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

REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

The Union's many arguments notwithstanding, the outcome of this appeal turns on one issue: whether the Mall's state-law claims for trespass and private nuisance are preempted by Section 303 of the Labor Management Relations Act (LMRA).

To be sure, the Union notes that the Mall included in its Second Amended Complaint an allegation describing "'this action'" as having been brought "'pursuant to Section 303 of the Labor Management Relations Act.'" Union Br. at 21 (quoting 2d Am. Compl. ¶ 9) (SER–3). Because this paragraph was incorporated by reference into each of the Mall's state-law causes of action, the Union argues that the "entire 'action'" was brought under Section 303, *id.* at 32, and that the Mall therefore conceded that "there were no *independent* state causes of action alleged," *id.* at 3.

But in making this argument, the Union conveniently ignores the *very next sentence of the Second Amended Complaint*, in which the Mall explains that its action also was brought "pursuant to state-based property laws regarding the unapproved use and trespass on its private property." SER–3 (2d Am. Compl. ¶ 9); *see also id.* (2d Am. Compl.

¶ 11) (explaining that the District Court would have "pendent jurisdiction over [these] state-based property claims"). Moreover, the purpose of this allegation was to fairly *describe* the theory of jurisdiction invoked by the District Court. In seeking leave to amend, the Mall explained that the Second Amended Complaint "does not add any new claims." Mem. of Points & Auths. in Support of Pl.'s Mot. for Leave to File Second Am. Compl. at 5 (filed May 23, 2011) [Dkt. No. 25] [hereinafter "Pl.'s Mot. for Leave"].

Thus, the Mall plainly did not claim in its Second Amended Complaint that there were no independent state-law causes of action. Quite the contrary. Each iteration of the Mall's complaint includes separate and independent state-law causes of action for trespass and private nuisance. *See* ER–47-59 (Compl. ¶¶ 29-37); SER–19-21 (1st Am. Compl. ¶¶ 25-33); SER–3, 7-9 (2d Am. Compl. ¶¶ 9, 11, 27-35). As a result, no matter which complaint is scrutinized, this Court still must ask whether the Mall's state-law claims for trespass and private nuisance are preempted by Section 303 of LMRA.

On that main issue, the parties have pointed to supposedly competing precedents of the Supreme Court, but there is no real

tension. These cases—*Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), and *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252 (1964)—involved two very different sets of facts, and implicated two very different state-law causes of action.

In short, *Sears* is on point; *Morton* is not. In *Sears*, a store filed a trespass action against a union that had invaded the store's property by holding a picket in an attempt to dissuade customers from shopping there. *See* 436 U.S. at 182-83. In contrast, the union in *Morton* had engaged in a campaign against a company without ever setting foot on that company's property, and the company's state-law action was therefore directed solely at the losses caused by the union's *noninvasive*, "peaceful persuasion of [a customer] not to do business with the [company] during the strike." 377 U.S. at 260.

The Union never reconciles these critical distinctions in its brief. Instead, the Union clings to language from *Morton* stating "that 'state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities.'" Union Br. at 5 (quoting *Morton*, 377 U.S. at 261).

If *Morton* existed alone, then perhaps it could be argued that the Supreme Court meant to extend the preemptive effect of Section 303 to any state-law claim that touches upon a secondary boycott. But *Morton* is but one star in the constellation of labor-law preemption. *Sears* shines just as bright. Moreover, the Supreme Court has explained away any perceived tension between *Morton* and *Sears*. In *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669 (1983), 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" under *Sears*. Mall Br. at 48 (citing *Jones*, 460 U.S. at 682). Rather than address *Jones*, the Union has simply chosen to ignore it.

The Union also argues that *Sears* is distinguishable—chiefly because, at least according to the Union, Sears did not include any factual allegations in its complaint relating to the objective of the union's protest. *See* Union Br. at 38-39. If Sears had included such an allegation, the Union continues, then the case would have implicated LMRA. *See id.*

But the actual complaint that was before the Supreme Court in *Sears* includes much more than allegations that the union was on Sears' property without permission. In *Sears*, the store alleged, among other things, (1) that its adversary was a union, (2) that the union was "*picket[ing]*" the store, (3) that the purpose of the picketing was to "*dissuade customers of [Sears] from doing business* with" the company, and (4) that Sears had suffered "*monetary and other damage to [its] business* as a direct result" of the union's tortious conduct. Compl. ¶¶ 2, 8-10, 12, *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, No. 347511 (Cal. Super. Ct.) (filed Oct. 29, 1973), *reprinted in* Appendix at 1-6, No. 76-750 (U.S.) (filed June 6, 1977) (emphasis added) [hereinafter "Sears Compl."].*

Thus, the complaint that was before the Supreme Court in *Sears* plainly included factual allegations that could have supported a claim under Section 303 of LMRA, but those allegations did not factor into the Court's analysis. Instead, the *Sears* Court looked at the company's *cause of action* when conducting its preemption analysis. *See* 436 U.S.

* For the convenience of the Court, a complete copy of the Appendix that was filed with the Supreme Court in *Sears* has been reprinted in an addendum to this reply brief. *See infra* 35-73.

at 197-98; *see also Jones*, 460 U.S. at 682 (focusing on the "elements" of the plaintiff's "state-law cause of action").

Here, the Mall's state-law claims for trespass and private nuisance fall squarely within *Sears* and its progeny. In assessing these property-related causes of action, it is the *location* of the Union's conduct—not the "union's peaceful strike" itself, *Morton*, 377 U.S. at 256—that gives rise to liability. *Sears*, 436 U.S. at 198; *see also Jones*, 460 U.S. at 682-83; *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 475 (2008) (holding that *Sears* applies to private nuisance claims). Indeed, if the Union had simply prevailed upon the Mall's customers not to shop at the Mall, without invading the Mall's private property, then the Mall would have no cause for redress under the claims that it filed in state court. But, of course, that is not what happened here. The Union repeatedly invaded the Mall's property, all the while engaging in obnoxious and highly disruptive conduct. Mall Br. at 14-18.

Quite simply, the Mall's state-law property claims are not preempted by the LMRA. As a result, this Court should vacate the judgment of the District Court—whether on jurisdictional grounds or on the merits.

Even after setting aside the District Court's judgment, however, there still remains the issue of whether the Mall's state-law claims should be sent back to state court. There are, in fact, two bases for remanding those claims back to state court: Either the District Court lacked subject-matter jurisdiction, in which case, the matter must be returned to state court, or the District Court erred on the merits, and because only the Mall's state-law claims would remain, remand would be appropriate under 28 U.S.C. § 1367(c)(3), which favors returning pendent state-law claims back to state court where "the district court has dismissed all claims over which it has original jurisdiction."

The Union mistakenly argues that the Mall waived its objection to removal by filing "an amended complaint in federal court that included an unmistakable federal cause of action.'" Union Br. at 19 (quoting *Bernstein v. Lin-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984)). But, as explained further below, the Mall never pled or proceeded on a federal cause of action; it merely meant to *describe* the theory of jurisdiction that the District Court had invoked. *See* SER–3 (2d Am. Compl. ¶ 9). The Second Amended Complaint still sets forth *only state-law causes of action* for trespass and private nuisance, *see id.* at 3, 7-9

(2d Am. Compl. ¶¶ 27-35), and the *Union* never construed the Mall's Second Amended Complaint as pleading a federal claim. Rather, in moving to dismiss the Mall's Second Amended Complaint, the Union argued that the Mall continued to assert *only* "*state law causes of action*" for "trespass" and "private nuisance." Defs.' Mem. of Points & Auths. in Support of Defs.' Mot. to Dismiss Pl.'s 2d Am. Compl. at 1, 3, 11 (filed July 29, 2011) (emphasis added) [Dkt. No. 40] [hereinafter "Defs.' Mot. to Dismiss"]. As a result, the Mall never added "an unmistakable federal cause of action," and it therefore never waived its objection to removal.

In the end, though, the Union's waiver argument accomplishes nothing. The Mall voluntarily dismissed, with prejudice, the only possible claim over which the District Court could have exercised original jurisdiction—the court-imposed LMRA claim. *See* ER–5-7. As a result, even if the Mall unintentionally invoked the original jurisdiction of the District Court, the only claims that now remain are the Mall's pendent state-law claims for trespass and private nuisance.

In circumstances similar to this one, this Court has held that it would have been improper for a district court to exercise pendent

jurisdiction over the state-law claims, and that a court of appeals may, on its own, order the district court to remand the state-law claims back to state court. *See, e.g.*, *Wren v. Sletten Constr. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) (per curiam). Here, every possible factor favors sending the Mall's state-law claims back to state court: (1) the Mall originally filed this action in state court; (2) the federal claim (if it existed at all) has been dismissed; (3) the state-law claims raise novel and important issues of state law; (4) the state-law claims have not been adjudicated on the merits; and (5) no substantial discovery has been taken.

Thus, this Court need not decide whether the Mall inadvertently invoked the original jurisdiction of the District Court, because, either way, the Mall's state-law claims should be remanded back to state court. Those claims—for trespass and private nuisance—are not preempted by LMRA.

REPLY ARGUMENT

I. LMRA DOES NOT PREEMPT THE MALL'S STATE-LAW CLAIMS.

On the issue of preemption, the Union asserts two basic arguments: (1) that, under *Morton* and its progeny, Section 303 of LMRA preempts state-law *property* claims that relate to "'peaceful

union secondary activities,'" Union Br. at 5, 24-36; and (2) that *Sears* is distinguishable, *id.* at 5, 37-48. The Union also appears to argue that this Court's preemption analysis somehow changes, depending on which of the Mall's complaints is scrutinized. *Id.* at 3-4, 32-33, 38, 44. Respectfully, however, the Union is mistaken in all respects.

A. *Sears* is Squarely on Point.

In attempting to distinguish *Sears*, the Union makes a two-fold argument. *First*, the Union believes that, in *Sears*, the store included factual allegations in its complaint challenging *only* "the location of the picketing"; the store did *not* "allege that the protest activity was engaged in with a certain object." Union Br. at 39. *Second*, based on the Union's first belief, the Union argues that the Supreme Court has looked beyond "the labels of the [state-law] causes of action" in conducting its preemption analysis; the Court has focused instead on the factual "*allegations*." *Id.* at 5; *see also id.* at 41-43. As explained below, neither argument withstands scrutiny.

1. The Factual Allegations that the Mall Included in Its Complaints Are Nearly Identical to the Allegations that the Store Made in *Sears*.

In *Sears*, the Supreme Court noted that "the scope of the controversy [that Sears had presented] in the state court was limited." 436 U.S. at 185. "Sears had asserted no *claim*," the Court continued, "that the picketing itself violated any state or federal law." *Id.* (emphasis added). Instead, the store "sought simply to remove the pickets from its property." *Id.* "Thus, as a matter of *state law*, the location of the picketing was illegal but the picketing itself is unobjectionable." *Id.* (emphasis added).

