United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 24, 2016

TO: Marlin Osthus, Regional Director
Region 18

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: ART, LLC;
Glen Lake's Market, LLC;
Victoria's Market, LLC;
Thomas B. Wartman; and
Thomas W. Wartman
Cases 18-CA-168725, 168726, 168727,
168728, 168729

Bill Johnson's Chron
512-5009-6700
524-3350-8500
560-7540-4020-5000
560-7540-4020-5084
750-0150
750-2550
750-5037

The Region submitted this case for advice as to whether the lawsuit the Charged Parties filed against the Union in the United States District Court for the District of Minnesota that advances a claim under Section 303 of the LMRA for damages due to alleged unlawful secondary boycott activity, and pendent state law claims of tortious interference with prospective economic advantage and defamation, violates Section 8(a)(1) of the Act because it is baseless and retaliatory under the principles of *Bill Johnson's Restaurants*.[1] We conclude that each count of the Charged Parties' lawsuit is both baseless and retaliatory, and the Region should therefore issue complaint, absent settlement, alleging that the Charged Parties' lawsuit violates Section 8(a)(1). We also conclude that Count II of the lawsuit, which alleges the state law tortious interference claim, will be preempted under the principles of *San Diego Bldg. Trades Council v. Garmon*[2] upon issuance of complaint. Similarly, Count III, which alleges the state law defamation claim, also will be preempted under *Garmon* upon issuance of complaint. If the Charged Parties take any action to revive their state law claims, which the federal district court has dismissed, in either federal or state court, the Region should amend the complaint to also allege that the Charged Parties' continued prosecution of the preempted state-law claims independently violates Section 8(a)(1). However, the Charged Parties' Section 303 claim (Count I) is a federal claim and, as such, is not subject to preemption by a Board complaint.

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[1] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

[2] 359 U.S. 236, 243–45 (1959).

FACTS

From approximately 2005 until spring 2014, Fresh Seasons Market operated two grocery stores in Victoria, Minnesota and Glen Lake, Minnesota ("Union Stores"). For the last few years of the stores' existence, United Food and Commercial Workers Local 653 ("Union") represented employees at the Union Stores. Both of the Union Stores were parties to a multi-employer collective-bargaining agreement negotiated by the Union with grocery employers in the Union's geographical jurisdiction. The Union Stores were owned almost exclusively (96%) by Thomas B. Wartman ("Wartman, Sr.") with a minority share (4%) owned by another person.

Additionally, Wartman, Sr. has ownership interests in the land upon which the Victoria and Glen Lake stores were located. Regarding the Victoria store, Glenhaven Center, LLC, a corporate entity owned by Wartman, Sr. (59%), his wife (20%) and his three sons—Thomas W. Wartman ("Wartman, Jr.") and his two brothers—(7% each), wholly owns Victoria City Center, LLC, which in turn wholly owns the land that the Victoria store was situated upon. Wartman, Sr. and his wife are the sole operators of Victoria City Center, LLC.[3] Similarly, Glen Lake's Mall, LLC, which is owned in equal shares by Wartman, Sr. and Non-Family Partner, wholly owns the land upon which the Glen Lake store was located.

On April 24, 2014, the Union received a letter from Wartman, Sr. stating that the Union Stores would soon be closed and all of the employees would be laid off. The Union demanded to bargain over the effects of the closure. The Union Stores asserted to the Union that, even absent a formal agreement, it intended to honor and pay employees' accrued vacation and personal holidays under the contract. On May 5, 2014, the Union Stores closed. On June 12, 2014, the Union Stores notified the Union that there were insufficient funds to pay the former employees for their accrued vacation and personal holidays at that time, but they remained hopeful that their financial situation would improve during the winding down phase.

In early 2015, the Union learned that Wartman, Sr. had begun raising money and seeking aid from the local authorities to reopen grocery stores at the Victoria and Glen Lake properties. By April 2015, the Union observed Wartman, Sr. at the Victoria storefront daily preparing the store to reopen. Several Union business agents applied for jobs, and Wartman, Sr. interviewed them.

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[3] Wartman, Sr. could not recall whether any of his sons "technically" hold a corporate office in Victoria City Center, LLC.

On May 4, 2015, the Victoria store reopened as Victoria's Market. The store was owned in equal shares by ART, LLC and Non-Family Partner. ART, LLC, in turn, is owned in equal shares by Wartman, Sr.'s three sons, which includes Wartman, Jr. After Victoria's Market opened, Wartman, Sr. continued to be present within the store. He was observed meeting with the store's vendors, working at the store's BBQ area, and directing employees at the store while wearing a store apron. Additionally, Wartman, Sr. was the only person authorized to sign payroll checks on behalf of the new store. On the day the store reopened, the Union, still trying to recoup its members' unpaid vacation and personal time from the now-defunct Union Stores, began engaging in informational picketing and handbilling at Victoria's Market.

Several weeks later, the Glen Lake store reopened as Glen Lake's Market.[4] On the day that Glen Lake's Market opened, Wartman, Sr. was at the store directing the store's employees and vendors. He approached the Union's President, who was on-site observing the new store, and proceeded to yell at him and accused him of "trying to destroy my business." By June 2015, the Union began informational picketing and handbilling Glen Lake's Market. On June 1, 2015, the Union filed a grievance against the Union Stores regarding the outstanding vacation and personal pay owed to the former employees. The Union Stores denied the grievance as untimely and without merit.

Throughout summer and fall 2015, the Union continued to engage in informational picketing and handbilling at both Victoria's Market and Glen Lake's Market ("Non-Union Stores"). Each day, two to fourteen individuals were at each location distributing handbills and carrying picket signs. The Union's message was principally targeted at informing the public of its on-going dispute with the Union Stores and "Tom Wartman" regarding the outstanding vacation and personal pay owed to the Union Stores' former employees.[5] The Union's message also criticized "Tom Wartman" for reopening the former Union Stores as non-Union and for not having a Union contract. The Union maintained during this period that the informational picketing would cease when the Union Stores' former employees were made whole for the money Wartman, Sr. owed them.

The Union distributed letters and handbills during its informational picketing. One letter addressed to the public described the history of the Union's relationship

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[4] This store also was owned in equal shares by ART, LLC and Non-Family Partner.

