UNITED STATES DISTRICT COURT
EASTERN DISTRICT
OF MICHIGAN

THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, a federally recognized Indian tribe,

Plaintiff,

vs. Court File No. 11-14652

THE NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the board, MARK G. PEARCE, Chairman, CRAIG BECKER, and BRIAN HAYES.

Defendants.

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S NOTICE OF MOTION AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The plaintiff, Saginaw Chippewa Indian Tribe of Michigan ("Saginaw Tribe"), pursuant to Fed. R. Civ. P. 65, respectfully moves this Court for a Temporary Restraining Order and Preliminary Injunction against the defendants, the National Labor Relations Board ("NLRB") and Board members, who are sued in their official capacity (collectively the "Board"). Injunctive relief is necessary to protect the Saginaw Tribe's sovereignty from the imminent threat of infringement by the Board. At an NLRB hearing to commence on November 2, 2011, the Board will seek to apply the National Labor Relations Act[1] to the Saginaw Tribe's operation of a licensed gaming location on trust lands on the Tribe's Isabella Reservation. The Saginaw Tribe regulates, operates, and manages the gaming location, the Soaring Eagle Casino and Resort

[1] 29 U.S.C. §§ 151-169 ("NLRA").

("SECR") as part of its exercise of its: (1) treaty right of self-government; (2) inherent sovereign authority to engage in and regulate economic activity; (3) rights under the Indian Gaming Regulatory Act ("IGRA");[2] (4) the Saginaw Tribe and State of Michigan Gaming Compact ("Compact"); and (5) the Saginaw Tribe's laws.

Under settled federal law, "federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization."[3] Congress has not expressly authorized the application of the NLRA to Indian tribes. The NLRA therefore has no application to the Saginaw Tribe's regulation, operation, and management of the SECR location, which has no legal or corporate existence separate from the Saginaw Tribe.

If the Board is allowed to proceed with the November 2 hearing, it would violate the Saginaw Tribe's Treaty right of self-government and its inherent sovereign authority to engage in and regulate economic activity at its SECR location, as well as its rights under IGRA and the Compact. These impacts constitute irreparable harm.[4]

The Saginaw Tribe therefore brings this motion to enjoin the Board, the individual members of the Board in their official capacity, and any of the Board's agents, officers, employees, or representatives, from seeking to apply the NLRA to the Saginaw Tribe, the Tribe's operation at SECR, or any of the Tribe's officials, agents, or representatives, either at the NLRB hearing now scheduled for November 2, 2011, or at any later time during the pendency of this action. In further support of this Motion, the Saginaw Tribe respectfully refers the Court to the accompanying memorandum.

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[2] 25 U.S.C. §§ 2701-2721.

[3] *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (footnote omitted).

[4] *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (prospect of significant interference with tribal self-government is irreparable harm).

Dated: October 21, 2011

s/ William A. Szotkowksi
William A. Szotkowski (MN # 161937)
Sara K. Van Norman (MN # 0339568)
Andrew Adams III (WI # 1052371)
Jacobson, Buffalo, Magnuson,
Anderson & Hogen, P.C.
335 Atrium Office Building
1295 Bandana Boulevard
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: bszot@jacobsonbuffalo.com;
svannorman@jacobsonbuffalo.com;
aadams@jacobsonbuffalo.com

Sean Reed (MI # P62026)
General Counsel
Saginaw Chippewa Indian Tribe
7070 East Broadway
Mt. Pleasant, Michigan 48858
Tele: (989) 775-4032
Fax: (989) 773-4614
E-mail: sreed@sagchip.org

UNITED STATES DISTRICT COURT
EASTERN DISTRICT
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THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, a federally recognized Indian tribe,

Plaintiff,

vs. Court File No. 11-14652

THE NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the board, MARK G. PEARCE, Chairman, CRAIG BECKER, and BRIAN HAYES.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

CONCISE STATEMENT OF ISSUES PRESENTED

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized Indian tribe with treaty rights of self-government and inherent sovereign authority to engage in economic activity. The National Labor Relations Act by its terms (and as articulated under persuasive federal precedent) does not extend to Indian tribes, but the National Labor Relations Board has still set a the date of November 2, 2011 to hear a union's complaint that the Saginaw Tribe has engaged in unfair labor practices under the Act. Is the Saginaw Tribe entitled to a temporary restraining order and preliminary injunction to stop the Board proceedings until this Court has a full chance to consider whether the Board even has jurisdiction over the Saginaw Tribe?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Temporary restraining order factors

Warshak v. U.S., 490 F.3d 455, 465 (6th Cir. 2007)

G&V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1076 (6th Cir. 1994)

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 374 (2008)

NLRA does not extend to Indian tribes

Dobbs v. Anthem Blue Cross and Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010)

Prairie Band of Potawatomi Indians v. Peirce 253 F 3rd. 1234, 1250-51 (10th Cir. 2001)

Chickasaw Nation v. National Labor Relations Board, Case No. CIV-11-506-W (W.D. Okla. July 11, 2011)

