UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCHWARZ PARTNERS PACKAGING, LLC, *d/b/a Maxpak*, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendants.	Civil Action No. 13-343 (BAH) Judge Beryl A. Howell

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO TRANSFER VENUE OR, IN THE ALTERNATIVE, TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

The National Labor Relations Board ("NLRB" or "Board") respectfully submits this Reply to Plaintiff's Opposition to Defendants' Motion to Transfer Venue or to Dismiss for Lack of Subject Matter Jurisdiction. As set forth below, nothing in that Opposition ("Pl. Opp.") supports that the instant case should remain in this Court rather than be transferred to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1404(a), as this Court previously concluded under nearly identical facts. Nor does anything in that Opposition support this Court's jurisdiction to engage in an unwarranted intrusion into the comprehensive, exclusive scheme that Congress mandated for handling the specialized and complex problems arising under the National Labor Relations Act ("NLRA"). Plaintiff Schwarz Partners Packaging, LLC, d/b/a Maxpax ("Maxpak") may argue that the Board lacks a valid quorum, but this is neither the appropriate time nor the appropriate forum in which to do so. Accordingly, this case should be transferred to Florida, or alternatively dismissed for lack of subject matter jurisdiction.

1. This Court should exercise its discretion under 28 U.S.C. § 1404(a) to transfer the case to the Middle District of Florida. The facts specific to the administrative case at issue in this lawsuit primarily occurred in Florida and the impact of this Court's decision will be felt by employees residing in that state. As shown below, similar facts led this Court to transfer the action in *Laboratory Corp. of Am. Holdings v. NLRB*, 2013 WL 1810636, *3 (D.D.C. April 4, 2013) ("*LabCorp*"), and the Court should reject Maxpak's unpersuasive arguments to the contrary.

This Court has explained that perhaps the most important private interest factor under Section 1404(a) is "the interest in having local controversies decided at home." *W. Watersheds Project v. Pool*, 2013 WL 1800238, *3 (D.D.C. April 30, 2013) (internal citation omitted). Here, it is undisputed that Maxpak's facility and employees are located in Lakeland, Florida, and the proceedings surrounding the disputed union election took place in Lakeland. (Pl. Opp. at 3-4.) Because the greatest impact of this case will be felt in Florida, these factors weigh in favor of transfer.

A defendant's burden in a motion to transfer is diminished when plaintiff's choice of forum is not the plaintiff's home forum. *See Pacific Maritime Ass'n v. NLRB*, 905 F.Supp.2d 55, 60-61 (D.D.C. 2012). Maxpak cannot claim this district as its home forum. Instead, Maxpak argues that there is a meaningful nexus to Washington, D.C. because this case involves a decision made by Board members serving pursuant to allegedly unconstitutional recess appointments. (Pl. Opp. at 5.) This was the precise argument rejected in *LabCorp*.

Strikingly similar to the instant case, in *LabCorp* "the plaintiff's facilities and employees involved . . . [were] located in New Jersey [the transferee jurisdiction], and the proceedings surrounding the disputed union election took place in New Jersey." 2013 WL 1810635, *2.

Maxpak's attempts to distance this case from the facts in *LabCorp* are unavailing. Although the Board has made a decision in this case, the dispute in *LabCorp* was also pending before the Board in Washington, D.C. at the time of this Court's decision to transfer the case.[1] Moreover, the instant lawsuit is not confined to the Board's decision. It also challenges whether "the Regional Director [located in Florida] . . . had authority to act" and seeks to enjoin processing of unfair labor practices against Maxpak. (Compl. at 2.) Although the Complaint names the Acting General Counsel for such injunction, regional directors in the Board's various regional offices issue complaints on behalf of the Acting General Counsel. *See* 29 C.F.R. § 102.15. Accordingly, it is the Board's Florida Regional Director who would be prohibited by this lawsuit from issuing and processing complaints.

Moreover, this Court has considered where the "lion's share" of decisions in the case were made to determine the proper forum. *See Western Watersheds Project v. Pool*, 2013 WL 1800238, *5 (D.D.C. April 30, 2013). Here, the vast majority of the decisions that led to this lawsuit were made in Florida. (NLRB Br. at 3-5.)[2]

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[1] LabCorp had filed a motion with the Board requesting review of the Regional Director's decision on March 12, 2013. See Case No. 13-cv-276, Doc. 16 at 4.

