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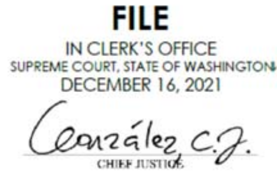
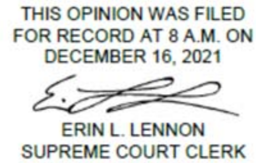
APPENDIX A





IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLACIER NORTHWEST, INC., d/b/a CalPortland, Respondent/ Cross Petitioner	NO. 99319-0
v.	EN BANC
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174, Petitioner/ Cross Respondent.	Filed: December 16, 2021

STEPHENS, J.—This case asks us to decide whether an employer's state tort claims against its truck drivers' union are preempted by the National Labor Relations Act (NLRA)[1] and whether any claims that are not preempted were properly dismissed below.

[1] 29 U.S.C. §§ 151–169.

Glacier Northwest Inc.[2] claims the International Brotherhood of Teamsters Local Union No. 174 (Local 174) is liable for concrete product loss during a strike and for an alleged misrepresentation by a union representative that Glacier claims interfered with its ability to service a concrete mat pour. The trial court ruled the strike-related claims were preempted by the NLRA and granted summary judgment for Local 174 on the misrepresentation claims. Glacier appealed, and the Court of Appeals reversed on the preemption issue but affirmed the trial court's dismissal of the misrepresentation claims. We granted review and accepted amicus curiae briefing from the American Federation of Labor and Congress of Industrial Organizations.

Today we affirm in part and reverse in part, remanding this case to the trial court with instructions to dismiss Glacier's claims consistent with this opinion. We conclude the NLRA preempts Glacier's tort claims related to the loss of its concrete product because that loss was incidental to a strike arguably protected by federal law. We also affirm the dismissal of Glacier's misrepresentation claims because the union representative's promise of future action was not a statement of existing fact on which those claims can be properly based and because the statement was not a proximate cause of Glacier's losses.

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[2] Glacier does business as "CalPortland." Clerk's Papers at 1. We refer to the company as "Glacier," following the lead of the parties and the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

Glacier is a Washington corporation that sells and delivers ready-mix concrete to businesses in Washington. According to its complaint, Glacier creates custom batches of concrete for each job, mixing various materials to customer specifications. The materials are first mixed in a hopper or a barrel, then moved into a ready-mix truck that continues to mix the materials until the concrete is delivered to the customer. Concrete begins to harden as soon as 20 to 30 minutes after the mixing stops, so Glacier must deliver the concrete on the same day it is mixed or else it becomes useless. And if the concrete remains in the ready-mix trucks long enough, it will eventually harden and damage the truck's revolving drum.

Glacier employs approximately 80 to 90 truck drivers to deliver concrete, and Local 174 is the exclusive union representative for Glacier's truck drivers in King County. Glacier's lawsuit stems from Local 174's conduct both before and after the ratification of a new collective bargaining agreement (CBA) between Glacier and Local 174 on August 18, 2017. On August 11, 2017, during negotiations for the new CBA, Glacier truck drivers went on strike by stopping work, and this strike resulted in the loss of some of Glacier's concrete. Just after the CBA was ratified and the strike ended on August 18, 2017, a Local 174 representative allegedly misrepresented whether Glacier drivers would service a job that was rescheduled to August 19 after the August 11 strike. We examine each claim in turn.

