

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

ART, LLC; GLEN LAKE'S MARKET, LLC;
THOMAS B. WARTMAN; THOMAS W.
WARTMAN; VICTORIA'S MARKET, LLC

Cases 18-CA-168725
18-CA-168726
18-CA-168727
18-CA-168728
18-CA-168729

and

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL 653

Kimberly A. Walters, Esq. and Abby E. Schneider, Esq.
for the General Counsel.

Jason S. Raether, Esq. and Joseph P. Beckman, Esq.
(Hellmuth & Johnson, PLLC) of Edina, Minnesota,
for the Respondent.

Timothy J. Louris, Esq. (Miller O'Brien Jensen, P.A.), of
Minneapolis, Minnesota, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case involves two of the more intriguing and complex areas of labor law: secondary picketing and retaliatory lawsuits. Both areas implicate critical free speech rights protected by the First Amendment of the U.S. Constitution. In May 2014, two grocery stores owned and operated by Respondent Thomas B. Wartman closed. Certain employees at those stores were represented by Charging Party Local 653 of the United Food and Commercial Workers union. After they closed, the stores did not pay the represented employees all of their accrued compensation. A year later, two new stores owned in part by Thomas B. Wartman's three sons opened in the same locations. Moreover, Thomas B. Wartman played a role in the formation and opening of the new stores. When the stores opened, the Union began picketing and handbilling. The Union asked customers not to

patronize the new stores, due to Thomas B. Wartman's involvement and the money owed to employees of the closed stores. The Union's conduct went on for approximately 3 months at one store and 7 months at the other store. Eventually, both of the new stores closed.

5 As a result of the Union's picketing and handbilling, the five respondents here filed a lawsuit against the Union in federal district court in Minnesota. The lawsuit asserted a federal Section 303 claim under the National Labor Relations Act, based on unlawful secondary picketing. It also contained two Minnesota state law claims: tortious interference with prospective economic advantage and defamation. The General Counsel's complaint in this case
10 alleges that the filing and prosecution of that ongoing federal lawsuit is unlawful, because the suit lacks a reasonable basis and was filed with a retaliatory motive.

 As discussed fully herein, I conclude the Respondents' Section 303 claim, although unlikely to succeed on the merits, did not lack a reasonable basis when the lawsuit was filed.
15 Thus, the filing and continued prosecution of that claim is not unlawful. However, I also find that the Respondents violated Section 8(a)(1) by filing and prosecuting the two state law claims.

STATEMENT OF THE CASE

20 On January 29, 2016, United Food & Commercial Workers, Local 653 (the Union or Charging Party) filed charges against the following Respondents: ART, LLC in Case 18-CA-168725; Glen Lake's Market, LLC (Glen Lake's Market) in Case 18-CA-168726; Thomas B. Wartman in Case 18-CA-168727; Thomas W. Wartman in Case 18-CA-168728; and Victoria's Market, LLC (Victoria's Market) in Case 18-CA-168729. On October 19, 2016, the General
25 Counsel issued an order consolidating cases and a consolidated complaint against the Respondents. The complaint alleges the Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act), by filing and maintaining a lawsuit against the Union in the United States District Court for the District of Minnesota. The complaint further alleges that the lawsuit is baseless and was filed to retaliate against the Union. The Respondents filed a timely
30 answer to the complaint on November 2, 2016, in which they denied the allegations and asserted numerous affirmative defenses. I conducted a trial on the complaint from February 1 to 3, 2017, in Minneapolis, Minnesota.

 On the entire record and after considering the briefs filed by the General Counsel, the
35 Respondent, and the Union on March 30, 2017, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

40 I. JURISDICTION

 From May 4, 2015 to March 26, 2016, Respondent Victoria's Market was engaged in the business of operating a retail grocery store in Victoria, Minnesota, that sold food, beverages,

and other products. In conducting its business operations during this time period, Victoria's Market derived gross revenues in excess of \$500,000. It also purchased and received goods at its Victoria facility in excess of \$5,000, directly from suppliers located outside the State of Minnesota. Victoria's Market admits and I find that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction.

From June 17 to September 30, 2015, Respondent Glen Lake's Market likewise was engaged in the business of operating a retail grocery store, this one in Minnetonka, Minnesota, that sold food, beverages, and other products. In conducting its business operations during this time period, Glen Lake's Market derived gross revenues in excess of \$500,000. It also purchased and received goods at its Minnetonka facility in excess of \$5,000, directly from suppliers located outside the State of Minnesota. Glen Lake's Market also admits and I find that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction.

Finally, the Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.¹

II. ALLEGED UNFAIR LABOR PRACTICES²

As previously noted, the Union's picketing and handbilling in this case arose out of the closing of two unionized grocery stores, and the subsequent formation, opening, and operation of two new, nonunionized stores. In November 2005, the Fresh Seasons Market Glen Lake grocery store opened in Minnetonka. In April 2009, the Fresh Seasons Market Victoria grocery store opened in Victoria.³ Respondent Thomas B. Wartman (Wartman Sr.) owned and operated both of these stores. He also owned 50 percent of the mall from which Fresh Seasons Market Glen Lake operated. Mark Ploen, an investor, owned the other 50 percent of that mall. Wartman Sr., his wife, and three sons collectively owned 100 percent of the facility from which Fresh Seasons Market Victoria operated. The Union represented certain employees at both stores and had collective-bargaining agreements in effect covering those employees. In May 2014, both Fresh Seasons Market grocery stores closed. Following the closings, neither store paid employees all of the vacation and holiday pay they previously accrued. The stores also owed money to the Union's pension and health funds. A year later on May 4, 2015, a new store

¹ Tr. 486-487.

² In unlawful retaliatory lawsuit cases, both the U.S. Supreme Court and the Board have directed administrative law judges not to make credibility determinations or to determine what proper inferences may be drawn from undisputed facts. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744-746 (1983); *Atelier Condominium*, 361 NLRB No. 111, slip op. at 3 (2014). Accordingly, my findings of fact contain only undisputed facts. I also will describe in footnotes any testimony upon which I have not relied, because it involves a credibility determination or disputed, material facts.

³ The respective corporate names for the two stores, as reflected in the record, were Fresh Seasons Market, LLC and Fresh Seasons Market Victoria, LLC.

called Victoria's Market opened in the same space where Fresh Seasons Market Victoria previously operated. On June 17, 2015, a new store called Glen Lake's Market opened in the same space where Fresh Seasons Market Glen Lake previously operated. Wartman Sr. played a role in the formation and opening of the two new stores.

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*A. Wartman Sr.'s Role in the Formation and Opening of
Glen Lake's Market and Victoria's Market*

The idea for the new stores came shortly after the old Fresh Seasons Markets stores closed. In the fall of 2014, Wartman Sr.'s son, Thomas W. Wartman (Wartman Jr.), who had a background in real estate appraisal, suggested to his father that the two find other tenants for the buildings.⁴ Nothing came of this idea until a couple of months later. At that time, Wartman Sr. proposed to all three of his sons that they open new grocery stores in the same locations. The group agreed and collectively decided to form ART, LLC (ART) to do so.

15

The first step thereafter involved seeking out investors for the stores. In early January 2015, Wartman Sr. contacted Michelle Aspelin, one of his former employees at Fresh Seasons Market Victoria.⁵ He told her he wanted to try to find somebody to open a store in that same location again. He said he was looking out for investors. Aspelin responded that she would reach out and see if she could find anyone. On January 9, Aspelin sent an email to a list of undisclosed recipients.⁶ She advised them that Wartman Sr. was "ready to open a new grocery store in Victoria." She indicated that "[h]e has secured his vendors, he has much of his staff 'on call.'" She also said "[h]e is leasing equipment and his role will be landlord." As for the investment opportunity, Aspelin stated:

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[Wartman Sr.] has a complete pro forma with all the details (including your anticipated return on investment) ready to share. He is looking for 5 investors at \$50,000 each, or fewer if they'd like to invest more. He needs \$250,000 total. If you know of someone who'd like to be part owner in the store, and "Invest in Victoria" please have them contact him directly.

30

Aspelin included Wartman Sr.'s cell phone number.

35

In that same timeframe, the Union learned of Wartman Sr.'s involvement in the potential new stores and took steps to confirm it. In January, Matt Utecht, the Union's president, heard from other employers in a multiemployer bargaining association that Wartman Sr. might be seeking out investors to reopen the two stores. The Union obtained a

⁴ For the sake of clarity herein, Thomas B. Wartman will be referred to as Wartman Sr. and Thomas W. Wartman as Wartman Jr. Both kindly agreed to these designations at the hearing for ease of understanding, although they do not use them in the normal course of their lives.

⁵ All dates hereinafter are in 2015, unless otherwise noted.