Ignoring the full implication of the Court's references to "claim" and "state law," the Union construes these statements to mean that Sears did not include any *factual allegations* in its complaint that would have placed those issues before the Court. *Id.* at 39. "In fact," the Union continues, "it was only the *union* that alleged that the picketing had a certain purpose." *Id.*

Based on this reading of *Sears*, the Union argues that the Mall's complaints are distinguishable. The Union notes that the Mall "complained of more than the fact that the picketers were on its

property without permission." *Id.* The Mall "complained (1) that the protesters were picketing, (2) . . . the *manner* in which they did so, and (3) [that the] *effect*" of the picketing extended beyond the Mall's "interests in real property"—it extended to the "*businesses*" of the Mall and its tenants. *Id.* at 40-41.

The factual allegations levied in Sears' complaint, however, were not limited to "the location of the picketing," as the Union contends. *Id.* at 38. Instead, the complaint that was before the Supreme Court in *Sears* included allegations that are virtually indistinguishable from those levied by the Mall in its complaints. Sears alleged:

(1) that its adversary, the Carpenters union, "is and at all times mentioned was a *labor organization* within the meaning of the National Labor Relations Act";

(2) that the union had "*attempted to dissuade customers* of [Sears] from doing business with" Sears by "picket[ing]" the store;

(3) that "customers of [Sears] have *refused to shop* at [Sears'] department store *because of the statements of said pickets* and *because of the presence of said pickets* on the private property of [Sears]";

(4) that members of the union "conspired together in concert to commit the unlawful acts against [Sears] of *interfering with [Sears] in the lawful conduct of its business*";

(5) that the union and its members acted with "*the purpose of injuring [Sears] in the conduct of its business*"; and

(6) that, because the "amount of *monetary damages to [Sears'] business* as a result of the acts of Defendants complained of herein is extremely difficult, if not impossible, to ascertain," and because Sears will suffer "[f]urther monetary and other *damage to [its] business* as a direct result of said acts complained of herein," Sears is entitled to "the granting of injunctive relief prayed herein."

Sears Compl. ¶¶ 2, 8-10, 12 (emphasis added) (*reprinted infra* at 39-43).

It is apparent from Sears' factual allegations that its complaint could have been construed to support a claim under Section 303 of LMRA. Sears had alleged that its adversary was a union, that the union was picketing the store, that the purpose of the picketing was to "dissuade customers of [Sears] from doing business with" the company, and that Sears had suffered "monetary and other damage to [its] business as a direct result" of the union's tortious conduct. *Id.* *Sears*, therefore, cannot be distinguished along the lines offered by the Union.

2. In Any Event, the Proper Labor-Law Preemption Analysis Focuses on the "Elements" of the "State-Law Cause of Action," Not the Plaintiff's Factual Allegations.

Given the allegations at issue in *Sears*, the Court's references to the store's "claim"—and to "state law"—can only mean one thing: In conducting its preemption analysis, a court should focus on the *elements* of the plaintiff's state-law claims. 436 U.S. at 185; *see also id.* at 182

(explaining that, in *Sears*, the issue 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" (emphasis added)).

If any doubt remained, the Supreme Court later clarified in *Jones* that it was the "elements" of Jones' "state-law cause of action"—a state-law claim for tortious interference with contractual relations—that triggered preemption. 460 U.S. at 682. And in distinguishing *Sears*, the *Jones* Court noted that, there, "the *state court action* was for trespass." *Id.* (emphasis added). Thus, the Supreme Court has clearly recognized that it is the elements of the Mall's state-law causes of action—not the Mall's factual allegations—that bear on a federal court's preemption analysis.

Under that analysis, the Mall's state-law causes of action are virtually indistinguishable from the trespass action that the Supreme Court deemed not preempted in *Sears*. As in *Sears*, the conduct that the Mall challenged is actionable by virtue of its *location*. Had the Union limited its protests to the public sidewalks that surround the Mall's property, the Mall would have had no grounds to bring an action for trespass or private nuisance. The Union could have yelled, kicked,

screamed, and whistled all that it wanted to on the public land that surrounds the Mall—a parking lot and insulated walls would have separated the Union's disturbance from the Mall's tenants and patrons.

In light of this reality, the Union's effort to distinguish *Helmsley-Spear* is particularly unavailing. The Union acknowledges that, in *Helmsley-Spear*, the New York Court of Appeals affirmed an injunction that enjoined a union's drumming and other noisemaking activities, but the Union notes that the New York trial court did not enjoin the union's peaceful leafleting in that case. Union Br. at 43-44 (citing *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 475 (2008)). Here, in contrast, the Union notes that the Mall did not simply "complain about noise"; the Mall sought to force the union to "leave and thereby stop their protest activity altogether." *Id.* at 44. But in *Helmsley-Spear*, the union had conducted its drumming and other noisemaking activities on the public sidewalks immediately adjacent to the entrance of the Empire State Building; it did not invade the building's lobby. *See* 11 N.Y.3d at 472-73. Here, in contrast, the Union not only engaged in disruptive conduct that interfered with the Mall's use and enjoyment of its property, but it did so *inside the mall*. Thus, unlike the building

owner in *Helmsley-Spear*, the Mall has viable claims for both private nuisance *and trespass*, and as *Helmsley-Spear* and *Sears* both recognize, these claims touch upon "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [a court should] not infer that Congress had deprived the State of the power to act.'" *Sears*, 436 U.S. at 195 (quoting *San Diego Bldg. Trade Council v. Garmon*, 359 U.S. 236, 244 (1959)); *Helmsley-Spear*, 11 N.Y.3d at 476 (quoting the same).

Finally, the Union contends that, because the Mall complained of business losses based on the invasion of the Mall's property, the Mall was not seeking to protect its "interests in real property," and its action therefore falls outside the ambit of *Sears*. Union Br. at 41. But, for at least three reasons, the Union's argument does not serve as a principled basis for distinguishing *Sears*. *First*, Sears itself complained of "monetary and other *damage to [its] business* as a direct result" of the union's tortious conduct. Sears Compl. ¶ 12 (emphasis added) (*reprinted infra* at 43). *Second*, because the Mall is a money-making venture, the Union's interference with the Mall's use and enjoyment of its property necessarily includes business losses as a result of the

Union's trespass and nuisance. *Third*, the Supreme Court's preemption analysis has never turned on the form of the relief requested, because the Court has always focused its analysis instead on the "elements" of the plaintiff's state-law claims. *See* Mall Br. at 37-38; *see also Jones*, 460 U.S. at 682. In short, *Sears* is controlling.

B. *Morton* is Easily Distinguished.

The Union makes much of *Morton*, but, properly understood, that case is no impediment to the Mall's state-law causes of action. *Morton* involved very different facts and very different state-law claims.

In *Morton*, the union attempted to convince customers to cease doing business with a company, but in doing so, the union never treaded upon the company's private property. 377 U.S. at 253-54. As a result, the company's state-law cause of action—a common-law claim analogous to tortious interference with a prospective business advantage—was directed solely at the union's "peaceful persuasion" of one of Morton's customers "not to do business with" that company. *Id.* at 260. *Morton*, therefore, did not address a state-law action for trespass or private nuisance.

Nor did *Morton* apply a preemption standard that differed from the standard that the Court applied in *Sears* and *Jones*. *But see* Union Br. at 5-6. As in *Sears* and *Jones*, *Morton* considered whether the state-law cause of action touched upon a "'compelling state interest'" so deeply rooted that it should not be "'overridden in the absence of clearly expressed congressional direction.'" *Morton*, 377 U.S. at 257 (quoting *Garmon*, 359 U.S. at 247-48); *cf. Sears*, 436 U.S. at 183, 188-89 (quoting the same). The logic of *Morton*, therefore, compels the same deference to state-law property claims that the Supreme Court later recognized in *Sears* and *Jones*.

The Union does not acknowledge any of this. Instead, it appears to argue that, under *Morton*, any state-law action that might be said to relate to a secondary boycott is preempted by Section 303 of LMRA. *See* Union Br. at 5, 24-36. But *Morton* itself rejected this view. The *Morton* Court noted that it had "allowed the States to grant compensation for the consequences, as defined by the traditional law of torts," of conduct that touches upon a "compelling state interest." 377 U.S. at 257. And in *Sears*, the Court expressly held that an action for trespass falls

within this exception. *See* 436 U.S. at 195. Thus, *Morton* is fully consistent with *Sears*.

In this regard, the Union confuses the nature of the "compelling state interest" exception. The Union argues that, as long as its protest can be described as "peaceful," it has free reign to invade the Mall's private property. *See* Union Br. at 5, 33-36. But *Sears* held that even a "peaceful" protest is not preempted if it involves the invasion of a company's private property—precisely because a state-law action to redress such an invasion touches upon a "compelling state interest." *Sears*, 436 U.S. at 195. Accordingly, even a peaceful protest falls squarely within *Morton*'s "compelling state interest" exception when it involves the physical invasion of private property. *Id.*; *see also Morton*, 377 U.S. at 257 (describing the "compelling state interest" exception).

In the end, the Union has not cited a single case where a court has invoked *Morton* to preempt a state-law property claim—because no such case exists. Indeed, none of the Union's prior cases involved a state-law property claim for trespass or private nuisance. *See Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798 (7th Cir. 2009); *Adobe Drywall, LLC v. United Bhd. of Carpenters & Joiners*, No. 2:08-cv-2105 (D. Ariz.

Feb. 5, 2009) (unpublished) (*reprinted in* Mall Br. at 57-66); *Allstate Interiors, Inc. v. United Bhd. of Carpenters & Joiners*, No. 10-cv-2861, 2010 WL 3894915 (S.D.N.Y. Sept. 10, 2010) (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 (W.D. Wash. Sept. 23, 2009) (unpublished); *see also* Mall Br. at 46-47 (distinguishing these cases).

Nor did the Union identify any new case in its appellate brief. *See, e.g.*, Union Br. at 46 (citing *BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners*, 90 F.3d 1318, 1321 (8th Cir. 1996) (state-law tortious interference claim)). The closest the Union comes is *NKW, Inc. v. Southwest Regional Council of Carpenters*, No. 04-cv-1445 (D. Ariz. Dec. 7, 2004) (unpublished) (*reprinted at* SER–57-61). *See* Union Br. at 31. But even that case does not help the Union. In *NKW*, the district court held only that the plaintiff's claim for "interference with its contractual and business relationships" was completely preempted, and that this claim, in turn, gave rise to federal question jurisdiction; the court did *not* hold that the plaintiff's "trespass" claim was likewise preempted. *See* SER–58, 61. Instead, after acknowledging that *Sears* held that a trespass claim is *not* preempted, the district court simply

noted that, because it "has federal question jurisdiction [over] some of the claims, it may invoke supplemental jurisdiction to hear the related state law claims." SER–61. Thus, the Union has not rebutted—indeed, it cannot rebut—the presumption against the preemption of the Mall's state-law property claims.