[5] The Union states that it was not aware at this time that Wartman, Jr., who also goes by "Tom Wartman," was involved with the Non-Union Stores. Any Union communication that used "Tom Wartman" also referred to the Union Stores, and the similarly-named son did not have an ownership interest in those stores.

with Wartman, Sr.—referring to him as "Tom Wartman"—and the nature of its dispute with the Union Stores. Another letter, addressed to the Victoria community, responded to counter-allegations that had recently been distributed by the Non-Union Stores. A Union flyer encouraged readers to "not patronize Glen Lake's Market" because the Union believed that "Tom Wartman" had an ownership interest in the store's landlord, Glen Lake's Market, LLC. The flyer then went on to identify "Tom Wartman" as the owner of "[the Union Stores] which owes back wages to its employees . . . ."

The Union's picketers patrolled the public sidewalks just off the property that the Non-Union Stores were located on and carried picket signs, displayed a stationary banner, and passed out handbills and flyers. The picket signs and banner stated "Please do not patronize [the Non-Union Stores]" and "Shame on Tom Wartman." In addition to the handbilling and picketing, the Union engaged in other activities aimed to promote its dispute with the Union Stores and "Tom Wartman." The Union maintained several websites that contained information about its grievances against the Union Stores and the informational picketing. The Union also utilized its Facebook page as a forum to promote its informational picketing and its dispute with the Union Stores and "Tom Wartman." At times, members of the public would post comments both in support of the Union and against it during the Union's informational picketing campaign at the Non-Union Stores.

On July 13, 2015, the Non-Union Stores filed unfair labor practice charges against the Union alleging that it was engaging "in unlawful secondary activity by picketing and/or threatening and encouraging a consumer boycott of [the Non-Union Stores] where an object thereof is to force or require [the Non-Union Stores] to cease doing business with [Victoria City Center, LLC or Glen's Lake Mall, LLC] and Tom Wartman, Sr., one of its owners."[6] On July 23, 2015, the Non-Union Stores withdrew the charges after the Region determined they did not have merit because the Non-Union Stores did not present sufficient evidence to demonstrate that they were neutral employers distinct from the Union Stores.

During this time, the Union continued to engage in informational picketing at the Non-Union Stores and attempted to bring its June 1, 2015 grievance to arbitration. On August 18, 2015, the Union Stores asserted to the Union that the June 1, 2015 grievance was not substantively arbitrable because the collective-bargaining agreement between the parties had expired before the grievance was filed. On October 21, 2015, the Union filed a Section 301 lawsuit in the United States District Court for the District of Minnesota to compel the Union Stores to arbitrate the June 1, 2015 grievance. The Union Stores filed an answer in that suit. In

[6] Cases 18-CC-155830 and 18-CC-155835.

October 2015, the Union ended its picketing of Glen Lake's Market after it was sold to a new company. In November 2015, the Union concluded its picketing of Victoria's Market.[7]

On January 5, 2016, at a pre-trial scheduling conference for the Union's Section 301 suit to compel arbitration, the Union Stores stated that they did not have the funds to defend against the suit and intended to withdraw their answer. However, the Union Stores have never withdrawn their answer in the Section 301 lawsuit.

On January 25, 2016, ART, LLC, the two Non-Union Stores, Wartman, Sr., and Wartman, Jr. (collectively, "the Charged Parties") filed a lawsuit in the United States District Court for the District of Minnesota alleging in Count I a claim for damages under Section 303 of the LMRA based on an assertion that the Union's picketing and handbilling activity at the Non-Union Stores amounted to unlawful secondary activity within the meaning of Section 8(b)(4) of the Act. The lawsuit alleges that the Non-Union Stores were "entirely new operations, with entirely new owners" that also "had new management . . . and new employees." It alleges that the Union "has engaged in bannering, handbilling and picketing . . . in supposed connection with its dispute against [the Union Stores]." It further alleges that the Union's communications never distinguished between Wartman, Sr. and Wartman, Jr., thereby making them "false" statements about Wartman, Jr.'s involvement in a labor dispute between the Union and the Union Stores. For instance, the lawsuit alleges that the Union displayed large "Shame On" banners that contained false statements about its labor dispute because the informal name used on the banners misled customers to believe that Wartman, Jr., rather than Wartman, Sr., had an obligation to pay wages to employees in his "individual capacity."

Specifically, Count I of the Charged Parties' lawsuit alleges:

> Violation of the Labor Management Relations Act ("LMRA")
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> [The Union] violated the LMRA though [sic] the conduct described, *supra*, by, *inter alia*:
>
> a. Engaging in secondary picketing of Victoria's Market and Glen Lake's Market;
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> b. Handbilling at Victoria's Market and Glen Lake's Market;

[7] Victoria's Market subsequently closed in March 2016.

c. Attempting, by its own admission, to force a boycott of Victoria's Market and Glen Lake's Market;

d. Establishing the Website in an effort to coerce one or more plaintiffs to pay amounts alleged to be due by the Employers;

e. Defaming Thomas B. Wartman[, Sr.] and Thomas W. Wartman[, Jr.] through, among other things, the Website and related publications, including full-page newspaper ads;

f. Posting communications on social media in a similar effort to force a boycott of Victoria's Market and Glen Lake's Market, as well as to defame and disparage Thomas B. Wartman[, Sr.] and Thomas W. Wartman[, Jr.];

g. Publishing open letters "to the public" in a similar effort to induce the public not to patronize Victoria's Market and Glen Lake's Market;

h. Attempting to deter, coerce, or intimidate the non-union employees of Victoria's Market and Glen Lake's Market; and

i. Attempting to deter, coerce, or intimidate suppliers and contractors of both stores.

Count II of the lawsuit is a pendent Minnesota state law claim alleging that the Union tortiously interfered with the Charged Parties' prospective economic advantage. It asserts that the Non-Union Stores and ART, LLC "had a reasonable expectation of an economic advantage by virtue of operation of the non-union grocery stores," that the Union knew of and intentionally interfered with the Charged Parties' reasonable expectation through "unlawful acts" that "directly violated the LMRA," and absent the Union's unlawful acts, the Charged Parties "would have realized a greater economic advantage."

