APPEAL NO. 17-1178

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 and its LOCAL LODGE 873,

Plaintiffs-Appellees

v.

RAY ALLEN and JAMES R. SCOTT,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 16-cv-77-wmc
Before the Honorable William M. Conley

ANSWER TO PETITION FOR EN BANC REHEARING BY PLAINTIFFS-APPELLEES INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 AND ITS LOCAL LODGE 873.

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INTRODUCTION

The State cannot establish that *en banc* review is warranted. There is no intracircuit conflict on the substantive issues nor does the petition address an area of unsettled law. See Fed. R. App. 35(a). For 47 years the law has been settled that dues checkoff duration is governed by 29 U.S.C. §186(c)(4) and state regulation of duration is preempted by federal law. See *SeaPAK v. Industrial, Technical and Professional Employees*, 300 F. Supp. 1197(S.D. Ga. 1969) *summarily aff'd* 400 U.S. 985 (1971). Review would confuse, rather than clarify, existing law on checkoff agreements.

Last month, in *Int'l Union of Operating Engineers Local 399 v. Village of Lincolnshire*, 2018 WL 4655487 (7th Cir. Sept. 28, 2018), this court specifically stated:

> Section 302 of the Taft-Hartley Act comprehensively regulates the payment of fees by employers, including payments to unions. 29 U.S.C. § 186. This includes a provision allowing for checkoffs to pay union fees under certain circumstances. *Id*. § 186(c)(4). ***The statutory scheme represents a careful balancing of interests and leaves no room for regulation—complementary or otherwise—by subnational units of government.***

Id. at *5 (emphasis added) (*citing* See *United Auto. Workers of Am. Local 3047 v. Hardin Cty., Ky.*, 842 F.3d 407, 421 (6th Cir. 2016) *cert. denied* 138 S.Ct. 130 (2017)). The decision was circulated to all members of the court and "[n]o judge in regular active service wished to hear this case *en banc*." *Id.* at *1, fn 2.

Village of Lincolnshire and the majority decision in this case are consistent with decisions by the Fourth, Fifth and Sixth Circuits. *N.L.R.B. v. Shen-Mar Food Prod.*, 557 F.2d 396, 399 (4th Cir. 1977); *N.L.R.B. v. Atlanta Printing Specialties & Paper Prod. Union 527*, 523 F.2d 783, 787 (5th Cir. 1975); *Hardin Cty., supra.* They are also consistent with a holding of the National Labor Relations Board. *See e.g. Metalcraft of Mayville, Inc.*, 2017 WL 956627 (N.L.R.B. Div. of Judges, Mar. 10, 2017)

Rather than addressing controlling precedent under §186(c)(4), the State and *amici* incorrectly rely on the statutory provisions governing union security agreements under § 29 U.S.C. §164(b). The Supreme Court has pointed out, the "statutory provisions which permit these obligations," are different: "§158(a)(3) [for] union security," and "§186(c)(4) [for] dues check-off." *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 199 (1991). Dues checkoff agreements have not now, nor have they ever been, union security devices. *Vill. of Lincolnshire*, 2018 WL 4655487 at *5; *Atlanta Printing Specialties*, 523 F.2d 783, 786. Union security agreements require union membership as a condition of employment, while a dues checkoff agreement bears no relationship to employment.

There have been no doctrinal developments that warrant questioning *SeaPak.* Absent from the petition is any citation to the underlying Supreme Court cases on either dues checkoff authorizations, *i.e. Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959), or the labor law preemption doctrines articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). *Felter, Garmon, and Machinists* are all cited by the panel majority's in holding in this case. The Seventh Circuit has made it clear that the tactic "of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir.1987).

The petition for *en banc* review should be denied.

STATEMENT OF CASE

International Association of Machinists District 10 and its Local Lodge 873 ("the Union") are parties to a collective bargaining agreement with John Deere Horicon Works. Under the terms of the agreement negotiated between the Union and John Deere, it explicitly states that "[d]uring the life of the Agreement, the Company agrees to deduct Union membership dues…from the pay

of each employee who executes or has executed the 'Authorization for Check-Off of Dues' form." (App. Docket No. 13; Pl-Appellees' Supplemental Appendix at 4 ("Supp. App.")

Among the employees the Union represents is Lisa Aplin ("Aplin"). (*Id.* at ¶3). On or about November 18, 2002, Aplin signed a dues check-off authorization authorizing the deduction of union dues from her wages. (*Id.* at ¶4). The authorization stated that:

> This authorization shall be irrevocable for one (1) year or until the termination of the collective bargaining agreement between my Employer and the Union, whichever occurs sooner….

