

Background Information

On September 2, 2010 the General Counsel issued a Subpoena, B-622715, for a hearing scheduled to commence on September 21, 2010. See Exhibit B. It was served on September 3, 2010. A Petition to Revoke was timely filed with the Regional Director on September 7, 2010 and referred the following day for decision by the Administrative Law Judge. See Exhibits C and D. On September 9, the Administrative Law Judge rendered her Decision and Order.

Issue

May the Administrative Law Judge engage in an *in camera*, inspection of documents that are or may be protected by the attorney-client or work product privilege?

Discussion

The Administrative Law Judge accepted some and rejected some of Respondent's requests to revoke the Subpoena. While we respectfully disagree with some of those rulings, only one is presented by this Request For Special Permission To Appeal. The only question is whether the Administrative Law Judge may make "*in camera* review" of the documents.

There are several categories of documents. Written communications between counsel within the same office discussing legal issues; communications between legal counsel for the Respondent from different firms; communications between legal counsel and the Respondent; communications between Respondent's labor consultant and legal counsel; and finally, communications between Respondent's labor consultant and Respondent. The general areas covered include advice regarding the pending election; advice, trial strategy, etc. regarding a class action under the FLSA; advice regarding discharge of Dalton and other employees; advice regarding handling of a host of unfair practices; advice regarding the discharge of Ms. George; and advice regarding the pending Complaint, including trial strategy and the like.

In its Petition to Revoke, Respondent provided ample authority to establish that both privileges exist. Further the Region failed to respond to the Petition; neither has it provided any evidence to support an argument that the privilege does not exist nor any basis to suggest that it should be ignored.

Unfortunately, the law is unsettled. The Federal Courts of Appeal have held that it is for the courts, not the NLRB, to decide, by *in camera* inspection, whether the privilege applies. *NLRB v. Detroit News Paper*, 185 F3d 602 (6th Cir. 1999). In the Ninth Circuit, where this case is to be tried, the Respondent resisted the General Counsel's Subpoena and the Administrative Law Judge issued a Preclusion Order barring the Employer from rebutting the General Counsel's evidence covered by the Subpoena. The Ninth Circuit held that only a court could determine the issue of privilege and set aside the Preclusion Order. *NLRB v. Int'l Medication Systems, Ltd.*, 640 F2d 1110 (9th Cir. 1981).

More recently, a District Court in Maryland in *NLRB v. Interbake Foods, LLC*, 2009 US. Dist. LEXIS 86826 (D Md. 2009) concurred. It flatly denied enforcement. It relied upon the Supreme Court decision in *United States v. Zolin*, 491 US. 554, 575-76 (1989). It further stated that it would enforce only if two conditions were met: Foundational showing by the General Counsel, supported by evidence, doubting the presence of a privilege and if the Court, not the Administrative Law Judge, performed the inspection.

The NLRB has chosen to ignore this consistent line of authority and has created a turf war. See *CNN America, Inc.*, 352 NLRB No. 54 (2008). That case was decided by a two judge panel and may therefore be suspect authority. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). See also *In Naples Comm. Hosp*, 355 NLRB No 171. None of these cases have discussed the potent conflict with the Supreme Court in *Zolin*.

A very interesting interim decision in *Douglas Autotech Corp.*, 2010 NLRB LEXIS 5 (2010), casts a different light. It attempts to reconcile the conflicting authorities. There the Administrative Law Judge recognized the due process concerns that would erode the strength of the privilege. He required the General Counsel seeking *in camera* inspection to articulate grounds to suspect counsel's representations were unreliable. He further suggested there ought to be a third party neutral to inspect the documents.

Conclusions

Of course, the charging party is fearful of a Preclusion Order. On the other hand, it is the duty of counsel to protect the privilege which they are sworn to uphold. While the Respondent has nothing to hide, and no contrary inference should arise from this argument, it is our responsibility to raise and have the issue resolved.

It is tempting to suggest that the Board carefully review the *Zolin* case. It is our view that it forecloses reliance upon the earlier *Brink's Inc.* decision, 281 NLRB 488 (1986); and that the Board should do one of two things: Embrace the judicial decisions or consider the *Autotech* analysis and assign the inspection to a different Administrative Law Judge. Embracing the federal decision makes excellent sense because the Ninth Circuit would reverse any Preclusion Order or adverse inference upon petition to review. The parties ought not to be set on such an expensive course of action. In the alternative, and without waiving our rights as expressed by the federal courts, the following approach makes excellent sense:

- Require the General Counsel to make the showing required.
- If it fails, then the issue is moot.
- If it succeeds, order *in camera* review by a different Administrative Law Judge.
- Keep the record open until such time as the ruling is made.

Dated this 14th day of September 2010.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT

By: 
for Thomas M. Triplett
Attorneys for Respondent

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO

SABO, INC., d/b/a HOODVIEW VENDING CO.

and

Case 36-CA-10615

ASSOCIATION OF WESTERN PULP AND
PAPER WORKERS UNION, AFFILIATED WITH
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

RULING ON PETITION TO REVOKE SUBPOENA

The Complaint in the above matter alleges essentially that Respondent discharged employee LaDonna George on January 19, 2010 because of her union activities. Respondent petitions to revoke Counsel for the General Counsel's Subpoena Duces Tecum No. B-622715 issued on September 2, 2010. In disputed part¹, the subpoena seeks production from Respondent's Custodian of Records of

Subpoena Item 4: documents and communications relating to unions, union organizing, union activity, union supporters, knowledge of union activity, rumors of union activity and/or supporters, and/or discussions with employees about unions or union affiliation, involving the Respondent's employees, supervisors, and/or managers.

Subpoena Item 7: Documents and communications supporting Respondent's first and second affirmative defenses asserting failure to mitigate and that no reliance may be placed upon events resolved by prior settlements with the National Labor Relations Board.