Finally, Count III of the lawsuit alleges a pendent Minnesota state law claim that certain statements and communications made by the Union about Wartman, Sr. and Wartman, Jr. were defamatory. This count specifically alleges that the Union made false representations that: [1] Wartman, Sr. or Wartman, Jr. owed any amount to former employees of the Union Stores; [2] Wartman, Sr. or Wartman, Jr. had engaged in unlawful conduct; [3] the Union had pursued legal action against Wartman, Sr. or Wartman, Jr.; [4] Wartman, Sr. or Wartman, Jr. had committed unlawful acts; [5] Wartman, Sr. or Wartman, Jr. had engaged in any acts that invited the "Shame on Tom Wartman" banners that the Union displayed in front of the Non-Union Stores; and [6] Wartman, Sr. had provided the Union with only three days'

notice that the Union Stores would close. In support of these allegations, the Charged Parties attached copies of the flyers, handbills, webpages, and Facebook posts that the Union had published as part of its informational picketing and campaign against the Union stores. The Charged Parties also allege that the Union made its publications and statements with "actual malice" because the statements were made "with full knowledge by [the Union] of their falsity, or reckless disregard of whether the defamatory statements were true or not."[8]

With regard to all three counts, the Charged Parties allege that they have been damaged "in excess of $75,000." The Charged Parties also request injunctive relief enjoining the Union from engaging in future informational picketing and handbilling against them. The Charged Parties retained the same legal counsel as the Union Stores in the Union's Section 301 lawsuit.

On February 16, 2016, the Union filed a motion under Federal Rule of Civil Procedure 12(b)(6) and (1) to dismiss the Charged Parties' complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. The Union's principal argument in its motion to dismiss was that, because the Charged Parties had alleged that the Union Stores had been out of business since 2014 and had no business relationship with the "new" Non-Union Stores, there could not be an unlawful "cease doing business" objective to the Union's informational picketing and handbilling at the Non-Union Stores.

On May 19, 2016, the federal district court granted the Union's motion to dismiss the Charged Parties' Section 303 claim (Count I) for failure to state a claim upon which relief can be granted.[9] The district court concluded that the Union's objective was "not to coerce the [Charged Parties] to cease doing business with [the Union Stores]." In support of this conclusion, the district court relied on the admitted fact that the Charged Parties "are acquainted with or related to the owners of [the Union Stores]." The district court concluded that the Union's objective was not prohibited under Section 8(b)(4) because the Union was merely trying "to pressure [the Charged Parties] . . . to encourage [the Union Stores] to resolve its dispute with the Union." Thus, according to the district court, "the Union's objective could not have been to prevent business between [the Charged Parties and the Union Stores]." Having dismissed the Charged Parties federal Section 303 claim, the district court also

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[8] On May 4, 2016, the Charged Parties filed an amended complaint adding the allegation that the Union's statements were made with "actual malice."

[9] *Wartman, et al. v. United Food & Commercial Workers Local 653*, 2016 WL 2930916, at *3 (D. Minn.).

exercised its discretion to not take supplemental jurisdiction of the Charged Parties state law claims and dismissed those claims without prejudice.

On June 16, 2016, the Charged Parties filed a notice of appeal in the Eighth Circuit appealing the district court's dismissal of their Section 303 lawsuit. On June 22, 2016, rather than withdrawing its answer to the Union's Section 301 lawsuit, the Union Stores filed a motion for summary judgment in district court. On August 15, 2016, the Charged Parties filed their opening brief with the Eighth Circuit in the Section 303 suit.[10] The Union's reply brief is due to the Eighth Circuit on September 14, 2016.

ACTION

We conclude that each count of the Charged Parties' lawsuit is both baseless and retaliatory and the Region should therefore issue complaint, absent settlement, alleging that the Charged Parties' lawsuit violates Section 8(a)(1). We also conclude that Count II of the lawsuit, which alleges a state law tortious interference claim, will be preempted under the principles of *Garmon*[11] once the Region issues complaint alleging that the lawsuit violated Section 8(a)(1) because it is baseless and retaliatory. Similarly, Count III, which alleges the state law defamation claim, also will be preempted under *Garmon* once the Region issues complaint because the Charged Parties' failed to plead the federal overlay of actual damages as required by *Linn v. Plant Guard Workers.*[12] Thus, because the federal district court has dismissed the Charged Parties' state law claims without prejudice, they must take no action to revive those claims while the Board is permitted in the first instance to decide whether the relevant Union conduct remained protected under Section 7. If the Charged Parties' take any action to revive their state law claims in either federal or state court after the Region issues complaint, the Region should amend the complaint to also allege that the Charged Parties' continued prosecution of the preempted state-law claims independently violates Section 8(a)(1). However, the Charged Parties' Section 303 claim (Count I) is a federal claim and, as such, is not subject to preemption by a Board complaint.

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[10] In their brief, the Charged Parties argue solely that the district court erred in dismissing their Section 303 claim (Count I). The Charged Parties did not appeal the district court's refusal to exercise pendent subject matter jurisdiction over their state law claims (Counts II and III).

[11] 359 U.S. at 243–45.

[12] 383 U.S. 53, 65–66 (1966).

I. Each Count of the Employer's Lawsuit Violates Section 8(a)(1) Because it is Baseless and Retaliates Against Section 7 Activity.

In *Bill Johnson's*, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: (1) lacks a reasonable basis in law or fact; and (2) was commenced with the motive of retaliating against the exercise of Section 7 protected activities. Both of these elements are satisfied here, as set forth below.[13]

A. Each Count of the Employer's Lawsuit is Baseless.

A lawsuit will be deemed objectively baseless when its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits."[14] When a charge attacks the prosecution of an ongoing lawsuit as baseless, the General Counsel's burden is to prove that the respondent, when it filed its complaint or during the pendency of the lawsuit, "did 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."[15] The Board, in assessing whether the respondent could satisfy the essential elements of its causes of action, must evaluate the evidence the General Counsel offered to satisfy his burden of proof while also considering the respondent's evidence to the contrary.[16]

In making its determination, the Board cannot make credibility resolutions or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or

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[13] In the event that the Charged Parties raise the issue as a defense, it is irrelevant that their lawsuit named the Union as the defendant rather than any employees. Such a lawsuit violates Section 8(a)(1) if, as here, it has a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights. *See, e.g.*, *Diamond Walnut Growers, Inc.*, 312 NLRB 61, 69 (1993), *enforced,* 53 F.3d 1085, 1089–90 (9th Cir. 1995); *Dahl Fish Co.*, 279 NLRB 1084, 1110–11 (1986), *enforced mem.,* 813 F.2d 1254 (D.C. Cir. 1987).

