IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Applicant,	)	**Civil Action No. 14-cv-10163**
v.	)	
NAVISTAR INTERNATIONAL CORP.,	)	**Hon. John Z. Lee** **Hon. Mag. Judge Susan E. Cox**
Respondent.	)	

MEMORANDUM IN SUPPORT OF SECURITIES AND EXCHANGE COMMISSION'S FIRST AMENDED APPLICATION FOR AN ORDER COMPELLING COMPLIANCE WITH ADMINISTRATIVE SUBPOENAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

Applicant, the United States Securities and Exchange Commission ("SEC"), respectfully requests that this Court compel respondent Navistar International Corp. ("Navistar") to produce certain documents that Navistar improperly has redacted and withheld as privileged in response to SEC investigative subpoenas.

The SEC staff is conducting an investigation to determine whether Navistar and others may have violated the federal securities laws by making false or misleading statements or material omissions, including in Navistar's public filings with the SEC. The current focus of the SEC's investigation relates to statements made by Navistar and others regarding Navistar's efforts to obtain a certificate of conformity ("Certificate") from the U.S Environmental Protection Agency ("EPA") (certifying that Navistar's engines complied with certain provisions of the Clean Air Act). The SEC is conducting its investigation through its Chicago Regional Office, based in this District. Navistar is a publicly traded company based in Lisle, Illinois. The SEC's investigation is ongoing; neither the SEC nor its staff has concluded that any person or entity has engaged in wrongdoing.

The SEC has issued various investigative subpoenas to Navistar from 2012 through the present. The focus of the SEC's subpoenas since May 2013 has related to Navistar's EPA certification efforts, while the SEC's earlier subpoenas related to other matters.

The SEC has also issued subpoenas to the firms of ASGK Public Strategies ("ASGK"), Alston & Bird LLP ("Alston & Bird"), Mayer Brown LLP ("Mayer Brown"), and Williams & Jensen, each of which performed lobbying and/or communications-related services (collectively, the "Lobbying and Communications Firms") to Navistar. The SEC's subpoenas to these firms requested information about the nature of their work for Navistar and about their

communications with Navistar and others concerning their work. This information bears directly on whether Navistar's understanding of the progress of its efforts to obtain EPA certification, as reflected in its lobbying efforts and its communications with others, was consistent with its public statements regarding this issue.

In response to the SEC's subpoenas to the Lobbying and Communications Firms, Navistar, as the Lobbying and Communications firms' client, determined which of their documents would be redacted and withheld as privileged, and prepared privilege logs provided to the SEC on behalf of the Lobbying and Communications Firms.[1]

Navistar has produced many thousands of documents in response to the SEC's subpoenas, but it also has redacted and withheld thousands more documents based on the attorney-client privilege and work product doctrine. Navistar has provided the SEC with privilege logs for most, but not all, of the documents Navistar has redacted and withheld as privileged.

The SEC has not challenged many of Navistar's privilege assertions. Among other things, the SEC generally is not challenging Navistar's privilege assertions over communications directly involving Navistar's attorneys, acting in a legal capacity, where the attorneys were the senders or primary recipients of the communications. But many of Navistar's other privilege assertions appear plainly to be incorrect based on the applicable law governing privilege claims, based on Navistar's descriptions of redacted and withheld documents, and based on the SEC staff's review of documents that Navistar clawed back on privilege grounds after the staff already had reviewed the supposedly privileged materials.

[1] As part of the SEC's request that the Court conduct an *in camera* review of the documents that Navistar has redacted and withheld from the Lobbying and Communications Firms' productions, the SEC will provide the Court with copies of the privilege logs provided to the SEC for the Lobbying and Communications Firms.

Many of Navistar's assertions of the attorney-client privilege and work product doctrine in support of its redactions and withholding of documents fall into three broad categories: (1) documents involving the Lobbying and Communications Firms; (2) communications involving only non-attorneys, including non-attorney notes; and (3) draft SEC filings and communications regarding those filings. While it appears that Navistar improperly has asserted privilege over thousands of documents, the SEC is attempting to narrow the dispute before the Court by focusing on those documents that appear most important to the SEC's investigation, as well as documents that implicate privilege issues common to many of Navistar's privilege claims.

None of the documents falling into these three categories were prepared in anticipation of litigation, and, therefore, the work product doctrine does not apply. Further, none of the documents involve the seeking or giving of legal advice, and therefore the attorney-client privilege does not protect the documents either. Even if the attorney-client privilege would protect the documents from disclosure, Navistar has waived the privilege over many of the documents as to which it claims privilege. Navistar has waived the privilege by sending certain of the documents to third-parties, such as the Lobbying and Communications Firms.

The SEC now asks the Court to conduct an *in camera* review of documents that Navistar improperly has redacted and withheld involving the Lobbying and Communications Firms, communications involving only non-attorneys, and draft SEC filings and communications regarding those filings.[2] Because these documents are not privileged, the Court should order Navistar to produce them after the Court conducts its *in camera* review.

[2] It appears that there is significant duplication in Navistar's privilege logs. For example, Navistar has made separate privilege log entries for different copies of a single email, contained in various email strings in the electronic mailboxes of various custodians. The SEC is not requesting that the Court conduct an *in camera* review of duplicate versions of documents that Navistar has redacted and withheld. When taking duplication into account, the SEC estimates that it is requesting that the Court conduct an *in camera* review of several hundred documents.

I. Facts

A. The SEC's Investigation

In July 2012, the SEC issued a Formal Order captioned *In the Matter of Navistar Corp.*, SEC File No. C-7947-A. (Declaration of Robert J. Burson, submitted herewith, ¶ 4) The Formal Order designates and empowers certain members of the SEC's staff as officers of the SEC to, among other things, subpoena witnesses for testimony, compel their attendance, gather evidence and require the production of materials relevant to the investigation. (*Id.)*

This investigation concerns the activities of Navistar, a manufacturer and marketer of integrated mid-range and heavy-duty diesel engines and trucks. (*Id.)* Pursuant to this investigation, the SEC seeks, among other things, information regarding whether Navistar and its representatives have engaged in violations of the antifraud provisions of the federal securities laws, Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. (*Id.)*

B. Navistar's Responses to the SEC's Subpoenas and Its Privilege Claims

In response to the SEC's subpoenas to Navistar, Navistar has produced hundreds of thousands of pages of documents, but it has also redacted and withheld many thousands of pages more as privileged. (Burson Decl., ¶ 10) In a May 2014 letter to the SEC, Navistar's counsel advised that as of that date, Navistar had produced privilege logs[3] itemizing more than 2,500 redactions and withheld documents and expected to log an additional 3,500 redactions and withheld documents. (*Id.)* In a July 2014 letter, Navistar's counsel advised that as of that date, Navistar had withheld an additional 983 documents sent between Navistar and its outside counsel that Navistar had not logged on a privilege log. (*Id.)* Subsequent to this letter, Navistar

[3] As part of the SEC's request that the Court conduct an *in camera* review of certain documents that Navistar has redacted and withheld, the SEC will provide the Court with copies of the privilege logs provided by Navistar for documents relating to engine certification issues.

produced several additional privilege logs to the SEC itemizing several hundred additional redactions and withheld documents. Many of Navistar's assertions of the attorney-client privilege fall into three broad categories:

1. Navistar's Privilege Claims Over Communications Involving Only Non-Attorneys

The majority of communications that Navistar has redacted and withheld as privileged in response to the SEC's subpoenas are communications involving only non-attorneys, including non-attorney notes. Even though the communications involve only non-attorneys, Navistar has claimed privilege over the communications – usually asserting both the attorney-client privilege and the work product doctrine – by claiming that the communications "memorialize," "reflect," or "reflect material memorializing" a communication to or from an attorney. (*See, e.g.*, 11-5-14 Withheld Documents Privilege Log, Entry Nos. 76-79, 81-84; 11-10-14 Withheld Documents Privilege Log, Entry No. 6; 11-10-14 Redacted Documents Privilege Log Entry Nos. 1-9, 12-16) Using this rationale, Navistar has redacted and withheld thousands of communications involving only non-attorneys.

The SEC acknowledges that, as a general principle, communications involving only non-attorneys can be privileged under some circumstances. But Navistar's privilege claims are unusual in that the majority of its many thousands of privilege claims apply to documents that no attorney has wrote, sent, or received.

In April 2014, Navistar's counsel wrote to the SEC staff identifying 56 documents that Navistar asserted had inadvertently been produced despite being protected by privilege. Navistar requested that the SEC immediately destroy all of these documents and return them to Navistar. The SEC staff responded that the staff had already reviewed some of these documents. The SEC staff agreed to destroy any of these documents that the staff had not

already reviewed or where the staff agreed with Navistar's privilege claims, but as to the remainder, the SEC staff agreed to sequester them and not use them in the investigation, except to the extent such use was necessary to resolve privilege disputes and until any such privilege disputes were resolved.[4] To assess Navistar's privilege claims over the documents the SEC staff already had reviewed, the SEC re-reviewed these documents. None of the senders or recipients of these documents were attorneys. The staff concluded that few of Navistar's privilege claims with respect to those documents were valid. This assessment informed the SEC's view of Navistar's privilege claims regarding other documents involving only non-attorneys.