Respondent petitions to revoke Subpoena Item 4 essentially on grounds that the request is overbroad and burdensome and that it invades work product and attorney-client privilege. Item 4 is limited to a period of fewer than two years, which is reasonable, and the material sought is relevant to the complaint issues. As the party seeking to avoid compliance with the subpoena, Respondent bears the burden of demonstrating that it is unduly burdensome or oppressive. See *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997). To satisfy that burden, the party must show that the production of the subpoenaed information "would seriously disrupt its normal business operations." *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996)

¹ In its petition to revoke, Respondent states it does not object to "Request Nos. 1-3 nor 5, 6 or 8 except to the extent that they may invade confidentiality provided by statements to the NLRB, attorney-client or work product privilege."

(quoting *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)). The Respondent has not provided evidence of undue burden. Insofar as any producible documents may fall within work product and attorney-client privileges, they may be presented to the judge at the hearing for review. Accordingly, the Petition to Revoke is denied as to item 4.

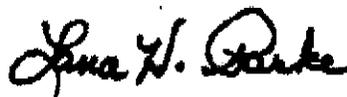
Respondent petitions to revoke Subpoena Item 7 on two grounds: (1) that the request relating to its affirmative defense of failure to mitigate is premature and (2) that the request relating to its affirmative defense that no reliance may be placed upon events resolved by prior settlements is inappropriate because evidence relating to allegations resolved by prior settlement is inadmissible. The information sought by Item 7 is akin to traditional discovery requests for defense theories; discovery is not permitted in Board proceedings.

Moreover, as to Item 7's request relating to Respondent's affirmative defense of failure of the alleged discriminatee to mitigate back pay, since all questions relating to back pay will be deferred to any compliance stage of this matter, the request is not relevant to the present issues.

As to Item 7's request relating to Respondent's affirmative defense of inadmissibility of evidence encompassed in settled cases, it is necessary to distinguish the viability of such a defense from the information sought. The rule of *Joseph's Landscaping Service*, 154 NLRB 1384 fn.1 (1965), as stated in *Morton's IGA Foodliner*, 237 NLRB 667, 669 (1978), "permits the use of presettlement conduct as background evidence to establish a motive or object of the [r]espondent in its postsettlement activities." Item 7 does not, however, address acquisition of relevant conduct evidence, but rather seeks information as to the basis of Respondent's defense. While explication of defense theories is an accepted discovery point, it is not consistent with the Board's procedures, which do not provide for pretrial discovery. Accordingly, the Petition to Revoke is granted as to Item 7.

SO ORDERED.

Dated: September 9, 2010



Lana H. Parke
Administrative Law Judge

Served by Facsimile:
Helena Fiorianti
Thomas Triplett

503.326.5387
503.796.2900

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
SABO, d/b/a Hoodview Vending Co.
19660 S.W. 118th Ave., Tualatin, OR 97062

As requested by Helena A. Fiorianti, Counsel for the Acting General Counsel
whose address is 601 S.W. Second Avenue, Suite 1910, Portland, OR 97204
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE _____
an Administrative Law Judge of the National Labor Relations Board
at ODS Tower, 601 S.W. Second Avenue, Suite 1910
in the City of Portland, Oregon

on the 21st day of September 2010 at 9:00 (a.m.) (~~xxx~~) or any adjourned
or rescheduled date to testify in SABO, d/b/a Hoodview Vending Co. 36-CA-10615

(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

****SEE ATTACHED****

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

B - 622715

Issued at Portland, Oregon

this 2nd day of September 2010



Lesfer A. Neltzer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

ATTACHMENT**Definitions and Instructions:**

"Documents" includes all material defined in Rule 34 of the Federal Rules of Civil Procedure, and are not limited to the specific examples listed. We seek production of all requested documents within your possession, custody or control without regard to who has physical possession of them or who prepared the documents and wherever retained.

"Communications" means any oral or written exchange of words, speeches, correspondence of any nature, thoughts or ideas to another person(s), whether person-to-person, in a group, by telephone, by letter, by telex, facsimile transmission, by e-mail, or by any other process, verbal, written, electronic, or otherwise.

Documents produced should be grouped and in the order that they are maintained in the normal course, and should include all files and file labels in which the documents, and extra copies of them, are located.

For any document withheld on a claim of privilege and/or under the work-product doctrine, identify the date, author, recipients, title, general nature and privilege claimed.

If additional documents are discovered that fall within the terms of this request, the additional items shall be produced immediately.

This subpoena is intended to cover all documents that are available to SABO, Inc., d/b/a Hoodview Vending Co., herein called Respondent, subject to their reasonable acquisition, including, but not limited to, documents in the possession of their attorneys, accountants, board of directors, advisors, investigators, officers, managers, agents or other persons directly or indirectly employed by, or associated with, the Employer, or their attorneys, or their parent, subsidiaries, or other related companies, and anyone else otherwise subject to their influence or control.

Documents Requested:

1. Documents and communications setting forth and/or discussing procedures followed and relied upon by Respondent, at its Tualatin, Oregon, facility in effect from January 2009 through the return date of this subpoena, including the Respondent's Employee Handbook;
2. Documents and communications showing LaDonna George's work history, performance appraisals, disciplinary records, and/or the contents of what would traditionally be in her personnel file or its equivalent;