C. This Court's Preemption Analysis is the Same Under Each Iteration of the Mall's Complaint.

Finally, the Union appears to argue that this Court's preemption analysis somehow changes depending on which complaint—the Mall's original complaint or one of the two subsequent, amended complaints—is subjected to scrutiny. *See* Union Br. at 3-4, 32-33, 38. But this argument is completely without merit.

The Union's argument here focuses on the addition of a single paragraph in the Mall's Second Amended Complaint. In particular, the Union notes that the Mall included in that complaint an allegation describing "'this action'" as having been brought "'pursuant to Section 303 of the Labor Management Relations Act.'" Union Br. at 21 (quoting 2d Am. Compl. ¶ 9) (SER–3). Because this paragraph was incorporated by reference into each of the Mall's state-law causes of action, the Union argues that the "entire 'action'" was brought under Section 303. *Id.* at

32; *see also id.* at 3 ("By incorporating Paragraph 9 into every cause of action, Plaintiff was claiming that (1) all conduct complained of was a Section 8(b)(4) violation and (2) there were no *independent* state causes of action alleged.").

But in making this argument, the Union conveniently ignores the *very next sentence, also set forth in paragraph 9 of the Second Amended Complaint*, in which the Mall explains that its action is also being brought "pursuant to state-based property laws regarding the unapproved use and trespass on its private property." SER–3 (2d Am. Compl. ¶ 9). In addition, the Mall noted that the District Court would have "pendent jurisdiction over [these] state-based property claims." *Id.* (2d Am. Compl. ¶ 11).

Thus, the Mall plainly did not claim in its Second Amended Complaint that there were no independent state-law causes of action—it expressly alleged the contrary. Accordingly, it makes no difference which complaint this Court scrutinizes; they each include state-law trespass and private nuisance claims that are independent of, and not preempted by, LMRA. *See* ER–47-59 (Compl. ¶¶ 29-37); SER–19-21 (1st Am. Compl. ¶¶ 25-33); SER–3,7-9 (2d Am. Compl. ¶¶ 9, 27-35).

II. THE MALL DID NOT WAIVE ITS CHALLENGE TO REMOVAL WHEN IT ADDED AN ALLEGATION ACKNOWLEDGING THE BASIS FOR JURISDICTION INVOKED BY THE DISTRICT COURT.

The Union also argues that, even if the District Court did not have jurisdiction at the time of removal, the Mall waived its challenge to removal when it filed its Second Amended Complaint. *See* Union Br. at 18-21. More specifically, the Union argues that the Mall waived its challenge by adding an "'unmistakable federal cause of action.'" *Id.* at 19 (quoting *Bernstein*, 738 F.2d at 185).

As noted above, this argument accomplishes little if anything for the Union. Even if the Mall waived its objection to removal, the District Court clearly erred on the merits when it dismissed the Mall's state-law claims with prejudice. *See* ER–16-19. As a result, this Court should vacate the judgment of the District Court—regardless of whether the Mall waived its objection to removal.

And yet, the Mall never waived that objection. In the cases cited by the Union, the reviewing court concluded that the plaintiff had waived its objection by adding an "unmistakable," "obvious[]," or "clear" federal cause of action. *See, e.g.*, *Bernstein*, 738 F.2d at 185 ("unmistakable"); *Brough v. United Steelworkers*, 437 F.2d 748, 750

(1st Cir. 1971) ("obvious[]"); *see also Cades v. H & R Block, Inc.*, 43 F.3d 869, 873 (4th Cir. 1994) (noting that it was "clear" that the plaintiff added a federal cause of action). But, as explained below, the Mall never added such an "unmistakable" federal claim.

In addition, the courts that have found a waiver have done so to prevent gamesmanship, and to promote interests of finality and judicial economy. *Bernstein*, 738 F.2d at 185-86 (noting that a plaintiff "'cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses'" on his federal claim (quoting *Brough*, 437 F.2d at 750)); *accord Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998); *see also Moffitt v. Residential Funding Co.*, 604 F.3d 156, 160 (4th Cir. 2010) (noting that the waiver doctrine is grounded both in interests of "finality" and "judicial economy"). But, as explained below, those equitable considerations are likewise absent here.

A. The Mall's Second Amended Complaint Still Alleges Only State-Law Causes of Action.

The Mall did not intend to waive its objection to removal, nor did it allege an "unmistakable federal cause of action" in its Second Amended Complaint. As the Mall previously explained, it twice sought to remand the case to state court. *See* Mall Br. at 1-2, 6-7. Even after

twice losing, the Mall did not plead a federal cause in its Second Amended Complaint. *See* SER–1-12. Instead, it pled two distinct state-law causes of action—for "trespass" and "private nuisance"—along with a state-law request (styled as a "cause of action") for injunctive relief. *See* SER–1, 7-10.

To be sure, the Mall also included in its Second Amended Complaint a general allegation that the action was brought "pursuant to Section 303 of the Labor Management Relations Act," and further brought "'pursuant to state-based property laws regarding the unapproved use and trespass on its private property." SER–3 (2d Am. Compl. ¶ 9); *see also id.* (2d Am. Compl. ¶ 11). But the purpose of this allegation was to fairly *describe* the theory of jurisdiction invoked by the District Court; it was not to allege a new cause of action. In seeking leave to amend, the Mall explained that the Second Amended Complaint "does not add any new claims." Pl.'s Mot. for Leave at 5.

Even the Union did not previously construe Paragraph 9 of the Mall's Second Amended Complaint as pleading a federal cause of action. Instead, the Union moved to "dismiss [the Mall's] Second Amended Complaint in its entirety, without leave to amend," precisely because

the Mall continued to assert *only* "state law causes of action" for "trespass" and "private nuisance," and thus, the Second Amended Complaint "still fail[ed] to state a claim on its face that is not preempted by section 303." Defs.' Mot. to Dismiss at 1, 3, 11. The Union cannot plausibly argue now that the Mall—through the addition of a single allegation in Paragraph 9 of the Second Amended Complaint—presented an "unmistakable federal cause of action." *Cf. Bernstein*, 738 F.2d at 185. Thus, under these circumstances—where the Mall twice challenged the District Court's jurisdiction, and where it did not intend to add any new claims—this Court should hold that the Mall did not waive its objection to removal.

B. Because the Mall Never Attempted to Proceed on a Federal Cause of Action, the Mall Did Not Implicate Any of the Equitable Considerations that Have Traditionally Justified a Finding of Waiver.

The Mall likewise did not trigger any of the equitable considerations that have traditionally justified a finding of waiver. After the District Court construed the Mall's Second Amended Complaint as pleading a federal cause of action, the Mall immediately moved to voluntarily dismiss that claim with prejudice. *See* ER–5-7. Accordingly, the Mall never attempted to "take advantage of [its]

involuntary presence in federal court" by proceeding on the merits of a subsequently-added federal claim, only to "disclaim" jurisdiction after losing on that claim. *Cf. Bernstein*, 738 F.2d at 185-86. Instead, the Mall proactively and permanently surrendered its right to invoke a claim under Section 303 of LMRA.

Similarly, there is no interest in finality that could be said to justify a finding of waiver here. Finality will typically support a finding of waiver where, unlike here, the District Court proceeds to a determination on the merits of the state-law claims. Thus, in *Caterpillar Inc. v. Lewis*, the Supreme Court held that, even though the district court did not have jurisdiction at the time of removal and obtained jurisdiction only after the case had been removed, because the state-law claims had been "tried in federal court . . ., considerations of finality, efficiency, and economy [had] become overwhelming." 519 U.S. 61, 75 (1996). The *Caterpillar* Court therefore affirmed the adjudication of the plaintiff's state-law claims based on interests of finality. And yet, here, the District Court never resolved—let alone tried—the Mall's state-law claims on the merits.

Nor is there a separate interest in judicial economy that justifies a finding of waiver. In cases that have not been adjudicated to a final judgment on the merits, judicial economy has been invoked to prevent "pointless movement between state and federal court." *Moffitt*, 604 F.3d at 160. In *Moffitt*, for example, the Fourth Circuit cited such a concern because the plaintiffs "expressed no intent to abandon" the portion of their complaint giving rise to federal question jurisdiction, and the "defendant would thus be able to file renewed notices of removal once the cases landed back in state court." *Id.* Here, in contrast, the Mall has expressly disavowed any claim that might be said to support the original jurisdiction of the District Court. As a result, remand will not give rise to renewed notices of removal.

III. EVEN IF THE MALL UNINTENTIONALLY INVOKED THE ORIGINAL JURISDICTION OF THE DISTRICT COURT, THIS COURT MAY STILL REMAND THE MALL'S PENDENT STATE-LAW CLAIMS.

Even though the Mall never waived its objection to removal, this Court does not have to reach that issue, because there is another avenue compelling remand of the Mall's state-law claims. Here, the Mall voluntarily dismissed, with prejudice, the only claim that could possibly support the original jurisdiction of the District Court—the

court-imposed Section 303 claim. *See* ER–5-7. Accordingly, even if the Mall inadvertently invoked the District Court's original jurisdiction by amending its complaint, the only claims that remain are the Mall's pendent state-law claims for trespass and private nuisance.

Although this Court will review a district court's decision whether to retain pendent jurisdiction for an abuse of discretion, this Court has likewise claimed for itself the prerogative to remand to state court pendent state-law claims. For instance, in *Wren v. Sletten Construction Co.*, the plaintiff had filed an action in state court that included federal and state-law claims. 654 F.2d at 530-31. On appeal, this Court affirmed the dismissal of the federal claim, but "remand[ed] the case to the district court with directions to remand the state claims to" state court. *Id.* at 537. Similarly, in *Reynolds v. County of San Diego*, this Court affirmed the dismissal of federal claims but remanded the pendent state-law claims with "instructions to dismiss without prejudice"—the preferred course where, unlike here, the action was originally filed in federal court, rather than removed from state court. 84 F.3d 1162, 1171 (9th Cir. 1996) (dismissal without prejudice), *overruled on other grounds by Acri v. Varian Assoc., Inc.*, 114 F.3d 999,

1001 (9th Cir. 1997) (en banc); *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 261 (9th Cir. 1977) (same); *see also Avelar v. Youth & Family Enrichment Servs.*, 364 F. App'x 358, 359 (9th Cir. 2010) (non-precedential) (same).

Moreover, this Court is not alone in exercising such a prerogative to remand pendent state-law claims directly back to state court, rather than simply leave it to the district court to determine whether it may exercise pendent jurisdiction consistent with 28 U.S.C. § 1367(c). One of the Union's own cases recognizes the ultimate futility of its waiver argument. In *Brough v. United Steelworkers*, the First Circuit noted that the plaintiff had waived its objection to removal by amending his complaint to add a claim that "obviously arises under federal law." 437 F.2d at 750. But, in the end, this made little difference. Because the district court had ultimately dismissed the federal claim, the court of appeals exercised its "own prerogative" to remand the plaintiff's remaining, state-law claim back "to the state court." *Id.*

Here, the circumstances overwhelming support remand—as the five factors identified below demonstrate. *First*, the Mall originally filed this action in state court, and ordinarily, a plaintiff's choice of forum

should be respected. *Cf. Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (explaining that, in the context of a motion to transfer venue, the "defendant must make a strong showing . . . to warrant upsetting the plaintiff's choice of forum"); *see also Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) ("The burden of establishing federal jurisdiction is upon the party seeking removal, and the removal statute is strictly construed against removal jurisdiction." (citations omitted)).