⁶ GC Exh. 3.

copy of Aspelin's email at the end of that month. As a result, Utecht told Richard Milbrath, a business representative, to go out and monitor the Victoria location. Initially, Milbrath went there two to three times a week. He observed Wartman Sr. going into the store in the morning. In February, Milbrath increased his visits to the Victoria location to three to four times per week. He did so after observing electricians, refrigeration workers, carpenters, plumbers, and other workers in the building. He saw Wartman Sr. interacting with these workers. In March, Milbrath visited Victoria's Market four to five times per week. He observed Wartman Sr. at the start of the day in the front of the store. Wartman Sr. interacted with management and employees after they arrived at the store. He also met with vendors onsite, either walking with them to where they were going to deliver product or pointing them in the direction to go.

In February and March, the ownership interests and corporate structure for ART, Victoria's Market, and Glen Lake's Market were established through filings with the Minnesota Secretary of State's office.⁷ As for ART, Wartman Sr.'s three sons became equal, 1/3 owners. Wartman Jr. was designated the CEO and President, while his brothers became Secretary and Treasurer. Wartman Sr. introduced Wartman Jr. to the attorney who completed the corporate paperwork for ART. Wartman Jr. met with that attorney multiple times in that regard. His father was present for at least two of the meetings. With respect to the two new grocery stores, ART and Ploen became 50-percent owners. Ploen was the co-owner, with Wartman Sr., of the Glen Lakes Mall and the building where Fresh Seasons Market Glen Lake and Glen Lake's Market were located. Ploen's investment came about after Wartman Sr. introduced him to Wartman Jr. For the two new grocery stores, Wartman Jr. became the CEO.

On March 5, Victoria's Market entered into a lease, effective April 1, for the same space from which Fresh Seasons Market Victoria operated. The lease was with the same entity owned by Wartman Sr. and his other family members. The lease set forth an initial 10-year term and called for Victoria's Market to pay \$273,000 in rent annually in years 1-5, then \$286,000 annually in years 6-10. Glen Lake's Market ultimately entered into a similar lease for the same space from which Fresh Seasons Market Glen Lake previously operated.⁸

On that same date, Wartman Jr. filed authorization resolutions for the bank accounts that were opened for Glen Lake's Market and Victoria's Market.⁹ He listed himself and his father as agents, each with authority to engage in any transactions involving the accounts. At some point thereafter and within a month, Wartman Jr. removed his father as an agent for both bank accounts.¹⁰ During the limited time periods when he was authorized on the accounts, Wartman Sr. signed checks for remodeling work and petty cash.

⁷ R. Exhs. 1-3, 11, 12, 14, 25-27.

⁸ R. Exhs. 16, 32. The record evidence does not establish whether the new stores did, in fact, pay rent pursuant to these agreements, when the stores were in operation.

⁹ R. Exhs. 21 and 35.

¹⁰ R. Exhs. 22, 36-38.

In March and April, Wartman Jr. began hiring supervisors and consultants for the new stores. On March 30, Wartman Jr. brought Alan Commins aboard as senior general manager for Glen Lake's Market and Victoria's Market. He also hired Will Jedlicka as store manager of Victoria's Market prior to April 15. Wartman Jr. delegated the daily operation of both stores to the managers, including the responsibility for selecting suppliers and vendors. Neither manager conferred with Wartman Sr. concerning their job tasks. Wartman Jr. also hired a variety of independent consultants to assist with the store formation and opening. These consultants were paid in the neighborhood of a five-figure salary each month. They included Elizabeth Wyatt, an old friend of Wartman Sr., who was responsible for setting up financial processes for the new stores. They also included Aspelin, the individual who previously sought out investors for the stores on Wartman Sr.'s behalf. Wyatt began consulting on financial matters for Victoria's Market in April. At one point, Wartman Jr. spoke with both Wartman Sr. and Wyatt about choosing a health insurance plan for the store. The two made different recommendations on their preferred insurer. Wartman Jr. selected the company recommended by Wyatt. Another time, Wyatt sent an email to Wartman Sr. and Jedlicka, but not Wartman Jr., concerning changes to the accounting process to be used for placed orders. Aspelin's work was focused on marketing for Victoria's Market. She met with Wartman Sr., his wife, and other consultants concerning her marketing efforts. They discussed the feel of the store, the product offerings, and the content for a website and Facebook page that Aspelin was creating for the store. Wartman Jr. did not attend these meetings. In fact, until the time period prior to the closing of Victoria's Market, Aspelin never spoke to Wartman Jr.

At the end of April, ART and Ploen finalized their exact monetary contributions to the new stores.¹¹ For their respective 50-percent ownership interests in Glen Lake's Market, Ploen contributed \$750,000 and ART contributed \$590,372. For the same interests in Victoria's Market, Ploen again contributed \$750,000 and ART contributed \$454,583. Although ART was owned in equal shares by the three sons, none of them contributed any actual money to its capital contribution to the new stores. Instead, on April 30, Wartman Sr. provided ART with a loan totaling \$1,044,955, or the full amount of ART's contribution.¹² The loan agreement provided for an 8-percent interest rate, compounded monthly. However, no payment schedule was included. Instead, the loan payment was due upon written notice from Wartman Sr. The loans were not secured by any collateral.¹³

Also on April 30, Glen Lake's Market and Victoria's Market entered in a foreclosure purchase sale and agreement with Minnwest Bank.¹⁴ Pursuant to the agreement, the new stores purchased the equipment, fixtures, and inventory of the closed Fresh Seasons Markets stores.

¹¹ R. Exhs. 18 and 40.

¹² R. Exh. 4.

¹³ At the time of the hearing in this case, ART had repaid only \$50,000 of this total loan amount to Wartman Sr. (Tr. 41; R. Exh. 9.)

¹⁴ R. Exhs. 17, 33, and 41.

The Union continued its observation of both stores before and after they opened. Two weeks prior to the grand opening of Victoria's Market, Utecht and another Union representative went into the store in plain clothes. Utecht saw Wartman Sr. speaking to vendors and other people working in the store. He also observed Wartman Sr. pointing out to people where he wanted things. On May 4, Victoria's Market opened to the public for business. That same day, the Union began picketing and handbilling the store. It did so from an outside location, where the inside of the stores could be observed. Utecht saw Wartman Sr. there almost every day, interacting with managers, employees, and vendors. Utecht also observed Wartman Sr. regularly restocking shelves. Wartman Sr. also maintained the outside front part of the store, including watering flowers and bringing out bundles of firewood. He assisted customers with putting groceries in their cars. On May 9, Utecht photographed Wartman Sr., as he operated a BBQ grill at the outside front of the store and provided food samples to customers.¹⁵ Milbrath also was present for daily picketing at Victoria's Market and likewise observed Wartman Jr.'s activities. Among other things, he saw Wartman Sr. setting up advertising signs, stocking and rotating produce, and dropping boxes in aisles for stacking on shelves.¹⁶

At some point prior to June 10, the Union sent a letter to "Tom Wartman" at the address for Victoria's Market.¹⁷ Utecht stated therein that the Union was filing a formal grievance over the Fresh Seasons stores' failure to pay employees wages, personal holiday, and accrued vacation that they were owed. John Bowen, an attorney, sent a response dated June 12 to Roger Jensen, an attorney representing the Union.¹⁸ It is not clear from the letter whom Bowen represented. Bowen stated that "the letter from Mr. Utecht was incorrectly sent to 'Tom Wartman' at Victoria's Market in Victoria, where it was opened by Tom Wartman Jr." Bowen also said that the grocery store in Victoria was not a valid mailing address for Wartman Sr.

A couple of days before Glen Lake's opened, Utecht and another union representative physically visited the inside of that store as well. Utecht again observed Wartman Sr. there, speaking to vendors about where product was to be placed. When Wartman Sr. observed them, he stated: "Mr. Utecht, what are you doing in my store?" Utecht responded that he was just looking around. Wartman Sr. asked them to leave. When they did, Wartman Sr. followed them outside. There, he asked Utecht, "why are you trying to bust my balls?"¹⁹

¹⁵ GC Exh. 4.

¹⁶ Wartman Sr. testified that, after Victoria's Market opened, he was at the store two to four times a week on average. He also stated that he monitored repairs that needed to be made and shopped at the store. He offered nothing more concerning what he did there. However, he did not deny Utecht's and Milbrath's specific testimony concerning what they observed him doing there after the store opened. Thus, no credibility issue is present. In addition, Utecht and Milbrath gave inconsistent testimony concerning how often Utecht was on the picket line after the store opened. No resolution of that conflict need be made though, as under either version Utecht was there multiple days a week to observe what was happening.

¹⁷ Jt. Exh. 1(c).

¹⁸ Jt. Exh. 1(d).

¹⁹ Tr. 182-183. Again, Wartman Sr. testified, but did not contradict Utecht's testimony in this regard.