3. Documents and communications, including minutes from meetings and e-mails, relating to or reflecting the Respondent's decision to terminate employee LaDonna George's employment;
4. Documents and communications relating to unions, union organizing, union activity, union supporters (whether perceived or actual), knowledge of union activity (whether perceived or actual), rumors of union activity and/or supporters, and/or discussions with employees about unions or union affiliation, involving the Respondent's employees, supervisors and/or managers, at the Respondent's Tualatin, Oregon facility, between January 1, 2009 and the return date of this subpoena;
5. Documents and communications discussing or touching upon conversations and/or confrontations between LaDonna George and any other past or present employees, including Steve Boros;
6. Documents and communications showing the personal cell phone records for Robert Hill and Sally Hill for the month of January 2010;
7. Documents and communications supporting Respondent's first and second affirmative defenses asserting failure to mitigate and that no reliance may be placed upon events resolved by prior settlements with the National Labor Relations Board; and
8. Documents and communications supporting Respondent's third affirmative defense asserting that the claims are barred, in whole or in part, by the applicable statute of limitations.
9. In lieu of providing the items specified in paragraphs 1 through 8 above, at the unfair labor practice hearing, the custodian of records may make the records and documents and/or true copies of such records requested herein available at a convenient location in Portland, Oregon, no later than 12:00 p.m. on Monday, September 20, 2010, to an agent or agents of the National Labor Relations Board for his, her, or their inspection, copying and use in connection with these proceedings. Provided further, that such records and documents requested herein will not be required to be produced at the hearing in this matter if Respondent and Counsel for the General Counsel arrive at a stipulation with regard to the information contained therein and such stipulation is received in evidence by the Administrative Law Judge hearing this matter.

employee, Gary Dalton, also filed by counsel who has worked for the union, asserting, after he lost wrongful discharge claims under the NLRA, that he had been terminated in violation of state discrimination laws. Respondent won both suits. This firm was also retained to provide guidance to Rudnick, provide legal advice in connection with the rerun of the election¹ and to provide advice in connection with the termination of LaDonna George. In order to avoid undue extension of this memoranda, attached hereto is a brief filed in a companion matter in which the Circuit Court for Multnomah County held that these communications were privileged. Exhibit B.

In addition, various employees, including Sally Hill, gave affidavits to the NLRB. Such affidavits are confidential, until or unless they are called to testify.

Before addressing Request No. 4, it is appropriate to address Requests Nos. 7 and 8. As to Request No. 7, Respondent has alleged that George failed to mitigate. It is the duty of George to seek other employment. Respondent provided numerous leads to George. It has evidence that she has not diligently pursued these leads. Copies of e-mails to counsel for the charging party document these leads and untimely follow-up exist. However, this request is premature. It is irrelevant to the merits of the complaint and, assuming that the complaint is dismissed, will never be relevant to these proceedings.

Also, Respondent has asserted that General Counsel may not rely upon matters previously settled. These are 36-CA-10438, 10470, and 10481. The Region and the Respondent settled a series of charges filed by the Union. The settlement occurred in August 2009. It was a "no admissions settlement." At no time has the Board sought to set aside the settlement. It could not now because compliance was held to have been made. Accordingly, it is the contention of the Respondent that no evidence relating to the underlying charges is admissible.

¹ On December 31, 2009 the Union withdrew its petition for election. 36 RC 6454.

With respect to Request No. 8, Respondent has asserted that General Counsel may not rely upon matters barred by 10(b) of the Act. The Union filed charges 36 CA 10,469, 10,471, 10472, 10482, and 10483. All of these charges preceded July 1, 2009, each were withdrawn by the union, and none were refiled within 6 months. It is asserted that evidence pertaining to these charges should not be allowed to be introduced.

Finally turning to Request No. 4, this is a broad-based demand for documents. For example, it seeks all documents relating to unions. It thus sets the employer on a wild goose chase to examine all of its files to see if there is an article about card check legislation, and the like. At minimum, the search should be limited to the charging party. Second, the Request seeks documents that precede the filing of the charge by more than thirteen months. Third, it invades work product and attorney-client privilege.

If the purpose of this request is to seek an admission that the Company became aware that LaDonna George was known to be a supporter of a union organizing campaign, Respondent will admit that it knew that, because of a letter written by Mr. Cloer to the company identifying seven employees as supporters. However, in December 2009 the Union withdrew interest in organizing and Respondent has no knowledge nor documents that suggest anything to the contrary. Second, while time barred, the request seeks discussions with employees apparently from the election campaign. Without waiving its objection, a copy of the single speech given will be provided.

Dated this 7th day of September 2010.

SCHWABE, WILLIAMSON & WYATT

By: Thomas Triplett
Thomas M. Triplett
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September 2010, I served the foregoing PETITION TO REVOKE SUBPOENA B-6SS715 on the following parties at the following addresses:

Linda L Davidson
Board Agent
National Labor Relations Board
Subregion 36
601 SW Second Ave., Room 1910
Portland, OR 97204-3170
Facsimile: (503) 326-5387

Helena A. Fiorianti
Board Agent
National Labor Relations Board
Subregion 36
601 SW Second Ave., Room 1910
Portland, OR 97204-3170
Facsimile: (503) 326-5387

Paul Cloer
AWPPW
P. O. Box 4566
Portland, Oregon 97208
Facsimile: (503) 228-1346

Richard L. Ahearn
Regional Director
National Labor Relations Board
915 Second Avenue, Room 2948
Seattle, WA 98174
Facsimile: (206) 220-6305

by faxing and mailing to them a true and correct copy thereof, placed in a sealed envelope addressed to them at the addresses set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day with postage prepaid.

Thomas Triplett

Thomas M. Triplett
Of Attorneys for Respondent

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
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19660 S.W. 118th Ave., Tualatin, OR 97062

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B - 622715

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this 2nd day of September 2010



Leslie A. Nelson

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1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 GARY DALTON,
7 Plaintiff,
8 vs.
9 SABO, INC., an Oregon Corporation,
10 ROBERT HILL, and SALLY LAYTON
11 HILL,
12 Defendants.