[2] For these reasons, Maxpak's cited cases are distinguishable. In *Nat'l Ass'n of Homebuilders v. EPA*, 675 F.Supp.2d 173 (D.D.C. 2009) (Pl. Opp. at 4-5), this Court refused to transfer the case because no part of the decision-making process occurred in Arizona and no decision-maker resided in Arizona. Similarly, in *Greater Yellowstone Coalition v. Bosworth*, 180 F.Supp.2d 124, 128-29 (D.D.C. 2001) (Pl. Opp. at 5), the vast majority of decision-making throughout the case occurred in Washington, D.C., where two plaintiffs also had offices. The decision not to transfer the case in *Wilderness Soc. v. Babbitt*, 104 F.Supp.2d 10, 17 (D.D.C. 2000) (Pl. Opp. at 5), was based on facts including that half of the plaintiffs were located in Washington, D.C. and the involvement of the federal agency in D.C. was "not routine."

Moreover, there is no merit to Maxpak's attempt to distinguish this Court's recent decision to transfer venue in *Pacific Maritime Ass'n v. NLRB*, 905 F.Supp.2d 55 (D.D.C. 2012) (Pl. Opp. at 12.) Key to that decision was this Court's finding that "this case ultimately centers on a labor dispute in Portland Oregon." *Id.* at 60. Judge Howell explained that Portland was where the

Further, little, if any, impact of this Court's decision will be felt in Washington, D.C. The Maxpak employees who are waiting for the decision in this case to find out whether they are unquestionably represented by a union, all live and work in Florida, where the resulting collective bargaining will take place. As this Court has explained "[c]ourts prefer to resolve cases in the forum where people whose rights and interests are in fact most vitally affected by the suit. Thus, the interests of justice are promoted when a localized controversy is resolved in the region it impacts." *W. Watersheds Project v. Pool*, 2013 WL 1800238, *3 (internal citation omitted). The mere fact that a case implicates application of federal law does not automatically make it one of national character (Pl. Opp. at 10-11), because if that were true, then "any challenge involving a federal law implemented by a federal agency could not be transferred elsewhere." *Preservation Soc. of Charleston v. U.S. Army of Engineers*, 2012 WL 4458446, *4 (D.D.C. 2012).

2. Contrary to Maxpak's assertions (Pl. Opp. at 9-12), the public interest factors also weigh in favor of transfer. Such factors include "(1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home." *Valley Community Presevation Comm'n v. Mineta*, 231 F.Supp. 23, 45 (D.D.C. 2002) (internal citation omitted). Here, the first two factors are neutral and, for reasons stated above, the third weighs in favor of transfer. Moreover, transfer is appropriate in the interests of justice because Maxpak has engaged in forum shopping to take advantage of the D.C. Circuit's *Noel Canning* decision.

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administrative hearing was held, the hearing officer's report was prepared, and "is precisely where the immediate effects of the Board's decision were felt. . . ." *Id*. Here too, although some of the actions alleged in the complaint occurred in Washington, D.C., "the rest of the play was set elsewhere." *Id*. Maxpak simply cannot ignore all of the decisions and work of the Florida Regional Office that led to this case.

a. This Court and the Middle District of Florida are equally equipped to decide this case. As this Court has instructed, where "the action concerns federal law, neither court is better suited than the other to resolve these issues." *Id*.

Maxpak's argument that Congress has established a special preference through section 10(f) for NLRA issues to be heard in "federal courts in the District of Columbia" is entirely irrelevant. (Pl. Opp. at 11.) Section 10(f) applies to the D.C. Circuit Court of Appeals, not this District Court, and only in the context of the review of final Board decisions. Indeed, *district* courts lack authority to review NLRB proceedings precisely because Congress set forth this exclusive procedure in section 10(f) for review by courts of appeals. *See, e.g., Myers v. Bethlehem Shipbuilding Corp*., 303 U.S. 41, 48-49 (1938).[3]