Second, and most important, "the district court has dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3)—if the District Court ever had original jurisdiction in the first place. As numerous courts have recognized, there is a strong presumption that, "[w]hen federal claims are dismissed before trial, . . . pend[e]nt state claims also should be dismissed." *Jones v. Cmty. Redev. Agency of City of Los Angeles*, 733 F.2d 646, 651 (9th Cir. 1984); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (explaining that, if the jurisdiction-invoking federal claims "are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"); 13D CHARLES ALAN WRIGHT, ET AL.,

FEDERAL PRACTICE AND PROCEDURE § 3567.3, at 429 (3d ed. 2008) ("As a general matter, a court will decline supplemental jurisdiction if the underlying claims are dismissed before trial."). "This presumption makes sense." 13D WRIGHT, *supra*, § 3567.3, at 429-31. As the learned contributors to FEDERAL PRACTICE AND PROCEDURE have explained: "If the underlying claims are dismissed before trial, ordinarily the court and litigants will have invested little effort on litigating the supplemental claims." *Id.*

Third, the state-law claims at issue here raise novel and important issues of state law, including the precise contours of Mall's right to exclude union protesters from a private shopping center. *See* Mall Br. at 11, 51 n.4 (identifying undecided and important state-law issues implicated here). In these circumstances, courts have noted that remand is appropriate where the state-law "'claim raises a novel or complex issue of State law.'" *Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 908 (7th Cir. 2007) (quoting 28 U.S.C. § 1367(c)(1)); *Anglemyer v. Hamilton Cnty. Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995) (similar). Moreover, as the Supreme Court recognized in *Gibbs*, "[n]eedless decisions of state law should be avoided *both* . . . to promote

justice between the parties, by procuring for them a surer-footed reading of applicable law," *and* "*as a matter of comity*." 383 U.S. at 726 (emphasis added). Here, California's courts should be the ones to decide whether the Union's conduct gives rise to liability under state law.

Fourth, the state-law claims have not been adjudicated on the merits; thus, this is not a situation where judicial economy might favor the retention of the state-law claims. *Cf. Williams Elecs. Games,* 479 F.3d at 908 (noting that, there, several of the state-law claims had been adjudicated on the merits, but nevertheless affirming remand because the state-law claims raised novel and complex issues of state law).

Finally, no significant discovery has been taken here—only a few interrogatory and document requests were served, and no depositions were taken. This too supports remand. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 183 (2d Cir. 2004) (noting that the district court declined supplemental jurisdiction "before significant discovery had taken place"); *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (7th Cir. 1997) (noting that the presumption favoring remand is "especially" strong when "almost no discovery" has been taken).

Accordingly, even if the Mall waived its objection to removal, this Court should still vacate the judgment of the District Court and direct that court to remand the Mall's state-law claims back to state court.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of the District Court and remand the Mall's state-law claims back to state court.

Dated: April 10, 2013

Respectfully submitted,

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ADDENDUM

Appendix,
Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters,
No. 76-750 (U.S.) (filed June 6, 1977)

FILE COPY

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED DECEMBER 1, 1976.
CERTIORARI GRANTED FEBRUARY 28, 1977.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-750.

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

TABLE OF CONTENTS.

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO.

Sears Roebuck & Company,
Plaintiff,
vs.
San Diego County District Council of Carpenters, and Does 1 through 100,
Defendants.

No. 347511

COMPLAINT FOR INJUNCTION (CONTINUING TRESPASS)

Plaintiff alleges:

I.

Plaintiff, Sears Roebuck & Company (hereinafter referred to as "Plaintiff") is and at all times pertinent was a corporation duly organized and existing under and by virtue of the laws of the State of New York, with places of business in the State of California and other states.

Plaintiff is and at all times mentioned was engaged in the operation of a retail department store at 555 5th Avenue, Chula Vista, San Diego County, California.

II.

Defendant, San Diego County District Council of Carpenters (hereinafter referred to as "Carpenters") is and at all times mentioned was a labor organization within the meaning of the National Labor Relations Act, as amended, and is organized for the purpose of negotiating terms and conditions of employment on behalf of the employees it represents and for the purpose of representing employees in collective bargaining, all within the County of San Diego, California.

III.

DOES 1 through 100, inclusive, are labor organizations or are members, officers or agents of one or more of said labor organizations or of Carpenters. Plaintiff does not know the true names and capacities of the organizations and individuals sued herein as DOES, and pursuant to the California Code of Civil Procedure, Section 474, Plaintiff will amend its complaint to show the true names and capacities of these fictitious defendants when those names have been ascertained by Plaintiff at or before the time of trial or hearing.

IV.

Commencing at approximately 10:00 a.m. on October 26, 1973, Defendants, their agents, representatives, officers, picket captains, pickets and other persons acting under the direction, control and at the invitation of the Defendants, authorized, established and caused to be established and assisted in and sanctioned and at all times maintained and do now maintain picket lines on and about the property of Plaintiff's facility as hereinafter alleged. Said picket lines have been established and now are and at all times herein mentioned have been maintained.

V.

Attached hereto and made a part hereof by this reference as though set forth at length herein, is Exhibit A which constitutes a schematic drawing of Plaintiff's retail department store and property located at and about 555 5th Avenue, Chula Vista, San Diego County, California. Said picket line has been maintained and is now maintained on the private property of Plaintiff at said location. Said location and property of Plaintiff is for the exclusive use of Plaintiff, its customers, employees, agents, and suppliers, and no business is maintained on said property that is not operated or controlled by Plaintiff.

VI.

On October 26, 1973, shortly after said picket line was established on Plaintiff's property, Plaintiff did notify the pickets and Defendants that said pickets were on the private property of Plaintiff and Plaintiff demanded that said pickets leave said property immediately. Said pickets did leave the property upon Plaintiff's demand, but returned in a short time on the same day, October 26, 1973. Upon the return of the pickets, Defendants informed Plaintiff that said pickets of Defendants would remain on the private property of Plaintiff unless and until ordered to leave by a court of law. Defendants continued to maintain and do now maintain said picket lines as alleged on the said private property of Plaintiff.

VII.

Defendants have access to the public sidewalks adjacent to the said property of Plaintiff where said pickets could patrol in the full view of the employees, customers, and suppliers of Plaintiff; Defendants have chose not to use said public sidewalks, but rather have continued to maintain said picket line on the private property of Plaintiff despite the objections of Plaintiff.

VIII.

Said pickets, pursuant to the instigation and direction of Defendants, have attempted to dissuade customers of Plaintiff from doing business with Plaintiff, and Plaintiff is informed and believes and based thereon alleges that customers of Plaintiff have refused to shop at Plaintiff's department store because of the statements of said pickets and because of the presence of said pickets on the private property of Plaintiff.

IX.

Plaintiff is informed and believes and based thereon alleges that Defendants and each of them, and other diverse persons unknown to Plaintiff have conspired together in concert to commit the unlawful acts against Plaintiff of interfering with Plaintiff in the lawful conduct of its business and engaging in continuing trespass onto the property of Plaintiff. Each of the acts complained of herein has been done in furtherance of said conspiracy.

X.

The Defendants, and each of the [sic], have performed and continue to perform the acts and things herein complained of deliberately, willfully and intentionally, with the full knowledge of the illegality of said acts and for the purpose of injuring Plaintiff in the conduct of its business. Plaintiff is informed and believes and upon such information and belief alleges that Defendants, and each of them, will continue to do the acts complained of herein unless restrained and enjoined from doing so by this court.

XI.

Each and every act herein complained of was done maliciously, unlawfully, and oppressively and with the intention to injure, vex, harass and annoy Plaintiff in the conduct of its business.

XII.

The acts of Defendants complained of herein have caused, are causing and will continue to cause so long as said acts are continued, irreparable damage to Plaintiff. As a direct and sole result of said acts, Plaintiff's goodwill has been, is being, and so long as the acts complained herein continue will be seriously impaired. The amount of monetary damages to Plaintiff's business

as a result of the acts of Defendants complained of herein is extremely difficult, if not impossible, to ascertain. Further monetary and other damage to Plaintiff's business as a direct result of said acts complained of herein can only be prevented by the granting of injunctive relief prayed for herein.

XII.

Unless restrained by this court, Defendants will continue the said acts continuously or intermittently and will continue to cause the injuries hereinabove referred to, and will cause said injuries before the matter can be heard on notice. Plaintiff has no plain, speedy or adequate remedy at law, and the restraint of this court is necessary to prevent a multiplicity of judicial proceedings concerning the continuing trespass of Defendants.

WHEREFORE, Plaintiff prays judgment as follows:

1. That Defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, be permanently enjoined from causing, instigating, furthering, participating in, or carrying on picketing on the Plaintiff's property located at 559 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, H Street, and I Street in Chula Vista, California.

2. That an order be made directing the Defendants, and each of them, to show cause at a time and place specified therein why they, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, should not be enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the Plaintiff's property located at 559 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, H Street and I Street in Chula Vista, California.

3. That the court, upon the ex parte application of the Plaintiff, and upon reading Plaintiff's verified complaint herein and the declarations annexed thereto, grant a temporary restraining order against Defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, from doing any of the acts set forth in paragraph 1 above, pending a hearing on the order to show cause re preliminary injunction herein.