No. 0903-03169

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

13 **INTRODUCTION**

14 Defendants Sabo, Inc., Robert Hill, and Sally Layton Hill (collectively "Defendants") file
15 this response to Plaintiff Gary Dalton's Motion to Compel Production of Documents. Because
16 Plaintiff seeks to compel documents that do not exist, are privileged or protected under the work
17 product doctrine, and are not reasonably calculated to lead to the discovery of admissible
18 evidence, Plaintiff's Motion to Compel should be denied. This response is supported by the
19 Declarations of H. Sanford Rudnick, Sally Layton Hill, and Amanda Gamblin, attached hereto.¹

20 **BACKGROUND**

21 Defendant Sabo, Inc. is a small, family-owned company of 13 employees based in
22 Tualatin, Oregon. (S. Hill Decl. ¶1). Defendants Robert Hill and Sally Hill own Sabo, which for
23 17 years has been engaged in the vending machine business. (Id.). Like many other companies,
24 Sabo has recently experienced economic difficulties due to the loss of client accounts, and was
25 forced to conduct a reduction in force. (Id. at ¶2). Plaintiff Gary Dalton's position was

26 ¹ These declarations are hereinafter referenced as Rudnick Decl., S. Hill Decl., and Gamblin
Decl., respectively.

8
PAGE 8 EXHIBIT C

1 eliminated because it was one of Sabo's highest paid overhead positions and because its duties
2 could be absorbed by others. (Id.).

3 On March 4, 2009, Mr. Dalton filed this lawsuit alleging that Defendants terminated his
4 employment in retaliation for making a wage claim and because of his age. Plaintiff does not
5 allege that his termination was related to union organizing activities, nor could he, because the
6 National Labor Relations Act ("NLRA") preempts any state court claims related to that issue.
7 *Chamber of Commerce v. Brown*, 128 S Ct 2408, 2412 (2008) (finding that the NLRA preempts
8 state law claims). In fact, the National Labor Relations Board ("NLRB") investigated and
9 considered plaintiff's claim that Sabo retaliated against him for his union activities and
10 concluded that Sabo did not retaliate, but rather laid him off for economic reasons. (Rudnick
11 Decl. ¶8).

12 FACTS

13 On January 24, 2009, the Association of Western Pulp and Paper Workers ("AWPPW")
14 faxed a letter to Sabo advising it that an in-plant organizing committee had formed at Sabo. (S.
15 Hill Decl. ¶4). On January 28, 2009 Mr. Cloer appeared at Sabo headquarters. (Id.). He
16 announced to Sally and Bob Hill that if they cooperated with the AWPPW, he would make sure
17 that Sabo's employees did not file any lawsuits against it, and threatened that if they hired an
18 attorney, the union would view this as an adversarial move. (Id.). He repeated this threat several
19 times. (Id.).

20 From this first encounter with Mr. Cloer, Mr. and Ms. Hill recognized that litigation
21 would likely result unless Sabo relinquished its rights under the NLRA as demanded by Mr.
22 Cloer. (Id. at ¶5) On January 29, 2009, Mr. and Ms. Hill consulted with Sabo's counsel at the
23 law firm of Garvey Schubert Barer. (Id.). On February 6, 2009, Garvey Schubert Barer
24 represented Sabo at an NLRB proceeding related to a charge brought against Sabo by the
25 AWPPW. (Id.). After this hearing Defendants felt that Sabo needed the advice of someone
26 more experienced with labor matters. (Id.). Therefore, on February 19, 2009, Sabo retained H.

PAGE 9 EXHIBIT C

1 Sanford Rudnick as a labor consultant to advise it on labor-related matters, and to represent it
2 before the NLRB. (Id.). Mr. Rudnick took over the role of Sabo's representative at the NLRB.
3 He is an attorney, but is no longer practicing law. (Rudnick Decl. ¶1).

4 In advising his clients, Mr. Rudnick always involves a practicing attorney. (Id. at ¶3).
5 Therefore, the retainer agreement signed by Sabo gave Mr. Rudnick permission to consult with
6 an attorney on its behalf. (Id. at ¶3). He regularly seeks the advice of Robert Fried, a partner at
7 the law firm of Atkinson, Andelson, Loya, Rudd & Romo. (Id. at ¶4). Anticipating potential
8 litigation given Mr. Cloer's visit and his increasingly threatening emails, Mr. Rudnick involved
9 Mr. Fried almost immediately after being retained by Sabo. (Id.). Sabo officially retained Mr.
10 Fried on March 5, 2009, however, Mr. and Ms. Hill viewed him as Sabo's attorney prior to that
11 time and expected that he would keep the communications between Mr. Fried, Mr. Rudnick, and
12 themselves confidential. (S. Hill. Decl. ¶9). Therefore, Mr. and Ms. Hill anticipated litigation in
13 late January and consulted Garvey Schubert as its legal team, and although it changed that team
14 to Mr. Rudnick in conjunction with Mr. Fried, at all times it expected litigation and that its
15 communications would be confidential as part of the rendering of legal services.

16 During this time, Mr. Cloer's emails became increasingly threatening. For example, in
17 one letter to Mr. Rudnick, Mr. Cloer told Mr. Rudnick that he would make a substantial sum of
18 money in fees from Defendants because of all of the claims that the AWPPW would bring
19 against Sabo: "Sandy, can you hear 'cha ching', 'cha ching' coming from Bob and Sally Hill's
20 counting room at Hoodview Vending?" (Rudnick Decl. ¶11). In addition, Mr. Cloer threatened
21 Mr. Rudnick that "if your clients knew what I know ... they would never get another night of
22 good sleep." (Id.). AWPPW also picketed in front of Sabo and publicly implied that it used
23 poisoned food in its vending machines. (S. Hill Decl. ¶7).

24
25 After Mr. Dalton's employment was terminated, the AWPPW filed a claim with the
26 NLRB alleging that Plaintiff Gary Dalton was terminated in retaliation for his union activity.

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1 (Rudnick Decl. ¶8). After months of investigation and consideration, the NLRB found that Mr.
2 Dalton was laid off for economic reasons. (Id.).