2. **Navistar's Privilege Claims Over Communications Involving Lobbying and Communications Firms**

Navistar has redacted and withheld as privileged hundreds of communications involving the Lobbying and/or Communications Firms of ASGK, Mayer Brown, Alston & Bird, and Williams & Jensen, although Navistar's approach has varied somewhat within this group of firms. (Burson Decl., ¶ 11) In response to the SEC's subpoenas to the firms of ASGK and Williams & Jensen, Navistar asserted privilege over approximately 163 documents and 38 documents, respectively, and permitted ASGK and Williams & Jensen to produce a significant number of documents to the SEC without privilege claims. With respect to the SEC's subpoenas to Alston & Bird, Navistar withheld as privileged all substantive communications between Navistar and Alston & Bird, and among Alston & Bird lawyers and non-lawyers, as

[4]Various authorities permit a party who reviews a document prior to a privilege being asserted over the document to use the document in an effort to resolve a privilege dispute. *See, e.g., U.S. Home Corp. v. Settlers Crossing, LLC*, 2012 WL 5193835 at *5 (D. Md. Oct. 18, 2012) ("It would be wholly illogical to read Rule 26(b)(5)(B) as prohibiting the use of documents 'subject to a claim of privilege' when resolving that very claim of privilege."); *cf.* Ill. State Bar Ass'n Opinion on Professional Conduct No. 98-04 (January 1999) (it is "unrealistic" for a receiving lawyer to "unring the bell" and ignore material information that has been received and reviewed in good faith.)

well as notes created by Alston & Bird, collectively withholding approximately 316 documents. Navistar permitted Alston & Bird to produce communications between Alston & Bird and third-parties (mostly public officials and their staffs) in unredacted form. With respect to the SEC's subpoena to Mayer Brown, Navistar has withheld virtually all substantive documents involving Mayer Brown, totaling approximately 193 documents. (*See* ASGK, Williams & Jensen, Alston & Bird, and Mayer Brown Privilege Logs)

In November 2014, the SEC staff determined that the ASGK and Williams & Jensen document productions contained certain documents in unredacted form that Navistar simultaneously had redacted and withheld as privileged in other productions in response to SEC subpoenas. The SEC staff alerted Navistar's lawyers to this issue, and Navistar responded by asserting privilege over most of these documents and demanding that the unredacted documents be destroyed. The SEC staff sequestered these documents. Having already reviewed the portions of these documents that Navistar claimed to be privileged, the SEC staff re-reviewed the documents to assess Navistar's privilege claims. The staff believes none of Navistar's privilege claims with respect to these documents are valid. This assessment informed the SEC's view about Navistar's assertion of privilege over other documents involving the Lobbying and Communications Firms.

3. Navistar's Privilege Claims Over Draft SEC Filings

Navistar also has redacted and withheld certain draft SEC filings and communications regarding those filings, mostly on the grounds of both the attorney-client privilege and work product doctrine. As a result, Navistar has redacted and withheld draft language in Navistar's SEC filings relating to Navistar's efforts to obtain a certification from the EPA, which is part of the focus of the SEC's investigation. Mostly non-attorneys were involved in the

communications relating to SEC filings that Navistar has redacted and withheld.

C. Efforts to Resolve Disputes Over Navistar's Privilege Claims

Over many months, the SEC staff repeatedly has attempted to resolve its disputes with Navistar over Navistar's privilege claims. (Burson Decl., ¶ 12) In addition to several telephone conversations and in-person discussions in which SEC staff questioned Navistar's privilege assertions, on August 8, 2014, the SEC wrote a detailed letter to Navistar's counsel outlining the SEC's challenges to many of Navistar's privilege claims. (*Id.)* The SEC followed with a second letter to Navistar dated August 28, 2014, which focused on Navistar's privilege claims over certain of the Lobbying and Communications Firms' documents responsive to the SEC's subpoenas. On September 24, 2014, the SEC staff conducted a meet-and-confer session in the office of Navistar's counsel in an effort to resolve the privilege disputes. (*Id.)* Subsequent to this meeting, the SEC staff continued to communicate with Navistar's counsel by telephone and email in an effort to resolve the parties' disputes over Navistar's privilege claims. (*Id.)*

These efforts narrowed, but did not resolve fully, the privilege disputes between the SEC and Navistar. Prior to filing this subpoena enforcement action, Navistar agreed to withdraw its claims of attorney-client privilege over documents provided by Navistar to its independent auditor, KPMG, LLP. Additionally, Navistar agreed to revise or eliminate redactions on approximately 264 additional documents, approximately 65 of which were produced without any redactions. (*Id.)* After the SEC originally filed this subpoena enforcement action in December 2014 and before the SEC filed its First Amended Application, Navistar changed or withdrew its privilege claims on a number of additional documents. But even after Navistar's changes to its privilege claims, many documents remain in dispute. (*Id.)* Because the parties' attempts to resolve their disputes without court action did not substantially eliminate the parties' disputes,

and because the documents redacted and withheld by Navistar are relevant and important to the SEC's investigation, the SEC staff notified Navistar that the SEC would file this Application. (*Id.)*

D. Facts Relating to Navistar's Efforts to Obtain a Certificate of Conformity from the EPA[5]

The SEC's Application is directed at Navistar's improper assertion of privilege over documents relating to Navistar's efforts to obtain a Certificate from the EPA, and Navistar's disclosures regarding the status of those efforts. The SEC provides some factual background regarding these efforts below.

1. The EPA Enacts a 0.2 NOx Standard for Heavy-Duty Diesel Engines

As a manufacturer of heavy-duty diesel engines, Navistar must obtain a Certificate from the EPA each year for each type of engine that Navistar sells. A Certificate from the EPA confirms that the engine meets the Clean Air Act standards.

In 2001, pursuant to the Clean Air Act, the EPA enacted a rule requiring a 95 percent reduction in the emissions of nitrogen oxide ("NOx") from heavy-duty diesel engines by 2010. Under this rule, new engines were to emit NOx at a rate of no more than 0.2 grams of nitrogen oxide per horsepower hour ("0.2 NOx") by 2010 (the "0.2 NOx standard").

2. Navistar Develops an "EGR" Technology Different from Its Competitors

To comply with the 0.2 NOx standard, Navistar's competitors opted to develop a technology called selective catalytic reduction ("SCR"). SCR technology controls NOx

[5] The facts set forth in this section generally are derived from: (1) the D.C. Circuit's opinion in *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012); (2) the April 9, 2012 Declaration of Patrick E. Charbonneau filed by Navistar (attached hereto as Exhibit A) in support of its Brief as Intervenor in the *Mack Trucks* litigation in the D.C. Circuit; (3) Judge Ellis' opinion in the class action lawsuit captioned *Construction Workers Pension Fund – Lake County and Vicinity v. Navistar International Corp.*, 2014 WL 3610877 (N.D. Ill. July 22, 2014); and (4) Navistar's Memoranda in Support of its Motions to Dismiss the *Construction Workers Pension Fund* class action. (Dkt. Nos. 100, 133 in Case No. 13 C 2111 (N.D. Ill.)).

emissions in the exhaust stream by using a special after-treatment system and a diesel-based chemical agent. Using SCR, Navistar's competitors had obtained Certificates from the EPA by 2010 indicating that the engines manufactured by these companies met the 0.2 NOx standard.

Navistar, however, chose a different path from its competitors to try to meet the 0.2 NOx standard. Instead of using SCR technology, Navistar opted to develop exhaust gas recirculation ("EGR")-only technology. EGR-only technology reduces NOx emissions in the combustion chamber by re-circulating a portion of an engine's exhaust back into the engine's cylinders. Because EGR-only technology is designed to result in clean-burning engines, the technology does not depend on other emission related components, such the after-treatment system employed in SCR technology, to reduce emissions.

3. **Navistar Relies On Emissions Credits to Sell Engines While It Attempts to Obtain EPA Certification**

Navistar used EGR-only technology to reduce NOx emissions in several EPA-certified engines, including an engine that the EPA certified in 2010. However, Navistar was unsuccessful in using EGR-only technology to obtain a Certificate for an engine that met the 0.2 NOx standard.

Because Navistar was unable to develop EGR-only technology sufficiently to obtain a Certificate for an engine meeting the 0.2 NOx standard, all else being equal, Navistar would have been unable to sell certain engine families in the United States at some point in 2010. However, prior to 2010, Navistar had produced engines whose emissions were cleaner than required by the EPA. This allowed Navistar to generate a "bank" of EPA credits, which, under the EPA's emissions credits system, Navistar was allowed to use so it could continue to sell certain engine families even though those engine families had not met the 0.2 NOx standard. In 2010 and 2011, Navistar continued to use these banked emissions credits legally to allow the sale of certain

engine families that did not meet the 0.2 NOx standard.

In the meantime, Navistar continued to try to develop the EGR-only technology and obtain a Certificate for an engine that could meet the 0.2 NOx standard. In February 2011, January 2012, and May 2012, Navistar submitted applications to the EPA for certification at 0.2 NOx for one of its engine families. According to Navistar, from 2001 through 2012, Navistar devoted tens of thousands of employee hours and approximately $700 million in the development of its EGR-only technology. (*See* Ex. A, 4-9-12 Declaration of Patrick Charbonneau in *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012), at ¶ 13).

4. As Navistar Begins to Run Out of Emissions Credits, The EPA Passes an Interim Final Rule Regarding Nonconformance Penalties

As time passed, Navistar depleted its banked emissions credits by selling engines that did not meet the 0.2 NOx standard. In October 2011, Navistar informed the EPA that it would run out of emissions credits sometime in 2012.