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I. INTRODUCTION

A. Nature of the action.

This action is brought to protect the Saginaw Chippewa Indian Tribe's (the "Saginaw Tribe") treaty right of self-government and inherent sovereign authority to engage in and regulate economic activity. The National Labor Relations Board and its members (collectively the "Board") threaten to infringe on the Saginaw Tribe's rights in violation of federal case law that general federal laws do not apply to a tribal government's exercise of sovereign authority absent express congressional authorization.[5] At a hearing to commence on November 2, 2011 the Board will seek to apply the National Labor Relations Act ("NLRA")[6] to the Saginaw Tribe's regulation, operation, and management of gaming at one of its licensed gaming locations, the Soaring Eagle Casino and Resort ("SECR"), by subjecting the Saginaw Tribe to trial on unfair labor practice charges brought under section 8 of the NLRA.[7] SECR is a gaming facility duly chartered by the Tribe and operated pursuant to the Indian Gaming Regulatory Act ("IGRA"),[8] the Saginaw Chippewa Tribe – State of Michigan Gaming Compact ("Compact"),[9] and the Tribe's laws. The Board is proceeding on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Worker of America ("UAW" or "Union"), which has not been authorized by the Saginaw Tribe to enter or engage in activities within the Saginaw Tribe's Isabella Reservation or the Soaring Eagle Casino and Resort.

The Saginaw Tribe operates gaming activities at SECR as part of its government gaming, conducted as an exercise of the Saginaw Tribe's treaty rights of self-government and inherent sovereign authority to engage in economic activity, and pursuant to IGRA and the regulations

[5] *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010).
[6] 29 U.S.C. §§ 151-169.
[7] *Id.* at § 158.
[8] 25 U.S.C. §§ 2701-2721.
[9] Exhibit 1, attached hereto.

issued thereunder. Indian tribes are authorized to conduct tribal government gaming under IGRA as a "means of promoting economic development, and strong tribal governments,"[10] and may use gaming revenues only for governmental and charitable purposes.[11] IGRA further provides that Indian tribes may conduct Class III (or casino) gaming only in accordance with a tribal ordinance approved by the Chairperson of the National Indian Gaming Commission,[12] and pursuant to a Tribal-State Compact,[13] which the Secretary of the Interior has approved.[14] The United States Secretary of the Interior (the "Secretary") published approval of the Compact in the Federal Register as required by IGRA.[15] The SECR is licensed by the Saginaw Chippewa Gaming Commission ("SCGC"), as required by Section 5 of the Gaming Code of the Saginaw Chippewa Indian Tribe of Michigan ("Tribal Gaming Code")[16] and IGRA.[17] Soaring Eagle Gaming ("SEG") is a wholly owned government subdivision of the Saginaw Tribe chartered to conduct, operate, and manage gaming exclusively on behalf of the Saginaw Tribe.[18] This documentation manifests that the Saginaw Tribe's regulation, operation, and management of gaming at SECR is an exercise of the Saginaw Tribe's sovereign authority.

The Saginaw Tribe has had a long history of protecting and exercising its sovereign authority over its lands, its reservations, and its members through treaties, traditions, and tribal laws.[19] This Court and others have recognized that state and local laws and regulations do not

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[10] 25 U.S.C. § 2702(1).
[11] 25 U.S.C. § 2710 (b)(2)(B).
[12] *Id.* at (d)(1)(A).
[13] *Id.* at (d)(1)(C).
[14] *Id.* at (d)(8)(D).
[15] *Id.* at (d)(8)(D). *See also* 58 Fed. Reg. 63262 (Nov. 30, 1993).
[16] Exhibit 2, attached hereto.
[17] 25 U.S.C. §§ 2710(b)(1)(B), 2710(d)(1)(A).
[18] Exhibit 3, attached hereto.
[19] *See* Amended Constitution and By-Laws of the Saginaw Chippewa Indian Tribe of Michigan, Nov. 4, 1986 and Tribal Ordinance No. 3 Code of Conduct and Power to Exclude Non-Members,

apply to the tribe and its members on its reservation without the tribes consent.[20] In short, "federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent expressed congressional authorization."[21] And Congress has not expressly authorized the application of the NLRA to Indian tribes. Nothing in either the text or the legislative history of the Act even mentions Indian tribes.[22]

The Board's actions if not enjoined will impair and threaten to abrogate the Saginaw Tribe's treaty right of self-government, the very essence of its sovereignty, and the treaty right to exclude undesirable intruders from its lands. The Board's actions would also threaten and impair the Saginaw Tribe's sovereign authority to engage in and regulate economic activity and to fund essential government functions. Furthermore, the Board's actions violate the Saginaw Tribe's rights under IGRA. At its heart, the Board's action threaten to divest the Saginaw Tribe of its law making powers and regulatory authority by allowing a nontribal entity to use the "collective bargaining" process to determine what laws will apply to the Saginaw Tribe's gaming facility. The Board's actions would further impose the threat of a labor strike on a facility wholly owned and operated by the Saginaw Tribe. Under settled law, these impacts on the Saginaw Tribe's sovereignty constitute irreparable harm.[23] The Saginaw Tribe therefore brings this action for immediate injunction and declaratory relief.

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attached hereto as Exhibits 4 and 5.

[20] *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, CIV. 05-10296-BC, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010) *motion for relief from judgment denied*, 05-10296-BC, 2011 WL 1884196 (E.D. Mich. May 18, 2011).

[21] *Dobbs*, 600 F. 3rd at 1283 (footnote omitted) (emphasis added).

[22] *See NLRB v. Pueblo of San Juan*, 276 F. 3rd 1186, 1196 (10th Cir. 2002) (noting that "neither the legislative history of the NLRA, nor its language, make any mention of Indian Tribes" and holding that the NLRA did not divest the Pueblo of San Juan of its inherent sovereign authority to enact a right to work ordinance).