3 Yet Defendants continue to be the victims of crushing litigation at the instigation of the
4 AWPPW. Just as Mr. Cloer threatened during his first meeting with Mr. and Ms. Hill, in
5 addition to this case, four current and former Sabo employees, including Mr. Dalton, have filed a
6 class action lawsuit against Sabo claiming unpaid overtime. Opposing counsel, Mr. Willner, is
7 one of the attorneys representing the plaintiffs in the class action. His law firm has also
8 represented the AWPPW. (Gamblin Decl. ¶4).

9 Mr. Cloer and the AWPPW are undoubtedly extremely interested in seeing work product
10 and privileged communications between Sabo and its legal team and they are forbidden from
11 obtaining that information in the NLRB process. Only the National Labor Relations Board's
12 General Counsel can issue investigative subpoenas. 29 USC § 161(1) There is no
13 corresponding right vested under the statute in a private party. Furthermore, even where the
14 General Counsel issues a subpoena, communications regarding strategy is not subject to
15 disclosure. Thus, it appears that the AWPPW is seeking by indirection that which is foreclosed
16 under the National Labor Relations Act.²

17 In any event, Defendants proposed a solution that could have avoided this motion.
18 Although the work product doctrine and attorney-client privilege protect all communications
19 with Mr. Rudnick, defense counsel offered to produce communications between Defendants and
20 Mr. Rudnick that discuss Mr. Dalton's layoff prior to the date of that layoff. (Gamblin Decl. ¶3).
21 Defendants remain willing to produce these documents, and ask that this Court adopt this
22

23 ² In addition, under Section 8(b)(1)(B), the AWPPW is attempting to coerce Sabo in the selection
24 of its representatives. See *Operating Engineers Local 324 (Hydro Excavating, LLC)*, 353 NLRB
25 No. 85, (a labor consultant may qualify for protection against interference from a union under
26 section 8(b)(1)(B)) citing *NLRB v. Electrical Workers*, 481 US 573, 586 (1987) (Royal Electric);
See also *NLRB v. Intern'l Brotherhood of Electrical Workers*, 971 F2d 1435 (1992), holding
that even where there is no union contract in place a union cannot interfere with an employer's
representative. These violations will be raised with the NLRB.

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1 . compromise and deny Plaintiff's Motion to Compel.

2 **LEGAL AUTHORITY**

3 Defendants cannot be compelled to produce the documents demanded in Plaintiff's
4 Request For Production No. 4 because no responsive documents exist. Additionally, Plaintiff's
5 motion to compel documents responsive to his Request For Production No. 5 should be denied
6 on the grounds that: (1) the request goes beyond the scope of discovery permitted under ORCP
7 36(B)(1); (2) the requested documents are protected as work product under ORCP 36(B)(3); and
8 (3) the requested documents are privileged communications pursuant to ORE 503.

9 **A. There Are No Responsive Documents to Plaintiff's Request for All**
10 **Written Communications Between Wal-Mart and Defendants**

11 Plaintiff's Request For Production No. 4. demands:

12 "All written communications, including e-mails, between Wal-Mart and defendants or
13 any of them from July 1, 2008 to the present, and all memoranda mentioning or referring
14 to these communications."

15 Had Plaintiff's counsel adequately conferred with defense counsel,³ he would be aware
16 that no responsive documents exist. There are no written communications between Wal-Mart
17 and Defendants after July 1, 2008. The Wal-Mart contract was transferred from Best Vendors to
18 Canteen Vending on July 1, 2008. (S. Hill Decl. ¶3). Sabo has had no communications with
19 Wal-Mart since July 1, 2008. (Id.). However, as a professional courtesy, Sabo voluntarily
20 produced communications between Sabo and Best Vendors, and notes and memoranda referring
21 to same, even though Plaintiff did not request such documents. (Gamblin Decl. ¶5). There is
22 simply nothing more to produce.

23 ³ Defendants' counsel Amanda Gamblin met with Plaintiff's counsel, Mr. Willner, on May 20,
24 2009. Ms. Gamblin sent Mr. Willner a letter the following day in which she expressly stated that
25 "Hoodview had no contact with Wal-Mart after July 1, 2008." With regard to other discovery
26 issues, Ms. Gamblin suggested various compromises. Specifically with Request No. 5 Ms.
Gamblin agreed to produce communications between Mr. Rudnick and Sabo regarding plaintiff's
termination from employment dated prior to his termination. Ms. Gamblin requested continuing
dialogue regarding her suggested compromises. Instead of dialogue, Mr. Willner filed a motion
to compel. (Gamblin Decl. ¶3).

1 **B. Communications Between Mr. Rudnick and Defendants Are Not**
2 **Likely to Lead to the Discovery of Admissible Evidence.**

3 Plaintiff Request No. 5 seeks:

4 “All written communication, including e-mails, between defendants or any
5 of them and Sanford Rudnick concerning or mentioning Gary Dalton from
6 July 1, 2008 to present, and all memoranda mentioning or referring to
7 these communications.”

8 Defendants offered to produce communications between Mr. Rudnick and Defendants
9 concerning Mr. Dalton’s termination from employment and dated prior to such termination if
10 Mr. Willner would agree that Defendants were not waiving privilege in any broader respect.
11 (Gamblin Decl. ¶3). Plaintiff rejected that offer of compromise and did not propose any other.
12 (Id.)

13 Plaintiff’s request is overbroad because the requested documents are not reasonably
14 calculated to lead to the discovery of admissible evidence and are therefore not within the scope
15 of discovery under ORCP 36(B)(1). Plaintiff seeks all communications that have anything to do
16 with Mr. Dalton. Because Mr. Dalton was an employee of Sabo, that would include all
17 communications with Mr. Rudnick regarding strategy related to the union’s organizing
18 campaign. Mr. Rudnick was retained for the purpose of assisting Sabo with labor issues after
19 Sabo received a communication from a labor union that led the Defendants to anticipate potential
20 litigation. Sabo did not retain him to address wage claim retaliation or age discrimination
21 claims. (S. Hill Decl. ¶5). Communications containing thoughts and advice on Sabo’s situation
22 with the AWPPW can be of no assistance to Plaintiff in this action for alleged wage claim
23 retaliation and age discrimination.