(Supp. App. at 6) The agreement specifically states "I expressly agree that this authorization is independent of, and not a quid pro quo for, union membership…." (*Id.*)

On July 31, 2015, Ms. Aplin sent a letter to the Company, and to the Union stating that she no longer wished to pay union dues pursuant to Wisconsin 2015 Act 1. (District Court Docket ("D.C. Docket") No. 1-9). On September 11, 2015, the Union denied this request and informed Aplin that her request to revoke her checkoff authorization was untimely. (D.C. Docket No. 43 at ¶6; App. Docket No. 13, Short Appendix at 15).

After receiving the Union's letter, Ms. Aplin filed a complaint with the Labor Standards division of the Wisconsin Department of Workforce Development. (D.C. Docket No. 43 at ¶7). On November 12, 2015, the DWD found that the dues taken from Aplin's paycheck after she submitted her withdrawal were "unauthorized and illegal:"

> Under Wisconsin Statue 111.06(1)(i) such a deduction is illegal unless you have the employee's signed authorization to make the deduction and the authorization is terminable by the employee giving the employer at least 30 days' written notice of the termination. The changes to Wisconsin Statute 111.06(1)(i) required the 30 day termination notice period were enacted as of March 10, 2015 and were certainly in effect as of July 1, 2015 when the Labor Agreement between the employer and union was modified and extended.
>
> The Complainant provided the employer with written notice that she no longer wished to pay union dues or any fees on July 31, 2015. In accordance with

> Wisconsin Statute 111.06(1)(i) any union dues or fees deductions taken after the 30 day notice period, August 30, 2015, are considered unauthorized and illegal deductions from wages earned. Under Wisconsin Statute 109 the wages Ms. Aplin earned are due and payable.

(Supp. App. at 7).

On February 2, 2016, the Union filed the instant case in the U.S. District Court for the Western District of Wisconsin. The complaint alleged that §111.06(1)(i) is preempted by §302(c)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186(c), and sought declaratory and injunctive relief, pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988. On April 7, 2017, the court granted Plaintiffs' motion, denied Defendants motion, and permanently enjoined the Defendants from enforcing Wis. Stat. §111.06(1)(i).

On September 13, 2018, in a 2-1 decision, this court affirmed. The opinion, found "that the Taft-Hartley Act preempts Wisconsin's attempt to set new rules for dues-checkoff authorizations governed by § 186(c)(4)" based on three separate findings. *Int'l Ass'n of Machinists Dist. 10 et. al. v. Allen*, 904 F.3d 490, 495 (7th Cir. 2018). First, the court determined that "Because the challenged portion of Act 1 regulates an employee's optional dues-checkoff authorization rather than an employee's obligation to pay dues as a condition of employment, it falls outside the scope of the § 164(b) "right-to-work"/union security agreement exception." *Id.* Second, the court found that it was bound to the Supreme Court's summary affirmance in *Sea Pak*. *Id.* Third, it found that *Sea Pak* "fits comfortably with broader preemption principles of labor law" articulated in both *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140 (1976). *Id.*

ARGUMENT

I. *EN BANC* REVIEW IS NOT WARRANTED WHERE REVIEW WOULD BE INCONSISTENT WITH EVERY PRIOR DECISION ABOUT STATE REGULATION OF DUES CHECKOFF DURATION.

Petitions for rehearing *en banc* are governed by rule and designed to ensure the integrity of individual panel decisions and the consistent and thoughtful development of the law. *Easley v. Reuss*, 532 F.3d 592, 595 (7th Cir. 2008). Such hearings are limited to cases which either need to secure or maintain uniformity of the court's decisions or cases involving a question of exceptional importance. Fed. R. App. P. 35(b). These circumstances are not met here.