[23] *Prairie Band of Potawatomi Indians v. Peirce* 253 F.3d. 1234, 1250-51 (10th Cir. 2001) (prospect of significant interference with tribal self government constitute irreparable harm).

B. Jurisdiction

This Court has subject matter jurisdiction over this action under 28 U.S.C. Sections 1331 and 1362 because it is brought by a federally-recognized Indian Tribe with a governing body duly recognized by the Secretary of the Interior. The matter also raises substantial questions of federal law arising under the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2, treaties between the United States and the Saginaw Tribe,[24] and federal statutory and common law.

In this action, the Saginaw Tribe seeks to protect rights it holds by treaty and under its inherent sovereign authority to be free from interference by the Board. This court's federal question jurisdiction applies to claims based on treaty rights,[25] and questions concerning the scope of tribal inherent sovereign authority[26] and IGRA.[27] In addition, Indian tribes have the right of action to "sue[] to enforce Indian rights protected by treaties, statutes and executive orders."[28]

II. STATEMENT OF FACTS

On April 1, 2011, former SECR employee Susan Lewis filed a charge with the NLRB alleging violations of the NLRA. SECR had suspended and ultimately terminated Lewis from her employment with the SECR under the Tribe's progressive disciplinary policy for repeated violation of the Tribe's No Solicitation Policy. But the Tribe agreed to cooperate with the

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[24] Executive Order of May 14, 1855 in Kappler, Charles, comp. and ed., *Indian Affairs: Laws and Treaties* (Washington : Government Printing Office, 1913), Vol. III, 846-47; Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, Aug. 2, 1855 ("1855 Treaty"), 11 Stat. 633 (Aug. 2, 1855); and Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 1864 ("1864 Treaty"), 14 Stat. 637 (Oct. 18, 1864), attached hereto as Exhibits 6-8.
[25] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).
[26] *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53).
[27] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[28] *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)).

NLRB's investigation of the charge while preserving its right to challenge the jurisdiction of the NLRB over the SECR. The NLRB investigated the charge and on September 13, 2011 filed a Complaint against the SECR alleging that the Tribe's No Solicitation Policy violates the NLRA.[29] The Tribe filed an Answer by Special Appearance with the NLRB on September 22 contesting the jurisdiction of the NLRB over the Tribe or its enterprises.[30] On September 27, the Tribe received correspondence from the NLRB's attorney claiming that the Tribe's answer was incomplete under NRLB rules and threatening a motion to strike the Tribe's answer and to deem certain allegations as admitted if an amended Complaint was not filed.[31] The Tribe filed an amended answer with the NLRB on October 3, 2011 in an effort to avoid procedural complications regarding the important issues of the Tribe's sovereignty and treaty rights.[32] The NLRB has scheduled this matter for trial by a NLRB administrative law judge for November 2.

III. ARGUMENT

A preliminary injunction is warranted pending the outcome of this matter in order to prevent further irreparable harm to the Saginaw Tribe. In determining whether to grant preliminary injunctive relief, the Court must consider and balance the following four factors: "(1) whether the moving party has established a substantial likelihood or probability of success on the merits; (2) whether the moving party will suffer an irreparable injury if the court does not grant a preliminary injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief."[33] The

[29] Exhibit 9, attached hereto.
[30] Exhibit 10, attached hereto.
[31] Exhibit 11, attached hereto.
[32] Exhibit 12, attached hereto.
[33] *Warshak v. U.S.*, 490 F.3d 455, 465 (6th Cir. 2007); *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

factors need not be established in the conjunctive for an injunction to issue, but rather are to be balanced, with the court carefully considering each factor.[34] As discussed below, the Saginaw Tribe respectfully submits that these four factors weigh in favor of enjoining the actions of the Board, and the preliminary injunction should be issued.

A. The Saginaw Tribe has a substantial likelihood of success on the merits.

1. The rule of law set forth in the Tenth Circuit decision in *Dobbs*, not in the D.C. Circuit decision in *San Manuel*, is controlling.

a. *Dobbs* rule.

For nearly 30 years, the Board held that federally-recognized Indian tribes and reservation tribal enterprises are exempt from the NLRA.[35] And in considering the question, at least one Circuit, the Tenth, has concluded that "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization."[36] This rule applies whether the exercise of tribal sovereign power is based on a treaty that "expressly protect[s] Indian tribes' sovereignty" or inherent sovereign authority.[37] In *Dobbs*, the Tenth Circuit also made clear that "the proposition that '[f]ederal statutes of general application apply to Native Americans and their property interests'" applies only to "cases in which an Indian tribe exercises its property

[34] *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 46 F.Supp.2d 689, 694 (W.D. Mich. 1999). *See also In re: DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) ("Accordingly, the degree of likelihood of success required [to support the grant of a preliminary injunction] may depend on the strength of the other factors [considered].")
[35] *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976).
[36] *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (citing *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002) (*en banc*); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989); *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982)).
[37] *Id*. at 1284 (citations omitted).

rights," and thus not to "cases in which [a tribe] 'exercise[s] its authority as a sovereign.'"[38]

