D. Tex. 2004) ("[D]ocuments are not privileged merely because they were prepared by or sent to an attorney."); *accord Thompson v. Chertoff*, No. 06-004, 2007 WL 4125770, at *2 (N.D. Ind. Nov. 15, 2007) (concluding that an attorney who was one of several recipients of an e-mail authored by a non-attorney "in effect, simply 'sat in' on the communication"); *see also* Paul R. Rice, Attorney Client Privilege in the United States § 5:20 (2d ed. 2008) ("[T]he most difficult problem with e-mail communications has been the tendency of corporations to exaggerate attorney-client privilege claims simply because lawyers names appear in headers, either as an addressee or copyee."). Indeed, "the [attorney-client] privilege applies only when the person claiming the privilege has as a client consulted an attorney for the purpose of securing a legal opinion or services." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984). Yet, Interbake does not assert, much less substantiate, that the purpose of Slaughter's communications was

to seek legal advice, as opposed to factual background information. *See Harvey*, 349 F.2d at 906 ("'[A] communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged . . . .'") (quoting *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833)).[17] Instead, the log generically describes the subject of Slaughter's e-mails as the "Missy Jones [i]nvestigation." (App. at 89.) This summary description, which is repeated forty-four times throughout the log, is too cryptic to support a finding that the purpose of either communication was to seek legal advice or services. *See United States v. (Under Seal)*, 748 F.2d 871, 876 (4th Cir. 1984) (explaining that the proponent of the privilege bears the burden "to explain, through *ex parte* submissions if necessary to maintain confidentiality, the significance or meaning of an otherwise cryptic document").

Moreover, Interbake failed to separately enumerate the replies to each of Slaughter's e-mails—it remains unclear exactly how many such

[17] It cannot be presumed that all documents on the privilege log necessarily involve the advice of counsel. A handful of entries on the log expressly claim that the underlying documents reflect "advice of counsel." (*See* App. at 91-93.) Yet, no such claim was set forth with respect to Slaughter's e-mails.

replies exist and whether any are from the two non-attorneys on the recipient list—or to assert why each reply independently qualifies for privilege protection. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 672 (D. Kan. 2005) ("flatly reject[ing]" the proposition that "the individual e-mails within a strand should not be separated from one another when evaluating a privilege claim"); *accord Thompson*, 2007 WL 4125770, at *2 ("[E]ach individual e-mail in a string must be analyzed separately."). Indeed, Interbake did not even disclose the existence of these replies until it filed its opposition to the Board's application for subpoena enforcement in the district court. (*See* NLRB's Reply Br. at 11 n.7; App. at 207.) Nor do the log's conclusory descriptions supply a basis to ascertain whether the communications were intended to be confidential and were in fact kept confidential.

Accordingly, for these several reasons, Interbake has not satisfied its burden to demonstrate the applicability of the attorney-client privilege as to Slaughter's e-mails and associated replies.

Interbake's claim that the work product doctrine applies to Slaughter's messages and replies also fails because the log provides no basis to ascertain whether the documents were prepared at an

attorney's request principally or exclusively to assist in anticipated or ongoing litigation. As this Court has emphasized, to qualify for work product protection, a document must be created "because" of actual or prospective litigation. *Nat'l Union*, 967 F.2d at 984 (emphasis in original). And the apparent lack of attorney involvement in the creation of a document is "relevant . . . as to whether the document was prepared in anticipation of litigation." *APL Corp. v. Aetna Casualty & Sur. Co.*, 91 F.R.D. 10, 16 (D. Md. 1980). Here again, however, Interbake has not asserted, let alone offered evidence, that Slaughter sent those emails at the direction of an attorney "because" of anticipated litigation. Indeed, the e-mails could have been sent on Slaughter's own initiative for a variety of business or other non-litigation reasons. The same goes for the replies to Slaughter's messages, particularly any from the non-attorneys on the recipient list. Accordingly, Interbake's failure to adequately describe the reason why Slaughter wrote the messages or why others wrote replies precludes a conclusion that the e-mails and their associated replies are protected by work product doctrine.

Similarly, Interbake has not satisfied its burden of establishing that the attorney-client privilege and work product protection apply to

Otto's notes. Interbake makes the minimal assertion on its log that the notes were in regards to the "Missy Jones Investigation – Advice of Counsel." (App. at 91.) But this amounts to nothing more than a conclusory recitation of a necessary element of the claimed protections. "Conclusory statements such as ['legal advice'] do not sufficiently establish the elements of the attorney-client and work product privileges. Instead, they define the document as either an attorney-client communication or attorney work product and provide a general description of its topic." *CSX Trans., Inc. v. Admiral Ins. Co.*, No. 93-132-CIV-J-10, 1995 WL 855421, at *3 (M.D. Fla. July 20, 1995). Interbake offered no evidence to support the log's deficient contentions. Indeed, counsel who allegedly provided the "advice" is not even identified. (*See* App. at 91.) A basic affidavit reciting pertinent facts would have greatly assisted Interbake in meeting its less-than-onerous burden to show that the protections apply. Instead, both the Board and the district court were left with nothing more than Interbake's "ipse dixit" assertion that the privileges apply because the company says so. This simply does not pass muster. *See Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Midland Bancor, Inc.*, 159 F.R.D. 562, 567 (D. Kan.