This Court rejected the reasoning behind Maxpak's argument *in Federal Housing Financial Agency v. First Tennessee National Bank Ass'n*, 856 F.Supp.2d 186, 191 (D.D.C. 2012). There, the plaintiff contended that the Court should take into account for transfer purposes that a provision of the Housing and Economic Recovery Act of 2008 allows a party to choose to bring a subpoena enforcement action in this Court regardless of any specific facts of the case. Rejecting this argument, this Court explained that, *inter alia*, "the District of Columbia Circuit has made clear that § 1404(a) applies to actions governed by special venue provisions," (citing *SEC v. Savoy Indus., Inc*., 587 F.2d 1149, 1154 (D.C.Cir.1978)), and the fact that venue exists in this District Court does not mean it is required or even preferable. *Id*. at 192.

[3] Similarly irrelevant is Maxpax's repeated reliance on the Board's position in the *Arizona* federal preemption case (*NLRB v. Arizona*, Case No. 11-cv-913, 2011 WL 4852312 (D. Ariz. Oct. 13, 2011)) and its policy of non-acquiescence. (Pl. Opp. at 1-2, 8, 10-11.) Both matters concern the Board's exclusive jurisdiction to decide NLRA matters in the first instance, subject only to limited judicial review in the courts of appeals. These positions have no bearing on this case and certainly do not mean that the Board must agree to Maxpak's choice to bring this lawsuit in an inappropriate forum.

Moreover, in *LabCorp*, this Court specifically held that it had no greater competence than the District Court of New Jersey to decide whether the Board possessed a valid quorum for purposes of a dispute concerning a union election. *See LabCorp*, 2013 WL 181066, *2. Likewise, this Court possesses no greater competence than the Middle District of Florida to hear this case.

b. Further, contrary to Maxpak's contention, the relative congestion of the court calendars is also neutral in this case. While, as Maxpak reports, the volume of cases is larger in the Middle District of Florida, the median time interval for civil cases is roughly equivalent -- 8.7 months for this Court, and 9.0 months for the middle District of Florida, a difference of approximately 9 days. (Pl. Opp. at 10.) The median time figure should carry more significance than the number of cases on a court's docket because it shows how much of a burden an additional case would realistically impose on each court. *See In Wyeth Ayers Lab. Div. of Am. Home Products Corp. v. Seneca Freight Lines, Inc.*, 1996 WL 445354 (E.D. Pa. 1996) (unreported) (finding that "the administrative and economic considerations are best served by allowing this action to remain" in Pennsylvania even though it handled *more than double* the volume of cases than the Georgia court because, *inter alia*, the statistics showed that cases are adjudicated slightly more rapidly in the Pennsylvania court). Here, the nine-day difference between the courts is negligible, making the factor neutral. This is particularly true given Chief Judge Lamberth's recent transition to senior status. *See* http://www.fjc.gov/servlet/nGetInfo?jid=1333&cid=999&ctype=na&instate=na (last visited July 17, 2013).[4]

[4] There is no merit to Maxpak's argument that transfer is inappropriate in this case because the Board has not sought to transfer other cases. (Pl. Opp. at 8-9.) Consistent with how courts decide transfer motions, defendants analyze whether to seek to transfer a case based on the facts and circumstances specific to each case. *See, e.g.*, *Stewart Org. Inc. v. Ricoh Corp*., 487 U.S. 22, 29 (1988) ("The decision to transfer is discretionary and determined on an 'individualized, case-

c. Moreover, transfer is appropriate "in the interests of justice" because it is apparent that Maxpak forum shopped its Florida-centered labor dispute to Washington, D.C. in order to take advantage of the D.C. Circuit's *Noel Canning* decision, which squarely conflicts with the Eleventh Circuit's *en banc* decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004). Even in *LabCorp*, where the Third Circuit had not yet issued a controlling decision on the recess appointment issue, Judge Walton emphasized "[it] is not in the interest of justice to encourage, or even allow, a plaintiff to select one district exclusively or primarily to obtain or avoid specific precedents, particularly where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case." 2013 WL 1810636, *3 (quoting *Schmid Labs., Inc. v. Hartford Accident & Indem. Co*., 654 F.Supp. 734, 737 (D.D.C. 1986)).[5]

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by-case consideration of convenience and fairness'"); *SEC v. Savoy Indus., Inc.,* 587 F.2d at ("it is perhaps impossible to develop any fixed general rules on when cases should be transferred . . . ."). Moreover, none of the cases cited by Maxpak involved the same quorum issue that is causing Maxpak's forum shopping in this case. *See infra* at 7.