On June 17, Glen Lake's Market opened for business. Again, Wartman Sr. was present at the store two to four times per week on average, following the opening. On that same date, Wartman Sr. loaned ART an additional \$30,000, with terms identical to that contained in the initial promissory note.²⁰ ART in turn loaned the \$30,000 to Victoria's Market.²¹ As for
 5 Wartman Jr.'s involvement in the operations of the new stores after they opened, he only visited the stores once or twice a week from mid-May to the beginning of November. During that time period, Wartman Jr. worked full time for a landscaping and lawn maintenance company.²²

B. The Union's Picketing and Handbilling of the New Stores

As noted above, when Victoria's Market opened on May 4, the Union began picketing and handbilling at the store. The Union also began picketing and handbilling at Glen Lake's Market when it opened on June 17. The picketing occurred 7 days a week at both locations. The Union utilized only one picket sign at each location.²³ The Victoria's Market sign stated:
 15

PLEASE
 DO NOT
 PATRONIZE
 VICTORIA'S MARKET

**Victoria's Market does not employ members of, or have a
 contract with, UFCW Local 653, AFL-CIO.**

(This message is not directed to the employees of the above-named store or to employees of any other employer doing business with this store, and is directed solely to the consumer public.)
 25

²⁰ R. Exh. 8.

²¹ R. Exh. 28.

²² In making the findings of fact in Section II(A), I do not rely on the testimony of Kristin Stohl-Carlson, the office manager at Victoria's Market, or Deeanna Ellenbaum, a former Fresh Seasons employee who also worked at both Victoria's Market and Glen Lake's Market. Both witnesses testified concerning Wartman Sr.'s involvement in the new stores. However, Stohl-Carlson conceded during cross-examination that she quit her position prior to the store opening, because management refused to provide her with a chair she requested. (Tr. 63-66.) Ellenbaum, in turn, posted a picture on her Facebook page on March 27, 2016, after Victoria's Market closed. The photo showed a Victoria's Market hat on fire, with a corresponding message stating: "Store closed saying good bye to hat. second (sic) time around." (R. Exh. 58.) Ellenbaum posted a second photo on April 15, 2016, of her and numerous other people with the caption: "The gangs (sic) all here shame on you Tom Wartman." (R. Exh. 57.) It is true that this evidence, at most, would suggest some mild bias against the Respondents. Moreover, the testimony the two witnesses provided concerning Wartman Sr.'s activities at the new stores is largely uncontroverted. Nonetheless, because the Respondents introduced specific evidence of potential bias, any reliance on their testimony still would require me to make a credibility determination.

²³ R. Exh. 52.

The Union used an identically-worded picket sign at Glen Lake's market, but with that store's name on the sign. The Union also displayed a large banner, stating "Shame on you Tom Wartman" and UFCW 653 at the bottom right corner of the sign. While picketing, the Union handed out leaflets, which asked people not to patronize Victoria's Market.²⁴ One of the leaflets stated:

PLEASE
DO NOT PATRONIZE
VICTORIA'S MARKET

TOM WARTMAN IS THE LANDLORD FOR VICTORIA'S MARKET, LLC. TOM WARTMAN ALSO OWNED FRESH SEASON MARKET LLC WHICH OWES BACK WAGES TO ITS EMPLOYEES AND OWES HUNDREDS OF THOUSANDS OF DOLLARS TO THE HEALTH AND PENSION FUND FOR ITS EMPLOYEES. PLEASE DON'T PATRONIZE THIS MARKET AND TELL MR. WARTMAN TO PAY THOSE EMPLOYEES THEIR WAGES AND FRINGE BENEFITS. THANK YOU!

UFCW LOCAL 653

The Union utilized a similar handbill for Glen Lake's Market, but with slightly different wording:

PLEASE
DO NOT PATRONIZE
GLEN LAKE'S MARKET

TOM WARTMAN IS BELIEVED TO HAVE AN OWNERSHIP INTEREST IN THE CORPORATION THAT IS THE LANDLORD OF GLEN LAKE'S MARKET, LLC. TOM WARTMAN ALSO OWNED FRESH SEASON MARKET, LLC. WHICH OWES BACK WAGES TO ITS EMPLOYEES AND OWES HUNDREDS OF THOUSANDS OF DOLLARS TO THE HEALTH AND PENSION FUND FOR ITS EMPLOYEES. PLEASE DON'T PATRONIZE THIS MARKET AND TELL MR. WARTMAN TO PAY THOSE EMPLOYEES THEIR WAGES AND FRINGE BENEFITS. THANK YOU!

UFCW LOCAL 653

Tax records indicate Tom Wartman's home address as the taxpayer of this property.

²⁴ Jt. Exh. 1(a).

A second handbill stated:

PLEASE
DO NOT PATRONIZE
VICTORIA'S MARKET

Victoria's Market is non-Union. We urge you to withhold patronage from Victoria's Market and shop at the following stores, paying fair wages, benefits and observing fair working conditions.

[LIST OF THE NAMES OF SIX STORES]

(This message is not directed to the employees of the above-named store or to employees of any other employer doing business with this store, and is directed solely to the consumer public.)

UFCW LOCAL 653

The Union used the same handbill for Glen Lake's Market, with a different list of alternative stores at which it recommended the public shop.

The Union also set up a website concerning its dispute with the two Fresh Seasons Markets stores.²⁵ The site contained pictures and stories of some of the former Fresh Seasons employees. Each of the employees noted the claimed loss of pay and benefits when the stores closed. The website gave visitors the opportunity to sign a petition asking Fresh Seasons to pay the debts to its former workers. The text of the "Sign the petition" page stated:

When Fresh Seasons Markets in Victoria and Glen Lake Minnesota closed a year ago, owner Tom Wartman failed to pay his employees the vacation and personal holiday pay they had earned. Now the stores in Victoria and Glen Lake have reopened under slightly changed names and the former Fresh Seasons workers, members of UFCW Local 653 are still not getting paid what they're owed – while Tom Wartman still profits from the buildings he owns...

We're appealing to community members like you to not shop at the "new" stores (Victoria's and Glen's (sic) Lake Market) and tell Fresh Seasons Owner Tom Wartman that he should pay these Minnesota families the money they are owed – along with his unpaid debts to their health insurance and retirement funds.

At some point, both Victoria's Market and Glen Lake's Market issued their own leaflet concerning the Union's picketing. It stated:

²⁵ R. Exh. 43.

5 The union is making claims that employees were cheated out of
money and have been making personal attacks on Tom Wartman.
These false accusations are being used as a deterrent to shoppers
in an effort to force the current stores into a contract with the
union. Fresh Seasons Market closed its doors after paying all labor
wages to its employees for time worked. The bank accounts were
swept by the bank that held a 1st secured position on all assets.
That did mean that some of the past employees did not receive
10 accrued vacation pay, benefits and a disputed pension amount
with the UFCW 653 Union. Tom Wartman lost his entire
investment in the Fresh Seasons Markets; along with personal
funds he had contributed to keep the Markets open as long as they
were. He has no ownership in the current stores and acts as a
landlord of the property with a vested interest in its success.

15 The new ownership group is excited to be supporting the
community, hiring directly from the community, and providing a
much wanted local grocery store. The new ownership group and
much of the community is saddened that the union continues to
20 intimidate and spread false accusations in an effort to convince
people not to shop the store, hoping it signs a union contract. We
hope you will continue to support the new stores, the
hardworking employees, and show the union that it's (sic) anti-
business tactics will not stand in this community.

25 Jedlicka's name and title appeared as the signatory on the Victoria's Market letter. Commins'
name and title appeared on the Glen Lake's Market letter. Utecht responded with a letter to the
public, which stated in part:

30 [L]et me be clear about the Union's purpose. We want the former
employees of Fresh Seasons to be paid what they are owed.
Period. Any claim that the Union is out here solely to "intimidate
and spread false accusations" so that Victoria's Market will "sign a
union contract" is completely false. We're here for one reason:
35 justice for our members. The moment that Tom Wartman, as
owner of Fresh Seasons, pays his former employees what they are
owed, this Union will consider this dispute resolved, pack up, and
go. And we believe that Tom Wartman can make that happen any
time he wants.

40 In a second letter, Utecht stated, in part:

It has now been more than one year since Wartman closed the Fresh Seasons Stores, and he still refuses to pay his former employees...

5 Now, apparently, Wartman is helping to reopen those stores under new names and new ownership. However, while Wartman works to reopen those stores, Local 653 continues to fight for Wartman's former employees that he terminated and then refused to pay, and may distribute information about the dispute to
10 customers when the stores reopen in May and June.

UFCW 653 believes that Tom Wartman should prioritize paying his former employees the money that they earned before working to benefit himself by reopening the stores. If Tom Wartman wants
15 the stores to reopen with community support, he should start by doing right by those community members who used to work for him.

Utecht also was quoted in an article appearing on the Workday Minnesota website.²⁶ He said,
20 "I've never seen the landlord of a building be at the store to open it in the morning and work in and around the store until he closes it at night."