4. For Plaintiff's costs of suit herein incurred.

5. For all other and further proper relief.

Gray, Cary, Ames & Frye
By: /s/ James K. Smith
James K. Smith

Dated: October 29, 1973

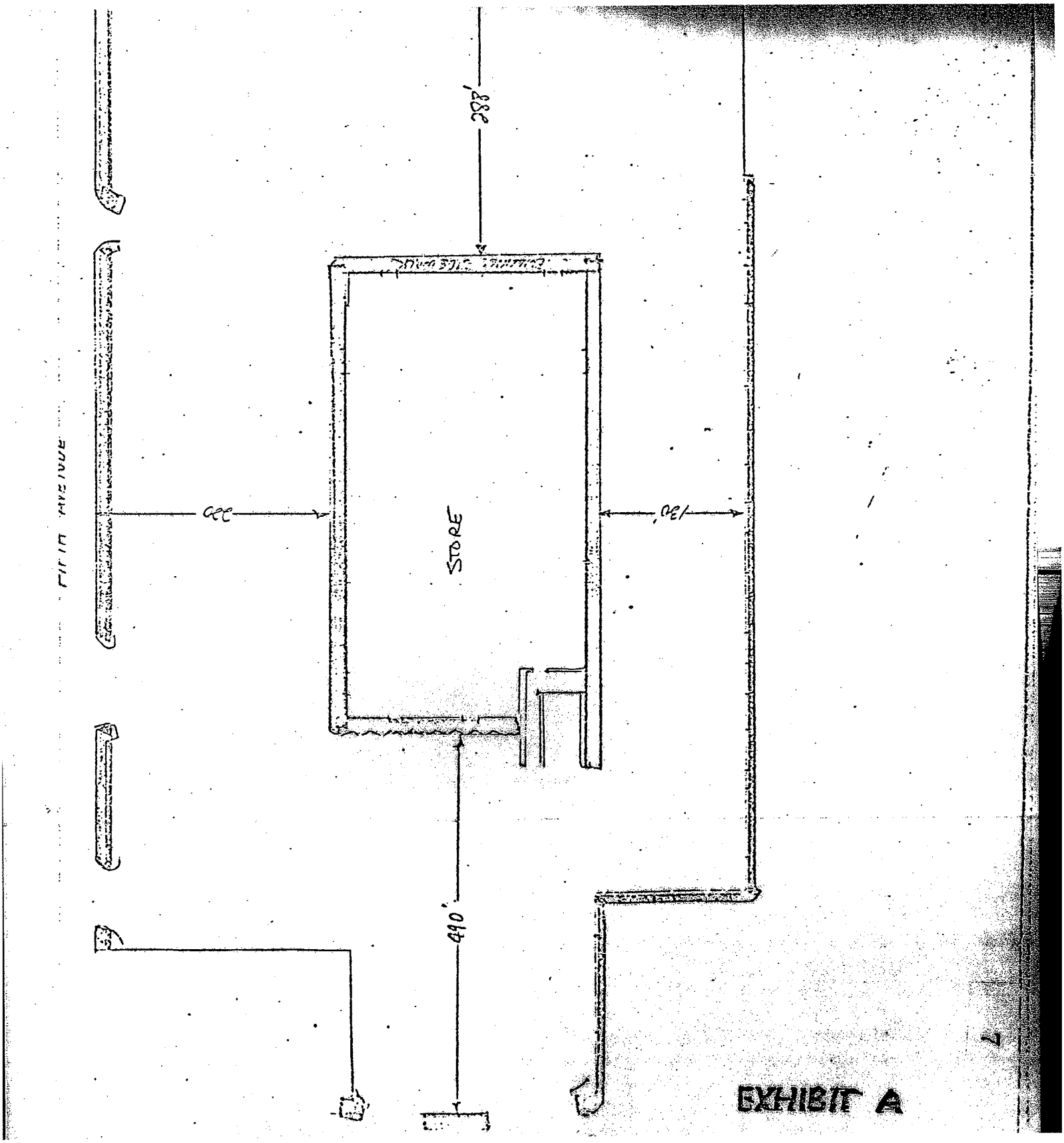
I, ROBERT D. WELLS, declare as follows:

I am the Operating Superintendent of the Chula Vista Store of SEARS ROEBUCK & COMPANY, Plaintiff in the above-entitled matter; I am fully informed of the facts alleged in the within complaint; the same is true of my own knowledge except as to those matters as stated therein on information and belief and to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 1973.

/s/ Robert D. Wells
Robert D. Wells


288'
STORE
490'
EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF KENNETH V. LAUHER, JR. IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE.

I Kenneth V. Lauher Jr., declare and say I am Credit Sales Manager at Sears, Roebuck and Co., Chula Vista # 1358, employed by Sears, Roebuck and Co., on October 26, 1973 I saw a man carrying a picket sign step into the path of an automobile and inquired of the occupants "Do you ladies intend shopping at Sears?" I did not hear their response, but the car had stopped. He then said "We would appreciate it very much if you would not." The car then proceeded.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego County, California on October 29, 1973.

/s/ Kenneth V. Lauher Jr.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER.

On reading the verified complaint of Plaintiff on file herein together with the declarations and exhibits attached thereto, and the memorandum of points and authorities submitted therewith, and it appearing to the satisfaction of the court that this is a proper case for granting an order to show cause and a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint is granted, great and irreparable injury will result to Plaintiff before the matter can be heard on notice.

Now, THEREFORE, IT IS HEREBY ORDERED that the above-named Defendants, and each of them, appear before this court in the Department #11 thereof at the San Diego County Courthouse, 220 West Broadway, City and County of San Diego, California on the 12 day of December, 1973 at the hour of 1:30 P. M., then and there to show cause if any they have why they, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, should not be enjoined and restrained during the pendency of this action from causing, instigating, furthering, participating in, or carrying on picketing on the Plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, H Street and I Street in Chula Vista, California.

IT IS FURTHER ORDERED that pending the hearing and determination of said order to show cause, the Defendants, and each of them, their officers, agents, representatives, members and all others acting for, on behalf of, or in concert with them,

or any of them, shall be and they hereby are restrained and enjoined from doing any of the acts hereinabove set forth in the order to show cause.

Dated: Oct. 29, 1973.

(Illegible)

Judge of the Superior Court.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.
In and for the County of San Diego.

SEARS ROEBUCK & COMPANY,
Plaintiff,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, and DOES 1 through 100,
Defendants.

No. 347511

DECLARATION OF ELBRIDGE G. McCONNELL IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE.

I, Elbridge G. McConnell, declare and say:

I am the Security Manager of the retail department store owned by Plaintiff located at 555 5th Avenue, Chula Vista, California.

On October 24, 1973, at about 4:00 p.m., I was called to the customer service counter of the store. When I arrived at the counter two men introduced themselves to me as business representatives of the Carpenters' Union. One of the two men told me his name was Dallas Roose, and I believe that the other man was introduced as Floyd Cain. Mr. Roose asked me who was doing the work of remodeling the women's fashions department of the store. I told him it was being done by employees of Plaintiff. He asked if he could talk to someone at the store about members of the Carpenters' Union doing the work of remodeling at the store. I told the two business representatives that they should speak to the Store Manager, Mr. J. L. Ochoa, about that subject. I then took the two men to Mr. Ochoa and introduced them to him.

On October 26, 1973, at about 8:30 a.m., I was told that five pickets were about to enter the parking lot of the Plaintiff's

Chula Vista Store. I went to the parking lot areas and saw five pickets patrolling on the store parking lot areas immediately adjacent to the walkways next to the store building. Each picket carried a sign which read in substance:

I am an AFL-CIO Picket.

Sanctioned by the Carpenters' Trade Union.

The pickets were walking in the store parking lot next to the walkways on the west, north, and east side of the store building.

I and my assistant, Dean Cochran, contacted each of the five pickets. We told each of the pickets that they were on the private property of the Plaintiff, and that they did not have permission to picket on that private property. We told each of them that the sidewalks on the outer perimeter of the store parking lot fronting 5th Avenue, H Street, and I Street were public sidewalks. We asked each of the pickets to leave the property of Plaintiff, and suggested that they continue their picketing on the public sidewalks abutting the Plaintiff's property. Three of the five pickets left the private property of the Plaintiff when first requested and began picketing on the public sidewalks on 5th Avenue and H Street. The other two pickets did not leave until about five minutes after they were told to do so, but then joined the other three pickets and also patrolled on the public sidewalks on 5th Avenue, and H Street.

After all five pickets had left the Plaintiff's property, I observed one of the pickets go to a public phone booth. Shortly thereafter I observed that same picket leave the phone booth and approach each of the other pickets.

At about 9:30 a.m. on the same day, October 26, 1973, I observed the five pickets return to the private property of the store and again patrol with the picket signs on the parking area immediately adjacent to the walkways on the west, east, and north sides of the store. At about that same time, I saw an automobile drive into the parking area, stop, and one of the passengers spoke to the pickets. The automobile parked on a

parking roadway adjacent to the walkway on the west side of the building. I recognized one of the men in it as the Carpenters' business representative with whom I had spoke two days' before, Mr. Roose.

I approached the automobile and spoke with Mr. Roose. I told him that his pickets were on private property and requested that he direct them to leave the plaintiff's property and picket on the public sidewalk. Mr. Roose said that the parking area of Plaintiff's store was a public thoroughfare and his pickets did not have to leave. I again requested that the business representatives remove the pickets from the private property of Plaintiff. Mr. Roose then said that the pickets would not leave the store property unless legal action compelled them to leave.

Pickets remained on the store property throughout the remainder of the business day on Friday, October 26, 1973, and picketing was conducted on the store property at the same locations as referred to above during store business hours on Saturday, Sunday, and today, October 27, 28, and 29.

Posted at numerous locations in the parking lot of the Sears Chula Vista Store are signs stating that solicitation and distribution of handbills is prohibited without prior permission of the store manager. These signs have been conspicuously posted since at least 1967. The policy of Sears concerning solicitation and distribution as posted has been enforced since I have been employed by Plaintiff. Plaintiff has permitted solicitation and distribution of literature on its property only in a few cases; the only instances of permitted solicitation and distribution on Plaintiff's property have been involving the Lion's Club white cane drive, Salvation Army at Christmas only, and the League of Women Voters for voter registration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 1973, at San Diego, California.

/s/ ELBRIDGE G. MCCONNELL
Elbridge G. McConnell

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF J. L. OCHOA IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

I, J. L. OCHOA, declare and say:

I am the Store Manager of the Chula Vista retail store of Sears Roebuck & Company. I have held that position since October of 1965. This store opened for business in February of 1966. Sears Roebuck & Company has owned the property on which the store and parking facilities are located since prior to my becoming manager in October of 1965.

The Sears Roebuck & Company retail store is the only retail operation conducted on the property depicted in Exhibit "A" to the complaint which is filed herein. The property is surrounded on three sides by public sidewalks and public streets. On the fourth side of the block there are private residences separated from the store by a concrete block wall. The store contains approximately 250,000 square feet. The parking lot contains approximately 1,000 spaces for the parking of automobiles. The parking lot is maintained and controlled solely for the use of customers of Sears Roebuck & Company.

The pedestrian walkways and sidewalks in and around the parking lot and immediately adjacent to the store are maintained solely for the use of customers of Sears Roebuck & Company. There are "Stop" signs located on the sidewalk and parking lot. These "Stop" signs are identical in appearance to those used by the City of Chula Vista on the adjacent public streets. These "Stop" signs were purchased at my direction by Sears Roebuck & Company and were installed at the Company's expense. They are owned and maintained by Sears Roebuck & Company. Additionally, the Company has purchased and installed "No Parking" signs along the curb edge of the side-

walk adjacent to the store. I do not believe these signs are identical in appearance to those utilized on the public streets by the City of Chula Vista. All of these signs are the property of Sears Roebuck & Company and were purchased and installed at the Company's expense approximately two to three years ago.

