No. 12-56427

IN THE

United States Court of Appeals for the Ninth Circuit

THE RETAIL PROPERTY TRUST,

Plaintiff-Appellant,

– v. –

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; CARPENTERS LOCAL UNION NO. 803; JAMES FLORES; AND DOES 1 THROUGH 100,

Defendants-Appellees.

On Appeal From a Judgment of the United States District Court for the Central District of California

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BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Plaintiff-Appellant, The Retail Property Trust, hereby makes the following disclosure:

The Retail Property Trust is a subsidiary of Simon Property Group, Inc., a publicly-held corporation. No other publicly-held corporation owns 10% or more of an interest in The Retail Property Trust.

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JURISDICTIONAL STATEMENT

This action was originally filed in the Superior Court of California for Orange County. (ER–41.) On the same day that it was filed, however, this action was removed by the Defendants to the United States District Court for the Central District of California. (ER–37, 53.)

The parties dispute whether the District Court properly invoked jurisdiction over this matter and, therefore, whether removal was proper pursuant to 28 U.S.C. § 1441. The Defendants, a union and its members, argued that the Plaintiff's state-law claims for trespass and private nuisance are completely preempted by Section 303 of the Labor Management Relations Act (LMRA) and are, therefore, construed to give rise to federal-question jurisdiction under 28 U.S.C. § 1331. (ER–38-39.) The Plaintiff, the owner of a California shopping mall, challenged these assertions and sought to remand the case back to state court. (ER–35-36.)

The District Court agreed with the Defendants. It held that the Plaintiff's trespass and private nuisance claims were completely preempted by Section 303 of LMRA. (ER–25-33.) As a result, it denied the Plaintiff's motions to remand (ER–20, 25), and it ultimately

dismissed the Plaintiff's state-law claims, construing them instead as a single claim for relief under Section 303 of LMRA (ER–16-19).

Wishing to take an appeal from the District Court's rulings that its state-law claims were completely preempted by federal law, the Plaintiff moved to voluntarily dismiss with prejudice the only remaining claim—the court-imposed LMRA claim—pursuant to Federal Rule of Civil Procedure 41(a)(2). (ER–71-72.) On July 12, 2012, the District Court granted this motion. (ER–5.) Thereafter, on September 14, 2012, the District Court entered a separate judgment as required by Federal Rule of Civil Procedure 58(a)(1). (ER–1.)

A timely notice of appeal was filed on July 31, 2012. (ER–2.) Although this notice was filed before the District Court entered a separate judgment as required by Rule 58(a)(1), "[a] notice of appeal filed after the [District Court] announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry" of that judgment or order. FED. R. APP. P. 4(a)(2). As a result, the notice of appeal is treated as if it were filed on September 14, 2012, immediately after the judgment entered on that date. (ER–1.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Section 303 of LMRA provides a cause of action for damages incurred by "reason of" an unfair labor practice in violation of Section 8(b)(4) of the National Labor Relations Act (NLRA). 29 U.S.C. § 187(b). Section 8(b)(4) of the NLRA provides, in turn, that it is an unfair labor practice to engage in a secondary boycott—that is, "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person." *Id.* § 158(b)(4)(B)(ii).

In *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, the Supreme Court recognized that state-law claims for intentional interference with a prospective business advantage are preempted by Section 303 of LMRA because those claims are for "business losses caused by a union's peaceful secondary activities proscribed by § 303." 377 U.S. 252, 260 (1964); *see also Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 808 (7th Cir. 2009) (extending *Morton* to state antitrust claims). Thus, LMRA provides an exclusive cause of action for "business losses" that are incurred "by reason of" a secondary boycott.

The District Court invoked this line of authority here, holding that the Plaintiff's state-law claims are preempted by Section 303 of LMRA.

The Plaintiff's claims, however, are not directed at business losses incurred by reason of a secondary boycott. Rather, in this case, the Plaintiff, a private property owner, invoked state-law trespass and private nuisance claims in an effort to seek legal and equitable relief against individuals who had violated its property interests while engaging in a secondary boycott. Paving the way for litigating such claims in state court, the Supreme Court long-ago recognized that an action in trespass is not preempted by the NLRA. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 198, 207 (1978) (the fact that a union engaged in picketing did not "deprive the California courts of jurisdiction to entertain Sears' trespass action"); *see also Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 474-77 (2008) (holding that a private nuisance action is not preempted by the NLRA).

The issue presented herein is therefore:

> Whether the District Court erred in holding that, contrary to the reasoning of *Sears*, a state-law action for trespass and private nuisance is preempted by Section 303 of LMRA simply because the invasion of property happened to involve a secondary boycott by a union.

STATUTORY PROVISIONS AT ISSUE

The pertinent statutory provisions at issue in this case—Section 303 of LMRA (codified at 29 U.S.C. § 187), and Section 8(b)(4) of the NLRA (codified at 29 U.S.C. § 158(b)(4))—are recounted in an addendum bound to this brief. *See infra* at 55-56.

STATEMENT OF THE CASE

This case implicates the ability of an owner of private property to invoke state-court jurisdiction to litigate property-based, state-law tort claims against a labor organization that intentionally violates the owner's state-defined property interests. The Plaintiff, the Retail Property Trust (the Mall), is the owner and property manager of the Brea Mall, a privately owned, regional shopping center located in Brea, California. (ER–41, 43.) The Defendants are a labor union, the United Brotherhood of Carpenters and Joiners of America; its local affiliate, Carpenters Local Union No. 803; an officer of the local affiliate, James Flores; and members of the local affiliate, Does 1 through 100, (collectively, "the Union"). (ER–41-42.)

On October 10, 2010, after the Union refused to honor the Mall's property interests, the Mall filed this action in the Superior Court of

California for Orange County. (ER–41, 53.) In addition to property-related damages for trespass and private nuisance (ER–47-49), the Mall sought declaratory and injunctive relief against the Union (ER–49-52), and it filed simultaneously with its complaint an application for a temporary restraining order to immediately bring to an end the Union's tortious conduct in violation of the Mall's property interests (ER–54-56).

On the same day that the Mall filed its complaint and application, the Union filed a notice removing the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1441. (ER–37.) In response, the Mall moved to remand the action to state court, arguing that removal was improper because the District Court was without jurisdiction to consider the state-law claims. (ER–34-36.) The District Court disagreed. (ER–25-33.) It held that the Mall's claims were completely preempted by Section 303 of LMRA, and that the District Court could therefore invoke jurisdiction pursuant to 28 U.S.C. § 1331. (ER–28-30.) Thereafter, the District Court afforded the Mall an opportunity to amend its complaint in a way that might avoid implicating the District Court's construction of Section 303 (*see* ER–67), but the Mall was unsuccessful in this endeavor (ER–20-24).

Ultimately, the District Court dismissed as preempted the Mall's state-law claims for trespass and private nuisance, construing them instead as a single claim for relief under Section 303 of LMRA. (ER–16-19.) Thereafter, in a separate order, the District Court entered judgment on the pleadings in favor of Mr. Flores, holding that the Mall's state-law claims were also preempted as to Mr. Flores, and that the Mall could not maintain a Section 303 claim against Mr. Flores because he is an individual. (ER–8-15.) After these rulings, only one claim remained—the court-imposed claim against the labor entities under Section 303 of LMRA. (*See* ER–19.)

The Mall moved to voluntarily dismiss the court-imposed claim, with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(2). (ER–71-72.) On July 12, 2012, the District Court granted this motion, dismissing the Plaintiff's only remaining claim. (ER–5-7.) Thereafter, on September 14, 2012, the District Court entered a separate judgment as required by Federal Rule of Civil Procedure 58(a)(1). (ER–1.)

The Mall filed a timely notice of appeal on July 31, 2012. (ER–2-4.)

STATEMENT OF THE FACTS

A. The Property Interests at Issue Here

As a general matter, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). These state-conferred interests have been described as a "bundle of rights" that persons and entities "acquire when they obtain title to property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). And among the bundle, the "power to exclude has traditionally been considered one of the most treasured strands." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

When it comes to large shopping and entertainment centers, like the Mall at issue here, California has modified the bundle of rights associated with these properties. In *Robins v. Pruneyard Shopping Center*, the Supreme Court of California recognized that the state's constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 23 Cal. 3d 899, 910 (1979). More specifically, the court held that a small group of high school students had a state-conferred right to set up a card table in the common area of a privately-owned shopping center to solicit

signatures for a petition to the government. *Id.* at 902. Because the federal Constitution does not afford a similar right, *Pruneyard* established "greater protection" of speech and petition rights under the California Constitution. *Id.* at 910.