C. The Respondents' Lawsuit Against the Union

25 A number of events preceded the Respondents' filing of their lawsuit against the Union. First, on July 13, both Victoria's Market and Glen Lake's Market filed charges with the Board. The charges alleged the Union's picketing and encouraging a consumer boycott of the stores violated Section 8(b)(4) of the Act.²⁷ The General Counsel, through the Regional Director of Region 18, investigated the charges and determined that no violation of the Act occurred.
30 When advised of the Region's no-merit finding, Wartman Jr. chose to voluntarily withdraw the charges. Thus, the Region did not issue a formal non-merit determination letter. Second, on September 30, the Union ceased picketing and handbilling at Glen Lake's Market when it closed. The assets of Glen Lake's Market were sold to another entity, ending ART's involvement in the store. Third, on October 21, the Union filed a federal lawsuit against Fresh
35 Seasons Market Victoria and Fresh Seasons Market Glen Lake in the U.S. District Court for the District of Minnesota. The Union's complaint sought to compel arbitration of its grievance over the stores' failure to pay compensation owed to employees upon their closing. Just 2 days later on October 23, Wartman Sr. met with attorney John Steffenhagen for the first time.²⁸ In that meeting, Wartman Sr. requested that Steffenhagen "investigate the availability of remedies"

²⁶ R. Exh. 46.

²⁷ Jt. Exhs. 1(e) and 1(f).

²⁸ Tr. 418. Steffenhagen is employed at the same law firm representing the Respondents in this case.

against the Union for its picketing and handbilling. At an unidentified time before the lawsuit was filed, Wartman Jr. discussed the Union's conduct with both his brothers and his father. He shared his sentiment that he did not think what the Union was doing could be legal. Thereafter, Wartman Jr. also met with the attorneys and the Respondents decided to file the lawsuit.

5 Finally, on a date in November, the Union stopped picketing and handbilling at Victoria's Market.

10 Then on January 25, 2016, the Respondents filed a federal lawsuit against the Union in the U.S. District Court for the District of Minnesota.²⁹ It is this lawsuit the General Counsel seeks to enjoin in this case. The lawsuit contains three counts. The first count alleges that the Union violated Section 303 of the Act by virtue of a Section 8(b)(4)(ii)(B) violation. This count specifically alleged the Union's violations as: secondary picketing of Victoria's Market and Glen Lake's Market; handbilling of the two stores; attempting to force a boycott of the two stores; defaming and disparaging Wartman Sr. and Wartman Jr. through its letters, website, and
15 other communications with the public; and attempting to coerce employees, suppliers, and contractors of the new stores. Count II of the complaint asserted a claim for tortious interference with prospective economic advantage and business relations under Minnesota state law. The specific claim in Count II was that the Union intentionally interfered with the Respondents' reasonable expectation of economic advance from operating the new stores.
20 Finally, Count III asserted a Minnesota state law claim of defamation, based upon numerous allegedly false statements made by the Union concerning Wartman Sr. and Wartman Jr. Each count pled that the Respondents had been damaged in an amount in excess of \$75,000.

25 The District Court's processing of the Union's motion to dismiss the Respondents' lawsuit followed shortly thereafter. On February 16, 2016, the Union filed its motion and brief in support.³⁰ On March 26, 2016, a day after briefing on the motion concluded, Victoria's Market closed. Then on April 8, 2016, the District Court held oral argument.³¹ At the outset, the judge indicated he had read the parties' briefs and that he wanted to "compliment you lawyers." He noted the unusual nature of a Section 303 case, this being the second one he heard
30 as a judge in 28 years. As a result, the judge stated it was "an interesting case." The judge questioned the Respondents' counsel as to how a cease-doing-business object could be found under Section 8(b)(4)(ii)(B), when the former Fresh Seasons Market stores, the primary employers, were out of business. In response, the Respondents' counsel argued that the traditional paradigm of picketing a secondary employer to cause it to cease doing business with
35 the primary was not a necessary predicate to finding a violation. The Respondents also advanced the argument that the Union's picketing was designed to force the secondary employers "to bring pressure upon the defunct union stores to settle a grievance."³² The Respondents argued that a violation could be established where an objective of picketing is to enmesh a neutral secondary employer in a labor dispute between a union and a primary

²⁹ Jt. Exh. 1(m).

³⁰ R. Exh. 60.

³¹ R. Exh. 63.

³² R. Exh. 63, p. 22.

employer. At the end of the argument, the judge stated: “[T]his is an interesting case that some some features – I’m certainly not going to issue an order off the bench here this morning.”

5 On May 4, 2016, the Respondents filed an amended complaint. The purpose of the amendments was to address the Union’s claim that the Respondents had not pled actual malice as part of their defamation count. The Respondents amended the factual allegations addressing the alleged defamatory statements to include that the statements were “knowingly false and malicious.” They also added the Union knew, from its previous dealings regarding the underlying labor dispute with the Respondents, that the statements were untrue.

10 On May 19, 2016, the District Court granted the Union’s motion and dismissed the Respondents’ complaint.³³ The Court dismissed the Respondents’ Section 303 claim with prejudice. In doing so, the district court stated that “the sine qua non of a [Section] 8(b)(4)(ii)(B) claim is conduct designed to prevent business between the primary and secondary employers.”
 15 The Court concluded that no Section 8(b)(4)(ii)(B) claim could be asserted, where the primary employer was out of business. Thus, the Court found it was impossible for the Union’s conduct to have been designed to force or require Victoria’s Market or Glen Lake’s Market to cease doing business with the two Fresh Seasons Markets, because those stores were closed. The district court dismissed the state law claims without prejudice. It declined to take supplemental
 20 jurisdiction over those claims, because they involved state law.

On June 16, 2016, the Respondents appealed the dismissal of their complaint to the 8th Circuit Court of Appeals. After full briefing, the Court of Appeals held oral argument on March 9, 2017, following the hearing in this case. At the time of the issuance of this decision, the
 25 appeal remained pending at the 8th Circuit.

ANALYSIS

30 The filing and prosecution of a baseless lawsuit, with the intent of retaliating for the exercise of rights protected by Section 7, violates Section 8(a)(1). *Atelier Condominium*, 361 NLRB No. 111, slip op. at 3 (2014); *Allied Mechanical Services, Inc.*, 357 NLRB 1223, 1228–1229 (2011); *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983). However, a reasonably based lawsuit, whether ongoing or completed, does not violate the Act, regardless of the motive for filing it. *BE&K Construction Co.*, 351 NLRB 451 (2007) (*BE&K II*). Thus, the initial question to be
 35 addressed is whether the Respondents’ Section 303 claim lacked a reasonable basis.

I. DID THE RESPONDENTS’ SECTION 303 CLAIM LACK A REASONABLE BASIS?

40 A lawsuit lacks a reasonable basis, or is objectively baseless, if no reasonable litigant could realistically expect success on the merits. *BE&K II*, 351 NLRB at 457 (quoting *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)). To demonstrate a lack of reasonable basis at the complaint stage, the General Counsel must prove that the plaintiff did

³³ Jt. Exh. 1(o).

not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action. *Milum Textile Services Co.*, 357 NLRB 2047, 2052–2053 (2011). In evaluating this burden, the judge’s inquiry is not limited to the bare pleadings. Guidance also may be drawn from summary judgment jurisprudence under Federal Rule of Civil Procedure 56. *Id.* at 2053, citing to *Bill Johnson’s*, 461 U.S. at 746 fn. 11. Consistent with that approach, the judge is not to weigh evidence or make credibility judgments. *Atelier Condominium*, *supra*. If there is a genuine issue of material fact that turns on credibility of witnesses or on the proper inferences to be drawn from undisputed facts, a lawsuit cannot be deemed baseless. *Bill Johnson’s*, 461 U.S. at 744–745. Similarly, if the lawsuit raises genuine legal questions for which there is any realistic chance that the plaintiff’s legal theory might be adopted, the lawsuit cannot be deemed baseless. *Id.* at 746–747.

The first count of the Respondents’ complaint alleges a cause of action based upon Section 303 of the Act. Section 303 permits an employer to sue in federal court for damages caused by a union’s conduct which violates Section 8(b)(4) of the Act.³⁴ See, e.g., *BE&K Construction Co. v. United Brotherhood of Carpenters and Joiners of America, AFL–CIO*, 90 F.3d 1318, 1328 (8th Cir. 1996); *Retail Clerks Int’l Union, Local 655 v. Quick Shop Mkts., Inc.*, 604 F.2d 581, 584 (8th Cir. 1979). To demonstrate a violation of Section 8(b)(4)(ii)(B), a plaintiff must show that a labor organization or its agents (1) engaged in conduct that threatened, coerced, or restrained any person; and (2) the conduct had an object of forcing or requiring such person to cease doing business with any other person.³⁵ The target of Section 8(b)(4)’s prohibition is the imposition of coercive sanctions not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it, in order to pressure the third party to cease doing business with the primary employer. *Allied Mechanical Services, Inc.*, 357 NLRB at 1229.

Two recent Board decisions addressed *Bill Johnson’s* complaints brought by the General Counsel, in the context of Section 303 lawsuits and alleged unlawful secondary picketing violations. In both cases, the lawsuits were found baseless. In *Milum Textile Services*, *supra*, the Board concluded that an employer violated Section 8(a)(1), by filing a baseless motion for a temporary restraining order (TRO) in federal district court. The plaintiff employer alleged that a union’s written communications with the public violated 8(b)(4)(ii)(B), and thereby Section 303. The communications called into question whether the plaintiff was providing

³⁴ Section 303 of the Act, 29 U.S.C. § 187, states: (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the Act. (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

³⁵ Section 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B), provides, inter alia, that it shall be an unfair labor practice for a labor organization or its agents to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is – (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

contaminated linens to restaurants. After the complaint filing, the plaintiff sought a TRO that would prohibit further union communications with customers. However, at oral argument, the plaintiff admitted that the injunctive relief it sought was not an available remedy to a private party under Section 303. The district court denied the motion, in part on that basis. The Board
 5 agreed with the district court's analysis of that issue and found the plaintiff's efforts to obtain a TRO lacked a reasonable basis.