[5] Maxpak's reverse forum shopping allegation against the NLRB is baseless. As explained, Maxpak's brief wholly ignores the intensely local interest of these proceedings on its Florida employees and Florida business. Seeking to undo a plaintiff's forum shopping to the only other available venue for the dispute cannot itself constitute forum shopping, particularly when all of the impact will be felt in the transferee jurisdiction. *Jackson v. District of Columbia*, 89 F.Supp.2d 48 (D.D.C. 2000), and *Sierra Club v. Van Antwerp*, 523 F.Supp.2d 5 (D.D.C. 2007) are distinguishable (Pl. Opp. at 7). In *Jackson*, a criminal case that was vacated in part (254 F.3d 262 (D.C. Cir. 2001)), there was no consideration of the local impact of the case perhaps because the Bureau of Prisons sought to transfer the case from D.C. to neighboring Eastern District of Virginia. 89 F.Supp. 2d at 53-54. Moreover, a "significant factor in the court's decision" was a strict statutory time limit to hear the case that would have left a new judge just 24 calendar days to resolve the issues. *Id*. at 54. In *Sierra Club*, the Court found that the plaintiffs who resided in the Middle District of Florida were not entitled to deference in their choice of this District Court. 5 23 F.Supp.2d at 12 n.3. Yet, unlike the instant case, the plaintiff Sierra Club, which was headquartered in D.C., was held entitled to a presumption in favor of its chosen forum in D.C. *Id.* at 11.

3. Alternatively, the Court should dismiss the case for lack of subject matter jurisdiction. Throughout its brief, Maxpak asserts that this is a special case because of the nature of its *ultra vires* challenges to the Board's authority. Yet neither *Leedom v Kyne*, nor as explained below, the related *Faye v. Douds* doctrine, provide this Court with the extraordinary authority to halt ongoing NLRB proceedings.

Initially, we note that Maxpak has failed to address, let alone refute, the Board's argument that jurisdiction is not available under *Kyne* because Maxpak has not shown that the Board violated a clear statutory command, namely the quorum requirement set forth in NLRA section 3(b). *See* NLRB Br. at 17-19; *Armco Steel Corp. v. Ordman*, 414 F.2d 259 (6th Cir. 1969) (per curiam) (based on circuit split, refusing to enjoin NLRB prosecution despite adverse Sixth Circuit precedent). *See, e.g., Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1312 (D.C. Cir. 1984) ("the absence of an alternative means of redress is irrelevant when a plaintiff can point to no violation of a clear statutory mandate"). Equally significant, Maxpak has conceded, as it must, that the NLRA provides a path for judicial review of its allegations of constitutional wrongdoing in this case through the ordinary course of NLRA proceedings. (Pl. Opp. at 13.) That concession is also fatal to Maxpak's case. *See Board of Governors of the Federal Reserve Sys. v. MCorp Financial, Inc*., 502 U.S. 32, 43-44 (1991).

This case is not unique under *Kyne* merely because it seeks to challenge the Board's constitutional and statutory power to act. (Pl. Opp. at 13-14, 18-19.) As set forth in the Board's brief (NLRB Br. at 16), numerous courts have rejected *Kyne* jurisdiction in cases alleging that the Board has acted unconstitutionally, including claims alleging that the NLRB proceeding

itself violated the Constitution.[6] As the Board has explained (NLRB Br. at 14-17) and Maxpak has recognized (Pl. Opp. at 13), Maxpak can argue in the context of an unfair labor practice proceeding that the Board lacks a quorum, and it can then appeal any adverse determination to a court of appeals. Indeed, that process has now begun. On July 16, 2013, the union filed an unfair labor practice charge against Maxpak alleging that Maxpak violated Section 8(a)(5) of the NLRA by unlawfully refusing to bargain. (Cohen Decl. Exh. A.) Accordingly, upon any final decision in the unfair labor practice case, a court of appeals will have the opportunity to review Maxpak's constitutional arguments. *See, e.g., Bokat v. Tidewater Equipment Co.*, 363 F.2d 667, 672-73 (5th Cir. 1966) (that plaintiff alleged the Board violated its constitutional rights in the context of an unfair labor practice proceeding "does not warrant stopping the Board in its tracks. As have others, we have recognized constitutional claims and have accordingly denied enforcement of the Board orders when the Board order comes up for enforcement").