[14] *BE&K Construction Co.*, 351 NLRB 451, 457 (2007).

[15] *Milum Textile Services Co.*, 357 NLRB 2047, 2053 (2011). By contrast, where a lawsuit or a major part of a lawsuit has been litigated to completion, the Board will evaluate the actual arguments and evidence presented by the respondent to determine whether it had reasonable grounds for seeking relief. *Id.* at 2052.

[16] *Id.*

judge.[17] At the same time, the Board's inquiry need not be limited to the bare pleadings.[18] Where a respondent fails to present the Board with any evidence demonstrating a reasonable belief that it could acquire the necessary factual support for its claim through discovery or other means, a lawsuit may be enjoined as an unfair labor practice prior to completion.[19] Claims by a respondent that undisclosed additional evidence exists will not prevent a lawsuit from being enjoined where that party fails to "explain, in testimony, by affidavit, or otherwise, why such evidence (assuming it existed) was not available (for example, because it could be obtained only through pretrial discovery)."[20]

1. Count I – Section 303 claim is Baseless Because the Charged Parties Cannot Establish that They are Neutral Persons Within the Meaning of Section 8(b)(4).

The Charged Parties allege that the Union's picketing, handbilling, and publicity at and around the Non-Union Stores constitutes an unlawful secondary boycott in violation of Section 8(b)(4). They also allege that the Union's actions were the direct and proximate cause of them incurring damages "in excess of $75,000."

Section 303 of the LMRA provides a private right of action for any person "injured in his business or property" by union secondary activities that violate Section 8(b)(4). Thus, in a Section 303 action, there can be no liability if the complained of actions do not violate Section 8(b)(4).[21] Section 8(b)(4)(ii)(B) makes it

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[17] *Bill Johnson's*, 461 U.S. at 744–46. *See also Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 & n.20 (Nov. 26, 2014) (quoting *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 962 n.6 (2000)).

[18] *Bill Johnson's*, 461 U.S. at 744–46.

[19] *Id.* at 746. *See also Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 4 & n.25 (citing, among other cases, *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997), *cert. denied,* 522 U.S. 808 (1997)); *Milum Textile Services Co.,* 2012 WL 1951390, JD(SF)-26-12, slip op. at 7, 11, 13 (ALJD dated May 30, 2012) (respondent did not have and could not have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its cause of action), *on remand from* 357 NLRB at 2053 & n.25, 2057.

[20] *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 4 & n.25 (citing, among other cases, *Geske & Sons*, 103 F.3d at 1376).

[21] *BE & K Const. Co. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 90 F.3d 1318, 1330 (8th Cir. 1996).

unlawful for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce" where the object of the conduct is to force or require any person to cease doing business with another person.[22] Section 8(b)(4) has been construed to implement "the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[23] "What distinguishes proscribed secondary activity from protected primary activity is the object of the picketing or, equivalently, the identity of the target of the union activity."[24] The Supreme Court has explained that the primary strike, which is protected by the proviso to Section 8(b)(4)(B), has characteristically been aimed at all those "approaching the situs whose mission is selling delivering or otherwise contributing to the operations which the strike is endeavoring to halt."[25] In other words, "primary activity is protected even though it may seriously affect neutral third parties."[26]

The foregoing principles establish that the threshold issue for finding a Section 8(b)(4) violation is whether the pressured employer is the primary with whom the union had its labor dispute, or an "unoffending" neutral. Only if the pressured employer is the latter can there be merit to a Section 8(b)(4) allegation and, in turn, a Section 303 claim. In determining whether an entity is "neutral" and therefore protected under Section 8(b)(4), the Board has taken special note of a statement made by Senator Taft in the provision's legislative history: "[t]his provision makes it unlawful to . . . injure the business of a third person who is *wholly unconcerned* in the

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[22] *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 611 (1980). *See also NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297, 302–303 (1971) (noting that Congress enacted Section 8(b)(4)(B) to prohibit "the secondary boycott, which was conceived of as pressure brought to bear, not upon the employer who alone is a party to a dispute, but upon some third party who has no concern in it with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands" (citations omitted)).

[23] *See Electrical Workers IUE Local 761 v. NLRB (General Electric Corp.)*, 366 U.S. 667, 672 (1961).

[24] *Anchortank, Inc. v. NLRB*, 601 F.2d 233, 237 (5th Cir. 1979), *enforcing* 238 NLRB 290 (1978).

[25] *United Steelworkers of America v. NLRB (Carrier Corp.)*, 376 U.S. 492, 499 (1964).

[26] *Burns & Roe*, 400 U.S. at 303.

disagreement between an employer and his employees."[27] Relying in part on this statement, the Board developed the "ally" doctrine, one branch of which holds that an employer's neutrality can be compromised through the performance of "struck work," while the other branch holds that a secondary employer is not a true neutral if it constitutes a single integrated enterprise with the primary employer.[28] However, the Board has stressed that the two branches of the ally doctrine should not be permitted "to take on lives of their own," but rather are "merely tools that must be used to reflect the full range of congressional policies underlying the primary-secondary dichotomy."[29] Thus, "all the strands of mutual interest" between two companies must be considered in order to determine whether one entity is truly neutral.[30]

For instance, in *Teamsters Local 282 (Acme Concrete & Supply Corp.)*, the Board held that where the facts demonstrate "such identity and community of interest" between two entities to negate a neutrality claim, the pressured employer loses the protection of Section 8(b)(4) even absent a formal single employer finding.[31] In that case, the union struck premises jointly operated by a ready-mix concrete company (primary) and a company that supplied materials for the production of ready-mix concrete (alleged neutral) after the primary had refused to let several economic strikers return to work.[32] In finding the two companies so interrelated that the alleged neutral could not claim that it was "wholly unconcerned" with the labor dispute, the Board relied on evidence that the primary and alleged neutral were owned by members of the same family, the primary owned the land that the alleged neutral occupied in conducting its business, and that the two companies did business almost exclusively with each other.[33] In dismissing the complaint, the Board stressed the "close family connections" between the two entities and the important roles that the family members had in the operation of both companies.[34] Thus, a determination

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[27] *Teamsters Local 560 (Curtin Matheson Scientific, Inc.)*, 248 NLRB 1212, 1213 (1980) (emphasis in original) (internal citations omitted).