In *Allied Mechanical Services*, supra, the Board likewise found that an employer filed a baseless lawsuit in federal district court. Three counts of the complaint there alleged the
 10 unions' denial of job targeting funds to the employer was threatening and coercive conduct that violated Section 8(b)(4). The district court granted the unions' motion to dismiss the complaint, which subsequently was affirmed by the U.S. Court of Appeals for the Sixth Circuit. The district court found the complaint failed to allege that the unions directed any of their activity
 15 against neutral employers or customers of the plaintiff primary employer, a necessary predicate to an 8(b)(4) violation. Rather, the alleged coercive conduct was directed at the plaintiff itself. The Board likewise concluded that the employer's lawsuit lacked a reasonable basis, in part on the same basis.

In this case, the General Counsel advances two theories as to why the Respondents' Section 303 claim is baseless: a lack of cease-doing-business object and an "ally" relationship
 20 between the new stores and the Fresh Seasons Market stores.

A. *The Alleged Lack of an Unlawful Objective*

The General Counsel contends that the Union's coercive conduct cannot be shown to
 25 have an unlawful, cease-doing-business object, because Victoria's Market and Glen Lake's Market never did business with the defunct Fresh Seasons Markets. This was the basis for the district court's dismissal of the Respondents' lawsuit. However, I cannot find merit to this argument. The basis for the district court's dismissal of the complaint runs contrary to
 30 extensive Board precedent, including decisions affirmed by federal appellate courts.

First and foremost in that regard, the Board has found a cease-doing-business object, even where the primary employer was out of business. *Iron Workers Local 272 (Miller & Solomon Construction)*, 195 NLRB 1063 (1972), involved a factual situation strikingly similar to the one
 35 here. In that case, a subcontractor, Sethro, had a collective-bargaining relationship with a union covering its ironworkers. A general contractor, Miller & Solomon, contracted with Sethro to perform work on a construction site. Sethro began work on the project, but then went out of business due to financial reasons prior to its completion. Sethro had fallen behind on its payments to the union's benefit funds before this job, and did not pay the debt before or after
 40 going out of business. The union then threatened to and did picket Miller & Solomon, with the object of getting Miller & Solomon to pay Sethro's debt to the funds. The Board found that the picketing violated Section 8(b)(4)(i) and (ii)(B). The cease-doing-business object there was "causing a disruption between [Miller & Solomon, the secondary employer] and the subcontractors on the project and any other employer with whom it was doing business." This

unlawful object was established, even though the picketing could not cause Miller & Solomon to cease doing business with Sethro, a defunct business.

5 Moreover, although a cease-doing-business object typically involves a primary and
 secondary employer, this unlawful objective also can be established by interference in a
 secondary employer's relationships with other businesses. In *Miami Newspaper Printing*
Pressmen Local No. 46 (Knight Newspapers), 138 NLRB 1346 (1962), enfd. 322 F.2d 405 (D.C. Cir.
 1963), the union had a primary dispute with the Miami Herald newspaper. It engaged in a 6-
 10 day strike and picketed both the Herald and the Detroit Free Press, which had the same
 corporate parent. The employees of the Free Press refused to work during the picketing. This
 resulted in the Free Press newspaper not being published. The Board found that the parent
 company, which published the Free Press, was a neutral entity and the union's conduct thus
 violated Section 8(b)(4). The union there, like the General Counsel here, argued that no cease-
 15 doing-business object could exist, because the Miami Herald and Detroit Free Press did almost
 no business with one another. The Board affirmed, without comment, the judge's conclusion
 that a cease-doing-business object did not require cessation of business between the primary
 and secondary employer. Instead, the judge concluded that the picketing had the object of
 forcing the Free Press to stop publication and thereby cease doing business with other persons.
 The judge noted the impact that not publishing the newspaper had on the Free Press'
 20 advertising and other revenue. The judge also cited the decline in the newspaper's purchases
 during the strike. The D.C. Circuit agreed the cessation of business between the primary and
 secondary employer was not necessary to finding a violation. The court specifically stated:

25 Although it is frequently true that the object of secondary
 picketing is to obstruct dealings with a primary employer,
 Congress did not so limit its language. And a moment's reflection
 establishes that such a limitation would not have been consonant
 with the central legislative purpose. That purpose was to confine
 labor conflicts to the employer in whose labor relations the
 30 conflict had arisen, and to wall off the pressures generated by that
 conflict from unallied employers. If one of the latter could with
 impunity be forced to suspend its business relations with all
 persons other than the primary employer, the evil which Congress
 sought to get at would be complete.

35

322 F.2d at 410.³⁶

³⁶ Numerous other cases recognize the principle that Section 8(b)(4) is not limited to solely interference between a primary and secondary employer. See, e.g., *Service Employees Union, Local 87 (Trinity Building Maintenance)*, 312 NLRB 715, 743 (1993) (it is no less a violation of Section 8(b)(4)(B) of the Act for a labor organization to disrupt the business of an unoffending neutral employer, which has no business relationship with the primary employer, in the hope that said neutral will be pressured into interceding in a labor dispute between the labor organization and the primary employer); *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303, 322 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971), cert.

Finally, on the question of actually establishing an unlawful objective, the Board's decision in *Teamsters Local 732 (Servair Maintenance)*, 229 NLRB 392, 400 (1977) is instructive. There, the union had a primary dispute with Servair Maintenance. The union picketed a freight facility of National Airlines, where Servair employees worked. The picket signs stated "Don't Fly National" and, for most of the time, did not contain Servair's name. The union also distributed handbills to truckdrivers of other companies who were coming to National's loading platform. The handbills primarily were addressed to National's customers, but also requested recipients to join the many people who already refused to cross the picket lines. The Board found the union's conduct possessed the traditional unlawful objective of coercing National to cease doing business with Servair. However, the Board also found the conduct unlawful, because it had an intermediate object of forcing or requiring other companies to cease doing business with National. Even more importantly here, the Board ruled an unlawful objective likewise was demonstrated by the union's conduct towards National's customers. In particular, the Board noted that the union did not limit its picketing and handbilling to those services provided by Servair. Instead, the purpose was clearly to persuade customers to use other airlines in order to force National to stop dealing with or to put pressure on Servair.

Applying this precedent, I conclude that the General Counsel failed to show the Respondents have no realistic chance of establishing a cease-doing-business object. The Union's picketing in this case was atypical. The Union's primary dispute was with closed employers. The Union's picket signs stated the names of the two new stores, not the closed stores with which it had the primary dispute. Although the language on the signs lawfully stated that the new stores did not have a contract with the Union, the accompanying handbills conveyed a different message and the actual purpose of the picketing. The Union asked customers not to patronize the new stores, due to the outstanding debt owed by the Fresh Seasons Market stores to its former employees. The Respondents pled in their federal complaint that customers refused to shop at the store and suppliers refused to make deliveries, because of the Union's picketing. Thus, the Respondents plausibly can make the argument that the Union's picketing caused a disruption to the secondary employer's business with others, with the object of getting the new stores to either pay off the old debts or convince Wartman Sr. to do so. Indeed, the Respondents made this argument to the district court. The argument certainly draws support from the Board decisions discussed above, even though this case is not factually identical. It simply cannot be said the Respondents do not have any realistic chance of showing a cease-doing-business object.³⁷

denied 404 U.S. 1018 (1972) (it did not matter that the neutral did no business with the primary: "It is enough that disruption of [the neutral's] business with others was an object of the picketing."); *Hod Carriers Local 980 (The Kroger Co.)*, 119 NLRB 469, 479 (1957) ("[t]he Act condemns all 'secondary boycotts' which injure the business of persons not involved in the basic dispute and the Act is not limited in its application to such actions which have an object of interrupting the flow of business between the neutral and the 'primary' employer").

³⁷ The Region's non-merit finding to the Section 8(b)(4) unfair labor practice charges against the Union does not preclude the Respondents from subsequently bringing a Section 303 claim. *W.R. Grace*

B. The Alleged “Ally” Status of Victoria’s Market and Glen Lake’s Market

5 The General Counsel also argues the Section 303 claim is baseless, because Victoria’s Market and Glen Lake’s Market were not neutral third-parties, but rather “allies,” of the Fresh Seasons Markets. If they were allies, the Union’s picketing cannot be found unlawful.

10 In *Teamsters Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212, 1212–1214 (1980), the Board detailed the evolution of the term “neutral” in the context of secondary boycotts, as well as the development of the ally doctrine. The Board began with the legislative history of Section 8(b)(4), in particular then Senator Taft’s statements as to what constitutes a neutral employer:

15 This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees. [Emphasis supplied and citations omitted.]

20 The secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike. . . . It is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer. [Citations omitted.]