Additionally, a United States Post Office mailbox is located on the sidewalk adjacent to the store. Soon after the store opened the Post Office requested permission of Sears Roebuck & Company to place one mailbox on the sidewalk. Sears Roebuck & Company granted permission for that mailbox to be placed on the sidewalk for the convenience of its customers. The United States Post Office owns and maintains that mailbox.

The curbs adjacent to the sidewalks surrounding the store are painted red with the exception of a limited area on the rear portion of the store which is yellow and marked for "Fifteen Minute Parking". The "Fifteen Minute Parking" area is for Sears Roebuck & Company customer pickup. Sears Roebuck & Company painted and maintains these curbs.

In the general vicinity of the Chula Vista store there are various other retail businesses. All of these businesses are separated from the Sears Roebuck & Company retail store by public sidewalks and streets. Each of them maintains, or have maintained for them, their own separate parking facilities for the benefit of their customers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 1973 at San Diego, California.

/s/ J. L. Ochoa
J. L. Ochoa

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF FLOYD CAIN

I, FLOYD CAIN, declare:

I am a business representative for the San Diego District Council of Carpenters and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Local 1571 is a labor organization which represents its members with regard to wages, hours and working conditions.

I have been a member of Local 1571 which is a carpenter's union affiliated with the District Council, since 1951 and I have been a business representative of the District Council since May, 1973.

On or about October 28, 1973, one of the members of the District Council told me that Sears Roebuck & Company was performing carpenters work in their Chula Vista store. It is part of my job as a business representative for the District Council to insure that all work performed within the carpenter classification as that term is used in our International Constitution and our Collective Bargaining Agreement is performed pursuant to dispatch from the hiring union halls named by the District Council and its local affiliates.

Accordingly, I viewed the premises of the Sears Roebuck & Company store at Chula Vista on October 24, 1973, to determine whether or not such work was being performed. At that place and time I observed the erection of platforms and other wooden structures by persons who had not been dispatched from our hiring halls. All of the work which I observed is covered by our master agreement by building construction in the Building Trades Council of San Diego County and all other work falls into the journeymen carpenter classification.

Later that same day I met Joe Ochoa, manager of the Chula Vista store. I introduced myself and explained to him that the work being performed was carpenter work and that the particular carpenter at the job had not been dispatched by our hiring halls and that other workers performing other work at their store were clerical workers in the store by their own admission.

I was accompanied by Dallas Roose, business representative for the District Council and financial secretary of Local 1490, another local affiliate of the District Council.

Mr. Roose and I asked Mr. Ochoa either to contract the work through a bona fide building trades contractor who would in turn utilize qualified and dispatched carpenters to perform the carpenter work in question; or in the alternative to sign a short form agreement which would require Sears to abide by the terms of the master contract agreement with regard to the dispatch and use of carpenters in completing the construction on that job.

Mr. Ochoa said he would look into that matter and let us know the very next day.

Before leaving we also pointed out that many of our members patronized that store and lived in that area and were out of work and we requested his cooperation.

Mr. Ochoa never advised me of their position and although I made a minimum of two telephone calls on the following day, none of them were returned and I was ultimately advised that Mr. Ochoa would be out of town until the following Monday.

Upon being so advised, I reported this information to Dallas Roose. The decision was then made by Mr. Roose to authorize the publicizing by the District Council of the fact that Sears Roebuck & Company was undercutting prevailing standards for the employment of carpenters by the establishment of pickets at the premises of the store.

Subsequently, authorization was obtained by Mr. Roose for sanction by the San Diego County Building Trades Council

sanctioning the picketing by the District Council as bona fide, legitimate and proper in all respects under the standards for pickets set by the AFL-CIO and its affiliates throughout the country.

Mr. Roose and I have relocated the pickets in accordance with the temporary restraining order as soon as we learned it had been issued. However, the pickets are now anywhere from one hundred-fifty to two hundred feet from the Sears building at which the work is being performed and in some cases much farther than that.

On Thursday, November 8, 1973, I took pictures pursuant to direction of legal counsel, from various angles of the Sears building and appurtenant structures including state traffic signs and a U. S. Mailbox, all of which are located on the sidewalk around the Sears store. Copies of those pictures are attached hereto, marked Exhibits "A" through " ", and incorporated herein by this reference.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 12, 1973.

/s/ Floyd Cain
Floyd Cain

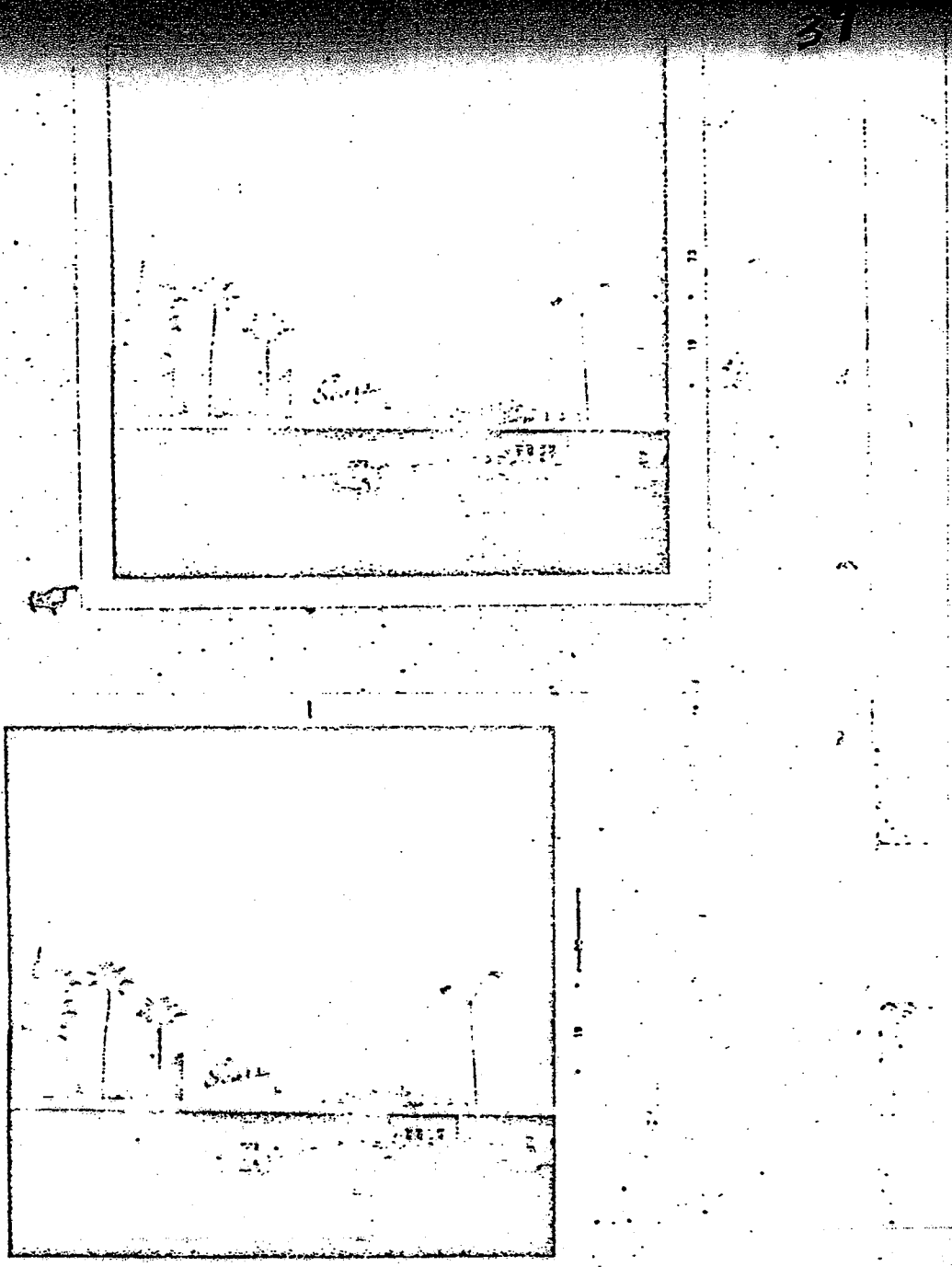
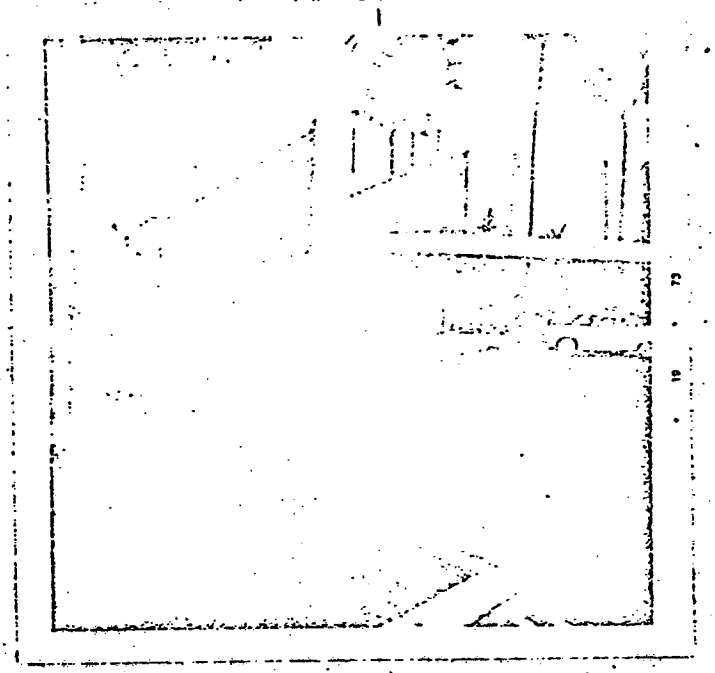


EXHIBIT "A"



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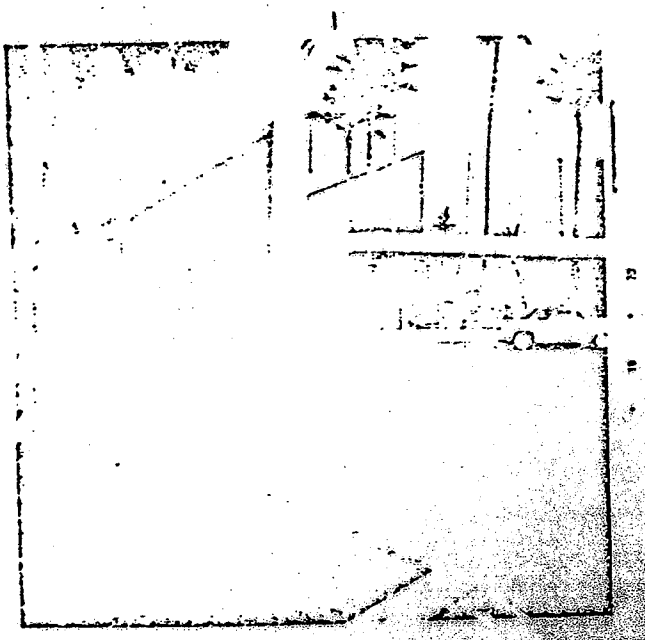