Recognizing that there were also private-property interests at stake, *Pruneyard* emphasized that the state-conferred right of free speech does not mean that "those who wish to disseminate ideas [at private shopping centers] have free rein." *Id.* Rather, a private shopping center "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). Because shopping centers retained authority to restrict access, a majority of the Supreme Court of California had little trouble concluding that "[a] handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by [a shopping center] to assure that these activities do not interfere with normal business operations, would not markedly dilute [the shopping center's] property rights." *Pruneyard*, 23 Cal. 3d at 911 (citations and quotation marks omitted).

Just recently, the Supreme Court of California clarified that *Pruneyard*'s reasoning extends only to a shopping center's "common areas." *Ralphs Grocery Co. v. United Food & Com. Workers Union Local 8*, --- Cal. 4th ---, ---, 2012 WL 6699628 at *4 (2012). In *Ralphs Grocery*, the court defined these common areas as places within a shopping center that "generally have seating and other amenities producing a congenial environment that encourages passing shoppers to stop and linger, to leisurely congregate for purposes of relaxation and conversation." *Id.* In contrast, the state constitution's protection of speech and petition does not extend to the "areas immediately adjacent to the entrances of individual stores," because expressive activities in those areas "pose a significantly greater risk of interfering with normal business operations." *Id.*

Although *Ralphs Grocery* recognized no state *constitutional* right to gain access beyond a shopping center's common areas, it went on to hold that labor organizations had certain state-conferred *statutory* rights to engage in "peaceful union picketing" in close proximity to a "targeted retail store during a labor dispute, and such union picketing may not be enjoined on the ground that it constitutes a trespass." *Id.* at

---, 2012 WL 6699628, at *13. The court, however, did not define "peaceful union picketing"; it did not determine whether such picketing may be enjoined on the ground that it poses a safety hazard (*e.g.*, a fire hazard); it did not consider whether a union may be enjoined from engaging in other tortious conduct, including the destruction of private property or obnoxious behavior giving rise to a claim for private nuisance; nor did it determine whether a union may be enjoined for protesting in front of a non-targeted business. These issues will have to be resolved by California courts in other cases.

In the end, regardless of how California might define the bundle of rights associated with a given type of property, each bundle is defined by state law. For this reason, the Supreme Court of the United States has recognized that "[t]he right of employers to exclude union organizers from their private property emanates from state common law." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994).

B. The Mall's Reasonable Time, Place, and Manner Rules

The Retail Property Trust (the Mall) owns and operates a regional shopping center in Brea, California. (ER–41.) The Brea Mall is a two-

level shopping center, featuring five major department stores and over 175 specialty shops. (ER–43.)

The Mall has endeavored to permit expressive activity consistent with the California Supreme Court's holding in *Pruneyard*. (ER–43.) But this has been no easy task. Since *Pruneyard* was decided more than 30 years ago, but before the California Supreme Court's recent pronouncement in *Ralphs Grocery*, courts had divided dramatically over what *Pruneyard* requires and allows. For instance, although *Pruneyard* considered only a right to solicit signatures in a mall's common area, at least one state appellate court held that individuals have a right to conduct protests outside the common areas of a mall, and "within aural and visual range of a targeted business." *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop. LLC*, 193 Cal. App. 4th 168, 181 (2011). In contrast, a co-equal state appellate court reached the opposite conclusion: "a shopping center is constitutionally empowered to enact a rule limiting expressive activities to a particular area." *Union of Needletrades, Indus. & Textile Employees (UNITE) v. Superior Court*, 56 Cal. App. 4th 996, 1010 (1997).

Consistent with the *UNITE* decision, the Mall adopted time, place, and manner rules designed to ensure that the public's free speech and petition rights may be reasonably exercised while causing minimal interference to the Mall's legitimate business interests, including the interests of the Mall's many tenants and patrons. (ER–43.) Among the Mall's rules, those who wish to petition, solicit, or protest must fill out an application in advance of their planned activities, agree to engage in planned activities within one of two designated common areas of the Mall, not create noise of a volume sufficient to impinge on the hearing or peace of the general public, and not impede, obstruct, or interfere with the free flow of pedestrian traffic, nor deface, damage, or destroy any real or personal property located within the Mall. (ER–43-44.) The Mall enforces these rules without regard to the content of the message being expressed—though it has afforded labor organizations greater leeway to conduct protests outside the Mall's two areas designated for expressive activity and in close proximity to a targeted business. (*See* ER–57-58.) In this way, the Mall's time, place, and manner rules are consistent with the California Supreme Court's recent decision in *Ralphs Grocery*, which likewise recognizes that labor organizations

should be afforded leeway to conduct "peaceful union picketing" in close proximity to a "targeted retail store during a labor dispute." --- Cal. 4th at ---, 2012 WL 6699628, at *13.

C. The Union's Failure to Abide by the Mall's Reasonable Time, Place, and Manner Rules

In 2010, Urban Outfitters, a specialty retail store, entered into a lease agreement to operate a store on the second floor of the Mall. (ER–44.) As is common when a new retail establishment signs a lease, Urban Outfitters needed to perform certain work to prepare the interior of the store for opening. (ER–45.) To shield patrons from the noise and hazards of this work, a barricade was erected around the exterior of the Urban Outfitters storefront. (ER–44.) This barricade ran approximately 85 feet long. (ER–44.) The width of the walkway from the barricade to a railing parallel to the storefront was approximately 7.8 feet. (ER–45.)

On or about September 10, 2010, the Mall received a letter from James Flores, the Financial-Secretary Treasurer of the Carpenters Local Union No. 803. (ER–45.) The letter advised the Mall that the Union would pursue a labor dispute against Urban Outfitters—presumably because the Union believed that the store had hired

"installation contractors who pay below the area standard wage." (ER–45.)

On October 1, 2010, approximately 60 members of the Union entered the Mall and began conducting a protest in the narrow walkway in front of the Urban Outfitters construction site. (ER–45.) The protest was highly disruptive. (ER–45.) Members of the Union marched in a circle, yelled, chanted loudly in unison, and blew whistles. (ER–45.) In addition, some members of the Union began hitting and kicking the construction barricade, creating a large hole, and members also hit their picket signs against the second floor railings, which created an intimidating and disquieting environment that interfered with the Mall's normal business operations. (ER–45.)

The Mall in no way consented to or approved of the Union's intimidating and intentionally disruptive behavior. (ER–45.) On the same day that the Union began its protests, the Mall's manager informed the Union that the Mall's common areas were private property subject to time, place, and manner rules. (ER–45.) The Union, however, refused to fill out a complete application to use the Mall's

common areas for the Union's protests, and it refused to comply with the rules' substantive requirements as well. (ER–45.)

During the October 1, 2010, protest, the Mall's manager contacted the Brea Police Department and requested its assistance in stopping the Union's unreasonable noisemaking, and intimidating and harassing conduct while engaging in its protest. (ER–45-46.) But, absent a court order, the responding officers would not remove the Union's members, nor were they able to persuade the Union to stop its disruptive protesting activity. (*See* ER–46, 59.)

On October 7, 2010, the Union returned to the Mall with approximately 25 protestors, who took up residence immediately in front of the Urban Outfitters construction site. (ER–46.) As before, the protestors shouted and chanted while marching in a circle in front of the narrow walkway that lined the construction site, impeding patron traffic. (ER–46.) These protestors also banged their picket signs against the Mall's railings, and they repeatedly blew a loud whistle. (ER–46.) As before, the Mall called the Brea Police Department, but as before, the responding officers would not remove members of the Union

absent a court order, nor were they able to persuade the members to leave. (*See* ER–46, 59.)