The EPA, estimating that Navistar might have as little as three to four months of credits remaining, promulgated an Interim Final Rule ("IFR") on January 31, 2012 aimed at facilitating Navistar's continued sale of certain engine families that did not meet the 0.2 NOx standard. The IFR made nonconformance penalties ("NCPs") available to Navistar and permitted it to sell heavy-duty diesel engines in model years 2012 and 2013 as long as it paid a penalty of $1,919 per engine and as long as the engines emitted fewer than 0.5 grams of nitrogen oxide per horsepower hour ("0.5 NOx").[6]

Shortly after the EPA promulgated the IFR, Navistar's competitors sued the EPA over the IFR, claiming that the EPA lacked the requisite good cause to forego notice and comment procedures with respect to the IFR and that the EPA erroneously determined through the IFR that

[6] Significantly, however, the California Environmental Protection Agency and the environmental protection agencies of nine other states did not allow the use of NCPs to satisfy emissions standards.

NCPs should be available to Navistar. Navistar intervened in the lawsuit on behalf of the EPA. In June 2012, the D.C. Circuit vacated the EPA's IFR. *See Mack Trucks, Inc. v EPA*, 682 F.3d 87 (D.C. Cir. 2012).

5. Navistar Retains ASGK as a Consultant for Public Affairs and Related Matters

In May 2012, Navistar retained ASGK, a firm co-founded by David Axelrod, a former White House Senior Adviser, and Eric Sedler, a former adviser to Illinois House Speaker Michael Madigan. Navistar retained ASGK to perform services relating to Navistar's efforts to obtain a Certificate from the EPA. It appears that Navistar and ASGK first began discussing Navistar's possible retention of ASGK in April 2012. According to ASGK's public website, ASGK's services include public affairs, corporate communications, coalition management and stakeholder engagement, media and public relations, brand management, and crisis communications. (Ex. B, ASGK Website Excerpt)

According to an internal ASGK email early in the period of its Navistar engagement, in May 2012, Navistar was "in the midst of a crisis at EPA right now related to certification of their zero-emissions engine." (*See* Ex. C, 5-11-12 email Cantillon to DeAngelis) According to the email, ASGK's statement of work for the engagement included generating: (1) a list of "third-party organizations that can be activated to either put pressure on EPA or provide political cover for certification;" (2) a "media plan;" (3) Navistar "plant/facility host community activation;" and (4) "[w]ork on messaging materials." (*Id.*) The email noted that "Patrick [Charbonneau] of Govt Relations [at Navistar] is leading the crisis effort which [has] involved mostly lobbyists." (*Id.*)

As part of its work for Navistar, ASGK produced several iterations of an "issue management plan," the purpose of which was "to facilitate a clear-decision making infrastructure

of help Navistar manage a potentially high-profile and damaging issue." (*See* Ex. Y, 5-25-12 email Adler to Cantillon, Spangler, Culloton, and Denning, with attachment, at ASGK-NAV-E-00003150) In a May 25, 2012 version of the issue management plan that ASGK sent to Navistar's public relations personnel, ASGK proposed to help Navistar to develop a "communications strategy [that] will closely mirror its business strategy with the goal of obtaining one or two desired outcomes." (*Id.* at ASGK-NAV-E-00003152) These two desired outcomes were that either "Navistar receives .2 NOx engine certification from the EPA" or that "Navistar continues working with the EPA and has a clear path to engine certification that can be made public and will occur in a timely manner (before Navistar's stock of pollution credits is depleted.") (*Id.)* ASGK told Navistar that "we will communicate with policymakers, the media and stakeholders about what this case is all about and what's fully at risk." (*Id.*) ASGK described the ASGK employees who would be working on the assignment as fulfilling a "communications" role for Navistar. (*Id.* at ASGK-NAV-E-00003152-53)

Navistar's Vice-President of Government Relations, Patrick Charbonneau ("Charbonneau") (the head of Navistar's government relations department in 2012), testified that he hired ASGK as a lobbyist, though he modified that testimony after his attorneys objected. (*See* Ex. D, 12-9-14 Charbonneau Test. at 40:23-42:8; 12-10-14 Charbonneau Test. at 408:14-409:13) Charbonneau testified that Navistar hired ASGK to communicate with the EPA and with staff members of political offices Navistar interfaced with (*id.* at 43:1-11) and to reach out to the White House regarding the "uneven playing field," in Navistar's view, between Navistar and its competitors in terms of the EPA's treatment of engine certification issues. (*Id.* at 46:11-22)

6. Navistar Hires Law and Lobbying Firm Williams & Jensen

At some point prior to 2012, Navistar retained the Washington law and lobbying firm of Williams & Jensen to assist it with various matters. According to Williams & Jensen's public website, Williams & Jensen has "over four decades of law & lobbying experience" and is "one of the few independent law firms in Washington with a practice focused primarily on lobbying." (*See* Ex. E, Williams & Jensen Website Excerpt) Williams & Jensen employs lawyers and non-lawyers as lobbyists. The individual who appears to have been principally responsible for Williams & Jensen's work for Navistar, Michael Beer, is not a lawyer and no longer works at Williams & Jensen. But according to his new firm's public website, he is one of "a team of 6 lobbyists with more than eight decades of Washington lobbying experience, and with a total of more than 100 years of directly relevant Washington experience in the Administration, in Congress, and in the campaign world." (*See* Ex. F, Alignment Government Strategies Website Excerpt)

Among other things, in 2012 Williams & Jensen was involved in lobbying for Navistar to try to influence the EPA to issue a Certificate to Navistar for the 0.2 NOx emissions standard. For example, in a May 2012 email to members of Navistar's governmental relations department, Beer suggested that, among others, Governor Quinn, Senator Durbin, and Senator Sherrod Brown of Ohio serve as the public officials to "carry" Navistar's "ask" of getting the EPA to issue a Certificate to Navistar. (*See* Ex. G, 5-15-12 email Beer to Gelb and Sheahan) Beer also suggested that other members of the U.S. Senate could weigh in on the effort to persuade the EPA to issue a Certificate. (*Id.*) In another series of May 2012 emails, Beer and a member of Navistar's governmental relations department communicated with Senator Brown's office about the EPA certification issue, with Beer describing the issue as being as important "as the company has had in the last ten years." (*See* Ex. H, 5-10-12 email string Gelb, Beer, Slevin, McCracken

and 5-11-12 email string McCracken, Beer)

Charbonneau, Navistar's Vice-President of Government Relations, testified that Navistar worked with Beer and Williams & Jensen on issues relating to the "uneven playing field," in Navistar's view, between Navistar and its competitors, including reaching out to politicians and their staff members about these issues. (*See* Ex. D, 12-9-14 Charbonneau Test. at 45:13-46:3) He also testified that in the past he had referred to Beer and Williams & Jensen as lobbyists on engine certification issues, adding that the "general term lobbyist is for these type of companies that can do lobbying but they aren't necessarily doing lobbying for all these – the topics that I'm talking about." (*Id.* at 408:14-409:13)

7. Navistar Retains Alston & Bird for Lobbying Services

In approximately 2011, Navistar retained the law and lobbying firm of Alston & Bird LLP for a fixed fee of $25,000 per month. (*See* Ex. I, 3-10-11 Letter Jones to Ustian) Although Alston & Bird is a large firm that employs lawyers who provide legal services, Alston & Bird also employs lawyers and non-lawyers in its Legislative and Public Policy Group. According to Alston & Bird's public website, the firm's Legislative and Public Policy group is "a team that is consistently recognized as one of the top lobbying firms in the country." (*See* Ex. J, Alston & Bird Website Excerpt for William B. Anaya) The team of Alston & Bird lawyers and non-lawyers who provided services to Navistar appears to have been part of the firm's Legislative and Public Policy Group. The team included former U.S. Senate Majority Leader and former Republican Presidential nominee Bob Dole (*see* Ex. K, 5-11-12 email Dole to Jarrett), former U.S. Senator Blanche Lincoln (a non-lawyer who is no longer with Alston & Bird), and former U.S. Senate Agriculture Committee staff member Robert Holifield (also a non-lawyer who is no longer with Alston & Bird). (*See* Ex. L, 5-31-12 email Anaya to Jones, Tauzin, Lincoln,

Holifield; Ex. M, Lincoln Policy Group Website Excerpt).