41

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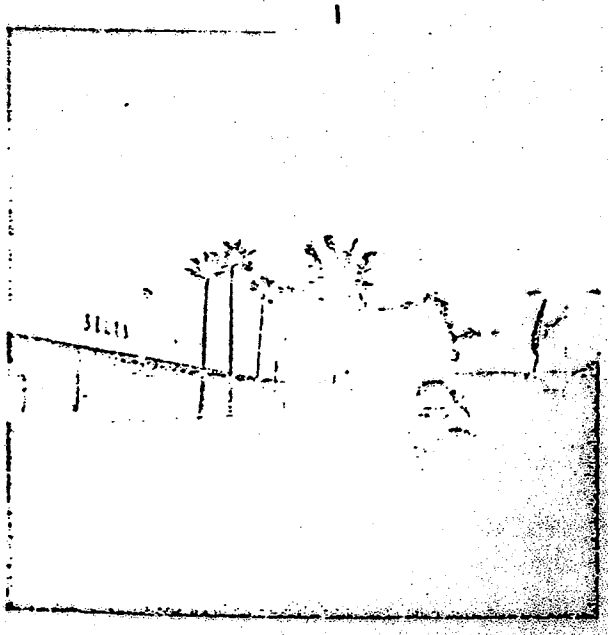

42

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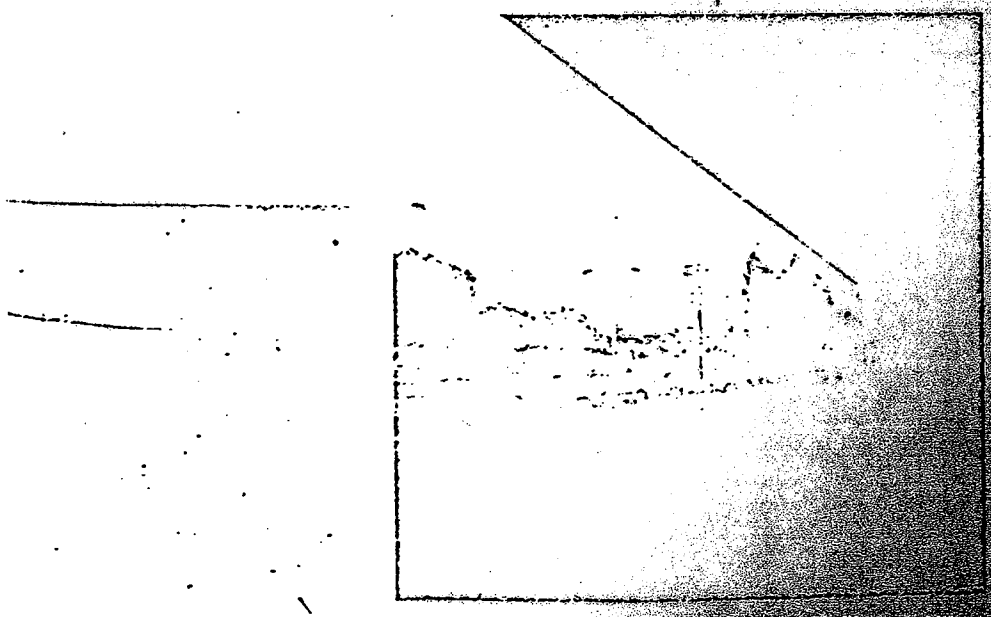

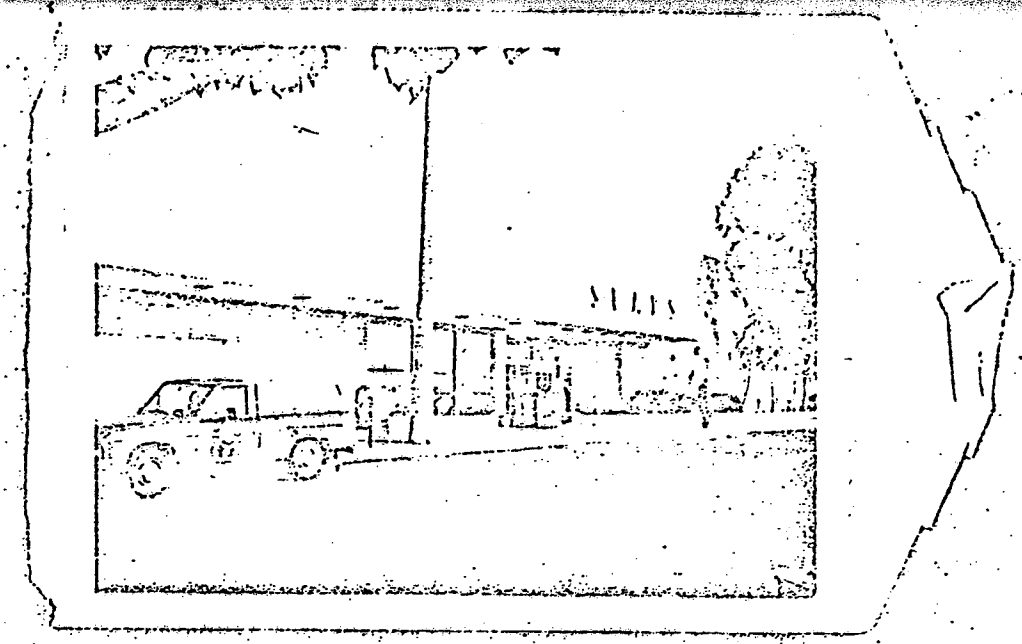

43

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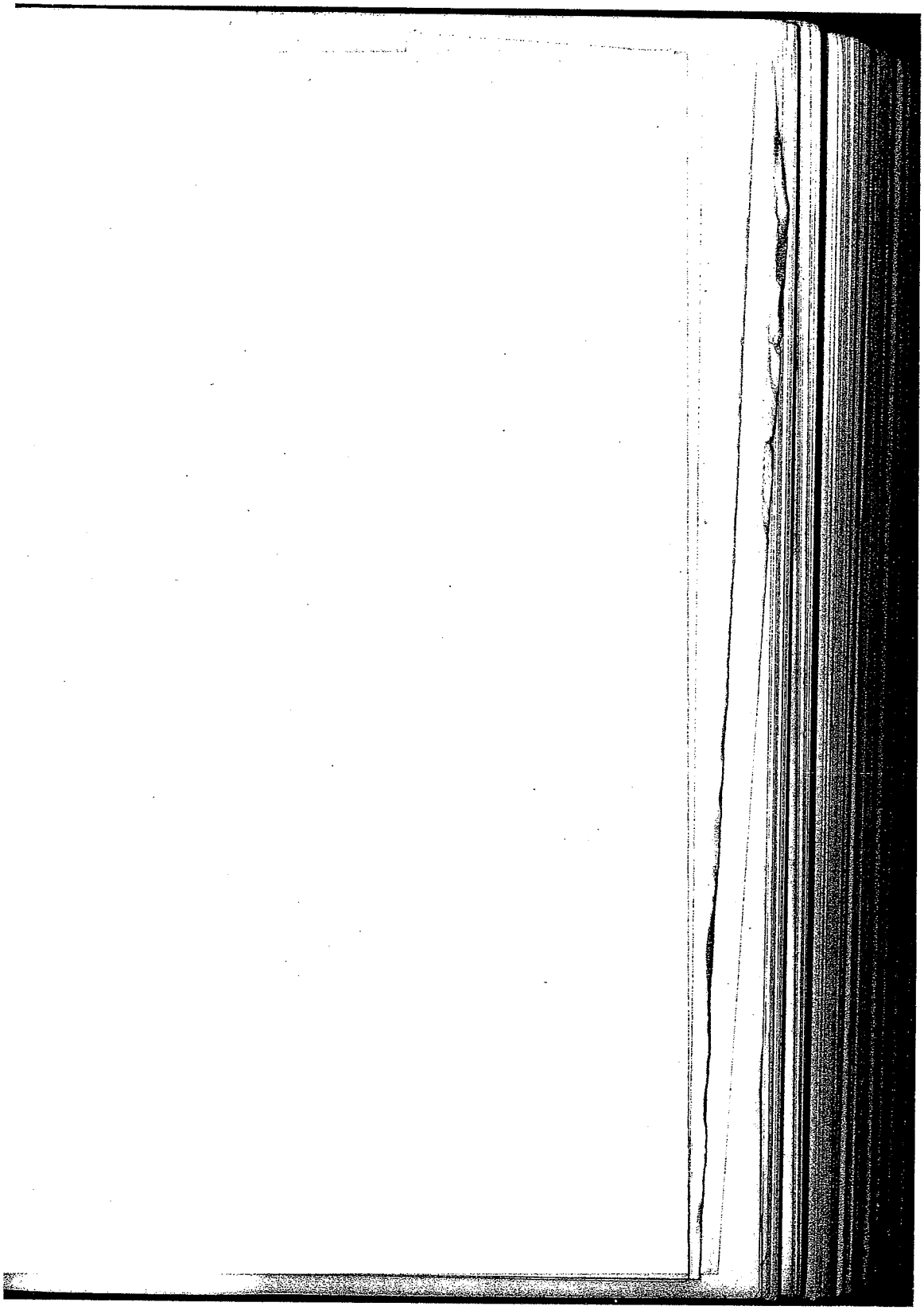

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DEMURRER TO COMPLAINT.
(C. C. P. Section 430)

Defendant, SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS demurs to the Complaint herein on the following grounds:

I.

The Court has no jurisdiction over the subject matter of this action.

(*C. C. P.* Section 430.10(a))

II.

The Complaint does not state facts sufficient to constitute a cause of action.

(*C. C. P.* Section 430.10(f))

WHEREFORE, Defendant prays that its Demurrer be sustained, that the Temporary Restraining Order be vacated, and that Defendant have judgment for its costs and for all other proper relief.

I hereby certify that this Demurrer is filed in good faith, is not filed for the purpose of delay, and that in my opinion the grounds are well taken.

Dated: November 12th, 1973.

BRUNDAGE, WILLIAMS & ZELLMANN

By: /s/ Jerry J. Williams
Jerry J. Williams
Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.
* * (Caption—347511) * *

DECLARATION OF DALLAS V. ROOSE

I, DALLAS V. ROOSE, declare:

I am a business representative for the San Diego District Council of Carpenters (hereinafter referred to as the District Council of Carpenters) and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

On October 29, 1973, I was informed that a temporary restraining order was issued against the District Council of Carpenters, said order requiring that I remove the picket line located at Sears and Roebuck, which is located in Chula Vista, to the outside public sidewalk which encircles the Sears Store.

I immediately complied with the terms of the Temporary Restraining Order.

Because the picketing was restricted to the outer sidewalk, the picketing became totally ineffective.

For that reason, I had to totally withdraw the pickets from the Sears Store. From November 12, 1973, to the present, there has been no further picketing of the Sears Store in Chula Vista by the District Council of Carpenters.