On October 14, 2010, the Union again returned to the Mall. (ER–46.) In response to complaints from tenants and their customers, the Mall had placed sound-reducing materials along the railings in front of the Urban Outfitters construction site in anticipation of the Union's return. (ER–46.) Perhaps because of this, the Union moved its protesting activities to the front of two other tenant stores—stores unrelated to the Union's alleged labor dispute with Urban Outfitters. (ER–46.) As before, the Union repeated its highly disruptive and intimidating conduct—banging the railings, chanting, and yelling—and as before, the police would not remove the Union's members without a court order. (*See* ER–46, 59.)

This cycle of trespass and nuisance repeated itself still again on October 15, 2010. (ER–46.) On this date, the Union's protesting was measured at 90 to more than 100 decibels—well in excess of the Mall's normal ambient noise levels, and also in excess of the limits imposed by a Brea municipal noise ordinance. (ER–46.) On this date, some of the

Union's members also made inappropriate catcalls to female employees and patrons of the Mall. (ER–46.)

The Union and, more specifically, Mr. Flores informed the Mall manager on more than one occasion that the Union would not comply with the Mall's time, place, and manner rules or the application procedure. (ER–47.) Indeed, Mr. Flores stated that the Union would not and had no intention of ever complying with the Mall's time, place, and manner rules. (ER–47.)

D. The Proceedings Below

In light of the Union's repeated disregard for the Mall's state-conferred property interests, the Mall filed an action asserting trespass and private nuisance claims in the Superior Court of California for Orange County. (ER–41.) Along with property-related damages, the Mall also sought declaratory and injunctive relief in an effort to prevent the Union from continuing to violate the Mall's private property interests. (ER–52.) In addition, the Mall also filed a simultaneous application for a temporary restraining order. (ER–54-56.)

On the same day that the Mall filed its action in the Superior Court, and before that court could rule on the Mall's application for a

temporary restraining order, the Union apparently researched, drafted, and then filed a notice of removal to the United States District Court for the Central District of California. (ER–37.) The Union asserted two bases for removal—specifically, that the Mall's claims were completely preempted by Sections 301 and 303 of LMRA. (ER–38-39.) The Union would later admit that its first basis for removal was unfounded—and for good reason. Section 301 of LMRA could not apply, because there was no collective bargaining agreement between the Union and the Mall. (ER–35.) But the Union would continue to maintain that removal was proper, because the Mall's trespass and private nuisance claims are completely preempted by Section 303 of LMRA. (ER–38-39.) In support of this argument, the Union invoked *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252 (1964)—apparently for the proposition that Section 303 completely preempts any claim that might touch upon a secondary boycott. (ER–39.)

In response to the Union's notice of removal, the Mall filed a timely motion to remand the action to state court. (ER–34-36.) The Mall argued that removal was not supported by Section 301 of LMRA, because there was no collective bargaining agreement between the Mall

and the Union. (ER–35.) In addition, the Mall also argued that Section 303 could not serve as a basis for removal, because the Mall had brought property-based, state-law tort claims in an effort to enforce its reasonable time, place, and manner rules; it was not pursuing business claims that touched upon Section 303 of LMRA. (ER–35-36.)

The District Court denied the Mall's motion to remand. Relying on the line of cases that the Union had provided to it—namely, *Morton*; *Smart v. Local 702 International Brotherhood of Electrical Workers*, 562 F.3d 798 (7th Cir. 2009); and a handful of trial court decisions applying *Morton*—the District Court held that when a "plaintiff files suit in state court containing claims that amount to asserting that a defendant has violated [Section 8(b)(4) of the NLRA], the complete preemption doctrine confers federal question jurisdiction permitting the defendant to remove the suit to federal court." (*See* ER–29.) Focusing on the Mall's factual allegations rather than its causes of action, the District Court found that "the sum of [those] allegations assert that Defendants violated [Section] 8(b)(4)(B)" of the NLRA. (ER–29.)

Mindful that there might be a way for the Mall to re-plead its complaint in a manner that might avoid the District Court's

construction of Section 303, the District Court afforded the Mall an opportunity to file an amended complaint that would remove some of the factual allegations associated with the secondary boycott. (*See* ER–65.) The Mall accepted this invitation; it filed an amended complaint and again moved to remand the action back to state court, making the same arguments it had made previously, and drawing the District Court's attention to *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). (*See* ER–65-66; *see also* Pl.'s Reply in Supp. of Mot. to Remand at 8 (dated Mar. 14, 2011) [Dkt. 21].) The Union, for its part, again opposed remand, arguing that the Mall's claims were completely preempted by Section 303 of LMRA. (ER–66.)

The District Court again denied the Mall's motion to remand. Although it did not attempt to reconcile its decision with *Sears*, the District Court held that the Mall's claims were "still completely pre-empted" by Section 303 of LMRA. (ER–23.)

Thereafter, the Mall filed a second amended complaint to reincorporate many of the factual allegations that it had agreed to strike from its first amended complaint. (ER–67.) Shortly thereafter, the Union moved to dismiss the Mall's second amended complaint with

prejudice. (ER–68.) Repeating a familiar refrain, the Union argued that the Mall's complaint was preempted by Section 303 of LMRA.

The District Court granted in part the Union's motion to dismiss. (ER–16-19.) It agreed that the Mall's state-law trespass and private nuisance claims were preempted by LMRA. (ER–18.) But it construed the complaint's factual allegations to support a claim under Section 303 of LMRA. (ER–19.) As a result, the District Court held that the Mall's complaint had stated a claim under Section 303 of LMRA "sufficient to withstand Defendants' motion to dismiss under Rule 12(b)(6)" (ER–19), but the District Court also noted that injunctive relief was not available under this claim (ER–18).[1]

Following the dismissal order, Mr. Flores filed a motion for judgment on pleadings, arguing that the Mall's state-law claims were also preempted as to him, and that the Mall could not maintain a

[1] Because the Mall had included in its complaint a request for injunctive relief, and because the District Court had now made clear that injunctive relief was not available (under Section 303 of LMRA or otherwise (ER–18)), the Mall construed the District Court's order as one refusing injunctive relief within the meaning of 28 U.S.C. § 1292(a)(1). Rather than waive a potential appellate claim, the Mall therefore filed a notice of appeal pursuant to that provision. (ER–69.) A panel of this Court held that the requirements of Section 1292(a)(1) had not been satisfied (ER–70) and proceedings continued in the District Court.

Section 303 claim against him because he is an individual. (*See* ER–11-15.) The Mall opposed this motion, but the District Court agreed with the Union's arguments. (ER–71.) As a result, the District Court granted Mr. Flores's motion for judgment on the pleadings. (ER–8-15.)

The Mall then moved to voluntarily dismiss with prejudice the only remaining claim—the court-imposed Section 303 claim that was pending against the Union—so that the Mall could take an appeal from the District Court's orders holding that the Mall's state-law trespass and private nuisance claims were completely preempted by Section 303 of LMRA. (ER–71-72.) On July 12, 2012, the District Court granted this motion, dismissing the Mall's only remaining claim. (ER–5-7.)

Thereafter, on September 14, 2012, the District Court entered a separate judgment as required by Federal Rule of Civil Procedure 58(a)(1). (ER–1.) This timely appeal follows. (*See* ER–2-4.)

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Sears* provides a roadmap for how this appeal should be decided. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 207 (1978). In that case, Sears brought an action for trespass, seeking the removal of a

union that had engaged in picketing on the store's private property. After noting that there was a strong presumption against the preemption of matters of traditional local concern, *see id.* at 183, the Supreme Court held that "the respective controvers[y]" that was presented under state law—which focused on "the *location* of the picketing"—differed from the one that would have been presented under federal law. *Id.* at 196-98 (emphasis added). As a result, the Court held that Congress did not clearly intend "the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207.

The same analysis applies here. The Mall brought state-law property claims—for trespass and private nuisance—based on the *location* of the Union's picketing activity. And each of these claims presents a controversy distinct from the controversy that would have been presented under federal law. Whereas federal law would have focused on the "object[ive]" of the Union's protests, *see* 29 U.S.C. § 158(b)(4)(B)(ii); *accord Sears*, 436 U.S. at 198, the Mall's common-law claims focus on two distinct questions: (1) "whether a trespass had occurred," *Sears*, 436 U.S. at 198, and (2) whether the Union's noise-

making and other obnoxious conduct, by virtue of its *location*, amounted to a private nuisance, *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 475 (2008) (holding that the reasoning of *Sears* applies to private nuisance claims). In short, the reasoning of *Sears* requires the vacatur of the District Court's judgment.