4. Maxpak's explanation of the *Kyne* decision is contrary to settled law. Maxpak argues that the plaintiff in *Kyne* could have obtained judicial review, and thus there is no authority for the proposition that *Kyne* jurisdiction can be denied to employers in representation cases simply because they are employers and have other means of obtaining review. (Pl. Opp. at 19.) Maxpak is mistaken. This matter was conclusively settled by the Supreme Court in *MCorp*, 502 U.S. at 43, which explained that "central to our decision in *Kyne* was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate

[6] Maxpak's attempt to distinguish some of the Board's cited constitutional cases is unavailing (Pl. Opp. at 17, n.1). This case is not, as Maxpak claims, merely a "general attack on the Board's power to act due to violations of the Constitution." Rather, like all of the constitutional cases it disputes, Maxpak seeks relief specific to itself based on its allegation that the Board violated the Constitution– namely to invalidate the August 2012 Board decision and subsequent certification, and to prohibit future unfair labor practice charges that may be filed *against Plaintiff*. *See* Compl. at 8 (seeking relief only as to events relating to Maxpak).

means of vindicating its statutory rights." *See also Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397-98 (6th Cir. 2002).

The sole support for Maxpak's argument to the contrary is a 1966 district court case, *Bullard Co. v. NLRB*, 253 F.Supp. 391, 393 (D.D.C. 1966), that predates *MCorp* and whose interpretation of *Kyne* was squarely rejected by the D.C. Circuit Court of Appeals years before *MCorp* was even decided. In *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1312 n.2 (D.C. Cir. 1984), the D.C. Circuit characterized *Bullard* as contrary to the prevailing view in the federal courts that "equity relief would probably not have been available in *Kyne* had the employer, rather than the union, been contesting the certification, for the employer would have had access to appellate review by refusing to bargain and contesting the unfair labor practice case." (citation omitted.) *Compare, e.g., Miami Newspaper Union Local 46 v. McCulloch*, 322 F.2d 993 (D.C. Cir. 1963) (Pl. Opp. at 19) (finding *Kyne* jurisdiction in suit brought by a union on grounds that while judicial review is available to employers through a subsequent unfair labor practice case, "it is practically unavailable to an unsuccessful union").

5. In arguing against this settled precedent, Maxpak imports legal standards and presumptions under *Kyne* that are inapplicable to NLRA proceedings. (Pl. Opp. at 14-18.)

Maxpak analogizes to Railway Labor Act representation cases through its citation of *Railway Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (Pl. Opp. at 14-15, 17-18) and *U.S. Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985, 989 (D.C. Cir. 1999) (Pl. Opp. at 14-16), asserting without support that representation cases under the RLA and NLRA are similar. (Pl. Opp. at 14.) Yet there are significant distinctions between the RLA and NLRA statutory schemes that make the court's decision to provide district court review in those cases inapplicable here. Critically, the RLA does not generally provide for judicial review of

representation cases, whereas judicial review *is* available to NLRA employers indirectly through the unfair labor practice process.[7] Indeed, the Supreme Court has admonished that "the NLRA cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes." *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989).

Under the Railway Labor Act, judicial review of NMB certification decisions made pursuant to Section 2, Ninth of the RLA is "one of the narrowest known to the law." *Int'l Ass'n of Machinists v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir. 1988), amended 848 F.2d 323 (D.C. Cir. 1988); *see also MCorp*, 520 U.S. at 43 n.15 (the language and legislative history of the Railway Labor Act "support[] the view that Congress gave administrative activity under [RLA] § 2, Ninth a finality which it denied administrative action under other sections of the Act") (quoting *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 306 (1943)). For this reason, the standards Maxpak relies upon are simply inapplicable here.