Review in this case would be inconsistent with Supreme Court precedent in *SeaPAK v. Industrial, Technical and Professional Employees*, 300 F. Supp. 1197 (S.D. Ga. 1969) *aff'd* 423 F.2d 1229 (5th Cir. 1970). In *SeaPak*, the Court, relying on both field and conflict preemption, held that a Georgia statute making dues checkoff authorizations terminable at will was preempted. *Id.* at 1200. It also held that a state's authority to regulate under §14(b) does not extend to the regulation of checkoff arrangements because a checkoff arrangement "leaves unimpaired the right of any state to prohibit union or closed shops…" *SeaPAK*, 300 F. Supp. at 1201. This decision was summarily affirmed by the Supreme Court. 400 U.S. 985 (1971). *En banc* review is improper, where the court cannot overturn a decision of the Supreme Court. "Lower courts are bound by summary decisions" of the Supreme Court "until such time as the Court informs them that they are not." *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Review would create both inter- and intra-circuit conflicts. *SeaPak* has never been successfully challenged in any court, at any level. In addition to this case and *Village of Lincolnshire, SeaPak* has also been affirmed by decisions in the Fourth, Fifth and Sixth Circuits. See *N.L.R.B. v. Shen-Mar Food Prod., Inc.*, 557 F.2d 396, 399 (4th Cir. 1977); *N.L.R.B. v. Atlanta*

Printing Specialties & Paper Prod. Union 527, AFL-CIO, 523 F.2d 783, 787 (5th Cir. 1975); *Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty., Ky.*, 842 F.3d 407, 421 (6th Cir. 2016). Numerous lower Courts have done the same. *See Georgia State AFL-CIO v. Olens*, 2016 U.S. Dist. LEXIS 94011 (N.D. Ga. July 7, 2016); *General Cable Industries v. Chauffeurs, Teamsters, Warehousemen and Helpers Local 135*, 2016 U.S. Dist. LEXIS 78961 (N.D. Ind. June 17, 2016); *Local 514, Transp. Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1327 (E.D. Okla. 2002); *Warner v. Chauffeurs Local Union No. 414*, 2017 Ind. App. LEXIS 134 at *14 (Ind. Ct. App. Mar. 23, 2017); *Michigan v. Callaghan*, 15 F. Supp. 3d 712, 718 (E.D. Mich. 2014). There are no cases (including this one) where the majority opinions distinguish or questions *SeaPak.*

En banc review should be limited to those cases that raise issues of important systemic consequences for the development of the law and the administration of justice. *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009). No such important issues are presented in this case. *En banc* review would serve no purpose except to create circuit conflicts, not avoid it.

II. THE PETITION FOR REVIEW IS BASED ON A MISTATEMENT OF LAW, WHERE DUES CHECKOFF AGREEMENTS ARE NOT UNION SECURITY DEVICES.

A. Section 14(B) of the National Labor Relations Act Only Gives States the Right to Prohibit Agreements Which Require Union Membership as a Condition of Employment.

The State's petition is exclusively based on the false premise that check-off authorizations are union-security agreements under §8(a)(3) of the National Labor Relations Act. 29 U.S.C. §158(a)(3). No court has ever treated a checkoff agreement as a union security device. In *Litton Fin. Printing Div., v. N.L.R.B.*, 501 U.S. 190, 199 (1991) the Supreme Court noted that the statutory provisions which permit each of these obligations are separate and distinct - §8(a)(3) of the NLRA

for union security and § 302(c)(4) of the LMRA for checkoff authorizations. The State materially misstates the law where it claims that checkoff is another form of union security.

Section 8(a)(3) makes it an unfair labor practice to discriminate because of union membership. That section states "It shall be an unfair labor practice for an employer ... by discrimination in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any labor organization." A proviso to that section specifically allows parties to collective bargaining agreements to negotiate union security into their agreements:

> *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to ***require as a condition of employment membership therein....***

(emphasis added).

Section 8(a)(3) standing on its own would prohibit all "right to work" laws, since it specifically allows unions and employers to require union membership as a condition of employment. However, separately, Section 14(b) of the Act states that:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements ***requiring membership in a labor organization as a condition of employment*** in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. §164 (emphasis added). The Supreme Court and the Seventh Circuit recognized that laws banning union-security agreements clash with §8(a)(3) and thus can be saved only if they fall within the scope of §14(b). *Vill. of Lincolnshire,* 2018 WL 4655487, at *3 (*Citing Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp.,* 426 U.S. 407, 416–17 (1976)).

The State and the *amici* ignore the statutory language which states that membership is prohibited only where it is "a condition of employment." The statute focuses on mandatory

membership, not payment of money. Requiring payment of money by non-members to a labor union for services has always been lawful so long as it is not also a condition of employment. *See e.g. Simms v. Local 1752, International Longshoremen Association,* 838 F.3d 613, 619 (5th Cir. 2016) (requiring nonmembers to pay fees to nonexclusive hiring halls); *See also Village of Lincolnshire* at *8. It is only where employment is conditioned on membership that a law falls within the scope of §14(b).