Nor does the Supreme Court's holding in *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252 (1964), compel a contrary result. In *Morton*, a company brought state-law claims for business losses based on "*peaceful* union secondary activities." *Id.* at 261 (emphasis added). The Court held that these types claims—and these claims only—were preempted by Section 303 of LMRA. *See id.* *Morton* did not consider or address whether other claims for tortious conduct were preempted, including claims for trespass and private nuisance. In fact, the *Morton* Court noted that other traditional state tort claims were *not* preempted under its analysis. *See id.* at 257.

The District Court's reliance on *Morton* and its progeny was therefore in error. And because each of the District Court's orders implicated in this appeal—denying the Mall's motions to remand, dismissing the claims against the Union, and awarding judgment on the

pleadings to the individual defendant—were infected by the same error of law, the judgment of the District Court should be vacated in its entirety, and the case should be remanded with an order instructing the District Court to remand the matter to state court.

STANDARD OF REVIEW

This Court reviews issues of law *de novo*. *E.g.*, *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996). Even though this appeal implicates a variety of orders—denying the Mall's motions to remand, dismissing the Mall's state-law tort claims as preempted, and awarding Mr. Flores judgment on the pleadings—each of these orders raises the same issue of law: Whether the District Court erred in holding that the Mall's claims for trespass and private nuisance are preempted by Section 303 of LMRA. As a result, this Court should apply the same standard of review—*de novo*—to each order that is implicated in this appeal. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 (9th Cir. 1988) ("Removal of a case from state to federal court is a question of federal subject matter jurisdiction which is reviewed *de novo*."); *see also Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 784 (9th Cir. 2012) ("We review *de novo* a district court's order granting a Rule

12(b)(6) motion to dismiss."); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) ("We review *de novo* an award of judgment on the pleadings.").

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT, BECAUSE THIS CASE HAPPENS TO INVOLVE A UNION ENGAGED IN A SECONDARY BOYCOTT, THE MALL'S STATE-LAW PROPERTY CLAIMS ARE PREEMPTED UNDER SECTION 303 OF LMRA.

The Mall's state-law claims for trespass and private nuisance are not preempted by Section 303 of LMRA, nor do they conflict with the policies embodied in Section 8(b)(4) of the NLRA. As such, the District Court erred in holding that the Mall's property-based, state-law tort claims were preempted by Section 303 of LMRA. Moreover, this error of law infected each of the District Court's orders subject to this appeal: (1) affirming removal under 28 U.S.C. § 1441; (2) dismissing the claims against the organizational defendants pursuant to Federal Rule of Civil Procedure 12(b)(6); and (3) awarding judgment on the pleadings to Mr. Flores. As a result, this Court should vacate the judgment of the District Court in its entirety and order the District Court to remand the case back to state court.

A. Consistent with the Supreme Court's Holding in *Sears*, the Mall's Action to Vindicate Its Property Interests Does Not Implicate Federal Labor Law.

The Supreme Court clarified, more than thirty years ago, that the NLRA does not preempt state-law property claims. *Sears*, 436 U.S. at 207. In *Sears*, a California store brought an action in state court, alleging that a union had established picket lines on private property in violation of the store's state-conferred property interests. The question that confronted the Supreme Court was whether the NLRA "deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably—but not definitely—prohibited or protected by federal law." *Id.* at 182.

Writing for the Court, Justice Stevens explained that the Court was "unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207. Along the way, Justice Stevens presented a forceful—and, in any event, binding—defense of the Court's holding.

As an initial matter, Justice Stevens explained that the scope of the controversy in state court was limited. The store's state-law action

did not challenge the lawfulness of the picketing generally; rather, it "sought simply to remove the pickets from its property." *Id.* at 185.

Justice Stevens also explained that "the history of the labor pre-emption doctrine in [the Supreme] Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." *Id.* at 188. As a result of these concerns, Justice Stevens continued, the Court had previously warned against an "inflexible application of the doctrine" of labor-law preemption—"especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Id.* For these reasons, the Court had previously "upheld state-court jurisdiction over conduct that touches 'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act,'" including state-law claims aimed at a variety of tortious conduct disruptive of civil order. *Id.* at 195 (quoting *San Diego Building Trades*

Council v. Garmon, 359 U.S. 236, 244 (1959), and citing other authorities).

Along the way, the Court had identified two issues that are relevant to the preemption inquiry that governs in cases, like this one, where it might be said that a union's conduct is arguably prohibited by federal labor law: (1) whether there existed "a significant state interest in protecting the citizen from the challenged conduct," and (2) in the event that "the challenged conduct occurred in the course of a labor dispute and an unfair labor charge could have been filed," whether "the exercise of state jurisdiction over the tort claim entailed little risk of interference" with federal labor-law policy and jurisdiction. *Id.* at 196.

Distilling these factors down to their essence, Justice Stevens explained that the "critical inquiry" is "whether the controversy presented to the state court is identical to . . . or different from . . . that which" might have been presented to the Labor Board or in federal court. *Id.* at 197. In the case before it, the Court continued, "the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court." *Id.* at 198.

Here, the upshot of *Sears* compels only one conclusion: It is impossible to square the holding of the District Court with the Supreme Court's reasoning in *Sears*.

1. The Mall's Action to Protect Its Property Interests is Premised Solely on State Law.

As in *Sears*, the scope of the Mall's state-law action is limited. The Mall restricted itself to two common-law torts touching upon interests "deeply rooted in local feeling and responsibility"—specifically, claims for trespass and private nuisance. *Id.* at 183. Although the Mall also requested declaratory and injunctive relief, these requests for equitable relief owed their existence to the Mall's two property-based causes of action, which the Union itself recognized in its motion to dismiss. *See* Defs.' Mot. to Dismiss at 10 (dated July 29, 2011) [Dkt. 40] (agreeing that the common-law claims provide the causes of action). And the Mall's two property-based claims easily fall within the local-interest exception to federal labor law preemption announced in *Sears*.

First, as in *Sears* itself, the Mall brought a claim for trespass on private property. The Supreme Court's jurisprudence is unequivocal in this regard: "The right of employers to exclude union organizers from their private property emanates from state common law." *Thunder*

Basin, 510 U.S. at 217 n.21. As a result, there is nothing "federal" about a claim for trespass—even where, as here, a union is involved. Moreover, although *Sears* recognized that unions have a limited federal right to invade private property, this right does *not* preclude a property holder from invoking state-court jurisdiction to bring a claim for trespass against a union, even when the federal right arguably attaches. 436 U.S. at 204-06 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535, 539 (1992) (recognizing the limited nature of this federal right); *accord* 2 JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 2365 (5th ed. 2006) (explaining that test supporting the narrow federal right of access is "a stringent one"). In any event, because the Union intended to communicate its message to prospective *patrons* of both the Mall and Urban Outfitters, the Union could not claim the limited right to access conferred by federal law. That is because, as this Court has recognized, the narrow federal right of access applies only "when the nonemployee picketers are trying to reach *employees*, not *customers*." *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997-98 (9th Cir. 1992); *accord United Food & Com. Workers, AFL-CIO, Local No. 880 v. NLRB*, 74 F.3d 292, 298

(D.C. Cir. 1996). Stated simply, the Mall's trespass action turns exclusively on state-law issues.