In investigative testimony before the SEC staff, Navistar's Director of Government Relations, Brien Sheahan, described the Alston & Bird lawyers and non-lawyers working for Navistar as "lobbyists." (*See* Ex. N, 6-6-14 Sheahan Test. at 100:14-16 ("Q: Who is Bill Anaya? A: He's a lawyer and a contract lobbyist with Alston & Bird, who was working on this."); 117:3-5 ("Q: Billy Tauzin? A: Former member of Congress and a lobbyist at Alston & Bird.")) Similarly, ASGK's draft Issue Management Plans for Navistar described Billy Tauzin and Alston & Bird as Navistar's "Outside Lobbying Partners." (*See* Ex. Y at ASGK-NAV-E-00003152)

Consistent with this description, Alston & Bird's documents produced to the SEC and not withheld as privileged by Navistar show that Alston & Bird's efforts were focused on lobbying officials within the EPA, White House, Congress, and the office of the Illinois Governor to influence the EPA to certify a 0.2 NOx engine for Navistar. For example:

- In early May 2012, Alston & Bird's Bob Jones emailed EPA Chief of Staff Diane Thompson about "the urgency of the issue facing my client, Navistar" and urging that "EPA leadership become involved in a certification matter today or tomorrow, latest." (*See* Ex. O, 5-10-12 email Jones to Thompson) Jones told Thompson that an adverse decision from the EPA on certification would have "major effects on the company's labor force, suppliers, and dealers" and asked Thompson and other senior EPA leadership to re-engage on the certification issue. (*Id.*)
- The next day, Alston & Bird's Dole emailed Valerie Jarrett, a senior adviser to President Obama, with similar language to Jones' email to Thompson from the

EPA. (*See* Ex. K, 5-11-12 email Dole to Jarrett) Dole told Jarrett that Navistar was requesting "that EPA certify its heavy-duty engines to the .2 NOx standard and "[w]e think it is essential that the EPA certification office have an appropriate amount of involvement from leaders within the Administration." (*Id.*)

- A few days later, in May 2012, Bob Jones of Alston & Bird engaged in an email exchange with another White House official, Michael Strautmanis, telling Strautmanis that although "no adverse decision was rendered by EPA staff yesterday," the "need for a win-win resolution continues in earnest." (*See* Ex. P, 5-15-12 email Jones to Strautmanis) Jones asked Strautmanis "whether there is anything more that would be helpful to you and the Administration during the consideration of this vital matter." (*Id.*)
- In June 2012, Alston & Bird's Bill Anaya engaged in an email exchange with Senator Durbin's staff noting that a Navistar executive was "personally meeting with [senior official] Margo Oge at the EPA on Monday to discuss the certification issue." Anaya suggested that "perhaps Governor Quinn could touch base with [then-EPA] Administrator Jackson and his staff could contact [EPA official] Ms. [Margo] Oge." (*See* Ex. Q, 6-15-12 email Anaya to Souders) Anaya asked Senator Durbin's staff whether "your office would be willing to ask Governor Quinn's team to engage in this way and also whether you and your staff could also share a similar perspective with EPA." (*Id.*)

Charbonneau indicated in testimony that Navistar hired Alston & Bird as lobbyists for Navistar. (*See* Ex. D, 12-9-14 Charbonneau Test. at 40:5-40:16; 12-10-14 Charbonneau Test. at 408:14-409:13) He also testified that Navistar had Alston & Bird "engage in the communication

of the level playing field on the certifications of [competitors'] SCR [engines] versus the certifications of Navistar at .2 [NOx]." (*Id.* at 50:7-15) Charbonneau testified that Billy Tauzin and Bill Anaya were Navistar's main contacts at Alston & Bird. (*Id.* at 50:20-22) He testified that Navistar had Alston & Bird reach out to politicians regarding the uneven playing field, in Navistar's view, surrounding the EPA's treatment of Navistar versus its competitors. (*Id.* at 51:6-12)

In mid-June 2012, Charbonneau engaged in an email exchange with Daniel Ustian, Navistar's then-CEO, and told Ustian "we will arrange a call for Friday with lobbyists." (Ex. R, 6-12-12 emails between Charbonneau and Ustian) The next day, Charbonneau's assistant arranged for a call for that Friday with Alston & Bird – presumably among the "lobbyists" Charbonneau had referred to in his email exchange with Ustian. (Ex. S, 6-12-12 to 6-13-12 emails between Anaya, Davalos, and others)

In 2011 and 2012, Alston & Bird registered as a lobbyist for Navistar under the federal Lobbying Disclosure Act of 1995 ("LDA"). (*See* http://disclosures.house.gov/lc/lcsearch.aspx) In the second and third quarters of 2012, Alston & Bird disclosed that it engaged in lobbying Congress, the EPA, and the White House for Navistar on subject matters including "[i]ssues related to domestic manufacturing activities & engine certification." (*See* Ex. T, Alston & Bird Lobbying Reports for Q2 2012 and Q3 2012) Alston & Bird's lobbyist disclosure forms identified Robert Jones, Bill Anaya, and Billy Tauzin as individual Alston & Bird lobbyists for Navistar on these issues. (*Id.*)

8. Navistar Also Retains Tyrone Fahner of Mayer Brown as a Lobbyist

In approximately 2012, Navistar retained Tyrone Fahner of the Mayer Brown firm. Fahner is a former elected public official, having served as the Illinois Attorney General from

1980-1983. Fahner remains politically active; for example, in recent years, he has served as the chairman of the Illinois Republican Party's Finance Committee and as the Illinois finance co-chair and national fundraiser for Mitt Romney's 2012 presidential campaign. (*See* Ex. U, 9-7-08 Article Crain's Chicago Business; Ex. V, 6-16-12 Article Chicago Sun-Times).

Sheahan testified that Fahner worked as a lobbyist for Navistar. (*See* Ex. N, 6-6-14 Sheahan Test. at 32:21-33:3 ("Q: Who was responsible for communicating with the White House regarding the .2 NOx certification effort from government relations? A: The initial contact with [Valerie] Jarrett I believe occurred through Ty Fahner, who was a lawyer and a lobbyist at Mayer Brown. He was on the team as a contract lobbyist.")).

Likewise, Charbonneau testified that he hired Fahner as a lobbyist to engage with politicians or the EPA regarding Navistar's 0.2 NOx certification application, though he modified that testimony after his attorneys prompted him to do so. (*See* Ex. D, 12-9-14 Charbonneau Test. at 40:23-42:8; 12-10-14 Charbonneau Test. at 408:14-409:13) He also testified that "Ty Fahner arranged and engaged with us at the EPA with a meeting with [current EPA Administrator and then-Assistant EPA Administrator] Gina McCarthy and some members of her staff" regarding EPA certification. (*Id.* at 46:23-48:11)

Consistent with Charbonneau's testimony, one of the few substantive documents that Navistar has produced regarding Fahner indicates that Fahner was engaged in lobbying on behalf of Navistar. In the document, an email from Charbonneau to Troy Clarke, Navistar's current CEO, Charbonneau recounted a January 23, 2012 meeting involving Fahner and Navistar executives and EPA officials. (*See* Ex. W, 6-27-12 email Charbonneau to Clarke) In this email, Charbonneau told Clarke that the meeting had been cordial and that "I believe our political pressure through Valerie Jarrett to EPA Administrator to Gina [McCarthy] helped make this

conversation more positive." (*Id.*) Documents listed on Mayer Brown's privilege log with dates prior to January 23, 2012 describe Fahner's "communications with the White House" over EPA-related issues (*see* Mayer Brown Privilege Log Entry Nos. 102-103, 82-83), suggesting that Fahner was part of Navistar's effort to put "political pressure" on the EPA through the White House. Indeed, Charbonneau testified that Fahner communicated with Jarrett regarding "leveling the playing field" in terms of the EPA's treatment of Navistar versus its treatment of Navistar's competitors. (Ex. D, 12-10-14 Charbonneau Test. at 252:13-254:8)

Further, most of the document descriptions drafted by Navistar in Mayer Brown's privilege log suggest that the withheld documents relate to lobbying activities, not providing legal advice. Many of these descriptions state that the withheld documents are communications regarding "the status of communications with the White House," (e.g., Mayer Brown Privilege Log Entry Nos. 57, 102-03), the "status of discussions with the EPA" (*id.* at Entry Nos. 8-16), the "status of discussions with the EPA and the White House" (*id.* at Entry Nos. 26-29), or "the status of discussions with Senator Durbin's Office and the White House." (*Id.* at Entry Nos. 30, 32) These descriptions indicate Fahner's involvement in lobbying public officials to pressure the EPA to issue a Certificate to Navistar, not involvement predominately in legal work.

9. **Navistar Shifts Its Strategy to Adopt SCR Technology**

Navistar's lobbying efforts relating to engine certification ultimately were unsuccessful. The EPA did not give Navistar a Certificate for the 0.2 NOx standard in response to any of Navistar's applications using its EGR-only technology.

In July 2012, Navistar announced a change to its emissions strategy, stating that it would begin using SCR technology as part of its emissions strategy and that it was withdrawing its application pending before the EPA for certification of a 0.2 NOx engine using EGR-only

technology. In 2013, Navistar obtained an EPA Certificate for a 0.2 NOx engine that relied in part on SCR technology, some of which it had purchased from one of Navistar's competitors.

II. ARGUMENT

Navistar's improper privilege claims are impacting the SEC staff's investigation to determine what, if any, violations of the securities laws have occurred. Therefore, the SEC now asks this Court to compel Navistar to produce documents that Navistar improperly has redacted and withheld as privileged.

A. This Court is Empowered to Grant the Relief Sought

As a threshold matter, it is well-established that this Court has jurisdiction and the authority to compel Navistar to comply with the SEC's subpoenas. Section 22(b) of the Securities Act and Section 21(c) of the Exchange Act give district courts jurisdiction over subpoena enforcement actions. *See* 15 U.S.C. § 77v(b); 15 U.S.C. § 78u(c). The SEC is permitted to commence subpoena enforcement actions upon application in any jurisdiction.[7] Courts have previously awarded relief to the SEC in subpoena enforcement actions in a variety of contexts, *see, e.g., SEC v. Shanahan*, 504 F. Supp. 2d 680 (E.D. Mo. 2007) (subpoena enforcement action to compel respondent to either produce documents and testify or assert the Fifth Amendment privilege), including a subpoena enforcement action brought to compel

[7] Although this subpoena enforcement action concerns non-parties ASGK, Alston & Bird, Mayer Brown, and Williams & Jensen, in addition to Navistar, the SEC and Navistar are the only necessary parties to this action. Navistar has asserted control over these non-parties' privilege claims by deciding which documents from these productions would be redacted or withheld as privileged. *See DeGeer v. Gillis*, 755 F. Supp. 2d 909, 924 (N.D. Ill. 2010) (client had control over law firm's database); *Ivy Hotel San Diego, LLC v. Houston Casualty Co.*, 2011 WL 4914941 at *9-*10 (S.D. Cal. 2011) (client had control of law firm's client files); *Cf. Hobley v. Burge*, 433 F.3d 946 (7th Cir. 2006) (noting that law firm had independent privacy interest in work product documents where client had not attempted to exercise control over privilege claims). Conversely, these non-parties have ceded any control they might otherwise have had over privilege claims by permitting Navistar to determine the documents over which privilege claims would be asserted.

production of documents withheld on the basis of the attorney-client privilege and work product doctrine. S*ee SEC v. Chesnoff*, 2006 WL 2052371 (N.D. Tex. July 18, 2006).