24 Plaintiff suggests that the correspondence could be relevant to whether he was terminated
25 for engaging in union activity. *See Plaintiff’s Motion to Compel Production of Documents*
26 (hereinafter “*Motion*”) ¶5. Yet Plaintiff alleges age discrimination and retaliation for making a
 wage claim, not retaliation for union organizing. Nor could he claim discrimination for union

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1 activity in this court because it would be preempted by the National Labor Relations Act.
2 *Chamber of Commerce v. Brown*, 128 S Ct at 2412 (2008). Furthermore, plaintiff already argued
3 before the NLRB that Sabo laid him off in retaliation for his union activities, and the NLRB
4 concluded after exhaustive investigation that Sabo had laid him off for economic reasons.
5 (Rudnick Decl. ¶8).

6 Plaintiff rejected Defendants' compromise to produce any communications between Mr.
7 Rudnick and Defendants regarding Mr. Dalton's termination of employment. This compromise
8 would allow Plaintiff to obtain documents potentially relevant to this case only but avoid
9 producing all of Mr. Rudnick's and Mr. Fried's advice to defendants regarding the union's
10 organizing campaign. Plaintiff rejected Defendant's compromise without discussion and with no
11 other offer of compromise by the plaintiff's and the union's attorney, Mr. Willner. Defendants'
12 communications with its labor consulting legal team, Mr. Rudnick and Mr. Fried, during the
13 union organizing campaign are undoubtedly of interest to the AWPPW in the ongoing litigation
14 before the NLRB. And they are documents that the union cannot obtain through the NLRB
15 administrative process. However, those communications are not reasonably calculated to lead to
16 the discovery of admissible evidence in this case which is exclusively about age discrimination
17 and retaliation for making a wage claim. Therefore, the Defendants' compromise should be
18 adopted, and Plaintiff's Motion to Compel should be denied.

19 **C. Communications Between Defendants and Sanford Rudnick Are**
20 **Privileged as Work Product**

21 Mr. Rudnick was retained in anticipation of the litigation threatened by Mr. Cloer, and
22 the communications between Mr. Rudnick and Defendants contain Mr. Rudnick's thoughts and
23 impressions in regards to this anticipated, and later actual, litigation. Under ORCP(B)(3), such
24 documents prepared in anticipation of litigation or for trial by a party's representatives (including
25 an attorney or consultant) are only discoverable upon a showing that that the party seeking
26 discovery has substantial need of the materials and is unable, without undue hardship, to obtain

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1 the substantial equivalent of the materials by other means. As a consultant retained by the
2 Defendants on behalf of Sabo, Mr. Rudnick is a representative of the Defendants under this rule.

3 The work product doctrine is intended to enable lawyers and consultants to work with
4 some degree of privacy and to feel free to put their thoughts and recollections in writing. See
5 *Upjohn Co. v. United States*, 449, US 383, 397-98 (1981) cited by *State v. Cartwright*, 173 Or
6 App 59, 70 (2001), *rev'd on other grounds*, 336 Or 408 (2004), for its discussion of the work
7 product doctrine. Therefore, the communications between Mr. Rudnick and Defendants, which
8 contain Mr. Rudnick's written thoughts and impressions about the legal situation faced by
9 Defendants, are precisely the kinds of communications that the work product doctrine protects.

10 Mr. Rudnick's communications with Defendants were also prepared in anticipation of
11 litigation. The "anticipation of litigation" requirement is meant to distinguish unprotected
12 documents prepared in the ordinary course of business. See *United Pac. Ins. Co. v. Traschel*, 83
13 Or App 401, 404 (1987) (affirming trial court's finding that where a party believed litigation to
14 be likely even though no claim had been filed, and distinguishing documents prepared in
15 anticipation of litigation from those prepared in the ordinary course of business). Sabo did not
16 consult with labor relations advisors in the regular course of business, and retained Mr. Rudnick
17 only when a lawsuit seemed forthcoming. (S. Hill Decl. ¶5). Thus, the communications between
18 Rudnick and Defendants were prepared in anticipation of litigation rather than in the ordinary
19 course of business.

20 While Oregon courts have provided little guidance as to when litigation may properly be
21 anticipated, other jurisdictions have held that the "testing question" is whether a person
22 subjectively believes that litigation is a real possibility, and whether this belief is objectively
23 reasonable. See *In re Sealed Case*, 146 F3d 881, 884 (DC Cir 1998); *Martin v. Bally's Park*
24 *Place Hotel & Casino*, 983 F2d 1252, 2360 (3d Cir 1997). Here, from Mr. and Ms. Hill's first
25 interaction with Mr. Cloer (during which Mr. Cloer repeatedly told Sally and Bob Hills that the
26 AWPPW would support and encourage Sabo's employees to file lawsuits if Sabo did not

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1 relinquish its rights under the NLRA), Mr. and Ms. Hill correctly realized that because they did
2 not intend give up their rights under the NLRA, litigation would result. This belief was
3 objectively reasonable given that Mr. Cloer explicitly threatened litigation, these threats
4 escalated and intensified in Mr. Cloer's emails, and indeed litigation ensued shortly thereafter.

5 Plaintiff also does not have "substantial need" of the communications between Sabo and
6 Mr. Rudnick because they are not pertinent to his wage retaliation claim or his age
7 discrimination claim. Plaintiff's speculates that Mr. Rudnick and Defendants may have
8 corresponded "on the desirability of finding excuses to terminate union supporters." *See Motion*
9 ¶5. Even if such hypothetical documents were to exist, they are not reasonably calculated to lead
10 to the discovery of admissible evidence relevant to the alleged wage retaliation or age
11 discrimination.