Second, the Mall brought an action for private nuisance. Although such a claim was not brought in *Sears*, it easily fits within that decision's reasoning. The Mall's private nuisance claim is not directed at the lawfulness of the Union's picketing generally. It is not even directed at the business losses that the Mall might have suffered solely by reason of the Union's secondary boycott. Rather, it is a traditional action in tort, seeking declaratory, injunctive, and legal relief from the Union's tortious conduct—*i.e.*, its members' whistling, yelling, and other noise-making activities—and *not* directed at peaceful union picketing, which, in any event, did not occur here. Relying on this distinction, the New York Court of Appeals (that state's highest court) recently held that, under the Supreme Court's reasoning in *Sears*, the NLRA does not preempt a state-law action in private nuisance. *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 476 (2008) ("The tort of private nuisance, much like the tort of trespass, has historically been governed by state law. It cannot be said that Congress, by enacting the NLRA, intended to preempt states from protecting their citizens from obnoxious

conduct."). Moreover, this distinction accords with a long-line of Supreme Court precedent holding that the NLRA does not preempt claims for tortious conduct disruptive of civil order. Under the Union's theory, a claim for wrongful death would be preempted by federal labor law merely because it happened to arise from a secondary boycott. But the Supreme Court has emphatically rejected arguments along these lines. *See, e.g.*, *Sears*, 436 U.S. at 195 (citing cases holding that claims touching upon areas of traditional state-law concern are not preempted absent "compelling congressional direction"); *see also* 2 THE DEVELOPING LABOR LAW, *supra*, at 2334-35 ("Judicial decisions recognizing these unpreempted local concerns have in common a focus upon the role of the state in maintaining civil order by deterring and punishing violence and other intentional torts, including defamation, trespass, and infliction of emotional distress.").[2]

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[2] In *Sears*, the Supreme Court highlighted a long line of cases holding that state-law claims directed at violent behavior are not preempted by federal labor law, including *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *International Union, United Automobile, Aircraft & Agricultural Workers v. Russell*, 356 U.S. 634 (1958) (violence); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (violence); and *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (threats of violence).

2. The Controversy that the Mall Wishes to Present in State Court is Not the Same Controversy that Would Be Presented Under Section 303 of LMRA.

As noted above, in *Sears*, the Supreme Court explained that the "critical inquiry" is whether the respective controversies would have been the same under state and federal law. *Id.* at 197-98. There, the Court held that "the controversy which Sears might have presented" under the NLRA "is not the same as the controversy presented to the state court." *Id.* at 198. The Court elaborated: "If Sears had filed a charge [with the Labor Board or otherwise filed a claim for conduct in violation of Section 8(b)(4) of the NLRA], the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred." *Id.* "Conversely," the Court continued, "in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim." *Id.* As a result, "permitting the state court to adjudicate Sears' trespass claim would create no realistic

risk of interference" with federal law under the NLRA. *Id.* Logic dictates the same conclusion here.

The Mall's claim for trespass depends entirely on whether the *location* of the Union's protest constituted a trespass in contravention of state law. That issue, in turn, depends on whether the Mall has a right to enforce its reasonable time, place, and manner rules—again, an issue that rises under and turns exclusively on state law.

As noted above, *Sears* did not address whether an entity could similarly proceed with a claim for private nuisance, but such a claim is no impediment to state-court jurisdiction, because it too is dependent on the *location* of the union's conduct. As the New York Court of Appeals recognized in *Helmsley-Spear*, the "reasoning" of *Sears* applies with full force to claims for private nuisance. 11 N.Y.3d at 475. More specifically, in *Helmsley-Spear*, the court explained that the controversy before it—"whether [a union's] drumming [and other noise-making activities] constituted a private nuisance—[was] distinctly different" from the issue under the NLRA, which would turn on "allegations that the Union engaged in impermissible picketing and coercive conduct." *Id.* So too here, the question whether the Union's yelling, whistling,

and other noise-making activities constituted a private nuisance is different from whether an otherwise peaceful protest might have violated the NLRA. Indeed, the conduct the Mall challenged is actionable by virtue of its *location*. As a result, there is no overlap between the Mall's claim and federal labor law, and hence, no preemption.

Besides the claim for private nuisance, there is another way in which this case might be said to differ from *Sears*: Here, the Mall seeks equitable *and* legal relief, whereas in *Sears*, the store appears to have limited its claim to a request for equitable relief. But this distinction is unimportant for at least three reasons:

First, in delineating the local-interest exception to federal preemption, the *Sears* Court relied on cases that had allowed a plaintiff to collect damages involving a host of state-law tort claims. 436 U.S. at 195 (citing authorities). These cases teach that the relief requested is immaterial to the Court's preemption analysis, and this leads directly to the next point.

Second, *Sears* teaches that the "critical inquiry" is not the form of the relief requested, but whether "the controversy presented to the state

court is identical to . . . or different from . . . that which" might have been presented to the Labor Board or in federal court. *Id.* at 197. No matter the form of the relief requested—legal or equitable—the state-law controversy presented here is inherently different from the controversy that would have been presented under federal law.

Third, if this matter is remanded to state court, the Mall would be strictly limited to the legal and equitable relief that is directly attributable to the Union's tortious conduct; it could not seek relief for "the consequences resulting from associated peaceful picketing or other union activity." *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966); *see also Youngdahl*, 355 U.S. at 139 (explaining that a state court could enjoin conduct calculated to provoke violence, but could not enjoin peaceful picketing that is otherwise lawful under state and federal law). As a result, the controversy that the Mall initiated in state court does not overlap with the controversy that would have been litigated in federal court had the Mall filed a claim under Section 303 of LMRA.

In short, the Mall's action turns exclusively on the Union's tortious conduct, and the validity of the Mall's claims depends on the

location of that conduct. In addition, the relief that the Mall might receive, including any damages, will be strictly limited so as not to include damages stemming solely from any peaceful aspect of the Union's protesting that was done in compliance with the Mall's reasonable time, place, and manner rules. The Mall's claims are, therefore, not preempted by LMRA or the NLRA.

3. Congress Did Not Clearly Express an Intent to Preempt Matters of Traditional Local Concern Merely Because They Might be Said to Relate to a Secondary Boycott.

Even if the question of preemption at issue here might be said to be a close one—and it is not—the Union cannot overcome its steep burden to demonstrate federal-question jurisdiction. *See Emrich*, 846 F.2d at 1195 ("The burden of establishing federal jurisdiction is upon the party seeking removal, and the removal statute is strictly construed against removal jurisdiction." (citations omitted)). There is a presumption against preemption, *e.g.*, *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985), and that presumption is particularly strong where, as here, a party is claiming that Congress meant to displace traditional state-law remedies, *see, e.g.*, *Sears*, 436 U.S. at 183 (explaining that, in *Garmon*, "the Union's continuing

trespass fell within the longstanding exception [to preemption] for conduct which touched interests so deeply rooted in local feeling and responsibility that pre-emption could not be inferred *in the absence of clear evidence of congressional intent*" (emphasis added)); *Garmon*, 359 U.S. at 247 ("State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden *in the absence of clearly expressed congressional direction*." (emphasis added)).

The Union will not be able to point to any expression of a clear congressional intent to displace state-law remedies designed to protect the private property interests of a state's citizens. And that is because Section 303 of LMRA provides none. Rather, Section 303 provides a limited and specific form of federal relief: It supplies a cause of action for business and property losses incurred by "reason of" secondary activity itself; it does not purport to limit damages for other forms of tortious conduct. *See* 29 U.S.C. § 187(b); *see also Morton*, 377 U.S. at 261 (explaining that "state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities").

Moreover, it is imperative that owners of private property are afforded an opportunity to invoke state-court jurisdiction to pursue claims for torts against their property interests. State courts are poised to quickly adjudicate these types of claims and, where appropriate, enter immediate equitable relief, such as a temporary restraining order. Under the Union's view of this case, the Mall cannot pursue property-based, state-law tort claims, and it cannot obtain injunctive relief under Section 303 of LMRA. *See San Antonio Cmty. Hosp. v. S. Cal. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997) (explaining that "an employer cannot seek injunctive relief from a secondary boycott under section 303; only damages are available"). As a result, the Mall would be left filing a claim with the National Labor Relations Board—a route that the Supreme Court already declared unnecessary in *Sears*. *See* 436 U.S. at 196, 201-02.

4. The Mall's State-Law Action Does Not Undermine Section 303's Purpose to Promote the Uniform Treatment of Labor-Management Relations.

Finally, because the Mall's property-based, state-law tort claims present a controversy distinct from the one that would have been litigated had the Mall brought a claim under Section 303 of LMRA,

there is little risk that the Mall's state-law action would interfere with a purpose of federal labor law—to promote uniform treatment of labor-management relations. Indeed, *Sears* expressly recognizes that a common-law property action presents "no realistic risk of interference" with the policies embodied in the NLRA. *See* 436 U.S. at 198.