[28] *Id.* (internal citations omitted).

[29] *Id.* at 1214.

[30] *Id.*

[31] 137 NLRB 1321, 1322 (1962).

[32] *Id.* at 1322–23.

[33] *Id.*

[34] *Id.*

of neutrality under Section 8(b)(4)(ii)(B) is not confined to the technical concepts of the "struck work" and "single employer" doctrines; rather, "all the strands of mutual interest" connecting the entities must be considered.[35]

Applying these principles here, we conclude that the Charged Parties cannot show that the Union targeted a neutral employer. The Union's handbilling and picketing activity was designed to enlist public support in its primary dispute with the Union Stores. We initially note that any claim (such as Count I, sections (e) and (f)) that the Union engaged in secondary activity vis-à-vis Wartman, Sr. is patently baseless because he remains the principal owner and manager of the primary employer—the now-defunct Union Stores.

Moreover, with regard to the remaining Charged Parties, the evidence establishes that the Non-Union Stores also are not neutral or "wholly unconcerned" employers within the meaning of Section 8(b)(4). There is substantial "mutual interest" between the Non-Union and Union Stores here. There is a close familial relationship between Wartman, Sr. and his sons (including Wartman, Jr.), who formally own the Non-Union Stores. Wartman, Sr. also has significant ownership in the land on which the Non-Union Stores operated. He and his sons also share a business relationship with Non-Family Partner, who co-owns the land where one of the stores is located with Wartman, Sr. and co-owns the Non-Union Stores with Wartman, Jr. and his siblings. Wartman, Sr.'s prominence in, at a minimum, aiding the new Non-Union Stores in opening in April and May 2015 by interviewing job applicants, signing employee paychecks, managing accounts payable and signing checks to vendors, and otherwise providing on-site supervision of employees at the new stores further demonstrates the interconnected relationship between the Union and Non-Union Stores. Indeed, when the Union began picketing near Glen Lake's Market in summer 2015, Wartman, Sr. accused the Union President of "trying to destroy *my business*." Considering all these strands of mutual interest between the two companies, it is clear that the Non-Union Stores are not a neutral company "wholly unconcerned" with the labor dispute between the Union Stores and the Union.[36]

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[35] *Teamsters Local 560 (Curtin Matheson Scientific, Inc.)*, 248 NLRB at 1214.

[36] In addition to the preceding argument, the facts here create a strong inference that the Non-Union Stores are nothing more than alter egos of the defunct Union Stores. Thus, by virtue of Wartman, Sr.'s direct involvement with the start up of the Non-Union Stores, there is evidence of "substantially identical management and supervision, business purpose, operations, equipment, and customers . . . [and] the additional indicia of ownership of the companies by members of the same family supports an alter ego finding." *Midwest Precision Heating & Cooling*, 341 NLRB 435,

In light of the foregoing, the Charged Parties here did not and could not reasonably believe that they could prove an essential element of their Section 303 claim against the Union, i.e., that the Non-Union Stores are neutral to the labor dispute. Bolstering this conclusion is the district court's order dismissing the Section 303 claim under Federal Rule 12(b)(6) based on the conclusion that the Charged Parties were "acquainted with or related to the owners" of the primary employer—the Union Stores. Indeed, based on the charge they filed in July 2015 in Cases 18-CC-155830 and 18-CC-155835, and in light of the current charge filed by the Union, the Non-Union Stores have had two opportunities to present evidence to the Region that they are neutral employers vis-à-vis the Union Stores and have failed to do so. Because the Charged Parties will not be able to demonstrate that they constitute neutral entities under Section 8(b)(4) with respect to the Union's dispute with the Union Stores, all the allegations under Count I are baseless.[37]

2. Count II – Tortious Interference with Prospective Economic Advantage and Business Relations -- is Baseless

The Charged Parties argue with regard to Count II that the Non-Union Stores and ART, LLC had a reasonable expectation of economic advantage "by virtue of

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435 (2004), *enforced*, 408 F.3d 450 (8th Cir. 2005). If further investigation establishes that the Union Stores and Non-Union Stores constitute alter egos, the Region's baselessness argument will be stronger.

[37] In concluding that the Charged Parties' Section 303 claim is baseless, we do not rely on the Region's finding that the charges in Cases 18-CC-155830 and 18-CC-155835 were without merit. In *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952), the Supreme Court held that proceedings under Section 303 are "independent" of Section 8(b)(4) unfair labor practice proceedings. Although collateral estoppel may apply under appropriate circumstances, the statutory structure of the Act allows for the "independent" actions to yield inconsistent results. *Cf. NLRB v. Deena Artware*, 198 F.2d 637 (6th Cir. 1952) (on the same day, Sixth Circuit reached inconsistent decisions in Section 303 and Section 8(b)(4) actions). Moreover, before collateral estoppel can apply, *the Board* must issue a final Board order. *Cf. Clark Eng'g & Construc. Co. v. Carpenters*, 510 F.2d 1075 (6th Cir. 1975) (concluding that refusal of a regional director or the General Counsel to issue complaint is not given similar effect as a final Board order because the General Counsel's refusal to act is part of ex parte investigation and not an adjudication). Thus, the Region's decision not to issue complaint in Cases 18-CC-155830 and 18-CC-155835 because of its conclusion that the Non-Union Stores were not neutral employers does not implicate collateral estoppel principles.

operation of the non-union grocery stores," and that the Union knew of and intentionally interfered with the Charged Parties' reasonable expectation. Accordingly, the Charged Parties assert that the Union's picketing and handbilling was the direct and proximate cause of the Non-Union Stores and ART, LLC incurring damages of over $75,000.