12 Consequently, ORCP 36(B)(3) does not allow production of these communications
13 because (1) Defendants retained Rudnick when they reasonably believed that litigation was
14 likely to ensue, (2) the communications demanded by Plaintiff contain thoughts, impressions,
15 and analysis prepared in anticipation of litigation, and (3) Plaintiff does not have substantial need
16 of them. They are privileged as work product, and the Court should deny Plaintiff's Motion to
17 Compel and instead adopt Defendants' proposed compromise.

18 **D. The Attorney-Client Privilege Extends to Communications Between**
19 **Defendants and Rudnick**

20 The documents requested by Plaintiff in Request No. 5 are also protected by the attorney-
21 client privilege. ORE 503(2)(d) protects from disclosure "confidential communications made for
22 the purpose of facilitating the rendition of professional legal services to the client" where the
23 communications are "[b]etween the client and a representative of the client."

24 ORE 503(1)(b) defines a confidential communication as:

25 "... a communication not intended to be disclosed to third persons other
26 than those to whom disclosure is in furtherance of the rendition of
professional legal services to the client or those reasonably necessary for
the transmission of the communication."

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1 Defendants intended for the communications between Rudnick and themselves to remain
2 confidential, and disclosed them to no one other than their attorney, Mr. Fried, for purposes of
3 facilitating Mr. Fried's rendition of legal services to them. (S. Hill Decl. ¶9). Therefore, they are
4 confidential under ORE 503(1)(b).

5 Furthermore, Mr. Rudnick is a "representative of the client." That term is defined in
6 ORE 503(1)(d) as a principal, an employee, an officer, or a director of the client:

7
8 "(A) Who provides the client's lawyer with information that was acquired during
9 the course of, or as a result of, such person's relationship with the client as
10 principal, employee, officer or director, and is provided to the lawyer for purpose
11 of obtaining for the client the legal advice or other legal services of the lawyer; or

12 "(B) Who, as part of such person's relationship with the client as principal,
13 employee, officer, or director, seeks, receives, or applies legal advice from the
14 client's lawyer."

15 Mr. Rudnick provided Sabo's lawyer with information he had acquired as Sabo's consultant for
16 the purpose of obtaining legal advice. (Rudnick Decl. ¶9) He communicated immediately and
17 directly with Mr. Fried, seeking and applying the legal advice that Mr. Fried offered and
18 conveying to Mr. Fried information he had obtained through his discussions with Bob and Sally
19 Hill. (Id.). Mr. Rudnick also communicated with Mr. Fried and Mr. and Ms. Hill
20 simultaneously, with both Mr. Rudnick and Mr. Fried contributing their ideas and expertise to
21 provide legal services to Sabo. (Id.). Therefore, he is a "representative of the client" and all of
22 his communications with Mr. Fried and with Defendants are privileged.

23 The fact that Mr. Rudnick is a consultant of Sabo, rather than an employee, does not
24 prevent these communications from being protected by the attorney-client privilege. While no
25 Oregon courts have confronted the issue, many other courts have held that if the attorney-client
26 privilege would apply to communications between a lawyer and a defendant's employee, it also
27 applies if that person happens to not be an employee, but is instead a third party independent
28 contractor or consultant.⁴ For example, in *Caremark, Inc. v. Affiliated Computer Servs., Inc.*,

⁴ See *In re Bieter, Co.*, 16 F.3d 929, 937 (8th Cir 1994) (applying the attorney-client privilege to

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1 192 FRD 263 (E D Ill 2000), Plaintiff's parent corporation retained an outside consultation
2 corporation, KPMG, to assist legal counsel in analyzing certain services performed for the
3 plaintiff. The engagement letter signed by KPMG and Plaintiff stated that KMPG would
4 coordinate with outside counsel in reviewing Plaintiff's contracts, but did not specify the counsel
5 that would be used. *Id.* at 267. The court held that KMPG was acting as the plaintiff's agent
6 when it obtained legal advice from a law firm. *Id.* at 268. Therefore, its communications with
7 this firm were privileged. *Id.* at 269.

8 Similarly, the agreement between Sabo and Mr. Rudnick authorizes Mr. Rudnick to
9 consult with outside legal counsel. (Rudnick Decl. ¶3). Mr. Rudnick thus became an agent and
10 extension of Sabo, and the communications between him, Defendants, and Defendants' counsel
11 are privileged just as they would if Mr. Rudnick were a principal or employee of Sabo.

12 This approach is consistent with Oregon's previous interpretations of the attorney-client
13 privilege. As noted in *Oregon Health Sciences University v. Haas*, 325 Or 492, 507-08 (1997),
14 Oregon followed the developing trend of recognizing a more broad lawyer-client privilege in the

15
16 protect communications between a party and an independent consultant and holding that "it is
17 inappropriate to distinguish between those on the client's payroll and those who are instead, and
18 for whatever reason, employed as independent contractors."); *Alliance Constr. Solutions, Inc. v.*
19 *Dept. of Corrections*, 54 P.3d 861, 869 (Colo 2002) ("a formal distinction between an employee
20 and an independent contractor conflicts with the purposes supporting the privilege."); *Am. Mfrs.*
21 *Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, 2008 U.S. Dist. LEXIS 100080, *11-12 (E.
22 D.N.Y. Dec. 11, 2008) (extending the attorney-client privilege to a construction consultant hired
23 by plaintiffs, who had no in-house employees with construction experience); *DE Technologies,*
24 *Inc. v. Dell, Inc.*, 2006 U.S. Dist. LEXIS 62580 *6 (W D Va Sept. 1, 2006) ("the existence of a
25 formal employment relationship is not the primary factor to consider in determining whether
26 attorney-client privilege applies...."); *Sieger v. Zak*, 859 N.Y.S. 2d 899, (2008) ("[t]he
corporation's attorney-client privilege applies as well to communications with independent
contractors or consultants, if the consultant has a significant relationship to the corporation and
the corporation's involvement in the transaction that is the subject of the legal services.")
(internal cites omitted). See also John E. Sexton, *A Post-Upjohn Consideration of the Corporate*
Attorney-Client Privilege, 57 N.Y.U. L. REV. 443, 498 (1982) (recognizing that the attorney-
client privilege would be under inclusive if it did not protect communications between parties
and independent contractors, since "at times there will be potential information-givers who are
not employees of the corporation but who are nonetheless meaningfully associated with the
corporation in a way that makes it appropriate to consider them 'insiders' for purposes of the
privilege.").