B. The Attorney-Client Privilege and Work Product Doctrine Are Narrowly Construed

Because documents and information that are redacted and withheld on the basis of the attorney-client privilege and work product doctrine are "in derogation of the search for the truth," courts narrowly construe the privilege. *U.S. v Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997); *see also Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 135 (N.D. Ill. 1993) ("As the attorney-client and work product privileges obscure the search for the truth, they are both narrowly construed by courts..."); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 260 (N.D. Ill. 2000) ("Like the attorney-client privilege, the work product doctrine significantly restricts the scope of discovery and must be narrowly construed in order to aid in the search for truth."). As the party seeking to assert the privileges, Navistar bears the burden of establishing "all the essential elements" of each privilege claim, and it must do so on a "question-by-question" or "document-by-document" basis. *U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991); *Sprecher v. Graber*, 716 F.2d 968, 973 (2d Cir. 1983) (stating that respondent in SEC enforcement action bears the burden of proving the applicability of the privilege).

C. **The Attorney-Client Privilege Only Applies to Communications Necessary for the Giving or Seeking of Legal Advice**

As one court in this District recently stated:

> It cannot be too strongly emphasized that the lawyer-client relationship, itself, 'does not create a cloak of protection which is draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client.' *In re Carl Walsh*, 623 F.2d 489, 494 (7th Cir. 1980). Thus, merely communicating with a lawyer or copying a lawyer on an otherwise non-privileged communication, will not transform the non-privileged communications or attachment into a privileged one. And that is so even if the otherwise non-

privileged communication was at the behest of a lawyer.

Lee v. Chicago Youth Centers, 2014 WL 2618537 at * 4 (N.D. Ill. June 10, 2014) (citation omitted); *accord Kleen Prods. v. Int'l Paper*, 2014 WL 6475558 at *2 (N.D. Ill. Nov. 12, 2014) (rejecting privilege claims over certain documents involving attorneys and noting that "many of the exemplar documents that were provided to the Court contain no legal advice at all" even where an attorney was a recipient of the document).

With respect to attorney-client communications, the attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege," *In re Carl Walsh*, 623 F.2d 489, 494 (7th Cir. 1980). For the attorney-client privilege to apply, the legal advice must be the "predominant element" in the communication, and the privilege does not apply "where the legal advice is incidental to business advice." *Allendale*, 152 F.R.D. at 137; *see also Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) ("Only where the document is primarily concerned with legal assistance does it come within [the attorney-client and/or work-product] privileges; technical information is otherwise discoverable.").

D. The Work Product Doctrine Only Applies to Documents Created Because of the Prospect of Litigation

In the Seventh Circuit, the test to determine whether materials are protected by the work product doctrine is "whether, in light of the nature of the document and the factual situation in the particular case, the documents can fairly be said to have been prepared or obtained because of the prospect of litigation." *Binks Manufacturing Co. v. Nat'l Presto Indus.*, 709 F.2d 1109, 1119 (7th Cir, 1983). For work product protection to apply, the "primary motivating purpose" behind a document's creation must be to aid in pending or future litigation. *See Rawat v. Navistar Int'l Corp.*, 2010 WL 1417840 at *7-*8 (N.D. Ill. Apr. 7, 2010) (holding that in

connection with a different matter, Navistar improperly asserted work product doctrine over withheld documents). Further, "the mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege; the privilege is not that broad." *Binks*, 709 F.2d at 1118. Even "a plethora of pending law suits as well as on-going law suits" is not substantial enough to establish that documents were prepared in anticipation of litigation and protected by the work product doctrine. *In re Bank One Secur. Litig.*, 209 F.R.D. 418, 425-26) (N.D. Ill. 2002) (documents prepared by bank as the result of a government inquiry arose from the evolution of the bank's business activities and were not protected by the work product doctrine.)

E. Navistar Improperly Has Asserted Privilege Over the Lobbying and/or Communications Firms' Documents

The SEC challenges Navistar's assertion of privilege over each of the documents listed on the Lobbying and Communications Firms' privilege logs, as well as documents on Navistar's own privilege logs relating to communications with these firms. (*See* Entry Nos. 44-45, 55-67 on Navistar's 11/5/14 Privilege Log of Withheld Documents; Entry Nos. 1-3, 12, 14-15 of Navistar's 11/10/14 Privilege Log of Redacted Documents). The SEC requests that the Court order Navistar to provide the Court with all non-duplicative copies of all of these documents in unredacted form for the Court's *in camera* review, and, for redacted documents, to indicate to the Court what portion of each document has been redacted as privileged. The Court should then conclude that these documents are non-privileged and order Navistar to produce them.

1. Neither the Attorney-Client Privilege Nor Work Product Doctrine Applies to Communications Involving Public Affairs and Communications Consultant ASGK

In response to the SEC's subpoena to ASGK, Navistar has redacted portions of 88

documents[8] and entirely withheld an additional 75 documents on privilege grounds. Additionally, Navistar withheld 7 documents in response to the SEC's subpoena to Mayer Brown involving communications with ASGK that ASGK did not produce in response to the SEC's subpoena and that were not listed on ASGK's privilege log. (*See* Mayer Brown LLP Privilege Log Entry Nos. 51-54, 175, 184, 190) Navistar has asserted both the attorney-client privilege and the work product doctrine as to most of the communications involving ASGK, and Navistar has asserted just the work product doctrine as to the remainder.

There is no privilege that applies to documents involving ASGK.

a. **Communications Including ASGK Neither Involve The Giving or Seeking of Legal Advice Nor Were Created in Anticipation of Litigation**

First, because ASGK was acting in a public affairs and communications consulting capacity for Navistar, not in a legal capacity, any communications including ASGK do not involve the seeking or giving of legal advice to Navistar. Accordingly, the attorney-privilege does not apply. *See, e.g., McNamee v. Clemens*, 2013 WL 6572899 at *5-*7 (E.D.N.Y. Sept. 18, 2013) (communications involving public relations firm and sports agency were not necessary for attorney to provide legal advice, and, therefore, were not protected by attorney-client privilege); *In re Prograf Antitrust Litig.*, 2013 WL 1868227 at *2-*3 (D. Mass. May 3, 2013) (communications between company or its outside counsel and public relations firm were not covered by attorney-client privilege); *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 967 (N.D.Ill. 2009) (attorney-client privilege did not apply to communications involving third-party advertising agencies); *Flagstar Bank v. Freestar Bank*, 2009 WL 2706965 at *5-*6 (N.D. Ill. Aug. 25, 2009) (communications involving firm providing branding and marketing services were not covered by attorney-client privilege).

[8] Most of these documents are different copies of a single email that Navistar has redacted, contained in various email strings in the electronic mailboxes of various ASGK custodians.

Likewise, communications involving a public affairs and communications consultant such as ASGK were not prepared in anticipation of litigation, and therefore the work product doctrine is inapplicable to such communications. *See McNamee*, 2013 WL 6572899 at *8 (work product doctrine did not apply to communications that dealt with strategizing about effects of litigation on the media or public generally, as opposed to strategizing about conduct of litigation itself); *Prograf*, 2013 WL 1868227 at *3 (communications involving public relations firms were not work product); *LG Electronics*, 661 F. Supp. 2d at 967 n.3 (work product doctrine did not protect communications with third-party advertising agencies where the communications did not refer to on-going litigation and did not constitute documents prepared in anticipation of litigation).

As an example of Navistar's improper privilege assertions over documents responsive to the SEC's subpoena to ASGK, Navistar asserted both the attorney-client privilege and work product doctrine over a portion of a document that ASGK simultaneously produced in redacted and unredacted form.[9] Navistar redacted as privileged the portion of a May 17, 2012 email from ASGK employee Kathleen Cantillon to several ASGK, Navistar, and other non-attorneys entitled "Next Steps" in which Cantillon stated that Navistar media relations employee Karen Denning would reach out to Navistar lawyer Laurence Levine (who at all relevant times has worked for Navistar under a full-time retainer agreement) about a certain topic. (ASGK-NAV-E-00003568) (part of Entry 43 on Navistar's Redacted Documents ASGK Privilege Log).[10] Because Navistar did not retain third-party ASGK to facilitate the giving or seeking of legal advice or to assist with

[9] The SEC staff alerted Navistar's counsel after discovering the unredacted versions of this document in ASGK's production, and Navistar's counsel responded by asserting that the unredacted versions were privileged and inadvertently produced.