1994) ("General allegations of privilege are insufficient to show that it exists.").

Thus, as shown, Interbake's "descriptions and comments simply do not provide enough information to support the privilege claim[s], particularly in the glaring absence of any supporting affidavits or other documentation." *Constr. Prods. Research*, 73 F.3d at 474. Accordingly, "[b]ecause the description of these documents in the privilege log is insufficient to make a *prima facie* showing that the attorney-client privilege [and work product doctrine] protects them, these documents should be produced as part of the *in camera* inspection for a determination of the" protections' applicability. *Ferrell v. HUD*, 177 F.R.D. 425, 432 (N.D. Ill. 1998).

C. Contrary to Interbake's assertion in the court below, the NLRB's General Counsel was not required in these circumstances to show why *in camera* review is warranted because such a showing is required only if the party invoking the privilege has first met its burden of showing that the asserted privilege applies. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1071, 1074-75 (9th Cir. 1992). As discussed above, *in camera* review is appropriate here even absent any

proof by the Board's General Counsel because Interbake failed to establish the essential elements of the attorney-client privilege and work product protection.

But even assuming that Interbake had met its burden, *in camera* review would still be warranted here because "the party opposing the privilege need only show a factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged." *Id.* at 1075. The Board's General Counsel did make such a showing. At the July 28, 2009 hearing on the Missy Jones complaint, Interbake's human resources representative, Jill Slaughter, insisted that the earliest she communicated with *anyone* regarding the company's investigation of Missy Jones was February 13, 2009. (7/28/09 NLRB Hr'g Tr. 3586:17-3587:1; App. at 184.) Slaughter's sworn testimony directly contradicts the log's assertion that Slaughter sent an e-mail to four persons, including counsel, regarding the "Missy Jones [i]nvestigation" on February 9, 2009. (App. at 89.) This discrepancy, cited to the district court, is glaring and serves as a legitimate basis to require an *in camera* review of the e-mails in question to ascertain whether they match

Interbake's descriptions and qualify for the protection of attorney-client privilege or work product doctrine. *Cf. Hawkins v. Stables*, 148 F.3d 379, 384 (4th Cir. 1998) (holding that a testimonial denial that a communication had occurred "both waive[s the] privilege and provide[s] probative evidence that [the client] had had no conversation with her attorney on the subject"). If there is an innocent explanation for this discrepancy, it was Interbake's burden to explain. The company has chosen not to do so, and it must therefore accept the consequences.

In short, *in camera* review is appropriate here both because Interbake has failed to meet its burden of showing that the asserted privileges apply and because the Board has shown a reasonable, good faith basis to believe that an *in camera* inspection may reveal evidence that some of the information claimed to be privileged does not, in fact, fall within the claimed protections.[18] Accordingly, the district court's

[18] To be sure, the Board does not seek a definitive ruling from either this Court or the district court that the documents at issue in this case are either privileged or not privileged. Such a determination would then become the law of the case and would undermine the purpose of the very relief requested by the Board in its application for subpoena enforcement. Rather, as shown *supra*, that determination belongs to the Board and its agents in the first instance.

contrary determination, lacking any analysis or factual findings, does not withstand scrutiny.

CONCLUSION

For these reasons, the order of the district court denying enforcement to the Board's subpoena should be vacated, and the case should be remanded with instructions to enter an order granting the Board's application for subpoena enforcement.

REQUEST FOR ORAL ARGUMENT

The NLRB respectfully requests oral argument because this case raises a significant question of first impression for this Court to decide—namely the authority of NLRB administrative law judges to attempt to resolve privilege disputes in the first instance. The Board believes that the Court would benefit from a dialogue with counsel on this and other issues involved in this case.

Respectfully Submitted,

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Dated: March 29, 2010

ADDENDUM

Section 11 of the NLRA, 29 U.S.C. § 161, provides, in relevant part:

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title--
>
> (1) Documentary evidence; summoning witnesses and taking testimony
>
> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
v.	)	Case No. 09-2245
INTERBAKE FOODS, LLC,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 11,189 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Century.

s/ Eric G. Moskowitz
Assistant General Counsel

Dated: March 29, 2010

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Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010, the Brief of Appellant National Labor Relations Board was served by CM/ECF (with courtesy copies sent by first-class mail) and one copy of the Appendix was served by first-class mail to each of the following:

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