In Minnesota, a plaintiff must satisfy the following elements to sustain a claim of 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.[38]

The Minnesota Supreme Court has made clear that a plaintiff must identify "specific third parties with whom the plaintiff claims prospective economic relationships" so that defendants will not be held liable for "the more speculative expectation that a potentially beneficial relationship will arise."[39] "Thus, a plaintiff's projection of future business with unidentified customers, without more, is insufficient as a matter of law."[40]

Here, the Charged Parties have failed to offer a scintilla of evidence that the Non-Union Stores had prospective economic relationships with specific third parties. Indeed, the only reference in the Charged Parties' complaint to any third party with whom they had a business relationship merely alleges that "[d]ue to the activities of

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[38] *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014).

[39] *Id.* at 220–21 (citations omitted).

[40] *Id.* at 221–22.

[the Union], [the Non-Union Stores] lost substantial business from its regular customers and goodwill in the community." There is currently no evidence that the Charged Parties will be able to adduce any evidence through discovery that the Union interfered with any prospective *specific* third parties with whom the Charged Parties had a reasonable expectation of economic advantage.

Furthermore, notwithstanding the fatal flaw in the Charged Parties' pleading of Count II, this count is also baseless as a matter of law because in the Eighth Circuit, where this cases arises, state law tortious interference claims arising out of a labor dispute are preempted by Section 303 of the LMRA.[41] In *BE & K Construction Co. v. United Brotherhood of Carpenters & Joiners of America*, the Eighth Circuit held that Section 303 preempts state law tortious interference claims arising out of a labor dispute because "state regulation cannot be allowed to interfere with th[e] balance" drawn by Section 303 between union rights to engage in protected conduct and legitimate restrictions on threats and coercion.[42] Thus, by alleging in Count II that the Union intentionally interfered with the Charged Parties' prospective economic advantage and business relations when it engaged in conduct "that directly violated the LMRA," the Charged Parties have foreclosed the viability of Count II as a matter of law.[43]

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[41] This argument is independent of the *Garmon* preemption theory for Count II discussed below. Because *Garmon* preemption requires the Board to exercise its "primary jurisdiction" to determine whether the challenged conduct is protected by Section 7 or prohibited by Section 8, Count II of the lawsuit will not be preempted until the Region issues complaint alleging that the Charged Parties' lawsuit violates Section 8(a)(1) because it is baseless and retaliatory. *See infra*, Section II.

[42] 90 F.3d at 1328.

[43] We also note that Count II of the Charged Parties' lawsuit is also likely preempted in the Eighth Circuit for failing to plead actual malice and damages consistent with *Linn*. *See Milum Textile Services Co.*, 357 NLRB at 2049–50 (noting that tortious interference with contract claims are "subject to the partial preemption articulated in *Linn*) (citing *Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d 191, 196 (8th Cir. 1964) ("[T]he malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements.")).

3. Count III – Defamation -- is Baseless Because the Charged Parties will Not be Able to Demonstrate Essential Elements of That Claim.

A plaintiff pursuing a state-law defamation claim in Minnesota must prove the following four elements:

(1) that the defamatory statement is "communicated to someone other than the plaintiff";

(2) that the statement is false;

(3) that the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community; and

(4) that the recipient of the false statement reasonably understands it to refer to a specific individual.[44]

In addition, where, as here, alleged defamatory statements are made within the context of a labor dispute, plaintiffs must prove the additional elements that the statements were made with "actual malice" and that they incurred actual damages to avoid federal preemption.[45]

With regard to the requirement that an actionable statement refer to a specific individual, the Minnesota Supreme Court has made clear that "an essential element in a defamation action" is the ability of persons hearing or reading allegedly false statements to reasonably identify the specific plaintiff.[46] Failure to prove that such identification of the plaintiff was possible—either directly or indirectly—defeats a defamation claim as a matter of law.[47] To meet this burden, the plaintiff must prove

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[44] *State v. Crawley*, 819 N.W. 2d 94, 104 (Minn. 2012).

[45] *See Beverly Health & Rehabilitation Services*, 336 NLRB 332, 333 (2001) ("For the plaintiff to prevail, he must prove not only defamation under State law, but also the Federal overlay of actual malice and damages."); *Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d at 194–95 ("Even in the context of a labor dispute, malicious defamation enjoys no constitutional protection.") (citing *Linn v. Plant Guard Workers*, 383 U.S. at 63).

[46] *Mahnke v. Northwest Publ. Inc.*, 280 Minn. 328, 364 (1968).

[47] *Id.*

that the statement at issue either explicitly referred to the plaintiff or that a reader by fair implication would understand the statement referred to the plaintiff.[48]

With regard to the requirements of actual malice and damages, as to the former, the plaintiff must show that the statements were made with knowledge of falsity or with reckless disregard of whether the statements were true or false.[49] In proving that a statement is maliciously false, a plaintiff may not rely on statements that require subjective determinations on the part of the audience because "to use loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies—like 'unfair' and 'fascist'—is not to falsify facts."[50] Regarding the necessary showing for actual damages, where, as here, a plaintiff alleges harm to its reputation, the plaintiff must show evidence of actual loss due to reputational harm.[51]

Applying these principles here, with respect to Plaintiff-Wartman, Jr., the Charged Parties' defamation claim is baseless because it presents no evidence that the Union made statements that a reader, by fair implication, would interpret as referring to him, either directly or indirectly. The Charged Parties' claim complains of several flyers, handbills, banners, and websites that the Union directed at the Non-Union Stores in connection with its labor dispute with the Union Stores. However, every single of instance of the Union making statements concerning "Tom Wartman" is in relationship to his ownership of the Union Stores. The Charged Parties'

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[48] *Crawley*, 819 N.W. 2d at 104.

[49] *Linn*, 383 U.S. at 65. *See also Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974) ("But the Court was obviously using 'malice' in the special sense it was used in *New York Times*—as a shorthand expression of the 'knowledge of falsity or reckless disregard of the truth' standard.").

[50] *Austin*, 418 U.S. at 284; *see Beverly Hills Foodland, Inc.*, 39 F.3d at 195–96 (in labor dispute, union asking patrons whether employer had discriminatory hiring practices or stating the employer was "unfair," were incapable of factual proof and were non-actionable statements requiring subjective determinations).