25 The ally doctrine grew from this overall purpose, with two defined branches. The first branch involves cases where an employer’s neutrality is alleged to be compromised by performance of “struck work.” The second branch involves cases where neutrality is contested on the ground that the boycotted employer and the primary employer were a single employer or enterprise. However, the Board cautioned in *Teamsters Local 560* that the two branches do not encompass the only manners in which an ally relationship can be established. Rather, each case must be considered based upon the factual relationship which the secondary employer bears to the
30 primary employer.

35 On this question, the General Counsel relies solely on *Teamsters Local 282 (Acme Concrete & Supply)*, 137 NLRB 1321 (1962). In that case, a union picketed the premises jointly occupied by Twin County Transit Mix, with whom it had a primary dispute, and Acme Concrete & Supply. The two businesses conducted almost all of their business with each other. Twin County purchased from Acme 99 percent of materials needed for its manufacture, sale, and distribution of concrete. In turn, Acme made 85 percent of its sales to Twin County. The two businesses also had close family connections. The sole stockholder of Acme was the wife of the general manager of Twin County. Acme’s actual operation was conducted by two brothers of

and Co. v. Local Union No. 759, International Union of United Rubber Workers of America, 652 F.2d 1248, 1256 (5th Cir. 1981).

the general manager of Twin County. Finally, the two businesses did not have an arms-length business relationship. Acme had no written agreement with Twin County covering their business transactions. Acme owned the facility from which both businesses operated, but did not receive any rent from Twin County for the latter's use of the premises. Moreover, Acme made two loans to Twin County totaling \$3,000 without security or written agreement.

The Board concluded, in a 2-1 decision, that the union's picketing of Acme was lawful primary, not secondary, picketing. In doing so, the Board found no need to determine whether the two were single employers or allies. Instead, it was sufficient that the factual relationship between Acme and Twin County, described above, established such identity and community of interests as to negate the claim that Acme was a neutral employer. However, the dissent in that case rejected the idea that common ownership or control could be inferred from these facts. Instead, the dissent pointed to the fact that Acme and Twin County were separate legal entities, separately owned and managed. Furthermore, the record evidence showed neither a common labor policy between the two employers, nor control over each other's operations.

In this case, the General Counsel makes a sound claim for finding that the new grocery stores were allies of the old stores, or at least had sufficient community of interests to negate their neutrality claim. The undisputed facts show that Wartman Sr. played a significant role in the idea of opening the new stores, financing their operation, and getting the stores ready to open for business. The stores operated on land that he co-owned. His sons were the owners of the new stores, but only because Wartman Sr. loaned them the money to make the necessary capital contributions. I find it more likely than not that, if the federal lawsuit went to trial, the Union could establish that the new stores were not neutral parties here. But my job is not to resolve the substantive merits. I need only evaluate if the Respondents had a reasonable basis for concluding the new and old stores were not allies and for proceeding with its Section 303 claim. In that regard, I conclude the Respondents' lawsuit raises a genuine legal question as to their ally status.

To begin, no dispute exists that neither of the two, specifically defined branches of the ally doctrine applies. The Fresh Seasons Markets stores were out of business at the time of the Union's picketing. As a result, no employees at the new stores could be performing struck work from the old stores. Similarly, the new and old stores could not be integrated and interdependent, so as to constitute a single operation. Thus, the Respondents were correct in concluding that the new and old stores were not allies under either theory.

That leaves the "identity and community of interests" catch all from *Teamsters Local 282*. The facts here are not on all fours with that situation. The new and old stores obviously could not transact business almost exclusively with one another, since the Fresh Seasons Market stores were closed. The broader question presented is whether an ally relationship can be established at all, where one of the two allies is not an operating business. In addition, the new stores had written lease agreements for their buildings. The record evidence contains no indication that the new stores did not pay the rents due under those leases. Finally, the loans from Wartman Sr. to ART were made pursuant to written agreements. Beyond these distinctions, the facts also

support the legal argument made by the dissent in *Acme Concrete*. It is undisputed that the new and old stores did not have common ownership. The new stores also were separate legal entities from the Fresh Seasons Markets. The new stores had different store managers running the day-to-day operations. The new and old stores could not have a common labor policy or control over each other's operations, since the Fresh Seasons Markets stores were out of business. The Respondents pled these facts in their complaint.³⁸ Thus, the Respondents could make a colorable argument, along the lines of the dissent in *Acme Concrete*, that the new stores were not allies of the old stores. Indeed, the 8th Circuit has relied on these factors in assessing ally status. *Pickens-Bond Construction Co. v. United Brotherhood of Carpenters*, 586 F.2d 1234, 1241 (8th Cir. 1978).

Finally, it appears the number of cases where the Board found ally status based only on community of interests can be counted on one hand. *Teamsters Local 282* was decided more than 50 years ago, with a dissenting member providing an alternative legal theory for finding the secondary employer was neutral. In *Teamsters Local 560 (Curtis Matheson Scientific)*, supra, the Board found ally status based upon the corporate relationship between a parent and its branches. In doing so, the Board relied upon common ownership, the performance of struck work by other branches pursuant to a corporate policy, and the corporate parent's occasional exertion of control over branch labor relations. Those factors are relevant here as well, but support the opposite conclusion. This case has no common ownership, no performance of struck work, and no control of labor relations.

As previously noted, the standard for evaluating the reasonableness of a lawsuit includes evaluating if "any realistic chance" exists that the Respondents' legal theory might be adopted. With that minimal required showing, I conclude that the General Counsel has not demonstrated the lack of a genuine legal question as to the new stores' ally status. Accordingly, the Respondents' lawsuit cannot be deemed baseless on that basis.³⁹

In summary, I conclude the Respondents' Section 303 claim did not lack a reasonable basis. Looking back to the unlawful lawsuits found in *Milum Textile* and *Allied Mechanical*, the employers' complaints had obvious shortcomings. In one case, the plaintiff sought a remedy not included in the Act. In the other, the plaintiff alleged secondary picketing by a union, while acknowledging the union only was picketing the primary employer. The factual and legal situations in this case certainly are not as clear cut as that. They do not foreclose the Respondents from surviving summary judgment, if the federal case were to proceed. As for the

³⁸ Jt. Exh. 1(m), paragraphs 17-19.

³⁹ The record evidence also arguably presents genuine issues of material fact regarding Wartman Sr.'s role in the new stores, the resolution of which could affect the ally analysis. Although Wartman Sr. did not dispute much of other witnesses' testimony concerning what he did at the new stores, he offered at one point that he was acting solely in his role as "landlord" of at least one of the properties. (Tr. 36.) He also testified that his role was to facilitate the construction work being done at the stores. (Tr. 32, 35.) Moreover, Wartman Jr. classified Wartman Sr.'s role as "unpaid consultant," a father looking to assist his sons. (Tr. 317.) This testimony conflicts with that of Utecht and Milbrath concerning Wartman Sr.'s role at the new stores, which essentially portrayed him as being in charge of the operation.

dismissal of their lawsuit, Federal and Board precedent are directly at odds with the district court's conclusion that a business relationship between the primary and secondary employer must exist to show a cease-doing-business object. Accordingly, pursuant to *BE&K II*, I cannot find that the Respondents violated Section 8(a)(1), by filing and prosecuting the reasonably-based Section 303 count.

II. DO THE RESPONDENT'S STATE LAW CLAIMS LACK A REASONABLE BASIS
AND ARE THEY PREEMPTED BY FEDERAL LAW?

In its federal complaint, the Respondents also assert claims against the Union for tortious interference with prospective economic advantage and for defamation. These claims are based upon Minnesota state law. The General Counsel asserts that these claims should be enjoined, either because they are baseless and filed with a retaliatory motive or because they are preempted by Federal law.

A. *The Tortious Interference with Prospective Economic Advantage Claim*⁴⁰

In *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252 (1964), the U.S. Supreme Court held that Section 303 preempts state law tort claims premised on a union's secondary activity, except where the claim involves union violence. The Court found that "the provisions of Section 303 mark the limits beyond which a court, state or federal, may not go in awarding damages for a union's secondary activities." *Id.* at 257. Preemption is warranted, irrespective of whether the alleged conduct arguably is protected under Section 7 of the Act or an unfair labor practice under Section 8. Subsequent to *Morton*, numerous federal courts, including the 8th Circuit and a district court in Minnesota, have ruled that Section 303 preempts state law claims for tortious interference. See, e.g., *San Antonio Cmty. Hosp. v. S. California Dist. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997) (interference with prospective economic advantage and contractual rights claims preempted); *BE&K Construction Co. v. United Brotherhood of Carpenters & Joiners of America*, 90 F.3d at 1327-1330 (8th Cir. 1996) (tortious interference with contractual relations claim preempted, absent union violence); *Hennepin Broadcasting Associates, Inc. v. NLRB*, 408 F.Supp. 932, 937 (D. Minn. 1975) (tortious interference with business relations claim under Minnesota state law preempted, where violence or coercive conduct presenting imminent threats to public order were lacking).