These rules are based on the pathmarking decision in *San Juan*, in which the Tenth Circuit held that the NLRA did not preempt tribal sovereign authority to enact a right-to-work ordinance.[39] The Board argued that Section 8(a)(3) of the NLRA protected the right of a union and an employer to enter into a union security agreement, and that under the express language of Section 14(b) of the NLRA, only states or territories could prohibit such agreements.[40] The court rejected that argument, holding that the Pueblo's right-to-work ordinance was an exercise of its "retained sovereign authority" that the NLRA would be construed to work a divestment of tribal sovereignty only if "Congress ha[d] made its intent clear that we do so."[41] Furthermore, the silence of the NLRA with respect to Indian tribes "is not sufficient to establish congressional intent to strip Indian tribes of their retained sovereignty to govern their own territory.[42] Rather, "[t]he correct presumption is that silence does not work a divestiture of tribal power."[43]

In so holding, the Tenth Circuit found inapposite the decision in *Federal Power Comm'n v. Tuscarora Indian Nation*,[44] in which the Supreme Court had held that the Federal Power Act ("FPA") authorized the condemnation of land owned by the Tuscarora Indian Nation, which Congress had never designated as a reservation by statute or treaty.[45] At the outset, the *Tuscarora* Court determined that the dictum in *Tuscarora* that "it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests"[46]

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[38] *Id*. at 1284 n.8 (internal citations omitted).
[39] 276 F.3d at 1200.
[40] *Id.* at 1195.
[41] *Id.*
[42] *Id*. at 1196.
[43] *Id.* (citing *Merrion*, 455 U.S. at 148 n.14).
[44] 362 U.S. 99 (1960).
[45] *San Juan*, 276 F.3d at 1198-1200.
[46] 276 F.3d at 1199 (quoting *Tuscarora*, 362 U.S. at 116). *EEOC v. Cherokee Nation*, 871 F.2d

addressed only the applicability of such laws to individual Indians. Addressing the legal force of the *Tuscarora* decision, the Tenth Circuit held that it "dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land," and thus "do[es] not constitute a holding as to tribal sovereign authority to govern."[47] On this basis, the Tenth Circuit subsequently held in *Dobbs* that the *Tuscarora* dictum applies only to an Indian tribe's exercise of its property rights, not when it "exercise[s] its authority as a sovereign.'"[48]

In the present case the Saginaw Tribe's sovereign authority to govern and operate its gaming facility pursuant to Tribal and federal law is directly at issue. The reasoning in *Dobbs* should apply here as well.

b. *San Manuel* rule.

In the D.C. Circuit decision of *San Manuel Indian Bingo & Casino,*[49] the district court (and the Board) departed from a longstanding position of noninterference (and the rule reflected in *Dobbs* and *San Manuel*). The Circuit affirmed the Board's holding that, under *Tuscarora*, "statutes of 'general application' apply to the conduct and operations, not only of individual Indians, but also of Indian tribes."[50] It held that the NLRA applies to the conduct and operations of Indian tribes on and off the reservation unless it is shown that "(1) the law 'touches exclusive rights of self-governance in purely intramural matters'; (2) the application of the law

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937, 938 n.3 (10th Cir. 1989) (recognizing this statement as a dictum).

[47] *Id*. at 1198-99.

[48] *Dobbs*, 600 F.3d at 1283 n.8 (quoting *San Juan*, 276 F.3d at 1199). The Tenth Circuit has also squarely held that "[t]he so-called *Tuscarora* rule *is not applicable* to treaty cases," *EEOC v. Cherokee Nation*, 871 F.2d at 938 n.3; *Donovan*, 692 F.2d at 711 ("The *Tuscarora* rule does not apply to Indians if the application of the general rule would be in derogation of the Indians' treaty rights").

[49] *San Manuel Indian Bingo & Casino v. NLRB* ("*San Manuel* II"), 475 F.3d 1306, 1316 (D.C. Cir. 2007); *see also San Manuel Indian Bingo & Casino v. NLRB*, 341 N.L.R.B. 1055 (2004) ("*San Manuel* I").

[50] 341 N.L.R.B. at 1059.

would abrogate treaty rights; or (3) there is 'proof' in the statutory language or legislative history that Congress did not intend the law to apply to Indians tribes."[51]

The new *San Manuel* "test" cannot be reconciled with *Dobbs* and *San Juan*, and this Court should reject the Board's deviation. In *Dobbs* and *San Juan*, the Tenth Circuit made clear that the *Tuscarora* dictum has no application to cases in which a tribe is exercising its sovereign authority.[52] In contrast, the Board construes *Tuscarora* to mean that general federal laws apply to Indian tribes.[53] In *San Juan*, the court held that the absence of a reference to Indian tribes in a statute and its legislative history demonstrates its inapplicability to the tribes: "Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory."[54] But under *San Manuel*, the Board silence establishes a double negative: that Congress did *not* intend that the NLRA *not* apply to Indian tribes.[55] Finally, respect for Indian sovereignty has the core of federal court rule.[56] In *Dobbs*, the court refused to assume Congress intended to infringe on tribal sovereignty by "treating tribal governments as a kind of inferior sovereign" unless it could find "an express statement or strong evidence of congressional intent."[57] In contrast, the Board considers the sovereign status of Indian tribes as a factor to consider in the exercise of its discretionary jurisdiction.[58] In sum, the

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[51] *Id*. (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985)).
[52] *Dobbs*, 600 F.3d at 1283 n.8 (quoting *San Juan*, 276 F.3d at 1199). Even if *Tuscarora* were otherwise applicable, the 10th Circuit has held that the NLRA is not a "generally applicable" law, given the exceptions set forth in section 14(b), 29 U.S.C. § 164(b), which expressly recognize that states and territories may prohibit Union shop provisions. *San Juan*, 276 F.2d at 1199. That same conclusion applies with even greater force when the broader exemptions set forth in Section 2(2), 29 U.S.C. § 152(2), are considered.
[53] *San Manuel* I, 341 N.L.R.B. at 1059.
[54] *San Juan*, 276 F.3d at 1196.
[55] *San Manuel* I, 341 N.L.R.B. at 1058.
[56] *Dobbs*, 600 F.3d at 1283.
[57] *Id*. at 1284.
[58] *San Manuel* I, 341 N.L.R.B. at 1062-63.