B. Because the Mall is Not Bringing an Action for Business Losses Incurred by Reason of a Secondary Boycott, the District Court Erred in Relying on *Morton* and Its Progeny.

Relying exclusively on *Morton* and its progeny, the Union secured a judgment that the Mall's property-based, state-law tort claims were completely preempted by Section 303 of LMRA. *Morton*, however, does not support such a result here, because the state-law claims at issue in *Morton* are distinct from those at issue here.

The facts of *Morton* are a bit confusing, but the limited nature of its holding is not. In *Morton*, a union had persuaded Morton's customers to cease doing business with Morton during the union's labor dispute with that company. *See* 377 U.S. at 253-54. The district court found that some of this conduct violated Section 303 of LMRA and some of it did not. *Id.* at 255. But the district court found that, during the period in which the union did not violate LMRA, it still violated Ohio

common law—more specifically, a common-law claim analogous to tortious interference with a prospective business advantage. *See id.* The district court, therefore, awarded damages under Section 303 of LMRA for a portion of the union's conduct, but it also awarded separate damages under Ohio common law, including punitive damages throughout the entire period of the union's conduct. *See id.* at 255-56.

The Supreme Court considered two issues: (1) whether the union had violated Section 303 during the period that was said to support the district court's award of damages under that provision; and (2) whether the company could collect damages under state law "*resulting from a union's peaceful strike vis-à-vis a secondary employer*, or is confined in the field of damage actions brought for union secondary activities to the specifically limited provisions of § 303 of the federal Act." *Id.* at 256-57. The Court quickly dispensed with the first question (it found that the union had violated Section 303) and moved on to second, which the Court described as the "central question" before it. *Id.* at 256.

On the critical question—whether an entity could recover state-law damages for a "union's peaceful strike"—*Morton* held that the union's "peaceful persuasion" of one of Morton's customers "not to do

business with [Morton] during the strike cannot stand." *Id.* at 260. According to the Court, Congress had specifically "focused on" whether to proscribe peaceful persuasion when it passed Section 303 of LMRA, but it declined to proscribe such peaceful conduct. *See id.* at 258-60. As a result, the Court found that Congress had intended to leave this form of "self-help" available to labor organizations. *Id.* at 259. In light of this finding, the Court held that Ohio law was preempted. *Id.* at 259-60 ("If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.").

For similar reasons, the Court also held that the trial court's award of "[p]unitive damages for violations of § 303" could not stand, because such damages "conflict with the congressional judgment, reflected both in the language of the federal state and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be

limited to actual, compensatory damages." *Id.* at 260 (footnotes omitted). "And insofar as [the] punitive damages . . . were based on secondary activities which violated only state law, they cannot stand, because, as [the Court had] held, substantive state law in this area must yield to federal limitations." *Id.* at 260-61.

In summarizing all of this, the Court explained that *Morton*'s holding was limited to state-law claims for damages based on "peaceful" secondary activity: "Accordingly, we hold that since state law has been displaced by § 303 in private damage actions *based on peaceful union secondary activities*, the District Court in this case was without authority to award punitive damages." *Id.* at 261 (emphasis added).

The limited holding announced in *Morton* is in full accord with the local-interest exception that would later serve as the premise for the Supreme Court's holding in *Sears*. Indeed, in *Morton* itself, the Court explained that it had "allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." 377 U.S. at 257 (citing cases later cited in *Sears*, 436 U.S. at 195). In *Morton*,

however, there was "no such compelling state interest," because the union's protests were "peaceful" in nature. *Id.*

As a result, the tort at issue in *Morton*—an analog to tortious interference with a prospective business relation or tortious interference with a contract—is distinct from the tort that the Supreme Court would later address in *Sears*. *Morton* is therefore readily distinguishable from the case here, and cannot support the judgment of the District Court in light of *Sears*.

Moreover, each of the other cases that the District Court relied upon here involved claims for business losses based upon a union's peaceful secondary activities—not claims for trespass or private nuisance. *See Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 804 (7th Cir. 2009) (holding that the plaintiff's "state antitrust claim is preempted by federal law"); *Allstate Interiors, Inc. v. United Bhd. of Carpenters & Joiners*, No. 10-cv-2861, 2010 WL 3894915, at *2 (S.D.N.Y. Sept. 10, 2010) (holding that the plaintiff's claims for tortious interference with prospective contractual relations were preempted by Section 303 of LMRA) (unpublished); *Alpha Theta of Alpha Delta Pi Bldg. Ass'n v. Pac. Nw. Reg'l Council of Carpenters*, No. 09-cv-1306,

2009 WL 3064688, at *2 (W.D. Wash. Sept. 23, 2009) (holding that the plaintiff's state-law action was completely preempted because "federal law, rather than local law, governs damages actions based on *peaceful* union secondary activities" (emphasis added)) (unpublished); *Adobe Drywall, LLC v. United Bhd. of Carpenters & Joiners*, No. 2:08-cv-2105, slip op. at 2 (D. Ariz. Feb. 5, 2009) (unpublished) (reprinted in Addendum B, *infra*, at 57-66) (holding that the plaintiff's claims for "intentional interference with existing" and "prospective contractual relations" gave rise to federal-question jurisdiction). As a result, none of these cases can support the judgment of the District Court.[3]

If there was any doubt about whether this case falls within the *Sears* local-interest exception, or whether it falls within *Morton*'s finding of preemption for claims of business losses based on peaceful secondary activities, that doubt was resolved by the Supreme Court in *Local 926, International Union of Operating Engineers, AFL-CIO v.*

[3] In *Smart*, the Seventh Circuit actually relied on *Sears* for the proposition that "'a state's antitrust law may not be invoked to enjoin collective activity which is also arguably prohibited by the federal Act.'" *Smart*, 562 F.3d at 805 (quoting *Sears*, 436 U.S. at 193)). The Seventh Circuit was therefore aware of *Sears*, and its decision is fully consistent with the distinction between claims for business losses incurred by reason of a secondary boycott, and claims for other tortious conduct.

Jones, 460 U.S. 669 (1983). In *Jones*, the Court clarified that a state-law claim for tortious interference with contractual relations—in that case, for the loss of a job caused by a union—was preempted by the NLRA, whereas a claim for trespass is not preempted. *Id.* at 682.

In discussing the critical distinction between *Morton* and *Sears*, the *Jones* Court explained that an action for tortious interference impermissibly overlapped with the NLRA, because the "same crucial element" must be proved under both federal and state law—namely, whether "the Union actually caused the [plaintiff's] discharge and hence was responsible for the employer's breach of contract." *Id.* at 682. As a result, there was overlap between the claims. *Id.* But "[t]his was not the case in *Sears*." *Id.* In *Sears*, the *Jones* Court continued, the action for trespass challenged "only the location of the Union picketing," whereas an action for unfair labor practices "would have focused on whether the picketing had recognitional or work reassignment objectives, issues 'completely unrelated to the simple question whether a trespass had occurred.'" *Id.* at 682-83 (quoting *Sears*, 436 U.S. at 198).

Accordingly, in *Jones*, the Supreme Court maintained the same distinction—recognized in *Morton*—that is fatal to the preemption arguments that the Union presented to the District Court in this case: Section 303 gives rise to complete preemption, but only of state-law claims for business and property losses based on peaceful union secondary activities; it does not preempt other common-law tort claims, including claims for the violation of state-conferred property interests. *Jones*, 460 U.S. at 682-83; *accord Sears*, 436 U.S. at 198; *Morton*, 377 U.S. at 257.

In this case, the District Court failed to recognize this critical distinction between claims for peaceful secondary activities and claims for other forms of tortious conduct—in part, because the District Court focused on the "sum" of the Mall's factual "allegations," rather than the Mall's causes of action. *See* ER–29. The District Court's focus directly contradicts the reasoning of *Sears*. In that case, the Supreme Court focused on the nature of the plaintiff's cause of action, not whether the plaintiff's factual allegations also might have supported a violation of Section 8(b)(4) of LMRA. *See* 436 U.S. at 197-98. Quite simply, the District Court focused on the wrong attributes of the Mall's complaint.