This language is tracked by the Wisconsin statute at issue in the case. The operative phrase in the first proviso to §8(a)(3) and in §14(b) is "agreement[] requiring membership in a labor organization as a condition of employment." Wis. Stat. §111.04(3)(a) uses identical language by making it unlawful to "require, as a condition of obtaining or continuing employment, any individual to . . . become or remain a member of a labor organization." This is in contrast to the language of §111.06(1)(i), the provision in this case, which does not mention "conditions of employment." While Wis. Stat. §111.04(3)(a) falls within the scope of §14(b), the same is not true of Wis. Stat. §111.06(1)(i).

Recent decisions concerning so called "right to work" laws have nothing to say about checkoff authorizations. *Sweeney v. Pence,* 767 F.3d 654 (7th Cir. 2014) solely discusses whether employment can be contingent on union membership. However, "*Sweeney* simply did not consider whether Indiana's right-to-work statute is preempted in the realm of dues checkoff authorization." *General Cable Indus. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 135,* 2016 U.S. Dist. LEXIS 78961 (N.D. Ind. June 17, 2016). Similarly, the Supreme Court's decision in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31,* 138 S. Ct. 2448, 2479 (2018) solely discusses "whether First Amendment question arises when a State requires its employees to pay agency fees." The decision explicitly states that "[n]o First Amendment issue could . . .

properly arise[]" with respect to private sector union security agreements. *Id.* at n. 24 (*citing White v. Communications Workers of Am., Local 1300*, 370 F.3d 346, 350 (3rd Cir. 2004) (J. Alito) (explaining that no First Amendment issue arises with respect to private sector union security agreements)). None of these decisions expand the scope of §14(b) beyond union security.

B. Checkoff Authorizations Never Require Union Membership as a Condition of Employment.

Union security is statutorily distinct from dues checkoff. Section 302(c)(4) of the Labor Management Relations Act (LMRA), 29 U.S.C. §186(c)(4) makes it unlawful for any employer to pay money to a labor organization, subject to a specific proviso on deductions pursuant to written authorization. That section states:

> with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

29 U.S.C. §186(c)(4).

For 59 years, it has been settled law that a checkoff authorization is not a union security device. The Supreme Court confirmed the separate and distinct nature of union security clauses and checkoff arrangements in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959). In *Felter*, a case which arose under the Railway Labor Act, the Court found that employees could not be required to use a special form to revoke a checkoff authorization. In doing so, the Court noted the difference between a union security agreement and checkoff:

> The Act makes no formal relationship between a union-shop arrangement and a checkoff arrangement; under it the parties can negotiate either one without the other, if they are so disposed. And of course, a labor organization member who is subject to a union-shop arrangement need not subscribe to the checkoff; he can maintain his standing by paying his dues personally…

Id. at fn. 12 & 13. *Felter* was directly applying and interpreting the legislative history of the NLRA in reaching its conclusion. *Id.* at 332, n10.

A check off authorization is merely an aid in the collection of union dues. "The dues checkoff section of the Act, on the other hand, far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues. An employee could revoke the dues deduction authorization, and yet continue to pay dues personally." *NLRB v. Atlanta Printing Specialties & Paper Products Union*, 523 F.2d 783, 786 (5th Cir. 1975).

The distinction between checkoff and union security has long been recognized by the National Labor Relations Board. Under Board law, it is not a valid basis for invalidating a dues checkoff agreement, simply because it is not revocable at any time. *Syscon International Inc.,* 322 N.L.R.B. 93, 539 (1996); *See also Lockheed Space Operations,* 302 N.L.R.B. 322, 324 (1991); *Shen-Mar Food Products,* 221 N.L.R.B. 1329, 1330 (1976), *enfd. as modified* 557 F.2d 396 (4th Cir. 1977); *See also Lincoln Lutheran of Racine,* 2015 NLRB LEXIS 674, 8-9 (N.L.R.B. 2015). *See also Metalcraft of Mayville*, 18-CA-178322, 2017 WL 956627 (N.L.R.B. Div. of Judges, Mar. 10, 2017) (Holding Wis. Stat. §111.06(1)(i) preempted under *SeaPak*).