Board's approach turns the *Dobbs* test upside down, and the Court should reject it.

2. The NLRA is inapplicable because the Saginaw Chippewa Tribe conducts gaming in the exercise of its sovereign authority.

As noted, the Saginaw Tribe regulates, operates, and manages all activities at the SECR in the exercise of its sovereign authority. The NLRA is therefore inapplicable to the Saginaw Tribe under the rule of *Dobbs*. Furthermore, applying the NLRA to the Saginaw Tribe would shift substantial control of the Saginaw Tribe's gaming operations to the Board and the UAW, subordinate the Saginaw Tribe's sovereign powers to those of the Board and the UAW, and make their decisions enforceable by the Board in its own fora through the prosecution of unfair labor practice charges. Application of the NLRA to the Saginaw Tribe is therefore barred because it would interfere with the Saginaw Tribe's sovereign powers.[59]

The Saginaw Tribe's treaty right of self-government is protected by the Executive Order of May 14, 1855,[60] and the 1855 Treaty[61] and the 1864 Treaty.[62] Article 2 of the 1864 Treaty specifically states that the lands selected in Isabella County, Michigan would be "set apart for the exclusive use, ownership, and occupancy" of the Saginaw Tribe.[63]

Applying the NLRA to the Saginaw Tribe would divest the tribe of the right to determine the manner in which it will engage in economic activity. The Board has already violated this right by asserting SECR is an entity separate from the Saginaw Tribe. And under the NLRA, the

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[59] *See Donovan*, 692 F.2d at 711 (barring application of general statute that would interfere with treaty rights and dilute tribal sovereign authority).
[60] Kappler, Charles, comp. and ed., *Indian Affairs: Laws and Treaties* (Washington : Government Printing Office, 1913), Vol. III, 846-47, attached at Exhibit 6.
[61] Exhibit 7.
[62] Exhibit 8.
[63] Bowes Aff. ¶ 26, attached hereto as Exhibit 13. *See also* J. Randolph Valentine, Linguistic Analysis of the 1855 and 1864 Treaties between the United States and the Saginaw, Swan Creek and Black River bands of Chippewa Indians, page 26 (August 1, 2007), attached here to as Exhibit 14.

Board has the power to determine the "unit appropriate for the purpose of collective bargaining,"[64] which would enable it to pick and choose the categories of employees it would recognize as a bargaining unit without regard to how the Saginaw Tribe's government is organized. The Board has no authority to alter or fragment the Saginaw Tribe's governmental structure in this manner.

The Saginaw Tribe also has the right to determine who may enter tribal territory, the right to condition the presence of those permitted to enter, and the power to exclude. The 1864 Treaty between the Saginaw Tribe and the United States sets apart the Isabella Indian Reservation for the "exclusive use, ownership, and occupancy" of the Tribe.[65] The Supreme Court has examined similar language in other treaties and held that it gives an Indian tribe the right to exclude non-Indians form reservation lands that are held by the United States in trust for the tribe or its members.[66] Applying the NLRA to require the Saginaw Tribe to grant access on the terms sought by the Board or Union would abrogate these rights. The Board has no right of access to Saginaw Tribe facilities to enforce the NLRA. Nor does the UAW have a right to engage in organizing and representation activities in the Saginaw Tribe's facilities, either in person or electronically. For example, the UAW has no right to the names and addresses of Saginaw Tribe employees, or to communicate with such employees using information furnished by the Saginaw Tribe. Applying the NLRA to the Saginaw Tribe to require it to grant such access would divest the Saginaw Tribe of its power to exclude. This would also deprive the Saginaw Tribe of the

[64] 29 U.S.C. § 159(b).
[65] *See* 1864Treaty at Art. 2.
[66] *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993). *See also Montana v. United States*, 450 U.S. 544, 553-54 (1981) (noting that treaty language stating that certain lands shall be "set apart for the absolute and undisturbed use and occupation of the Indians herein named" "gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it").

right to administer and enforce its background check and licensing processes as a condition of entry,[67] which is required by IGRA[68] and the Compact.[69] At the same time, the Saginaw Tribe would remain responsible for compliance with these laws, and for shielding its gaming activities from "organized crime and other corrupting influences."[70] This would create an untenable and illegal result, where the Saginaw Tribe would have to simply ignore both tribal law and federal gaming law.