For instance, Maxpak cites *U.S. Airways, Inc. v. National Mediation Bd*., 177 F.3d 985, 989 (D.C. Cir. 1999), for the proposition that there is no statutory presumption against district court jurisdiction if a case involves a violation of an employer's constitutional rights or a "gross violation of its statutory rights." (Pl. Opp. at 16.) However, the court makes clear that these are exceptions specific to the normal RLA rule that "district courts lack jurisdiction to review certification decisions rendered by the NMB within its scope of authority under § 2, Ninth of the RLA." *Id*. (citing *Railway Labor Executives' Ass'n v. NMB*, 29 F.3d at 662).

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[7] *See, e.g., Air Transp. Assn. of Am. v. Nat'l Mediation Bd*., 663 F.3d 476, 493 (D.C. Cir. 2011) (Henderson, K, dissenting) "[w]hile section 9(a) of the NLRA uses language similar to [RLA] section 2, Fourth to apply the majority-of-votes cast rule in selecting a representative, the NLRA also provides for judicial review of elections conducted thereunder." (citing *NLRB v. Central Dispensary & Emergency Hosp*., 145 F.2d 852, 854 (D.C. Cir. 1944)); NLRB Br. at 11-12.

Further drawing from RLA-specific standards, Maxpak argues that *Kyne* jurisdiction lies in this Court because the question of the Board's authority is "antecedent to" the issue of whether the Board correctly decided the representation case. (Pl. Opp. at 14-15, citing *Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655.) Here again, the law is not analogous. Judicial review of NMB decisions is barred *only if* the dispute falls within § 2, Ninth. *Railway Labor Executives' Ass'n v. NMB*, 29 F.3d at 662. Thus, under the peculiarities of the RLA, if a challenge is made to an NMB decision, the court must first inquire whether the disputed decision falls under §2, Ninth and is therefore unreviewable under the statute. In contrast, under the NLRA, judicial review is available indirectly to all employers regardless of the facts of a particular representation dispute. (NLRB Br. at 14-17.) Accordingly, there is no need for extraordinary district court review in this case.[8]

Maxpak's extensive reliance on *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988) (Pl. Opp. at 15), is similarly misplaced. As the Fifth Circuit explained, "[i]n *Dart*, the court dealt with a finality clause in the Export Administration Act ('EAA'), which expressly precluded judicial review. . . . Critical to the *Dart* court's decision to review the case under the *Kyne* exception was the fact that there was no other opportunity for meaningful judicial review of the agency's decision." *Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 469 n.4 (5th Cir. 2002). The

[8] Moreover, Plaintiff states that the court in *Railway Labor Executives Ass'n* held that judicial review was available through the Administrative Procedure Act, implying that was a factor in the court's reasoning in the majority decision. (Pl. Opp. at 17, citing 29 F.3d at 659 n.1). More accurately, the court stated that APA jurisdiction is "an alternative basis for the decision," relying on the separate concurring position by Judge Randolph. *Railway Labor Executives Ass'n,* 29 F.3d at 659 n.1. Thus, it was not part of the majority's analysis. Judge Randolph suggested APA jurisdiction would be proper under the RLA for the reason, distinguishable from this case, that the *Railway Labor Executives Ass'n* case involved agency rulemaking: "*Switchmen's* interpreted the Railway Labor Act to bar judicial review of Board adjudications. But that interpretation and the reasons behind it do not reach the Board's rulemaking in this case." *Id.* at 672.

court in *Dart* explained that because the statute included a finality provision, there was a presumption of judicial review, particularly where the agency was charged with acting beyond its authority. *Dart*, 848 F.2d at 221.[9] Here, there is no finality provision and as Maxpak concedes (Pl. Opp. at 13), judicial review is available. Thus, the presumption is the opposite: *Kyne* jurisdiction is available only under extraordinary circumstances. (NLRB Br. at 12-14.) Similarly, Maxpak's citation to *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010) (Pl. Opp. at 18), is distinguishable because the Court there found that the normal presumption of preclusion of review should not apply because the statutory scheme at issue there did not provide petitioner with an opportunity for meaningful relief. *Id*. at 3151.