[51] *See Linn*, 383 U.S. at 65 ("the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm . . . "); *see also Intercity Maint. Co. v. Service Employees Local 254*, 241 F.3d 82, 89–90 (1st Cir. 2001) (despite evidence of malice, plaintiff alleging defamation in labor dispute "could not rest on the common law presumption of damages" and failed to show "evidence of actual loss due to reputational harm and consequent lost profits").

complaint acknowledges that Wartman, Jr. never had an ownership interest in the Union Stores.

Furthermore, with respect to Wartman, Sr., the Charged Parties' defamation claim is also baseless because they have presented no evidence that the Union's statements were made with actual malice. In order to satisfy this burden, Wartman, Sr. will have to demonstrate that the Union made its statements with either knowledge of their falsity or reckless disregard for their truth. Wartman, Sr. will not be able to satisfy this heavy burden nor has he presented evidence during the course of the Region's investigation that he could obtain such proof through discovery. Indeed, as the owner of the Union Stores, most of the Union's statements concerning him are either true or require the audience to make subjective determinations, such as the Union's "Shame on Tom Wartman" banners, and are protected, non-actionable statements.[52]

Finally, with regard to both Wartman, Sr. and Wartman, Jr., the Charged Parties' defamation claim is also baseless because they have neither properly plead actual damages as required by *Linn* nor presented any evidence that they would be able to prove any actual damages on account of the Union's statements. In the Charged Parties' lawsuit, for each and all counts, they simply allege "damages in excess of $75,000.00." This general statement falls short of meeting the requirements set forth in *Linn*. In short, because the Charged Parties here do not have, and cannot reasonably believe that they can acquire through discovery or other means, evidence needed to prove essential elements of their defamation claim, Count III of the Charged Parties' lawsuit is baseless.

B. The Charged Parties Initiated Their Lawsuit to Retaliate Against the Union's Section 7 Activity.

Relevant factors for discerning a retaliatory motive include whether the lawsuit was filed in response to protected concerted activity; evidence of the respondent's prior animus toward protected rights; and the respondent's claim for punitive damages.[53] Although a lawsuit's baselessness alone is insufficient to establish

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[52] *See, e.g.*, *Austin*, 418 U.S. at 281–83 (finding union's use of "scab" along with negative definitions of the term in referring to non-union workers could not have been made with actual malice); *Beverly Hills Foodland, Inc.*, 39 F.3d at 195–96.

[53] *See, e.g.*, *Atelier Condo. & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 5; *Milium Textile Services Co.*, 357 NLRB at 2049, 2051–52 & n.22.

retaliatory motive, the Board will consider it as one factor in its analysis of motive.[54] Here, the evidence demonstrates that the Charged Parties filed their lawsuit with a retaliatory motive. Initially, the Charged Parties' lawsuit is aimed solely at the Union's protected Section 7 activity of picketing and handbilling the Non-Union Stores in relation to its dispute with the Union Stores over their failure to pay former employees for their accrued vacation and personal holidays. In addition, the Charged Parties filed their lawsuit shortly after the first status conference for the Union's Section 301 lawsuit to compel arbitration over the grievance concerning the vacation and holiday pay the Union Stores owed their former employees. Furthermore, although not dispositive, the overwhelming evidence that the Charged Parties' lawsuit is baseless further demonstrates the requisite retaliatory motive.

Accordingly, because the Charged Parties' filed a baseless lawsuit against the Union to retaliate against its protected activities, the Region should issue complaint, absent settlement, alleging that the Charged Parties violated Section 8(a)(1) of the Act, as set forth above.[55]

II. Counts II and III of the Charged Parties' Lawsuit are also Preempted and the Charged Parties Will Violate Section 8(a)(1) by Continuing to Process these Claims After Receiving a *Loehmann's* Letter from the Region.

In footnote 5 of *Bill Johnson's*, the Supreme Court made clear that it did not intend to preclude the enjoining of state court lawsuits that are preempted by the Board's jurisdiction.[56] Thus, regardless of whether it is baseless or retaliatory, "if a

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[54] *See id. See also Allied Mechanical Services*, 357 NLRB 1223, 1234 (2011).

[55] Because we have concluded that the Charged Parties' claims are baseless and retaliatory, the Region should contact the Injunction Litigation Branch if it concludes that the continued maintenance of the Section 303 claim (Count I) will cause the Union irreparable harm. *See Lineback v. Printpack, Inc.*, 979 F. Supp. 831, 850–51 (S.D. Ind. 1997) (Section 10(j) case enjoining an employer's Section 303 claim). The Region need not consider injunction proceedings for the Charged Parties' baseless state law claims because they are currently inactive. However, the Region would have to consider injunction proceedings if the Charged Parties take any action to revive those state claims.

[56] 461 U.S. at 737, n.5; *see also Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003) (stating that the Supreme Court's decision in *BE&K Constr.* "did not affect the footnote 5 exemption in *Bill Johnson's*").

suit is preempted, it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."[57]

In *San Diego Bldg. Trades Council v. Garmon*, the Supreme Court held that "a presumption of preemption applies even when the activity that the State seeks to regulate is only '*arguably*' protected . . . or prohibited" by the Act.[58] In such circumstances, the Board must exercise its "primary jurisdiction" and determine in the first instance whether the challenged conduct is protected or prohibited by the Act, thereby potentially divesting the states of all jurisdiction.[59] The Court, however recognized that not every state cause of action involving *arguably* protected or prohibited activity is preempted. The two exceptions the Court noted involve "activity that is 'a merely peripheral concern' of the Act and activity that touches interests 'deeply rooted in local feeling and responsibility.'"[60] Thus, *Garmon* preemption is designed to prevent state and local interference with the Board's interpretation and enforcement of the integrated scheme of regulation established by the Act.[61]

In *Loehmann's Plaza*, the Board, in interpreting *Garmon*, held that when the activity the state is attempting to regulate constitutes arguably protected activity,

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[57] *Webco Industries*, 337 NLRB 361, 363 (2001). *See also Federal Security*, 359 NLRB No. 1, slip op. at 13 (Sept. 28, 2012). Although *Federal Security* was issued by a panel that, under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), was not properly constituted, it is the General Counsel's position that this case was soundly reasoned. The Region should therefore urge the ALJ and the Board to apply the principles set forth in that case. *See DHL Express, Inc. v. NLRB*, 813 F.3d 365, 377 n.2 (D.C. Cir. 2016) (nothing that the rationale in a voided, two-member decision was "instructive").