Gaming is conducted by the Saginaw Tribe in the exercise of its sovereign authority to "undertake and regulate economic activity,"[71] which includes the right to conduct gaming on Indian reservation lands when state public policy towards gaming is regulatory rather than prohibitory.[72] Congress found in IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[73] IGRA provides a statutory basis for both "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,"[74] and "the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, . . ."[75] In enacting IGRA, Congress "intended to expressly preempt the field in the governance of gaming activities

[67] § 6.1 of Tribal Gaming Code.
[68] 25 U.S.C. § 2710(b)(2)(F).
[69] § 4(C),(D) at 5.
[70] 25 U.S.C. § 2702(2).
[71] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).
[72] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987).
[73] *See* 25 U.S.C. § 2701(5).
[74] *Id*. at § 2702(1).
[75] *Id.* at § 2702(2). *See also Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010) (tribe's sovereign immunity extended to the tribe's economic development authority and the casino that it operates).

on Indian lands."[76]

As required by IGRA, the Saginaw Tribe enacted the Tribal Gaming Code to regulate all Class II and Class III gaming that it conducts, and entered into a Class III gaming compact with the State of Michigan. Both have been approved and the Compact now has the force of federal law.[77] Pursuant to IGRA, the Saginaw Tribe's gaming revenues are used only to fund tribal government operations and programs, provide for the general welfare of the tribe, promote tribal economic development, and for charitable and local purposes.[78]

All persons working at the Saginaw Tribe's gaming locations, including SECR, are Saginaw Tribe employees, who are subject to the Saginaw Tribe's regulatory authority under IGRA, the Compact, and the Tribal Gaming Code. In addition, their employment is subject to personnel rules contained the SECR Associate Handbook ("Associate Handbook"), enacted by the Saginaw Chippewa Tribal Council in the exercise of the Tribe's right of self-government.[79] The Associate Handbook comprehensively addresses the terms and conditions of employment and provides an employment preference for Tribal members.[80]

Applying the NLRA to the Saginaw Tribe would divest the Saginaw Tribe of its right to regulate, operate, and manage gaming at the SECR. First, it would require the Saginaw Tribe to engage in collective bargaining[81] concerning "wages, hours, and other terms and conditions of employment. . . ."[82] This would subject virtually all of the rights on which the Saginaw Tribe relies to regulate, operate, and manage activities at the SECR to negotiations concerning the

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[76] S. Rep. No. 100-466, at 6 (1988) reprinted in U.S.C.C.A.N. 3071, 3076.
[77] 25 U.S.C. §§ 2710(d)(2)(C), (d)(3)(B).
[78] *Id.* at (b)(2)(B).
[79] Exhibit 15, attached hereto.
[80] *Id*. at §§ 2.2(A), 7.8.
[81] *See* 29 U.S.C. §§ 157-59.
[82] SECR Employ. Handbook at § 158(d), Exhibit 15.

"terms and conditions of employment."[83] For example, the regulatory requirements imposed and administered by the Saginaw Tribe under IGRA, the Compact, and the Tribal Gaming Code – including the background and licensing requirements[84] could be subjected to collective bargaining, as well as the Associate Handbook, including the Saginaw Tribe's employment preference for tribal members. As a result, the Saginaw Tribe would be required to bargain for the continued applicability of its own laws to its own governmental activities. The result of the collective bargaining process would be a *de facto* statute governing conditions of employment that would impermissibly replace the Saginaw Tribe's laws.

Second, applying the NLRA to the Saginaw Tribe would guarantee its employees the right to strike, which would confer on a representative selected by its employees the power to bring the tribal government to a halt. A strike by Saginaw Tribe employees would jeopardize the Saginaw Tribe's ability to operate its government; protect the safety, health, and welfare of its members, residents, and visitors; and provide tribal services. Furthermore, to eliminate the threat of a strike would require the consent of the employees' representative through the collective bargaining process.[85] As a result, the Saginaw Tribe's ability to continue to meet its governmental responsibilities would depend on the outcome of the bargaining process.

Subordinating the Saginaw Tribe's sovereignty to the NLRA inherently violates federal law. "Requiring the consent of the [Union] deposits in the hands of the [Union] the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority."[86] And it has not done so in the NLRA.

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[83] 29 U.S.C. § 158(d).
[84] *See* 25 U.S.C. § 2710(b)(2)(F); CNC §§ 3-3606, 3-3610.
[85] 29 U.S.C. §§ 157, 158(d).
[86] *Merrion*, 455 U.S. at 147 (1982) (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)).

3. Congress has not authorized the application of the NLRA to Indian tribes.

Under *Dobbs*, the NLRA is inapplicable to the Saginaw Chippewa Tribe unless Congress has expressly authorized its application.[87] Neither the NLRA nor its legislative history mention Indian tribes,[88] as the Board itself has recognized.[89] Accordingly, the initial question is what inference to draw from this silence. The rule of *San Juan* is clear: "Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory."[90] Rather, "the proper inference from silence is that the sovereign power [] remains intact."[91] The force of this rule is demonstrated by *Iowa Mut. Ins. Co. v. LaPlante*,[92] in which the Supreme Court rejected the argument that the federal diversity statute limited tribal jurisdiction and overrode the federal policy of deference to tribal courts. The Court found that "[t]he diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government,"[93] and that the diversity statute therefore had no effect on tribal sovereignty.[94] "[B]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact."[95]

Where Indian treaty rights are at issue, as is the case here, the test is even more demanding. As the Tenth Circuit explained in *EEOC v. Cherokee Nation*: "Like the Supreme

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[87] 600 F.3d at 1283.
[88] *San Juan*, 276 F.3d at 1196.
[89] *Sac & Fox Indus. Ltd.*, 307 N.L.R.B. 241, 245 (2004) (the Board "is not aware of [] any discussion whatsoever in the legislative history of the NLRA dealing with Indians").
[90] *San Juan*, 276 F.3d at 1196 (citations omitted).
[91] *Id*. (quoting *Merrion*, 455 U.S. at 148 n.14).
[92] 480 U.S. 9 (1987).
[93] 480 U.S. at 17.
[94] *Id*. at 18.
[95] *Id*. at 18 (quoting *Merrion*, 455 U.S. at 149 n.14).