Maxpak does not cite any precedent applying these different standards in the context of an NLRA case. This is unsurprising given that the NLRA contains a mechanism for employers to obtain indirect review of representation determinations through unfair labor practice proceedings. (NLRB Br. at 11-12, 14-17.)

6. Plaintiff also gains no support to the extent it is asserting district court jurisdiction based on *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), which held that district courts may have jurisdiction in certain circumstances where a plaintiff has made a non-frivolous assertion that its constitutional rights have been infringed. (Pl. Opp. at 16.) It is questionable whether *Fay v.*

[9] *See also El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1276 (D.C. Cir. 2011) ("When considering whether a statute bars judicial review, 'we begin with the strong presumption that Congress intends judicial review of administrative action'")(*quoting Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667 (1986)); *Ralls Corp. v. Comm. on Foreign Investment in the United States*, 2013 WL 681203, *11 (D.D.C. Feb. 26, 2013) (same).

Douds is valid law.[10] Even the Second Circuit revisited and limited its *Fay* holding. As explained by the Seventh Circuit, which rejects *Fay*, "[t]he Second Circuit has indicated that whatever is left of the doctrine it fashioned in *Fay* applies only to deprivation of 'property' rights." *Squillacote v. Int'l Bhd. of Teamsters, Local 344*, 561 F.2d 31, 37 (7th Cir. 1977) (citations omitted). Here, Maxpak has not shown, let alone asserted, any deprivation of a property right. (Pl. Opp. at 16.)

In any event, the availability of judicial review in the instant case is fatal to any claim for *Fay* jurisdiction. In contrast to this case, the right of judicial review was not available in *Fay*. *See Vapor Blast Mfg. Co. v. Madden*, 280 F.2d 205, 209 n. 8 (7th Cir. 1960). As the Seventh Circuit held in *Grutka v. Barbour*, 549 F.2d 5, 10 n.7 (7th Cir. 1977), "*Fay* is inapplicable [where the plaintiff] is not asserting a vested property right with respect to a collective bargaining agreement *where he has no way of ultimately obtaining judicial review*." (emphasis added).[11]

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[10] The Supreme Court has never adopted *Fay*, and, as this Court has observed, several cases "have cast doubt upon the continuing validity of the doctrine." *Midway Clover Farm Market, Inc. v. NLRB*, 318 F.Supp. 375, 378 n.2 (D.D.C. 1969) (collecting cases); *see also Bakery Confectionery and Tobacco Workers' Int'l Union, Local 6 v. NLRB*, 799 F. Supp. 507, 511-12 (E.D. Pa. 1992) (surveying the law and finding that the court "need not reach the merits of plaintiff's claim under the *Fay* doctrine because there is no reason to conclude that this exception is or will be recognized within the Third Circuit").

[11] Indeed, both NLRA cases cited by Maxpak were dismissed for lack of jurisdiction. (Pl. Opp. at 16). *See Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 708 (D.C. Cir. 1965) (district court had no jurisdiction in a declaratory judgment suit that an NLRB Regional Director's direction of a decertification election is void, finding no deprivation of property rights); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916 (D.C. Cir. 1968) (district court had no jurisdiction to entertain claim that the Board lacks statutory authority to hold elections and join bargaining units through its unit clarification procedure). Maxpak also cites *U.S. Airways, Inc. v. National Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999), which, as discussed *supra* at 11-12, states a standard specific to RLA statutory claims that is not relevant here.

Moreover, the test for *Fay* jurisdiction articulated by the D.C. Circuit is limited and similar to the *Kyne* test. "The District of Columbia Circuit's most recent expressions on the subject [of *Fay* jurisdiction] treat claims of violation of statutory and constitutional right alike as being subject to the test of *Leedom v. Kyne.*" *Squillacote*, 561 F.2d at 37. The D.C. Circuit explained that "[t]he Courts have also construed this [*Fay*] exception . . . very narrowly, requiring a 'strong and clear' showing that the Board has acted in a manner infringing on the union's constitutional rights." *United Food & Commercial Workers, Local 400 v. NLRB*, 694 F.2d 276, 279 (D.C. Cir.1982). As previously explained, Maxpak can make no such showing here. (NLRB Br. at 17-19.)