[10] The SEC is not discussing the content of the redacted portion in further detail in this memorandum because of Navistar's claim of privilege. But the document is part of the group of documents that the SEC is requesting the Court review *in camera* and then order Navistar to produce in unredacted form.

litigation strategy, ASGK's discussion of what Denning was planning to discuss with Levine is not protected by either the attorney-client privilege or work product doctrine. Further, the content of the redacted portion of the email is nothing more than a description of the general subject matter of a planned consultation with an attorney, which is not privileged. *See, e.g., Knox Energy v. Gasco Drilling*, 2014 WL 4052806 at *3 (W.D. Va. Aug. 14, 2014) ("The overwhelming authority from around the country is that the subject matter of an attorney-client communication is not privileged."); *In re Mortgage Store*, 509 B.R. 292, 299 (Bankr. D. Haw. 2014) ("Most of the redacted information describes the general subject matter of a communication. This is not privileged and must usually be revealed in a privilege log.")

b. **Navistar Waived Any Privileges on Documents in Which It Included ASGK as a Third-Party Participant**

Second, if Navistar included ASGK on communications that otherwise would be privileged, Navistar waived the privileges by including ASGK as a participant. *See, e.g., Hill v. State Street Corp.*, 2013 WL 6909524 at *3-*5 (D. Mass. Dec. 30, 2013) (company waived attorney-client privilege where documents were shared with investment and governance consultant); *BSP Software v. Motio*, 2013 WL 3456870 at *2-*5 (N.D. Ill. July 9, 2013) (company waived attorney-client privilege over emails which company disclosed to third-party advisory board); *Jackson v. Deen*, 2013 WL 1911445 at *10-*13 (S.D. Ga. May 8, 2013) (defendants waived claims of attorney-client privilege and work product doctrine over documents shared with agent and business adviser, business consultant, and marketing and public relations firm).

Assuming *arguendo* that Navistar did not waive any applicable privileges by including ASGK the firm in communications, Navistar waived the privilege over communications in which Navistar widely disseminated the communications to ASGK employees. (*E.g.,* ASGK Redacted

Documents Privilege Log Entry Nos. 2, 49, 52 (emails from Navistar to seven ASGK employees)). A company waives privilege by disclosing documents to employees whose access to them is unrelated to the purposes underlying the privilege. *See, e.g.*, *PSK v. Hicklin*, 2010 WL 2541795 at *4-*5 (N.D. Iowa June 22, 2010) (company waived privilege by including several employees in communications in addition to attorney); *ePlus, Inc. v. Lawson Software*, 280 F.R.D. 247, 257 (E.D. Va. 2012) (waiver of attorney-client privilege over 8 documents distributed to ten non-attorneys); *Traficante v. Homeq Servicing Corp.*, 2010 WL 3167435 at *2 (W.D. Pa. Aug. 10, 2010) (waiver of privilege where company gave access to low level employees); *accord Baxter Travenol Labs. v. Abbott Labs.*, 1987 WL 12919 at *5 (N.D. Ill. June 19, 1987).

c. **Communications Involving Only Non-Attorney ASGK Employees Presumptively Are Non-Privileged**

Finally, with respect to the majority of communications on Navistar's ASGK privilege logs, no privilege attaches to the communications because no attorneys were involved in the communications. Of the 88 entries on the ASGK Redacted Documents Privilege Log, 86 of those entries relate to communications involving only non-attorneys,[11] and of the 75 entries on ASGK Withheld Documents Privilege Log, 58 of those entries relate to communications involving only non-attorneys.

"A communication between non-lawyers is generally not protected under the attorney-client privilege unless the 'dominant intent is to prepare the information in order to get legal advice from the lawyer.'" *In re Behr Dayton Thermal Prods.*, 298 F.R.D. 369, 375 (S.D. Ohio 2013) (quoting *Comtide Holdings, LLC v. Booth Creek Mgmt. Corp.*, 2010 WL 5014483 at *2-

[11] As noted above, most of these 88 documents are different copies of a single email that Navistar has redacted, contained in various email strings in the electronic mailboxes of various ASGK custodians.

*3 (S.D. Ohio Dec. 3, 2010)). Although there may exist a "rare occasion that attorney-client protection may be established without direct attorney communication", *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, 297 F.R.D. 611, 620-621 (D. Kan. 2014), "substantial proof" is required to show that a communication between non-lawyers is privileged. *Behr*, 298 F.R.D. at 375; *cf. Wierciszewski v. Granite City Illinois Hosp. Co.*, 2011 WL 5374114 at *1-*2 (S.D. Ill. Nov. 7, 2011) (emails between employee of company and his supervisor regarding investigation of and determination to ultimately terminate the plaintiff's employment were non-privileged).

Likewise, the fact that a communication involved only non-lawyers weighs against a finding of work product protection. *Cf. In re Chase Bank USA, N.A. Check Loan Contract Litig.*, 2011 WL 3268091 at *5 (N.D. Cal. July 28, 2011) (holding that neither attorney-client privilege nor work product doctrine applied to communication between non-attorneys).

In this case, there is nothing to indicate that Navistar properly has asserted privilege over any of the over 140 communications among non-attorneys that Navistar has either redacted or withheld as privileged in response to the SEC's subpoena to ASGK. Navistar engaged ASGK as a public affairs and communications consultant to help Navistar pressure the EPA to certify a Navistar engine at 0.2 NOx and to deal with the fallout if Navistar was unsuccessful in obtaining a Certificate. Navistar did not use ASGK to seek or receive legal advice or to develop a litigation strategy. Therefore, communications among ASGK employees (none of whom are attorneys), or between non-attorney Navistar employees and ASGK, are subject to the general presumption that communications among only non-attorneys are non-privileged.

2. Communications Involving Lobbying Firm Alston & Bird Are Not Privileged

a. **Alston & Bird Provided Lobbying Services, Not Legal Services, To Navistar**

Navistar has withheld 316 documents as privileged in response to the SEC's subpoena to

Alston & Bird, asserting that Alston & Bird was providing legal advice to Navistar. But Alston & Bird functioned as a lobbying firm for Navistar, not a law firm.

The term "lobbyist" is defined under federal law. The LDA defines a "lobbyist" as any individual who (with exceptions) is "employed or retained by a client" for services that include making "lobbying contact[s]." 2 U.S.C. § 1602(10); *see Nat'l Ass'n of Manufacturers v. Taylor*, 582 F.3d 1, 7 n.2 (D.C. Cir. 2009). The LDA defines a "lobbying contact" as (with exceptions) a communication to a covered legislative or executive branch official with regard to the "formulation, modification, or adoption" of, among other things, federal legislation, regulations, or policies. *Id.* at § 1602(8)(A); *Taylor*, 582 F.3d at 7 n.2. "Lobbying activities" under the LDA are defined as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." *Id.* at § 1602(7); *Taylor*, 582 F.3d at 7 n.2.

Alston & Bird provided lobbying services for Navistar. The non-privileged documents that Alston & Bird produced in response to the SEC's subpoena show that the firm made contacts with various public officials to encourage those officials to influence the EPA to issue a Certificate to Navistar. This is a quintessential lobbying activity under the definition of "lobbyist" in the LDA and under any common-sense notion of what a lobbyist does. The fact that Alston & Bird and three of its partners registered as lobbyists under the LDA for this work for Navistar confirms that Alston & Bird considered itself to be doing lobbying work for Navistar. Moreover, both lawyers and non-lawyers at Alston & Bird performed this work, underscoring that Alston & Bird's work for Navistar was not legal in nature.

b. **Communications or Notes Involving Alston & Bird, Acting as a Lobbying Firm, Are Not Privileged**

Because Alston & Bird performed lobbying work for Navistar, not legal work, communications involving Alston & Bird are protected by neither the attorney-client privilege nor the work product doctrine. These privileges are not implicated when a law firm or a lawyer performs lobbying services to a client. *See, e.g., A&R Body Specialty and Collision Works v. Progressive Casualty Ins. Co.*, 2014 WL 657688 at *3 (D. Conn. Feb. 20, 2014) (emails from lobbyist-attorney to clients "are not protected by the attorney-client privilege as they do not provide analysis or interpretation of legislation, and are more in the nature of general lobbying activity updates"); *In re Application of Chevron Corp.*, 749 F. Supp. 2d 141, 165-66 (S.D.N.Y. 2010) (neither attorney-client nor work product privilege applies to a activities relating to lobbying, media and public relations, and political activism); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 2011 WL 1136440 at *3 (W.D. Mo. Mar. 25. 2011) ("JPMA asserts the privilege with respect to advice regarding lobbying, public relations, dealing with the media, and other non-privileged matters. Advice on these topics is not privileged, even if the advice comes from an attorney."); *cf. Evans v. City of Chicago*, 231 F.R.D. 302, 312 (N.D. Ill. 2005) (documents concerning advice on political, strategic, or policy issues not privileged) (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998)).

In discussions with the SEC staff, Navistar has asserted that Alston & Bird's engagement letter with Navistar (which Navistar improperly has redacted)[12] confirms that Alston & Bird provided legal services to Navistar. But "an engagement letter cannot reclassify non-privileged communications as 'legal services' in order to invoke the attorney-client privilege". *Sandra T.E. v. South Berwyn School District 100*, 600 F.3d 612, 620 (7th Cir. 2010) (citing *Burden-Meeks v.*

[12] *See, e.g., U.S. v. Hatfield*, 2009 WL 3806300 at *12 (E.D.N.Y. Nov. 13, 2009) (law firm engagement letters are not privileged; *Newmarkets Partners LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 103 (S.D.N.Y. 2009) (same).