Court, we have been "extremely reluctant to find congressional abrogation of treaty rights" absent explicit statutory language. *See United States v. Dion*, 476 U.S. 734, 739 (1986). . . . Indian treaty rights are too fundamental to be easily cast aside."[96] In *Dion*, the Court required that "Congress' intention to abrogate Indian treaty rights be clear and plain," emphasizing that "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty."[97]

The NLRA does not satisfy this standard. The absence of any reference to Indian tribes in the NLRA or its legislative history makes it impossible to show that, in enacting the NLRA, Congress "actually considered" the conflict between that Act and Indian treaty rights "and chose to resolve that conflict by abrogating the treaty."[98]

Nor does the Board's reliance on the definition of "employer" under the Act aid its cause.[99] The definition of "employer" – like the Act as a whole – is silent with respect to Indian tribes, and that silence does not support the application of the Act to Indian tribes.[100] And whether Indian tribes are "employers" within the literal meaning of the NLRA would not determine whether the Act applies to Indian tribes in any event.[101] In sum, the only basis on

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[96] 871 F.2d 937, 938 (10th Cir. 1989).
[97] 476 U.S. at 739-40.
[98] *Id.* Moreover, the available indications in the text are consistent with the inference to be drawn from that silence – that the sovereign power remains intact. *Id*. The Act's definition of "commerce," section 2(6), 29 U.S.C. § 152(6), expressly refers to States, the District of Columbia, Territories and foreign countries, but conspicuously omits any reference to Indian tribes.
[99] *See* § 2(2), 29 U.S.C. § 159(2).
[100] *San Juan*, 276 F.3d at 1194-96; *EEOC v. Cherokee Nation*, 871 F.2d at 938-39 (silence of ADEA with respect to Indian tribes is not sufficient to abrogate rights of Indian sovereignty).
[101] *Donovan*, 692 F.2d at 712 (although the parties conceded that a tribal enterprise was an "employer" within the literal meaning of OSHA, Court held that OSHA did not apply to the tribe because its application would violate the treaty power to exclude, and "dilute the principles of

which the NLRA could be argued to apply to Indian tribes is by implied preemption, which "does not suffice."[102]

Finally, if more were needed, the context in which the NLRA was passed makes it inconceivable that it was intended to apply to Indian tribes. The year before Congress enacted the NLRA, it enacted the Indian Reorganization Act ("IRA"),[103] whose "overriding purpose … was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[104] To enhance self-government, section 16 of the IRA authorized Indian tribes to adopt constitutions exercising "all powers vested in any Indian tribe or tribal council by existing law," as well as additional powers specifically stated in section 16. 25 U.S.C. § 476(e). To facilitate tribal economic development, section 17 of the IRA authorized the Secretary of the Interior to issue charters of incorporation authorizing Indian tribes to organize and operate business corporations under such charters.[105] It is inconceivable that, one year later, Congress would have reversed direction, and decided instead to treat Indian tribes as private employers under the Act.

4. The Court should follow the Western District of Oklahoma's holding in *Chickasaw Nation*, not the Western District of Michigan's decision in *Little River*.

Because this action seeks to protect the Saginaw Tribe's sovereign rights from application of the NLRA, the court should find the Western District of Michigan's decision in

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tribal sovereignty and self-government recognized in the treaty").

[102] *San Juan*, 276 F.2d at 1192 (citing *LaPlante*, 480 U.S. at 18). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-531 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

[103] 25 U.S.C. §§ 461-77.

[104] *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

[105] 25 U.S.C. § 477.

Little River Band of Ottawa Indians v. National Labor Relations Board[106] has no application here and instead that the Western District of Oklahoma's decision in *Chickasaw Nation v. National Labor Relations Board* is persuasive.[107] In *Little River*, the federal district court held that it lacked jurisdiction to prevent the Board from proceeding on the charge that the tribe engaged in an unfair labor practice, thus dismissing the tribe's request for a preliminary injunction.[108] The *Little River* court based its decision in large part on its belief that the tribe had not established federal-question jurisdiction: "The NLRA does not create a cause of action for a plaintiff in federal district court."[109]

But in *Chickasaw Nation*, the federal district court rejected the overly broad interpretation that other courts have given *Tuscarora* and granted the tribe's request for a preliminary injunction over the Board's pursuit of unfair labor practice charge. The *Chickasaw Nation* court held that the Nation's treaties, which allow the Nation to determine who is permitted to enter its territory, and to attach conditions to those allowed to enter the territory, were not abrogated by the NLRA.[110] In the present case, the Saginaw Tribe argues that its Treaties, which allow the Tribe to determine who is permitted to enter its territory and place conditions on those granted entrance, have not be abrogated by the NLRA. The Court should find the Saginaw Tribe has a substantial likelihood of success on the merits.