Although Maxpak has complained that the Board lacks a constitutionally valid quorum, it has not specified exactly which of *its* constitutional rights allegedly have been violated. To the extent Maxpak complains that it would prefer not to have to participate in the Board's processes (Pl. Opp. at 13), the caselaw is legion that this is insufficient to state a claim under the law.[12] Indeed, if it were otherwise, every plaintiff would prevail in *Kyne* cases and the requirement of administrative exhaustion would be rendered meaningless. In any event, Maxpak's claim certainly would not rise to the level of a "strong and clear showing," *United Food & Commercial Workers*, 694 F.2d at 279, nor would it prove the "deprivation of a property right," *Squillacote*, 561 F.2d at 37. Thus, Plaintiff has not met its burden, and this Court should dismiss the case for lack of subject matter jurisdiction if it does not transfer it.[13]

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[12] *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 47-48 (1938); *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002); *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974); *Heller Bros. Co. v. Lind*, 86 F.2d 862 (D.C. Cir. 1936) (per curiam).

[13] Maxpak failed to address, let alone dispute, the Board's argument that 28 U.S.C. § 1331 and 1337 are inapplicable here. (NLRB Br. at 21-23.)

8. Because this Court lacks jurisdiction under *Kyne* and *Fay*, it also lacks jurisdiction to exercise its discretion to award declaratory relief. *See, e.g., Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950) (explaining that the Declaratory Judgment Act "enlarged the range of remedies available in federal courts," but did not expand the subject-matter jurisdiction of the district courts); *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *Lexington Cartage Co. v. Int'l of Teamsters*, 713 F.2d 194, 196 (6th Cir. 1983); *Gallucci v. Chao*, 374 F.Supp.2d 121, 128-29 (D.D.C. 2005), *aff'd* 2006 WL 3018055 (D.C. Cir. 2006).[14]

9. To the extent that the case is not otherwise transferred or dismissed, Count II of the Complaint should be dismissed. Maxpak offers no counterargument or legal citation to refute the Board's argument and firmly settled precedent that district courts lack jurisdiction to restrain the NLRB General Counsel from performing its functions under the NLRA (NLRB Br. at 19-21), except to offer that "Count II of Maxpak's complaint should survive NLRB's venue and jurisdictional challenges for the same reasons Count I should survive." (Pl. Opp. at 21.) Count II has therefore been abandoned or forfeited.

[14] In any event, Maxpak's arguments for declaratory relief are unpersuasive and invite dangerous precedent. (Pl. Opp. at 20-21.) For instance, Maxpak asserts that it should not have to choose between bargaining with the union or refusing to bargain at the risk of drawing unfair labor practice charges. (Pl. Opp. at 20.) But as the Board has repeatedly explained, that is precisely the congressional design. *See, e.g., Hartz Mountain*, 727 F.2d at 1311. Maxpak also argues that the challenged ballots at issue in the first representation proceeding were in favor of Maxpak. (Pl. Opp. at 20.) However, the case was fully litigated and the NLRB concluded otherwise. (NLRB Br. at 4-5.) The Board's argument before this Court is not that Maxpak is incorrect on the merits of its assertion – merely that this is not the proper court or procedure through which to make such an argument.

CONCLUSION

For the foregoing reasons, as well as those contained in the Board's initial brief, this Court lacks subject matter jurisdiction over Maxpak's Complaint and should either transfer the case to the Middle District of Florida or dismiss the action with prejudice. If the Court decides that it will retain the case and that subject matter jurisdiction exists, it should decline to order the discretionary relief that Maxpak has requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief in Support of Motion to Transfer Venue or, in the Alternative, to Dismiss for Lack of Subject-Matter Jurisdiction was electronically filed with the Clerk of Court for the United States District Court for the District of Columbia this 18th day of July, 2013 using the CM/ECF system, which will serve Barbara A. Duncombe, Kerry P. Hastings, and Lisa A. Amend, Attorneys for Plaintiff Schwarz Partners Packaging, LLC d/b/a Maxpak by CM/ECF.

/s/ Nancy E. Kessler Platt