Welch, 319 F.3d 897, 899 (7th Cir. 2003)). Indeed, courts that have considered whether attorneys are acting in a lobbying capacity versus a legal capacity have analyzed the issue without regard to what engagement letters may have said. *See, e.g., A&R Body*, 2014 WL 657688 at *3 (no mention of engagement letter in analysis); *Chevron*, 749 F. Supp. 2d at 165-66 (same). Thus, the engagement letter has little relevance where other evidence establishes that Alston & Bird acted in a lobbying capacity for Navistar, not a legal capacity.[13]

Alston & Bird's communications with Navistar – many of which involve the "status of communications with the EPA and the administration" and the like (*see, e.g.,* Alston & Bird Privilege Log Entry Nos. 4-9, 20-21, 35-39, 46-57) – are precisely the sorts of communications that courts have held not be privileged because the communications relate to lobbying activities, not legal activities. This Court should adopt the reasoning in prior cases involving lawyer-lobbyists and hold that communications involving Alston & Bird are not privileged.

c. Even Assuming That Alston & Bird Was Acting as a Law Firm, Not All Communications With Alston & Bird Are Privileged

Even if Alston & Bird was acting as a law firm, rather than a lobbying firm, this does not mean that every substantive communication involving Navistar and Alston & Bird is privileged.

Communications involving Navistar and Alston & Bird such as updates on the status of Navistar's discussions with the EPA are non-privileged, even if the Court were to find that Alston & Bird acted in a legal capacity for Navistar. These communications, many of which Navistar engaged in with both lawyers and non-lawyers, and with law firms and non-law firms,

[13] Although the Seventh Circuit stated in *Sandra T.E.* that the engagement letter "should have been the most important piece of evidence" in that case, *Sandra T.E.*, 600 F.3d at 619, that case was "very fact-specific." *See Wartell v. Purdue Univ.*, 2014 WL 4261205 at *7 (N.D. Ind. Aug. 28, 2014) (distinguishing *Sandra T.E.*). Among other things, *Sandra T.E.* had nothing to do with whether attorneys acted in a lobbying capacity or a legal capacity, which is one of the key questions here. Instead, *Sandra T.E.* involved a law firm's assertion of privilege over its notes and internal memoranda relating to its internal investigation of claims that an elementary school teacher sexually abused students.

are not communications necessary for Navistar to obtain informed legal advice or to assist in developing litigation strategy. There is no legal advice sought or obtained in such communications. They do not discuss litigation or litigation strategy. Therefore, even assuming that lawyers, acting in a legal capacity, are involved in the communications, the communications are not privileged. *See e.g., Lee*, 2014 WL 2618537 at *6-*8 (finding that certain substantive communications between lawyer and client were non-privileged); *Evans*, 231 F.R.D. at 312-315 (same); *U.S. ex. rel. Fields v. Sherman Health Sys.*, 2004 WL 905934 at *1-*2 (N.D. Ill. April 28, 2004) (same).

3. Communications or Notes Involving Lobbyist Tyrone Fahner of Mayer Brown Are Not Privileged

Navistar has withheld 193 documents as privileged in response to the SEC's subpoena to Mayer Brown. All of these documents are communications involving Mayer Brown partner Tyrone Fahner relating to Navistar or Fahner's notes relating to Navistar.

This Court should analyze the Mayer Brown documents in dispute in the same manner as the Alston & Bird documents and conclude that none of the Mayer Brown documents are privileged. Like the Alston & Bird lawyers and non-lawyers who provided services to Navistar, Mayer Brown's Fahner provided lobbying services, not legal services, to Navistar. The descriptions of Fahner's communications relating to Navistar on Mayer Brown's privilege log – such as communications "regarding the status of communications with the White House," (e.g., Mayer Brown Privilege Log Entry 57, 102-03) and the like – are similar to the descriptions on Alston & Bird's privilege log. These entries indicate that, like Alston & Bird, Mayer Brown

acted as a lobbyist for Navistar to persuade EPA officials to issue a Certificate to Navistar and to encourage other public officials to pressure the EPA to do so.[14]

The testimony of Navistar's Director of Government Relations, Brien Sheahan, and Vice-President of Government Relations, Patrick Charbonneau, as well as the non-privileged email communication discussing Fahner's lobbying of EPA officials in or around January 2012, further indicate that Mayer Brown and Fahner were acting as lobbyists for Navistar. Conversely, there is nothing to indicate that Fahner was involved in developing litigation strategy, analyzing legislation, or otherwise providing legal services for Navistar. Because Mayer Brown and Fahner performed lobbying services for Navistar, not legal services, none of Fahner's communications or notes are protected by the attorney-client privilege or work product doctrine.

Further, even if Mayer Brown and Fahner were acting in a legal capacity for Navistar, not all attorney-client communications would be privileged because not all involved the giving or seeking or legal advice or the formulation of litigation strategy. *See Lee*, 2014 WL 2618537 at *6-*8; *Evans*, 231 F.R.D. at 312-315; *Fields*, 2004 WL 905934 at *1-*2; *Allendale*, 152 F.R.D. at 137.

Additionally, assuming *arguendo* that communications with Fahner and Navistar are privileged in the first instance, no privilege applies to communications that were disclosed to third-parties such as ASGK (*see* Mayer Brown LLP Privilege Log Entry Nos. 51-54, 175, 184, 190) and/or Alston & Bird (*id.* at Entry Nos. 1, 3-5, 7, 9-13 15-25, 27, 29, 31-36, 110, 131-139, 141, 144, 177, 179-80, 185-87, 191), or communications involving many other individuals unless

[14] Unlike Alston & Bird, Mayer Brown and Fahner do not appear to have registered as lobbyists for Navistar. But this is not dispositive. First, the LDA does not require all lobbyists to register. *See* 2 U.S.C. § 1602(10); *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014). Second, Mayer Brown and Fahner may have failed to register. Courts have found lawyers to have acted as lobbyists without evidence that the lawyers registered as such. *See, e.g., A&R Body*, 2014 WL 657688 at *3; *Chevron*, 749 F. Supp. 2d at 165-66.

Navistar can show that each and every individual involved in the communication was necessary for the giving or seeking of legal advice or formulation of litigation strategy. (*Id.* at Entry Nos. 1, 3-5, 7, 9-13 15-25, 27, 29, 31-36, 79-80, 110, 119-20, 131-139, 141, 144, 177, 179-80, 185-87, 191). The SEC incorporates by references its arguments in Sections II.E.1 to II.E.2 above with regard to these points.

4. Communications Involving Lobbying Firm Williams & Jensen Are Not Privileged

For the Williams & Jensen production, Navistar has asserted privilege over seven documents that Navistar listed on a privilege log, and Navistar asserted privilege over approximately 31 additional documents that Navistar has not yet listed on a privilege log for the Williams & Jensen production. As with Alston & Bird and Mayer Brown, Williams & Jensen performed lobbying work for Navistar, not legal work. Indeed, although Williams & Jensen is a law firm, it does not appear that any Williams & Jensen lawyers performed work for Navistar relating to engine certification issues, as opposed to Williams & Jensen non-lawyers such as Beer. Because Williams & Jensen was a lobbyist for Navistar, and because Navistar's retention of Williams & Jensen was not necessary for Navistar's lawyers to communicate with Navistar or develop litigation strategy, communications involving Williams & Jensen are not privileged. This Court should order Navistar to produce the documents that Navistar improperly has withheld as privileged from Williams & Jensen's document production.

As examples of Navistar's improper privilege assertions, Navistar asserted privilege over several documents that Williams & Jensen produced but that Navistar clawed back after the SEC staff alerted Navistar based on the listing of these documents on other parties' privilege logs. The documents that Navistar clawed back as privileged mainly consisted of updates from Charbonneau on the status of Navistar's discussions with the EPA over certification issues.

(*E.g.*, SEC-WandJ-E-0006858, SEC-WandJ-E-0006896-97, SEC-WandJ-E-0006862) Even assuming that Williams & Jensen and the other recipients of these updates from Charbonneau were acting in a legal capacity when they received the updates – which they were not – these status updates are not privileged. *See, e.g., Digital Vending Services Int'l v. The University of Phoenix*, 2013 WL 1560212 at *6 (E.D. Va. April 12, 2013) ("These communications are simply status updates and no legal advice is given by counsel. Therefore, these communications are not privileged.")

F. Navistar Improperly Has Asserted Privilege Over Internal Navistar Non-Attorney Communications

In addition to improperly asserting privilege over communications involving lobbyists, Navistar also has improperly asserted privilege over internal Navistar communications involving only non-attorneys, including non-attorney notes. Although rare occasions may exist in which non-attorney communications are privileged, there is nothing to indicate that Navistar has asserted a valid claim of privilege over the thousands of communications involving non-attorneys listed on Navistar's privilege logs. *See, e.g., Behr*, 298 F.R.D. at 375 (holding that communications involving only non-attorneys were non-privileged); *Black & Veatch*, 297 F.R.D. at 620-621 (occasions in which attorney-client protection applies to non-attorney communications are "rare"). Even if an attorney is referenced in these communications, the communications may be non-privileged because, for example, the communications do not reveal advice received or sought from an attorney, or the advice sought or received from an attorney constitutes predominately business or political advice rather than legal advice. *See Lee*, 2014 WL 2618537 at * 4; *Evans*, 231 F.R.D. at 312-315; *Fields*, 2004 WL 905934 at *1-*2;

The large volume of non-attorney communications redacted and withheld by Navistar makes it impractical for the Court to conduct an *in camera* review of all such documents. The

SEC is requesting that the Court conduct an *in camera* review of a subset of the non-attorney communications over which privilege disputes between Navistar and the SEC remain. Although the SEC is not requesting that the Court definitively determine the validity of Navistar's privilege claims as to every document that remains in dispute, the SEC is hopeful that with respect to remaining privilege disputes, Navistar will follow the Court's guidance in its resolution of this subpoena enforcement action. By asking the Court to conduct an *in camera* review of a subset of disputed non-attorney communications, the SEC is attempting to conserve Court resources and obviate the need for further Court intervention with regard to other privilege disputes between Navistar and the SEC.[15]

In Exhibit X attached hereto, the SEC has identified the non-attorney communications that it is requesting the Court review *in camera* and order Navistar to produce.