B. The Saginaw Tribe will suffer irreparable harm absent injunctive relief.

Applying the NLRA to the Saginaw Tribe would cause certain and great injury to the Saginaw Tribe's treaty rights and inherent sovereign authority that money damages could not

[106] 747 F.Supp.2d 872 (W.D. Mich. 2010).
[107] Case No. CIV-11-506-W (W.D. Okla. July 11, 2011), Exhibit 16, attached hereto.
[108] 747 F.Supp.2d at 890-91.
[109] *Id.* at 890.
[110] *Chickasaw Nation*, CIV-11-506-W at 6, Exhibit 16.

remedy: "A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages."[111] And if the Board is permitted to move forward, the Saginaw Tribe will "be compelled to expend time and effort on litigation [before a body] that does not have jurisdiction over it, which is an injury that cannot be vindicated following a determination on the merits."[112] While the alleged violation of a treaty or inherent sovereign right presents an issue of law that is subject to *de novo* review by the Court of Appeals if the Board were to rule that the NLRA applies,[113] the Saginaw Tribe would instead have to seek judicial review under Section 10(f) of the NLRA – the very enactment that the Saginaw Tribe claims is inapplicable here. Finally, the Tenth Circuit has established that the improper exercise of jurisdiction over a tribe is an irreparable injury to the tribe's inherent sovereign authority.[114] The Court here should find the Saginaw Tribe will suffer irreparable harm without injunctive relief.

C. The threatened injury to the Saginaw Tribe outweighs any possible injury to the Board.

Any possible injury to the Board does not outweigh the threat to the Saginaw Chippewa Tribe's treaty rights and inherent sovereignty. First, the injunction would not prevent the Board from enforcing the NLRA elsewhere.[115] Second, if the Board establishes that it has jurisdiction

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[111] *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992)).
[112] *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (quoting *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (amendment added)).
[113] *San Juan*, 276 F.3d at 1190.
[114] *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Prairie Band*, 253 F.3d at 1250-51; *Winnebago Tribe of Neb. v. Stovall*, 216 F. Supp.2d 1226 (D. Kan. 2002), *aff'd*, 341 F.3d 1202, 1233 (10th Cir. 2003).
[115] *See Prairie Band of Potawatomi Indians*, 253 F.3d at 1252 ("the state has not been prevented from enforcing its registration and titling laws wholesale-only with respect to the tribe and its members").

over the Saginaw Tribe, the Board proceeding may continue where it left off.[116] But if an injunction is *not* issued, the Saginaw Tribe's treaty right of self-government and inherent sovereign authority to engage in economic activity will be violated. The balance of harm factor therefore supports issuance of an injunction.

D. The public interest supports the grant of injunctive relief.

Federal courts have repeatedly affirmed that supporting tribal self-government is a matter of public interest.[117] The public interest therefore supports issuance of an injunction here.

IV. CONCLUSION

For the foregoing reasons, the Saginaw Tribe respectfully submits that injunctive relief should be granted to protect its sovereign authority from abrogation and infringement by the Board.

Dated: October 21, 2011

s/ William A. Szotkowksi
William A. Szotkowski (MN # 161937)
Sara K. Van Norman (MN # 0339568)
Andrew Adams III (WI # 1052371)
Jacobson, Buffalo, Magnuson,
Anderson & Hogen, P.C.
335 Atrium Office Building
1295 Bandana Boulevard
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: bszot@jacobsonbuffalo.com;
svannorman@jacobsonbuffalo.com;
aadams@jacobsonbuffalo.com

Sean Reed (MI # P62026)
General Counsel
Saginaw Chippewa Indian Tribe
7070 East Broadway
Mt. Pleasant, Michigan 48858
Tele: (989) 775-4032
Fax: (989) 773-4614
E-mail: sreed@sagchip.org

[116] *See Wyandotte Nation*, 443 F.3d at 1256.
[117] *Prairie Band of Potawatomi Indians*, 253 F.3d at 1253; *Seneca-Cayuga*, 874 F.2d at 716; *see also Sac and Fox Nation of Mo. v. LaFaver*, 905 F. Supp. 904, 907-08 (D. Kan. 1995) ("The public also has a genuine interest in helping to assure Tribal self-government, self-sufficiency and self-determination.").

AFFIDAVIT OF SERVICE BY MAIL

Re: *Saginaw Chippewa Indian Tribe of Michigan d/b/a Soaring Eagle Casino and Resort v. The National Labor Relations Board, and their official capacities as members of the board, Mark G. Pearce, Chairman, Craig Becker, and Brian Hayes.*

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Sara K. Van Norman being duly sworn states that on October 21, 2011 she electronically filed the following:

- *Summons and Complaint for Immediate Injunctive and Declaratory Relief;*
- *Plaintiff's Notice of Motion, Motion, and Memorandum in Support of Motion for Temporary Restraining Order with Index and Exhibits 1 through 16; and*
- *Proposed Order.*

and also served the same in hard copy upon the following individuals by overnight mail:

Mark G. Pearce, Member
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Craig Becker, Member
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Mary Beth Foy, Counsel
National Labor Relations Board
477 Michigan Ave Rm 300
Detroit, MI 48226

Brian Hayes, Member
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Barbara L. McQuade
United States Attorney for the Eastern District of Michigan
United States Attorney's Office
211 W. Fort Street, Suite 2001
Detroit, MI 48226

Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Lafe Solomon, Acting General Counsel
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

s/ Sara K. Van Norman
Sara K. Van Norman (MN # 0339568)
Jacobson, Buffalo, Magnuson,
Anderson & Hogen, P.C.
335 Atrium Office Building
1295 Bandana Boulevard
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: svannorman@jacobsonbuffalo.com