1 corporate setting. The court in *Haas* therefore applied the privilege to protect communications
2 with employees who are not high-ranking and whose interactions with a lawyer are not a regular
3 part of their jobs. *Id.* at 509.

4 Just as the corporate setting requires broadening the attorney-client privilege to protect
5 communications between a company and lower-ranking employees, the privilege applies to
6 protect communications with consultants hired because no employees have sufficient knowledge
7 and expertise. As recognized by the court in *Residential Constructors, LLC v. Ace Property &*
8 *Casualty Co.*, 2006 US Dist LEXIS 80403 (D Nev Nov 1, 2006), there is no reason to refuse to
9 apply the attorney-client privilege to independent consultants who perform the same functions as
10 in-house advisors. Sabo retained Mr. Rudnick to assist and communicate with its attorney
11 because no one at Sabo had experience with labor issues. If Sabo were a larger company, it
12 could have employed someone to manage such issues. It should not be denied the ability to
13 communicate openly with individuals retained to consult on legal matters simply because as a
14 small company, it must rely on independent consultants rather than employees to provide this
15 service. The policy behind ORE 503(2)(d) – that is, encouraging open and candid
16 communication between parties and persons hired to deal with legal matters – will be thwarted if
17 communications between Sabo and the consultant retained for the purpose of avoiding a lawsuit
18 are not privileged. Therefore, communications between Sabo and Mr. Rudnick are protected
19 under ORE 503(2)(D).

20 **E. Communications Between Sabo and Rudnick Are Also Privileged**
21 **Under ORE 503(2)(a)**

22 The communications between Defendants and Mr. Rudnick are also privileged under
23 ORE 503(2)(a), which extends the attorney-client privilege to confidential communications
24 between a client and a representative of the client's lawyer made for the purpose of facilitating
25 the rendition of legal services to the client.

26 Mr. Rudnick qualifies as a "representative of the lawyer" under ORE 503(1)(e) because

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1 he is "employed to assist the lawyer in the rendition of professional legal services." This rule
2 does not require that the attorney, rather than the client, employ the person to assist the lawyer.
3 Sabo hired Mr. Rudnick knowing that he would consult with attorneys regarding their labor
4 issues. (S. Hill Decl. ¶5; Rudnick Decl. ¶3). Mr. Rudnick then formed a legal team with Mr.
5 Fried, whom Sabo quickly retained as its attorney, and who continued to work with Mr. Rudnick
6 to provide legal services to Sabo. (Rudnick Decl. ¶6). Thus, Mr. Rudnick was employed by
7 Sabo to assist Mr. Fried in his rendition of legal services, and Mr. Fried used Mr. Rudnick's
8 expertise in the field of labor relations when offering Sabo legal advice. As a representative of
9 Mr. Fried, the communications between Sabo and Mr. Rudnick are privileged under ORE
10 503(2)(a).

11 **CONCLUSION**

12 Defense counsel has already offered to produce documents relating to Plaintiff's
13 termination of employment. Yet Plaintiff continues to demand production of documents that are
14 either nonexistent, or are privileged and beyond the scope of discovery. Therefore, Plaintiff's
15 Motion to Compel, which is yet another effort to drown Sabo in litigation, should be denied and
16 Plaintiff should instead accept Defendants' proposed compromise.

17 Dated this ___ day of June 2009.

18 SCHWABE, WILLIAMSON & WYATT, P.C.

19
20 By: _____
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Attorneys for Defendant, Sabo, Inc.

Trial Attorney: Amanda T. Gamblin

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CERTIFICATE OF SERVICE

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I hereby certify that on the ___ day of June 2009, I served the foregoing DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS on the following party at the following address:

Don S. Willner
Don S. Willner & Associates
630 Sunnyside Road
Trout Lake, WA 98650

by mailing to him a true and correct copy thereof, placed in a sealed envelope addressed to him at the address set forth above, and deposited in the U.S. Post Office at Portland Oregon on said day with postage prepaid.

Amanda T. Gamblin

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SABO, INC., d/b/a HOODVIEW VENDING CO.

and

Case 36-CA-10615

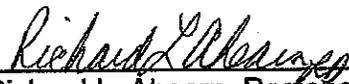
ASSOCIATION OF WESTERN PULP AND PAPER
WORKERS UNION affiliated with UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA

ORDER REFERRING RULING ON PETITION TO REVOKE
SUBPOENA DUCES TECUM TO THE ADMINISTRATIVE LAW JUDGE

On September 7, 2010, Counsel for Respondent filed with the Regional Director for Region 19, a Petition to Revoke Subpoena Duces Tecum B-622715 in the above captioned matter.

IT IS HEREBY ORDERED that the Petition to Revoke Subpoena Duces Tecum be, and it hereby is, referred for ruling to the Administrative Law Judge.

DATED at Seattle, Washington this 8th day of September 2010.


Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September 2010, I served the foregoing
REQUEST FOR SPECIAL PERMISSION TO APPEAL FROM DECISION OF
ADMINISTRATIVE LAW JUDGE TO THE NATIONAL LABOR RELATIONS BOARD on
the following parties at the following addresses:

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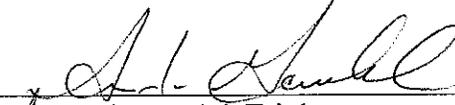
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by emailing to them a true and correct copy thereof, placed in a sealed envelope addressed to
them at the email addresses set forth above said day.


for Thomas M. Triplett
Of Attorneys for Respondent