The only way our picketing can be effective is by placing said pickets as close to the non-union work as possible. This means that our pickets must be allowed *on* the sidewalk immediately adjacent to the building which houses the Sears Store.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 15, 1973.

/s/ Dallas V. Roose
Dallas V. Roose

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

SUPPLEMENTAL DECLARATION OF J. L. OCHOA—
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION.

I, J. L. OCHOA, declare and say:

I am the Store Manager of the Chula Vista retail store of Sears Roebuck & Company. I have held that position since October of 1965. This store opened for business in February of 1966. Sears Roebuck & Company has owned the property on which the store and parking facilities are located since prior to my becoming manager in October of 1965. As Store Manager of the Chula Vista retail store I am fully cognizant of its operations and labor relations.

Subsequent to the service of the temporary restraining order on October 29, 1973, issued by this Court, on the Defendant, San Diego County District Council of Carpenters, the pickets on October 30, 1973 complied with the terms of the temporary restraining order by removing themselves to the public sidewalks on the perimeter of the plaintiff's private property. Those pickets continued to picket on the public sidewalks through November 12, 1973. Since that date they have not returned.

There are no walls, fences, berms or other obstructions adjacent to the public sidewalks which would result in the pickets not being visible to customers, employees or suppliers of Sears Roebuck & Company. In fact, the pickets, while located on the public sidewalk, are in complete view of all customers, employees and suppliers entering or leaving the private property of Sears Roebuck & Company through one of the driveways.

It has come to my knowledge that the picketing of defendant on the public sidewalks in compliance with the temporary restraining order has resulted in the following incidents:

1. On November 2, 1973 a telephone repairman dispatched by Pacific Telephone and Telegraph Company refused to enter upon the private property of Sears Roebuck & Company as a result of defendants pickets.

2. On November 5, 1973 a delivery truck dispatched by Maremont Marketing refused to cross defendant's picket line on the public sidewalk. This delivery truck was to deliver mufflers and other automotive parts to the Sears Roebuck & Company store.

3. On November 12, 1973, a contractor, Cal-Gon, was on the private property of Sears Roebuck & Company installing a vapor recovery system on the gasoline dispensing pumps located on the Sears Roebuck & Company property. As a result of defendant's pickets on the public sidewalks the employees of that contractor refused to make such installation and left the premises of Sears Roebuck & Company.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 16, 1973 at San Diego, California.

/s/ J. L. Ochoa
J. L. Ochoa

Reporters' Transcript of November 16, 1973, at pages 17, and 29-30:

[17] to read the pickets—or pay attention to what's on the picket sign in terms of entering or ingress or egress from the shopping center itself.

But more to the question of whether or not Sears Roebuck is dedicated to the public use is evidenced by pictures attached in the affidavit of Mr. Cain, a business agent for the District Council of Carpenters. One picture clearly demonstrates the post office—or, pardon me, a mailbox right out there on the sidewalk, which is immediately adjacent to the building. The sidewalk is a rather wide sidewalk. I have pictures here to demonstrate to your Honor, if you would like me to send those up.

David, I have another batch.

THE COURT: Here you are.

MR. MANNING: He's got one Polaroid of the mailbox. We couldn't get it duplicated. The point we are making, your Honor, is that certainly plaintiff was not asserting that only customers of Sears Roebuck come in and use that post office box. I think that various of the incidents involved here, namely, the stop sign, does have the same shape. I'm sure the customers don't know whether or not, by and large, as laymen, whether or not Sears maintains it or whether the public maintains it.

But the fact does remain that they are inviting the public at large to shop, to mill around or even to mail a letter for that purpose. So I think we are to the point that. . . .

* * * * *

[29] . . . or the greatest amount of people who are going to use the services of someone with which the union has a dispute, a bargaining dispute or a labor dispute of any type. These gentlemen have stood on the picket. They have seen that the people cannot see their signs. They are prepared to testify to that and they are prepared to testify concerning various other delivery trucks that don't see the signs at all, that can go through with-

out, you know, seeing the signs because of the traffic situation. I want that clear to the Court.

Thank you.

THE COURT: All right. Like all courts I have to follow the law. I don't make the law in the lower court. I think Central Hardware is an impressive case that seems to set out the situation.

What I don't like about it, I can conceive of a situation, as I told you earlier, where you could have a store like Sears Roebuck with a half mile of public parking, which would make picketing ineffective and I think really destroy the First Amendment rights.

When I was asking the question about how many doors you had, your diagram here that you give just shows one door, and I thought that maybe we could reach a point where you could put just one picket up there by the door and limit it.

MR. GEERDES: I believe that's just the loading dock, your Honor.

THE COURT: I think that I will have to find that this [30] is not industrial property; that P. C. 552.1 limits this right to enter to industrial property; that it is private property, and that a preliminary injunction will be granted. Picketing will be limited to the public sidewalks of Sears Roebuck.

Again I say that I don't like the decision, but I am bound by it. I think that there should be some latitude given when there is size, but your citations you give me indicate that size is not the controlling factor in these cases.

MR. GEERDES: Your Honor, would a minimum bond be acceptable?

THE COURT: I suppose—

MR. GEERDES: There is no evidence.

THE COURT: No evidence as to violation. Everything has been quiet, orderly. What do you want? A thousand dollars?

MR. GEERDES: Fine. We will post it. Thank you.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

UNDERTAKING UNDER SECTION 529 C. C. P.

WHEREAS, the above named Plaintiff desires to give an undertaking for Preliminary Injunction as provided by Section 529 C. C. P.

NOW, THEREFORE, the undersigned Surety, does hereby obligate itself, jointly and severally, to the above named Defendants under said statutory obligations in the sum of ONE THOUSAND AND NO/100 Dollars ($1,000.00).

In testimony whereof, the said Surety has caused its corporate name and seal to be hereunto affixed by its duly authorized officer.

Signed, sealed and dated this 20th day of November, 1973.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
Bond No. 8716383

The premium charge for this bond is $20.00 Dollars per annum.

By /s/ Robert E. Mark
Robert E. Mark
Attorney-in-Fact

STATE OF CALIFORNIA, }
COUNTY OF SAN DIEGO, } ss.

On November 20th, 1973, before me, the undersigned, a Notary Public of said county and state, personally appeared ROBERT E. MARK, known to me to be the Attorney-in-Fact of the corporation that executed the within instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

/s/ Eunice Bolash

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.
* * (Caption—347511) * *

PRELIMINARY INJUNCTION

Pursuant to this Court's order granting a preliminary injunction, and the plaintiff's filing an undertaking approved by this Court in the sum of $1,000.00;

IT IS HEREBY ORDERED that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

Dated this 21 day of November, 1973.

/s/ J. A. Kilgarif
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

ORDER GRANTING PRELIMINARY INJUNCTION

The above matter came on regularly for hearing on November 16, 1973 in Department 6 of the above entitled Court pursuant to an order to show cause why a preliminary injunction should not issue. Gray, Cary, Ames & Frye, by David B. Geerdes, appeared as counsel for plaintiff, and Brundage, Williams & Zellman, by Thomas B. Manning, appeared as counsel for defendant, San Diego County District Council of Carpenters.

On proof being made to the satisfaction of the Court, and good cause appearing therefore;

IT IS HEREBY ORDERED that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendant, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

IT IS FURTHER ORDERED that a preliminary injunction be issued as hereinabove set forth, upon plaintiff's filing and undertaking in due form, to be approved by this Court, in the sum of $1,000.00.

Dated this 21 day of November, 1973.

/s/ J. A. Kilgarif

Judge of the Superior Court

Reporter's Transcript of January 4, 1974, at pages 14-16 [14] . . . which I addressed myself and which are relevant.

With regard to the Penal Code provision, I did mention that since it is relied upon as legislative support for the Court's decision in the *Schwartz-Torrance Investment Corporation* case.

I can't think of any other matter.

THE COURT: The first question in my mind was the first problem, and that is it's preempted by the NLRB. If that is true, why don't you invoke the powers of the NLRB by putting the matter in their hands, if it is so preempted?

MR. WILLIAMS: There is no way of doing that, your Honor.

THE COURT: Then who acts? If the NLRB cannot act, why can't this Court act? This is the problem. You tell me that it's preempted but now you tell me they cannot act. The question is if they can't act, who does act?

MR. WILLIAMS: Well, —

THE COURT: And I am not talking about the merits; I am merely talking about jurisdiction.

MR. WILLIAMS: Yes, your Honor.

THE COURT: I would agree with you if this were a situation where you could take this case and say, all right, this is the NLRB and then let them handle the merits of the case. That would be one thing. But you tell me we can't go to the NLRB, you have no jurisdiction. Therefore, nobody has anything that can be done about it. Is this what [15] you are telling me?

MR. WILLIAMS: Yes, your Honor. I am saying there is no case, there is no cause of action, that a union has a right to picket as the California Supreme Court has indicated and the employer has the right to resist that picketing.

THE COURT: I am talking about jurisdiction. I am talking about your first point. As I understand your point, the issue in this case is without the jurisdiction of this Court because the subject matter is preempted by the NLRB legislation; is that correct?

MR. WILLIAMS: No, not quite, your Honor.

I am saying that the National Labor Relations Act, supplemented by the amendatory Labor Management Relations Act, says that labor organizations have the right to picket, to engage in concerted activities, and that those rights shall not be infringed. That does not mean that we can ask the National Labor Relations Board to come into this court and resolve the injunction. We have to address ourselves to that, and that is why we are here.

THE COURT: Where does that touch the jurisdiction of the Court? I may be bound by what the National Labor Relations Act provides and its amendments, but as far as the power of the Court to act—and this is what you are challenging when you say the jurisdiction I suppose. I am wondering about that.

[16] MR. WILLIAMS: Yes.

The Supreme Court of the United States ultimately held in Garmon I and Garmon II, and we have cited Garmon II—this was the second case, 359 U. S.—ultimately held that both State and Federal Courts are without jurisdiction to act when we are dealing with rights such as picketing arguably protected by Section 7. That does not mean that the Labor Board must act or it will act. It certainly means there is no jurisdiction in either State or Federal Courts.

Was there any other question?

THE COURT: No, that was the only problem I had in my mind.

The matter will be deemed submitted.

MR. SMITH: Your Honor, could I make one short comment on the record?

The question of jurisdiction does come up by implication in the Schwartz-Torrance case. It's a shopping center admittedly, but nowhere in that decision does the Supreme Court of this State have any problem of jurisdiction to decide the constitutional merits. I could not make that representation with Logan Valley because they specifically omitted to consider that.

THE COURT: I want to review the Central Hardware case and also the Garmon case primarily before making a ruling.

(Court adjourned in this matter.)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I hereby certify that that this Reply Brief is proportionately spaced; uses a Roman-style, serif typeface (Century Schoolbook) of 14-point; and contains **6,832 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 Reply Brief 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 April 10, 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