G. Navistar Improperly Has Asserted Privilege Over Draft SEC Filings And Communications Regarding Those Filings

1. Draft SEC Filings or Communications Regarding Those Filings Do Not Constitute Work Product

Navistar has redacted and withheld certain draft SEC filings, and communications regarding those filings, in response to the SEC's subpoenas to Navistar. For several of the draft SEC filings, and communications regarding those filings, Navistar has invoked the work product doctrine.

Navistar's assertion of the work product doctrine over draft SEC filings, and communications regarding those filings, is inappropriate. Navistar did not prepare draft SEC

[15] Courts deciding privilege disputes sometimes articulate guidelines governing the court's resolution of the disputes. *See, e.g., Hill*, 2013 WL 6909524 at *1 ("[t]he parties further agreed that they would use the court's guidance at argument and in this decision to govern their positions at the upcoming depositions"); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d. at 809 ("[I]n our assessment of [privilege] claims, we established guidelines to ensure consistency in rulings for recurring types and formats of communications.")

filings, such as Forms 10-Q and 10-K, in anticipation of litigation; rather, Navistar prepared the filings because SEC disclosure rules required a public company such as Navistar to make the filings. Because Navistar would have drafted SEC filings regardless of threatened or actual litigation, the work product doctrine is inapplicable to these drafts, or communications regarding those drafts. *See, e.g., RBS Citizens v. Husain*, 291 F.R.D. 209, 220-21 (N.D. Ill. 2013) (spreadsheets consisting of loan risk analyses and financial forecasts were not work product); *Rawat*, 2010 WL 1417840 at *8 (documents created by Navistar to ensure compliance with SEC rules and regulations were not work product); *Resurrection Healthcare and Factory Mut. Ins. Co. v. GE Health Care*, 2009 WL 691286 at *2-*3 (N.D. Ill. Mar. 16, 2009) (interviews, statements, and documentation regarding spill were not work product); *Bank One Secur. Litig.*, 209 F.R.D. at 425-26 (documents created as a result of regulatory inquiry were not work product).

2. **The Attorney-Client Privilege Does Not Protect the Draft SEC Filings Redacted and Withheld by Navistar**

Draft SEC filings, and communications regarding those filings, that Navistar has withheld are not covered by the attorney-client privilege. Courts within this District have held that draft SEC filings are not privileged. *In re JPMorgan Chase & Co. Secur. Litig.*, 2007 WL 2363311 at *3 (N.D. Ill. Aug. 13, 2007) (draft SEC filings are not privileged); *Christman v. Brauvin Realty Advisors, Inc.*, 185 F.R.D. 251, 256 (N.D. Ill. 1999) (same); *but see Roth v. Aon Corp.*, 254 F.R.D. 538, 540-41 (N.D. Ill. 2009) (certain draft SEC filings can be privileged).

Even if the Court holds that, as a general matter, certain draft SEC filings can be privileged, Navistar's withholding of draft SEC filings, and communications regarding those filings, from its productions in this investigation is improper. First, some of the draft SEC filings are attached to communications among only non-attorneys, and there is no indication that

Navistar has properly asserted the attorney-client privilege over such non-attorney communications. (*See* Section II.F., *supra*).

Second, to the extent communications attaching draft SEC filings include one or more attorneys, the attorneys were among many recipients of those communications. Where Navistar distributed these draft filings widely to attorneys and non-attorneys, Navistar was not primarily seeking or obtaining legal advice in distributing the filings. *See United Food and Commercial Workers Union v. Chesapeake Energy Corp.*, 2012 WL 2370637 at *10-*11 (W.D. Okla. June 22, 2012) ("final versions of publicly disseminated documents which were distributed to the attorney as well as other corporate officers or employees, without soliciting legal advice or comment or approval, would not be privileged."); *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equipment Resource, Inc*., 2004 WL 1299042 at *6-*7 (E.D. La. June 4, 2004) ("[e]ven though the draft [press] release was forwarded to [an attorney] for review and comment, the document was also forwarded to several other company executives and/or employees for review and comment."); *Cf. In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 809 (E.D. La. 2007) (communications involving both attorneys and non-attorneys are not privileged); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009) (same); *In re Avandia Marketing, Sales Practices and Prod. Liab.*, 2009 WL 4807253 at *4 (E.D. Pa. Oct. 2, 2009) (document sent to 12 non-attorneys and 1 attorney was not privileged). The distribution of the drafts to a few attorneys, among many others, does not make the drafts privileged. *See Lee*, 2014 WL 2618537 at *6-*7 (holding that certain communications between an attorney and client were not privileged); *Evans*, 231 F.R.D. 312-16 (same); *Kleen Prods.*, 2014 WL 6475558 at *1 ("courts in this District have held that '[w]here a document is prepared for simultaneous review by legal and nonlegal personnel and legal and business advice is

requested, it is not primarily legal in nature and is therefore not privileged.'") (quoting *RBS Citizens*, 291 F.R.D. at 216)).

As an example of Navistar's improper privilege assertions over draft SEC filings, and communications regarding those filings, Navistar redacted as privileged a portion of a draft press release which was to be filed with the SEC and accompany Navistar's first quarter 2012 Form 10-Q. Navistar's Manager of External Communications, a non-attorney, circulated the draft press release to several non-attorneys. (*See* NAV00115614-NAV00115619 (to be submitted to the Court for an *in camera* review), 2-29-12 email Koc to Klein, Keele, Miller, Campbell; *see also* NAV00115609-NAV00115612; NAV00115620-NAV00115625; NAV00129017-NAV00129020). In response, Navistar's Director of External Reporting and Technical Accounting, Donald Klein ("Klein") another non-attorney, provided comments on the draft, including comments on draft language regarding Navistar's submission to the EPA to obtain a Certificate for an engine that met the 0.2 NOx standard. In Klein's comments, he stated a need for legal input on certain portions of the draft, including portions regarding Navistar's submission to the EPA. Navistar has claimed privilege over all of Klein's comments relating to Navistar's submission to the EPA. (*Id.*)[16]

Navistar's redactions of Klein's comments on this draft press release are improper. Klein's comments are not privileged. Rather, they are non-privileged comments from one non-attorney to other non-attorneys on the contents of a draft press release. Klein's statement of a need for legal input does not change the analysis. This statement does not disclose the actual

[16] Navistar simultaneously produced this document both in redacted and unredacted form. In a privilege log, Navistar asserted both the attorney-client privilege and the work product doctrine over a redacted version of the document. (*See* 9-20-12 Redacted Documents Privilege Log, p. 10, NAV00016666-NAV00016668) (erroneously stating a 2011 date). After the SEC staff alerted Navistar's counsel about the unredacted versions of this document in Navistar's production, Navistar asserted the attorney-client privilege over portions of the unredacted versions of the document.

content of a confidential attorney-client communication. Indeed, there is no evidence that any attorney-client communication about Klein's comments ever occurred. This Court should rule that Klein's comments on the draft press release are not privileged. *See Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 538 (N.D. Ill. 2000) (communications between non-legal advisors were not privileged).

The draft SEC filings redacted and withheld by Navistar, and communications regarding those filings, that Navistar has redacted and withheld, and that the SEC is requesting that this Court review *in camera* and order Navistar to produce are: (a) Entry on Navistar 11-5-14 Privilege Log: Entry No. 37, pp. 49-50, NAVPRIV00006787-NAVPRIV00006791; (b) Entries on Navistar 1-19-15 Privilege Log: Entry No. 2, p, 1, NAV00115609-NAV00115612; Entry No. 3, page 1, NAV00115614-NAV00115619; Entry No. 4, p. 1, NAV00115620-NAV00115625; and Entry No. 5, p. 2, NAV00129017-NAV00129020; and (c) NAV00707022-NAV00707135 and NAV00707136-NAV00707220 (as to which Navistar has not yet listed on a privilege log but has stated it intends to do so).

While these documents appear to be the only draft SEC filings, or communications regarding those filings, that currently remain in dispute between the SEC and Navistar, it appears that the parties may continue to have disputes about over SEC filings, or communications regarding those filings. It appears that Navistar has not yet produced or not yet listed on a privilege log certain drafts of SEC filings that the SEC is seeking as part of its investigation. But the SEC is hopeful that with respect to possible remaining privilege disputes over draft SEC filings, and communications regarding those filings, Navistar will follow the Court's guidance in its resolution of this subpoena enforcement action so as to obviate the need for future Court intervention.

CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court grants its First Amended Application, conduct an *in camera* review of the documents identified in this First Amended Application and the SEC's Memorandum in Support, order Navistar to produce the documents that Navistar improperly has redacted or withheld as privileged, and award such other and further relief as this Court deems just.

Dated: January 22, 2015

Respectfully submitted,

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

/s/ Eric M. Phillips

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CERTIFICATE OF SERVICE

I, Eric M. Phillips, an attorney, being duly sworn, state on oath that on January 22, 2015, I caused the Securities and Exchange Commission's Memorandum of Law in Support of Its First Amended Application for an Order Compelling Compliance with Administrative Subpoenas to be served upon the following counsel by the Court's CM/ECF system:

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