In its second order denying remand, the District Court focused on a different—but, once again, erroneous—attribute of the Mall's complaint. Acknowledging that the Mall's first amended complaint had refocused on the Union's alleged violations of the Mall's time, place, and manner rules, the District Court held that the Mall's common-law property claims were "still completely pre-empted by Section 8(b)(4)"—presumably, because the enforcement of these rules might inhibit the Union's secondary activities. *See* ER–23-24. But this too was error. In *Sears*, the Supreme Court explained that the enforcement of Sears' state-conferred property interests did not interfere with federal labor law, because the union likely had no independent federal right to violate those state-conferred interests. *See* 436 U.S. at 204-07. And in *Thunder Basin*, the Supreme Court reemphasized that "[t]he right of employers to exclude union organizers from their private property emanates from state common law." 510 U.S. at 217 n.21. The outcome here is no different. The Union does not have "free rein" to engage in secondary activities on the Mall's private property. *Pruneyard*, 23 Cal. 3d at 910. Rather, under state law, the Mall "may restrict expressive activity [within its private property] by adopting time, place, and

manner regulations that will minimize any interference with its commercial functions." *Pruneyard*, 447 U.S. at 83. And even after *Ralphs Grocery*, a union does not have a state-law right to engage in destructive, obnoxious, and non-peaceful picketing activities on another's property. *See* --- Cal. 4th at ---, 2012 WL 6699628, at *13 (holding only that "*peaceful* union picketing . . . may not be enjoined on the ground that it constitutes a trespass" (emphasis added)). In any event, the actual validity of the Mall's state-law claims goes to the merits—merits that are beyond the District Court's jurisdiction to adjudicate.

As in *Sears*, the only issue to litigate in state court is whether, by virtue of its *location*, the Union's boycott was unlawful under state law, and that issue turns exclusively on another state-law issue—specifically, whether the Mall may enforce its reasonable time, place, and manner rules. There is no overlap with federal labor law. The District Court erred in ruling to the contrary.[4]

[4] The issues on which this case turns not only arise exclusively under state law, but they also implicate matters of policy of the highest order to the State of California, including the proper balance between the interests of private property owners and the rights of citizens to engage in reasonable expressive activities at large shopping and entertainment

C. Each Order of the District Court—Denying Remand, Dismissing the Claims Against the Union, and Awarding Judgment on the Pleadings to the Individual Defendant—Stems from the Same Faulty Premise.

Based on how this case was decided, the same error of law infected each order of the District Court that is implicated in this appeal. The District Court's erroneous preemption analysis lead it to twice deny the Mall's motions to remand this action to state court (ER–20-24, 25-33), and it also led the District Court to dismiss as preempted the Mall's state-law claims against the Union (ER–16-19), and also find preempted the Mall's state-law claims against Mr. Flores and the other individual defendants (ER–8-15). Because the same error infected each order, the judgment of the District Court should be vacated in its entirety.

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centers. As explained above, since *Pruneyard* was decided almost thirty-five years ago, California's intermediate appellate courts have divided over the proper balance among the interests and rights identified in that decision. *See supra* at 12. And even in the wake of *Ralphs Grocery*, the courts of California are still the more appropriate forum to adjudicate the important state-law issues that remain unresolved following the California Supreme Court's recent pronouncement in that case. *See supra* at 11 (listing important state-law issues that *Ralphs Grocery* left unresolved).

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of the District Court and instruct the District Court to remand the case to state court.

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STATEMENT OF RELATED CASES

Counsel for Plaintiff-Appellant The Retail Property Trust is unaware of any related case pending before this Court within the meaning of Ninth Circuit Rule 28-2.6.

ADDENDUM A – STATUTORY PROVISIONS AT ISSUE

Section 303 of the Labor Management Relations Act (LMRA) provides as follows:

> (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 158(b)(4) of this title [Section 8(b)(4) of the National Labor Relations Act].
>
> (b) Whoever shall be injured in his business or property by reason o[f] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title 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.

29 U.S.C. § 187.

Section 8(b) of the National Labor Relations Act (NLRA) provides, in pertinent part, as follows:

> (b) Unfair labor practices by labor organization
>
> It shall be an unfair labor practice for a labor organization or its agents—
>
> . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or

to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (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, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

29 U.S.C. § 158(b).

ADDENDUM B – UNPUBLISHED OPINION

Adobe Drywall, LLC v. United Bhd. of Carpenters & Joiners,
No. 2:08-cv-2105 (D. Ariz. Feb. 5, 2009)

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Adobe Drywall, L.L.C., an Arizona limited liability company, Plaintiff, vs. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506; Alan Cahill and Jane Doe Cahill, husband and wife; Cris Westmoreland and Jane Doe Westmoreland, husband and wife, Defendants.	No. CV-08-2105-PHX-SRB **ORDER**

This matter comes before the Court on Plaintiff Adobe Drywall, L.L.C.'s ("Adobe") Motion for Remand pursuant to 28 U.S.C. § 1447(c) (Doc. 14).

I. BACKGROUND

Adobe is an Arizona limited liability company with its principal place of business in Maricopa County, Arizona. Adobe performs drywall contracting services and is a duly licensed contractor. Defendant United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 ("the Union") is a labor organization within the meaning of § 2(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(5). The Union has its principal place of business in Los Angeles, California and maintains and staffs a local office in Phoenix, Arizona. Defendants Alan and Jane Doe Cahill and Cris and Jane Doe

Westmoreland are residents of Maricopa County, Arizona. Alan Cahill and Cris Westmoreland are or were Business Representatives for the Union.

On June 30, 2004, an agreement between Adobe and the Union expired and Adobe declined to enter into a new agreement. (Compl. at 3.) Adobe alleges that a Union representative threatened to "come after" and "destroy" Adobe if it did not sign a new agreement. (Compl. at 3.) Adobe alleges that the Union has verbally informed anyone within hearing range at jobsites that Adobe does not meet area labor standards, does not pay prevailing wages to all of its employees, and does not pay for health benefits and pensions. (Compl. at 3-4.) Adobe also alleges that the Union passes out hand bills at jobsites and has sent letters to Adobe's current and prospective clients stating that Adobe does not meet area labor standards. (Compl. at 4.) Adobe alleges that these statements made by the Union are false, and that Defendants know or should know that Adobe's compensation package for field employees meets or exceeds those paid to Union contractors. (Compl. at 4, 7.) On October 31, 2008, Adobe filed a Verified Complaint ("Complaint") against Defendants in the Superior Court of the State of Arizona in and for the County of Maricopa. The Complaint alleges claims for libel, slander, injurious falsehood, injunctive relief, intentional interference with existing contractual relations, and intentional interference with prospective contractual relations. (Compl. at 9-18.)

Defendants filed a Notice of Removal under 28 U.S.C. § 1441(b) on November 14, 2008 (Doc. 1). The Notice of Removal states that this Court has original jurisdiction over this action under 28 U.S.C. § 1331 because it involves an alleged claim or right arising under the laws of the United States. (Notice of Removal at 3.) Defendants argue that the claims for intentional interference with existing contractual relations and intentional interference with prospective contractual relations are preempted by § 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187. (Notice of Removal at 3.) The action was removed to this Court on November 17, 2008. On December 15, 2008, Adobe moved to remand the case pursuant to 28 U.S.C. § 1447(c).

II. LEGAL STANDARDS AND ANALYSIS

A. Motion for Remand and Complete Preemption

Adobe moves for remand pursuant to 28 U.S.C. § 1447(c), which states:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing 28 U.S.C. § 1441(a)).[1] Adobe argues that this Court does not have subject matter jurisdiction because the Complaint only alleges state law claims and those claims are not preempted by § 303 of the LMRA. Defendants argue that Adobe's claims for intentional interference with existing and prospective contractual relations are preempted by § 303 of the LMRA and that this preemption confers original jurisdiction on this Court.

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* Generally, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393 (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 12 (1983)).

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[1] 28 U.S.C. § 1441(a) states:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"There does exist, however, an 'independent corollary' to the well-pleaded complaint rule . . . known as the 'complete pre-emption' doctrine." *Id.* (quoting *Franchise Tax Bd.*, 463 U.S. at 22 (1983)). "On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* (citing *Franchise Tax Bd.*, 463 U.S. at 24).