[58] *See* 359 U.S. at 245, cited in *Federal Security*, 359 NLRB No. 1, slip op. at 6.

[59] *Garmon*, 359 U.S. at 245. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748–49 (1985); *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), *supplemented by* 316 NLRB 109 (1995), *aff'd sub nom., UFCF Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), *cert. denied sub nom., Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

[60] *Federal Security*, 359 NLRB No. 1, slip op. at 6 (citing *Garmon*, 359 U.S. at 243–44, and *Webco Industries*, 337 NLRB at 362).

[61] *See Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224–25 (1993). *See also Federal Security*, 359 NLRB No. 1, slip op. at 6 ("The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." (quoting *Garmon*, 359 U.S. at 246)).

preemption occurs only upon Board involvement in the matter, and Board involvement occurs when the General Counsel issues a complaint regarding the same activity that is subject of the state court lawsuit.[62] At that point, the pending state lawsuit is preempted and the "normal requirements of established law apply" rather than "the special requirements" of *Bill Johnson's*.[63] In other words, if the preempted lawsuit is unlawful under traditional Board principles, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with a Section 7 right.[64]

In this case, based on our conclusion that the Charged Parties' state law claims of tortious interference with prospective economic advantage (Count II) and defamation (Count III) are baseless and retaliatory, we additionally conclude that Counts II and III will be preempted after the Region issues complaint alleging that the lawsuit violates Section 8(a)(1). Although the federal district court has dismissed Counts II and III of the lawsuit without prejudice, the Charged Parties are currently appealing the dismissal of their Section 303 claim to the Eighth Circuit and, regardless of the outcome of that appeal, they remain free to refile those counts in a state court lawsuit. If the Board determines in the exercise of its primary jurisdiction that the Charged Parties' lawsuit is baseless and retaliatory, the subject of that lawsuit—the Union's picketing, handbilling, and other communications at the Non-Union Stores—is Section 7 protected conduct. Thus, until the Board decides whether the conduct of the Union that is alleged to violate state law has lost the protection of the Act, the disputed conduct is *arguably* protected. The Charged Parties must therefore take no action to revive Counts II and III until the Board rules in the first instance because a prior determination by a court applying Minnesota law that the disputed conduct constituted a state law tort would interfere with the national labor policy.[65]

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[62] 305 NLRB at 669–70.

[63] *Id.* at 671.

[64] *Id.* (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

[65] The Board's decision in *Beverly Health & Rehabilitation Services*, 336 NLRB at 333, does not defeat a preemption argument here regarding the state defamation claim. In that case, the Board rejected the General Counsel's argument that "issuance of a complaint against a defamation lawsuit preempts the State court suit, pending litigation on the 'baselessness' issue." *Id.* at 333. The Board held that defamation suits are not preempted until *the Board* determines that the suit was baseless and retaliatory. *Beverly Health* is distinguishable because, as set forth in that decision, the Supreme Court has determined that *Garmon* principles do not apply to state court defamation cases (under the "deeply rooted state interest" exception), so long as the plaintiff pleads and proves actual malice and damages. *See Linn*, 383 U.S. at 62, 65.

Based on the foregoing analysis, after the Region issues a Section 8(a)(1) complaint alleging that the Charged Parties' lawsuit is baseless and retaliatory, it should also send the Charged Parties' a *Loehmann's* letter directing them to take no affirmative action to revive Counts II and III in federal or state court.[66] If the Charged Parties take any action to revive Counts II and III, the Region should issue an amended complaint alleging that the Charged Parties independently violated Section 8(a)(1) by maintaining the preempted state-law claims in Counts II and III of its lawsuit post-complaint, taking into account the caveats previously mentioned regarding Count III, because that action would interfere with the exercise of employees' Section 7 rights to engage in protected picketing and handbilling in support of a primary labor dispute.[67] However, this analysis would not apply to the Charged Parties' Section 303 claim (Count I). A federal claim is not subject to preemption by another federal claim.[68]

As noted above, because the Charged Parties here have failed to plead and prove actual damages for their defamation claim, that claim is subject to Board preemption. However, if the Charged Parties refile Count III in such a way as to satisfy the actual damages requirement in *Linn*, then pursuant to *Beverly Health*, Count III will not be preempted after the Region issues complaint.

[66] *Loehmann's Plaza*, 305 NLRB at 671 (1991). Contrary to the procedure set forth in *Loehmann's Plaza*, 305 NLRB at 671–72, n.56, the Region should *not* send a similar letter to any court. Moreover, if the Eighth Circuit subsequently reverses the district court's decision dismissing the Charged Parties' Section 303 claim (Count I), the Region should send a second letter to the Charged Parties advising them to hold Counts II and III (the state law claims) in abeyance within seven days of the district court accepting the remand.

[67] *See Federal Security*, 359 NLRB No. 1, slip op. at 13–14; *Webco Industries*, 337 NLRB at 363–64; *Loehmann's Plaza*, 305 NLRB at 671–72. In that event, the Region should also submit this case to the Injunction Litigation Branch with its recommendation as to whether Section 10(j) proceedings are warranted to protect the Board's jurisdiction. *See, e.g.*, *Sharp v. Webco Industries, Inc.*, 265 F.3d 1085, 1089–90 (10th Cir. 2001) (affirming Section 10(j) order temporarily enjoining state court lawsuit on preemption grounds).

[68] *See, e.g., Lupiani v. Wal-Mart Stores, Inc.*, 435 F.3d 842, 846 (8th Cir. 2006) ("The Supreme Court and our sister circuits have suggested in several instances that *Garmon* preemption is not implicated where the potential conflict is between two federal statutes and not between a federal law and a state law."); *Baker v. IBP, Inc.*, 357 F.3d 685, 688–89 (7th Cir. 2004) (noting that "[f]ederal statutes do not 'preempt'

Accordingly, the Region should issue complaint, absent settlement, alleging that the Charged Parties violated Section 8(a)(1) as set forth above.

/s/

B.J.K.

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other federal statutes . . . though one may repeal another implicitly if they are irreconciliable").