⁴⁰ In Minnesota, a plaintiff must prove the following five elements to sustain a claim for tortious interference with prospective economic advantage: (1) the existence of a reasonable expectation of economic advantage; (2) defendant's knowledge of that expectation of economic advantage; (3) that defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation; (4) that in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and (5) that plaintiff sustained damages. *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014).

In this case, the Respondents pled their Section 8(b)(4)(ii)(B) claim as both a Section 303 claim and a state law tortious interference claim. The Respondents rely upon the same set of facts for both claims. It even confirms this in one of its allegations for the tortious interference claim, wherein it states: “Local 653 intentionally interfered with the above-named Plaintiffs’ reasonable expectation of economic advantage in a manner that directly violated the LMRA.”
 5 The Respondents make no contention in the pleadings, or in the evidence presented, that the Union engaged in violent conduct at the new stores. As the Supreme Court found long ago, the only damages available to the Respondents for the Union’s secondary activity are those set forth in Section 303. Its claim for tortious interference is preempted by federal labor law. Thus, the
 10 Respondents’ filing and maintenance of this claim violated Section 8(a)(1) and may be enjoined.

In the alternative, the General Counsel argues that the Respondents’ tortious interference claim lacked a reasonable basis. This argument is premised on the Respondents’ failure to identify any specific third parties with whom it had a reasonable expectation of economic advantage. I also find merit to this contention. In *Gieseke ex rel. Diversified Water Diversion, Inv. v. IDCA, Inc.*, 844 N.W.2d at 219–222, the Minnesota Supreme Court held that, to prove a defendant tortuously interfered with a plaintiff’s prospective economic advantage, a plaintiff must specifically identify a third party with whom the plaintiff had a reasonable probability of a future economic relationship. In addition, a plaintiff’s projection of future business with unidentified customers, without more, is insufficient as a matter of law. Here, the Respondents pled only that they would have realized a greater economic advantage from operation of the new stores, absent the Union’s conduct. They did not plead, present any evidence at the hearing in this case, or identify evidence they could obtain of specific third parties with whom the new stores reasonably expected to do future business. As the Minnesota Supreme Court stated, “the mere hope that some...past customers may choose to buy again cannot be the basis for a tortious interference claim.” *Id.* at 222, citing to *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 815 (Fla. 1994). Accordingly, the Respondents also did not have a reasonable basis for bringing the tortious interference claim.

B. *The Defamation Claim*⁴¹

Defamation claims premised on state law are subject to partial preemption, pursuant to the U.S. Supreme Court’s decision in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). In *Linn*, the Court held that a state law-based libel claim arising out of statements made during a labor dispute was not wholly preempted by the NLRA. Such state law claims may proceed, but only if a complainant pleads and proves false statements were made with actual malice and resulted in compensable damages. *Id.* at 64–65; see also *Beverly Health & Rehabilitation Services, Inc.*, 336 NLRB 332, 333 (2001) (for a plaintiff to prevail, he must prove not only defamation under State

⁴¹ In Minnesota, a plaintiff must prove the following four elements to sustain a claim for defamation: (1) The defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff’s reputation and to lower [the plaintiff] in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual. *McKee v. Laurion*, 825 N.W.2d 725, 729–730 (Minn. 2013).

law, but also the Federal overlay of actual malice and damages); *Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (actual malice showing is required for defamation claim arising out of a labor dispute).

5 The Respondents did not plead actual malice in their initial federal complaint. After the Union noted that omission in its motion to dismiss, the Respondents amended the complaint to include an allegation that the defamatory statements were made with actual malice. It also amended certain factual allegations to identify the Union statements that allegedly were
10 knowingly false. In that regard, the Respondents pled that the Union knew Wartman Sr., in his individual capacity, did not owe any money to the former Fresh Seasons employees. They also pled that the Union knew Wartman Jr. did not own any interest in the Fresh Seasons stores. Nonetheless, the Union repeatedly stated that “Tom Wartman” owed money to his former employees, without specifying which Tom Wartman it was.

15 Actual malice is demonstrated if the defamatory statements are published with knowledge of their falsity or with reckless disregard of whether they were true or false. *New York Times v. Sullivan*, 376 U.S. 254, 279–280 (1964). A false statement is defined as one that is “reasonably read as an assertion of a false fact.” *Beverly Hills Foodland*, 39 F.3d at 195. In
20 evaluating the actual malice component of the defamation claim, my job is not to determine if the alleged statements are true, but whether there is a genuine issue as to whether they were knowingly false. *Bill Johnson’s Restaurants*, 461 U.S. at 748. As a preliminary matter, I note that, because the federal lawsuit was dismissed, the parties never engaged in discovery. The Board has stated that the actual malice element of a libel claim typically requires discovery. *Milum Textile*, 357 NLRB at 2053, citing to *Karedes v. Ackerly Group*, 432 F.3d 107, 113 (2d Cir. 2005).
25 Thus, the procedural posture of this case suggests that finding no reasonable basis for alleging actual malice at this point would be premature. In any event, a genuine issue of material fact exists concerning whether the Union knew of Wartman Jr.’s existence and his role in the new stores when it made the statements in question. Shortly after the Union began picketing at Victoria’s Market, attorney Bowen sent a letter to the Union’s counsel. Bowen set forth
30 Wartman Jr.’s existence and his status as the store’s owner. Since the Union’s attorney, acting as an agent, received that letter, the Union’s knowledge of Wartman Jr. could be inferred. Utecht denied receiving the letter and knowing about Wartman Jr. until the federal lawsuit was filed. Thus, a credibility dispute exists that is to be left to a jury. If this dispute was resolved in the Respondents’ favor, it is within the realm of possibility that the Union could be found to have
35 knowingly made false statements. Therefore, I conclude the defamation claim does not lack a reasonable basis and cannot be preempted, as a result of the actual malice element.

 However, the Respondents’ failure to plead, or come forward with any evidence concerning, actual damages merits a different result. Compensable, or actual, damages must be
40 established with evidence of a specific harm, even in states where such damages otherwise

would be presumed.⁴² *Intercity Maintenance Co. v. Local 254, Service Employees*, 241 F.3d 82, 89–90 (1st Cir. 2001). An unsubstantiated allegation of injury to reputation is insufficient as a matter of law to show actual damages. *Ibid.* Furthermore, the Board has stated that a reasonable plaintiff, for *Bill Johnson's* purposes, would be in possession of evidence of the actual damages that it would have to prove at trial, upon the filing of a complaint and without the need for discovery. *Milum Textile*, 357 NLRB at 2052–2053.

Neither the Respondents' initial federal complaint nor the amended complaint contains any facts to support a finding of compensatory damages. The Respondents generally pled that the Union's defamation caused damages in excess of \$75,000. As the Respondents' counsel admitted at the hearing in this case, that figure conforms to the minimum amount in controversy needed for jurisdictional purposes in federal court. Wartman Sr. further admitted during his testimony that he was unaware of any damage calculation by the Respondents. Instead, Wartman Sr. described his damages as follows:

I had been doing real estate, going before public bodies in the city of Minnetonka and the city of Victoria. I was in real estate for approximately 45 years, up until the spring of 2015, when my name -- "Shame on Tom Wartman" -- was held up for 4 months on a 10-foot-by-3-foot banner in Minnetonka at the corner point of Excelsior Boulevard and Woodhill Road. In Victoria, at the main interstate, the main stoplight, it was front and center for approximately 6 months, "Shame on Tom Wartman". I have not -- I was embarrassed. I was humiliated. I was disgraced. I can't show my face in a public body right now without having to say "What did you do, Tom Wartman?"

I have passed on opportunities to go before any public bodies because of the shame that I encountered over a period of 4 and 6 months in both Minnetonka and in Victoria. And in the area of Excelsior, where people know me and I grew up, with multiple friends, "Tom, what have you done? Why did you screw people?"

I'm sorry, Your Honor, but this [is] in excess of \$75,000 of defamation.⁴³

Wartman Sr. was genuinely sincere and emotional when providing this testimony. But nowhere in this discussion is any inkling of actual damages or a connection between the injury to reputation and a specific monetary effect.

⁴² In Minnesota, defamation which affects the plaintiff in his business, trade, profession, office or calling is considered defamation per se and thus actionable without any proof of actual damages. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009).

⁴³ Tr. 266–268.

Similarly, Wartman Jr. testified that his reputation was harmed to such a degree that people he was doing business with unrelated to the new stores asked him questions about the Union's activities. But he did not state that he actually lost any business transactions as a result. He provided double hearsay testimony concerning his managers' conversations with customers and suppliers, to the effect that customers said they would not shop at and suppliers said they would not deliver to the new stores because of the Union's conduct. He also stated, without documentary support, that the new stores' revenues were only half of what he had projected. Of course, many possible reasons exist for a store not reaching its target sales goal. The bottom line is that this testimony does not establish actual damages linked to the Union's conduct.