Section 303 of the LMRA provides that: "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 158(b)(4) of this title." 29 U.S.C. § 187(a). Section 303 provides a private right of action for anyone injured by a violation of subsection (a), and allows suit in "any district court of the United States subject to the limitations and provisions of section 185 of this title 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." 29 U.S.C. § 187(b). Section 158(b)(4) of the NLRA prohibits a labor organization or its agents from threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring any person to cease doing business with any other person. 29 U.S.C. §158(b)(4)(ii)(B).

The Ninth Circuit Court of Appeals has explained that "cases involving [29 U.S.C. §158(b)(4)] are removable" because § 303 of the LMRA provides for original jurisdiction in federal district courts. *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1400 n.7 (9th Cir. 1988) (citing 29 U.S.C. § 187). Therefore, if any of Adobe's state law claims are preempted by § 303 of the LMRA, they are completely preempted, arise under federal law, and provide this Court with federal subject matter jurisdiction.

B. Adobe's claims for intentional interference with existing and prospective contractual relations are preempted by § 303 of the LMRA.

The Ninth Circuit Court of Appeals has made clear that "interference with prospective economic advantage and contractual rights claims are preempted by section 303 of the LMRA." *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997) (citing *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 261 (1964) ("[S]tate law has been displaced by § 303 in private damage actions based on peaceful union secondary activities.")). Therefore, Adobe's claims for intentional interference with existing and prospective contractual relations are completely preempted by § 303 of the LMRA, and this Court has original jurisdiction over those claims. The Court has supplemental jurisdiction over Adobe's other state law claims pursuant to 28 U.S.C. § 1367(a).[2]

Adobe argues that this Court does not have subject matter jurisdiction in this case because, in addition to the claims for intentional interference with existing and prospective contractual relations, it also brings claims for libel, slander, and injurious falsehood. (Mot. for Remand at 3-6.) Adobe argues that because it has alleged that Defendants knowingly made false statements, there is no federal preemption. In response, Defendants cite a decision from the Ninth Circuit Court of Appeals that considered claims against a union for false speech and also interference with prospective economic advantage and interference with contractual rights. (Defs.' Opp'n to Pl.'s Mot. for Remand ("Defs.' Opp'n") at 7-8 (citing *San Antonio Cmty. Hosp.*, 125 F.3d at 1234-35).)

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[2]28 U.S.C. § 1367(a), which confers supplemental jurisdiction, provides:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

"'[L]ibel actions under state law [are] pre-empted by the federal labor laws to the extent that the State [seeks] to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth.'" *San Antonio Cmty. Hosp.*, 125 F.3d at 1235 (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 (1974)). This standard is commonly known as the *New York Times* "actual malice" standard. *Id*. (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Adobe has alleged "actual malice" because it alleged that the statements made by Defendants were published with knowledge of their falsity. However, this does not deprive the Court of jurisdiction to enjoin Defendants' allegedly defamatory statements, nor does it deprive the Court of original subject matter jurisdiction over the claims for intentional interference with prospective and existing contractual relations. *See San Antonio Cmty. Hosp*., 125 F.3d at 1237.

Adobe also quotes language from the United States Supreme Court in support of its argument that claims based on false statements are "not protected" by the NLRA and that, therefore, this Court lacks subject matter jurisdiction. (Mot. for Remand at 4-5 (quoting *Linn v. Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 59-61 (1966)).) This argument is unpersuasive because *Linn* does not stand for the proposition that allegations of malicious false statements somehow interfere with complete preemption under § 303 of the LMRA. The issue in *Linn* was whether, and to what extent, the NLRA bars the maintenance of a state libel claim by an official of an employer subject to the NLRA seeking damages for defamatory statements published during a union organizing campaign. 383 U.S. at 55. The question was whether a federal district court had jurisdiction to apply state remedies or whether the National Labor Relations Board had exclusive jurisdiction over the subject matter. *Id*. The Court concluded that "where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." *Id*. Therefore, *Linn* stands for the proposition that federal district courts have jurisdiction to apply state remedies for state law defamation

claims based on allegedly malicious, false, and defamatory statements published during a union organizing campaign.

Adobe points to language in *Linn* indicating that:

> although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. In such case the one issuing such material forfeits his protection under the Act.

Id. at 61 (internal citations omitted). Adobe argues that this language means that there is no preemption under § 303 of the LMRA with respect to the claims for intentional interference with prospective and existing contractual relations. However, the quoted language from *Linn* refers to situations where employees' conduct is not protected activity under § 7 of the NLRA, which gives employees the right to self-organize, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid and protection, if the employees publish knowingly false material. 383 U.S. at 60 n.3, 60-61 (citing *Walls Mfg. Co., Inc*. 137 N.L.R.B. 1317, 1319 (1962) (noting that employee conduct is not protected under § 7 where employees make statements that are deliberately or maliciously false)). This language does not indicate that an employer loses the protections of § 303 of the LMRA and § 8(b)(4) of the NLRA where it alleges that the union published knowingly false material. It certainly does not undermine the holdings of *Morton* and *San Antonio Community Hospital* that claims for intentional interference with prospective and existing contractual relations are preempted by § 303.

Adobe then argues that an exception to federal preemption applies because the state's interests in protecting its citizens' reputations prevails over the federal government's interest in establishing a uniform set of rules to deal with labor disputes. (Mot. for Remand at 6-9.) In *Linn*, the Court discussed the *Garmon* exception:

> States need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . (o)r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

383 U.S. at 59 (quoting *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 243-44 (1959)).

In support of this argument, Adobe cites a decision from the Appellate Court of Illinois, which discussed *Linn* and held that the NLRA does not deprive a state court of jurisdiction to enjoin a union from picketing with placards that contain knowingly false statements. *Lowe Excavating Co. v. Int'l Union of Operating Eng'rs Local No. 150*, 535 N.E.2d 1065, 1068-1071 (Ill. App. Ct. 1989). The *Lowe* decision did not address preemption under § 303 of the LMRA and did not consider the question at issue here. As discussed above, the holding in *Linn* does not indicate that claims for intentional interference with existing and prospective contractual relations are not preempted by § 303 where there are allegations that the union made knowingly false statements. The Ninth Circuit Court of Appeals has held that claims for intentional interference with prospective economic advantage and interference with contractual rights are preempted by § 303 of the LMRA, even in a case where there were allegations of defamation. *San Antonio Cmty. Hosp.*, 125 F.3d at 1235. Adobe has not cited any authority holding that the *Garmon* exception applied in *Linn* and *Lowe* applies in a case such as this, concerning preemption of intentional interference with existing and prospective contractual relations claims by § 303 of the LMRA.

Adobe also argues that because employers cannot seek injunctive relief under § 303, the Court does not have jurisdiction in this case. (Mot. for Remand at 10.) It is clear that "an employer cannot seek injunctive relief from a secondary boycott under section 303; only damages are available." *San Antonio Cmty. Hosp.*, 125 F.3d at 1235 (citing *Burlington N. R.R. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 448 (1987)). However, Adobe may obtain injunctive relief in this Court based on its defamation claims. In *San Antonio Community Hospital*, the court held that the plaintiff could not obtain injunctive relief with respect to claims for intentional interference with prospective economic advantage and interference with contractual rights because those claims were preempted by § 303 of the LMRA. *Id.* However, the plaintiff could obtain injunctive relief with respect to its

defamation claims. *Id.* The fact that the Court may not order injunctive relief pursuant to § 303 does not undermine the conclusion that § 303 completely preempts Adobe's claims for intentional interference with existing and prospective contractual relations.

For the reasons discussed above, the Court concludes that Adobe's claims for intentional interference with existing and prospective contractual relations are completely preempted by § 303 of the LMRA. This complete preemption confers original jurisdiction on this Court, and this action was properly removed to this Court pursuant to 28 U.S.C. § 1441(a).

IT IS ORDERED denying Plaintiff's Motion for Remand pursuant to 28 U.S.C. § 1447(c) (Doc. 14).

DATED this 4th day of February, 2009.

Susan R. Bolton
United States District Judge

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I hereby certify that that this brief is proportionately spaced; uses a Roman-style, serif typeface (Century Schoolbook) of 14-point; and contains **10,615 words**, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Robert T. Smith
Robert T. Smith
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 7, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert T. Smith
Robert T. Smith
Counsel for Appellant