As the panel stated in this case, finding dues checkoff authorizations as a form of union security would require splitting with two other circuits in *Shen-Mar* and *Atlanta Printing Specialties.* 904 F.3d at 497. It would also involve a split within this circuit. Last month, this court reaffirmed the distinction between union security and dues checkoff in *Village of Lincolnshire,* stating:

> Checkoff provisions, though they govern relationships with the union after hiring, are also different from "membership" within the meaning of section 14(b). ***They do not, in and of themselves, require employees either to join unions or to make any payments to them.*** Rather, they facilitate payments once employees have themselves made the decision to contribute to a union or to accept a job requiring that contribution. To state the matter differently, ***filling out a checkoff form does not determine union membership either way***

Id. at *5 (emphasis added). The law in this area is clear that checkoff authorizations are distinct from union security devices.

III. THERE ARE NO SUBSEQUENT DOCTRINAL DEVELOPMENTS WHICH WOULD UNDERMINE THE SEAPAK DECISION, WHERE THE LAW ON CONFLICT AND FIELD PREEMPTION REMAINS UNCHANGED.

As the majority in this case stated "The State's reliance on more general principles of preemption from other statutory contexts thus fails to engage with the doctrinal heart of this case, which is the decades of decisions deciding the preemptive force of the Wagner and Taft-Hartley Acts." 904 F.3d at 500. Despite this admonition, the State's petition for *en banc* review focuses its attention exclusively on *SeaPak* without discussing other material Supreme Court precedent, including *Felter*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). The State cannot demonstrate that there have been doctrinal developments without first discussing the cases from which the doctrine derives.

Machinists and *Garmon* instruct that both the NLRB and the States are without authority to impose "an ideal or balanced state of collective bargaining" because Congress intended to leave such balancing to labor and management. *Machinists*, 427 U.S. at 149–50. When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the NLRA state jurisdiction must yield. *Garmon*, 359 U.S. 236, 244 (1959).

There is no question that both *Machinists'* and *Garmon* remain good law. Indeed, Judge Manion's dissent, upon which the Petition for review is based, specifically notes that "the Court has given no indication that *Machinists* is in danger of being overruled." 904 F.3d at 511 (citing *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68-69 (2008)). Although Manion would

not treat dues checkoff as subject to *Garmon,* 904 F.3d at 514, n6, the unanimous decision *Village of Lincolnshire* does:

> Dues checkoff provisions are mandatory subjects of bargaining. [citations omitted] Their negotiation is thus subject to section 8, and federal law requires state law to yield. *Garmon,* 359 U.S. at 244, 79 S.Ct. 773. In this respect too the Lincolnshire Ordinance threatens an actual conflict with federal law: it permits employers to remit dues only pursuant to fully revocable checkoffs, while federal law requires employers to bargain in good faith over checkoff proposals that bind both parties for up to one year.

2018 WL 4655487, at *4. There can be no doctrinal developments where the underlying decisions have been repeatedly cited and affirmed by the Supreme Court and the Seventh Circuit.

Instead of addressing preemption doctrines applicable to the Wagner and Taft-Hartley Acts, both the State and Judge Manion focus instead on changes to general preemption doctrine. *See e.g. Wyeth v. Levine*, 555 US 555 (2009). However, *Wyeth* has not been applied to labor law preemption doctrines, and the Supreme Court has emphasized the "special force of the doctrine of stare decisis with regard to questions of statutory interpretation" *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 633 (2012). Both *Garmon* and *Machinists* focus on statutory interpretation and there is nothing in recent decisions change labor preemption doctrines. *See also Kurns* at 637 (*citing Garmon*).

The State only raises a procedural issue about which kind of doctrinal developments are sufficient to challenge a summary disposition by the Supreme Court. *See e.g. Baskin v. Bogan,* 766 F.3d 648, 659 (7th Cir. 2014). However, this issue is wholly hypothetical where there has been no doctrinal change in labor law preemption doctrine since *SeaPak. T*he "important" issue the State raises is wholly advisory.

CONCLUSION

For the foregoing reasons, the petition for *en banc* review should be denied.

Dated this 31st day of October 2018.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 35(b)(2)(A

I, Nathan D. Eisenberg, hereby certify that this Answer To Petition For *En Banc* Rehearing By Plaintiffs-Appellees complies with the type-volume limitations set forth for principal briefs in Federal Rule of Appellate Procedure 35(b)(2)(A) Said Brief, including headings, footnotes, and quotations, contains 3,891 words, as calculated by the Microsoft Word count function.

Dated this 31st day of October 2018.

/s/ Nathan D. Eisenberg

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, I electronically filed the foregoing Answer To Petition For *En Banc* Rehearing By Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Nathan D. Eisenberg