The Respondents failure to identify any evidence to prove losses stemming from diminish reputation dooms it defamation claim. *Intercity Maintenance Co. v. Local 254, Service Employees*, 241 F.3d at 90 (finding plaintiff's evidence of actual loss due to reputational harm and consequent lost profits insufficient as a matter of law, where plaintiff offered only a "scintilla of evidence" to prove losses stemming from diminished reputation and did not show that it lost contracts as a result of alleged defamatory statements). The Respondents likewise offered only a scintilla of evidence as to losses from diminished reputation. They also did not present any evidence of specific contracts lost, as a result of the defamatory statements. Because the Respondents have not shown actual damages, their defamation claim is preempted pursuant to the Supreme Court's *Linn* doctrine. For the same reasons, the Respondents cannot be said to have a reasonable basis for bringing the defamation claim.

III. DID THE RESPONDENTS' FILE THEIR FEDERAL LAWSUIT WITH A RETALIATORY MOTIVE?

Because I have concluded that the Respondents' state law claims are not reasonably based, that leaves the question of whether the lawsuit was filed with a retaliatory motive. Relevant factors in that determination include: whether the lawsuit was filed in response to protected, concerted activity; evidence of prior animus towards protected rights; the lawsuit's baselessness; and a claim for punitive damages. *Atelier Condominium*, 361 NLRB No. 111, slip op. at 5. A retaliatory motive may be established by circumstantial evidence, thus making relevant the surrounding circumstances to the filing of a lawsuit. *Ibid*.

The testimony of the Respondents' own witnesses is indicative of a retaliatory motive. Wartman Jr. said they brought the suit, because:

[W]e felt as a group that we were never given a fair shot to operate a business in the community. And we felt that was unfair, what they did....if it's not fair, I don't know that it's necessarily legal.

We filed the lawsuit because our stores were drastically failing, and that was in no small part due to the actions of the picketers.⁴⁴

5 Wartman Sr. testified that he filed as a plaintiff in the lawsuit because of the defamation from the Union.⁴⁵ Both Wartman Sr. and Wartman Jr. also stated they brought the lawsuit, because the Union's conduct embarrassed them.⁴⁶ Animus may be inferred from testimony of this nature. See, e.g., *Laborers Local 806*, 295 NLRB 941, 958, 964 (1989) (animus showing supported by union officer's admission that picketing by dissidents made him "upset"); *P*I*E Nationwide, Inc.*, 295 NLRB 382, 382 fn. 1 (1989) (animus demonstrated where employees subjected supervisor who had testified in Board proceeding to subsequent teasing and practical jokes based on his performance at the hearing).

15 Moreover, the timing of the initiation of the Respondents' lawsuit also is particularly telling. On October 21, 2015, the Union filed and served its own lawsuit in federal court against Fresh Seasons Markets.⁴⁷ That lawsuit sought to compel arbitration of the grievance over the stores' failure to pay the accrued vacation and holiday pay of employees. Just 2 days later, Wartman Sr. met with Steffenhagen to investigate the possibility of bringing a lawsuit against the Union. This meeting also occurred just 3 weeks after the closing of Glen Lake's Market, which both Wartman Sr. and Wartman Jr. attributed to the Union's conduct. At the same time, 20 the Union still was picketing at Victoria's Market. Although the Respondents argue that they had a genuine desire to test the legality of the Union's conduct, this timing belies the claim that this was their only motivation and is indicative of animus.

25 Finally, although the Respondents did not ask for punitive damages, they did seek the following in their complaint: "injunctive relief enjoining Local 653 from continuing to engage in [the] unlawful behavior" summarized in the complaint. As previously discussed, injunctive relief plainly is not available as a remedy to private parties pursuing Section 303 claims.

30 For all these reasons, I conclude the Respondents' filed their lawsuit against the Union with a retaliatory motive.

⁴⁴ Tr. 364, 386.

⁴⁵ Tr. 268-269.

⁴⁶ Tr. 145-146, 267, 386.

⁴⁷ I take administrative notice of the docket report for the Union's lawsuit against Fresh Seasons Market. That report shows that, with the complaint filing on October 21, 2015, the court issued a summons to both Fresh Seasons Market stores. The summons required the defendants to file an answer within 21 days of service of the summons. The defendants did so on November 11, 2015, or exactly 21 days from October 21. Thus, the complaint and summons must have been served on the defendants on October 21.

CONCLUSIONS OF LAW

- 5
1. Respondents Glen Lake's Market, LLC, and Victoria's Market, LLC are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁴⁸
 2. United Food & Commercial Workers, Local 653 is a labor organization within the meaning of Section 2(5) of the Act.
 - 10 3. The Respondents violated Section 8(a)(1) of the Act on January 25, 2016, by filing and pursuing claims against the Union under Minnesota state law for tortious interference with prospective economic advantage and for defamation. These state law claims lacked a reasonable basis and were filed with a retaliatory motive. They also are preempted by Federal law.
 - 15 4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 - 20 5. The Respondents have not violated the Act in any of the other manners alleged in the complaint.

REMEDY

25 Having found that the Respondents engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

30 In particular, I shall order the Respondents enjoined from re-instituting the state law claims, which the district court dismissed without prejudice. I also shall order the Respondents to reimburse the Union for all legal and other expenses incurred in defending the state law claims. Interest on that amount is to be paid at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

⁴⁸ The General Counsel's complaint alleged that ART, LLC, Wartman Sr., and Wartman Jr. all were Section 2(2), (6), and (7) employers, as well as Section 2(13) agents of Glen Lake's Market and Victoria's Market. The complaint also alleged that Wartman Sr. was a Section 2(11) supervisor of Glen Lake's Market and Victoria's Market. The Respondents denied these allegations in their answer. The General Counsel bears the burden of proving these allegations. At the hearing, no specific evidence was introduced regarding the elements needed to prove these claims. Moreover, the General Counsel's brief contains no reference to or argument on the allegations, including the relevance of these statuses to the presented legal issues. As a result, I conclude the General Counsel failed to meet the required evidentiary burden for these allegations.

Because the record establishes that Victoria's Market and Glen Lake's Market closed on September 30, 2015, and March 26, 2016, respectively, I shall order these Respondents to mail a copy of the attached notice to the Union and to the last known addresses of their former employees in order to inform them of the outcome in this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁹

ORDER

The Respondents, ART, LLC, Glen Lake's Market, LLC, Thomas B. Wartman, Thomas W. Wartman, and Victoria's Market, LLC, their officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Filing and pursuing claims against the Union that lacked a reasonable basis and were filed with a retaliatory motive.
- (b) Filing and pursuing claims against the Union that are preempted by Federal law.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Reimburse the Union for all legal and other expenses incurred in defending the state law claims contained in the Respondents' January 25, 2016 lawsuit against the Union, in the manner set forth in the remedy section of this decision.
- (b) Within 14 days after service by the Region, duplicate and mail, at their own expense and after being signed by the Respondents' authorized representatives, copies of the attached notice marked "Appendix"⁵⁰ to the Union and to all employees who were employed by Respondent Glen Lake's

⁴⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Market as of September 30, 2015,⁵¹ and to all employees who were employed by Respondent Victoria's Market as of January 25, 2016.

- 5 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondents have taken to comply.

Dated, Washington, D.C., July 3, 2017.



Charles J. Muhl
Administrative Law Judge

⁵¹ The date typically used for notice mailing is that of a respondent's first unfair labor practice. *Excel Container, Inc.*, 325 NLRB 17, 17 (1997). The use of this date is designed to ensure that all employees who were exposed to the unfair labor practice and its effects will be notified of the outcome of the Board proceeding. However, Glen Lake's Market closed prior to January 25, 2016, when the Respondents committed their unfair labor practices. Thus, a technical reading of *Excel Container* would result in Glen Lake's Market not having to mail the notice to anyone. I find such a literal reading would not effectuate the purposes of the Act. The Union began picketing at Glen Lake's on June 17, 2015, and the Respondents' lawsuit grew out of that conduct. Glen Lake's employees obviously were aware of the Union's conduct. I conclude that it is appropriate to require Glen Lake's Market to mail the notice to its former employees who were employed as of the date it closed. This will insure they are aware of the order in this case. See generally *Abramson, LLC*, 345 NLRB 171, 171 fn. 3 (2005).

APPENDIX

NOTICE TO EMPLOYEES

Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT file and prosecute a lawsuit against the United Food and Commercial Workers, Local 653 (the Union) containing claims that lack a reasonable basis and are filed with a retaliatory motive.

WE WILL NOT file and prosecute a lawsuit against the Union containing claims that are preempted by Federal law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Union for all legal and other expenses incurred in defending the unlawful state law claims contained in our January 25, 2016 lawsuit against the Union.

ART, LLC

(Respondent)

Dated _____ By _____
(Representative) (Title)

GLEN LAKE'S MARKET, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

VICTORIA'S MARKET, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

THOMAS B. WARTMAN

(Respondent)

Dated _____ By _____

THOMAS W. WARTMAN

(Respondent)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Federal Office Building, 212 3rd Avenue S, Suite 200 Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/18-CA-168725 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS
CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.