I. August 11, 2017: Work Stoppage and Concrete Loss

On August 11, 2017, Glacier had a number of scheduled deliveries. Around 7:00 a.m. that morning, drivers at Glacier's Seattle, Kenmore, and Snoqualmie facilities engaged in what Glacier describes as a "sudden cessation of work." Clerk's Papers (CP) at 6. Glacier alleges this work stoppage occurred with truck drivers at every stage of the delivery process, including trucks waiting to be loaded, being initially loaded with concrete, driving en route to delivery sites, and already at sites delivering the concrete. A declaration of Adam Doyle, a dispatch coordinator, stated that drivers were scheduled to start work that day between 2:00 a.m. and 7:00 a.m. After learning of the strike, Doyle announced over the radio that "'I've just been informed to advise you that we are obligated to finish any job that we have started.'" CP at 208. Doyle further explained the normal process for drivers who return their trucks after making a concrete delivery, stating that the driver "offloads his leftover concrete into a reclaimer or into an ecology block form. He then rinses out his drum, and he gets back in line for his next load." CP at 208. But on that day, Doyle explained that drivers all brought their trucks back between 7:00 a.m. and 7:45 a.m., and he noted that many of the trucks were left with partial or full loads of concrete. Justin Denison, the ready-mix concrete manager for all facilities in Washington, was present at the Duwamish facility when the strike occurred. He stated that at least 16 drivers returned to the site with trucks fully loaded with concrete. While 7 of these drivers gave Glacier notice of the return of the trucks, 9 drivers left trucks without notice to Glacier.

Glacier alleges Local 174 had coordinated with truck drivers to purposely time the strike when concrete was being batched and delivered in order to cause destruction of the concrete. Glacier further alleges its drivers and Local 174 were fully aware that the concrete was perishable. As a result, Glacier had to take mitigation measures to dispose of the batched concrete on site through "constructed bunkers" and to clean out the trucks to prevent any damage to the trucks or to its plant, equipment, and wastewater system. CP at 8.[3] Glacier alleges the concrete was destroyed when it was left to harden, and Glacier had to hire trucks, break up the concrete, and haul it off-site. Glacier was unable to complete its deliveries that day. None of the trucks carrying the concrete were damaged because Glacier was able to take the concrete out of the trucks before it hardened.

Based on this conduct, Glacier wrote warning letters to 16 drivers, citing violation of Glacier's work and safety rules. However, Glacier withdrew the

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[3] As the Court of Appeals noted, Denison elaborated on what the strike looked like at the Duwamish facility:

> I was present in the yard when the loaded trucks came rolling back in on August 11. . . . It was complete chaos. We had to offload the concrete from the barrels before it "set up." We had to dispose of the concrete in a timely manner to avoid costly damage to the mixer trucks and in a manner so as not to create an environmental disaster. We had to reorganize material storage bunkers into which we offloaded the concrete. We had to deal with settling ponds, treatment of material and filter presses to handle hundreds of cubic yards of concrete. It took us 5 hours to properly handle and clean-up the mess created by the drivers.

CP at 202–03.

letters issued to 7 of the drivers who had given notice of their abandonment or who took steps to avoid damage to the trucks.

II. August 19, 2017: Mat Pour Cancellation

The second set of claims in Glacier's complaint involves a statement by Local 174 Secretary Treasurer Rick Hicks concerning the "Vulcan Project," a construction project in Seattle's South Lake Union for which GLY Construction Inc. was the general contractor. CP at 10. Glacier was scheduled to perform a mat pour at the Vulcan Project on August 12, 2017.[4] However, due to the strike on the morning of August 11, Glacier was forced to postpone the mat pour.[5] While Glacier rescheduled the mat pour for August 19, it did not schedule drivers for work that day because it was unclear how long the strike and bargaining for the new CBA would last.

On August 18, Glacier and Local 174 agreed to the terms of the new CBA, which was ratified after a vote by the drivers at approximately 11:00 a.m. The new

[4] A mat pour involves delivery of a large amount of concrete to pour a concrete slab that acts as the foundation for a commercial building. Mat pours are a substantial undertaking. They require a significant labor force to batch the concrete, move it into ready-mix trucks, and deliver the concrete to the site. They further require personnel at the delivery location, including subcontractors to pump the concrete into the foundation and inspect the foundation, as well as police officers. Mat pours require a permit from the city of Seattle, and they usually take place on Saturday nights to minimize traffic disruption.

[5] Local 174 had initially considered a plan to strike on August 12. But after a conversation between Ted Herb and Rick Hicks, Local 174 decided to strike on August 11 instead to avoid unintentional harm to GLY.

CBA was retroactive, encompassing the period of August 1, 2017 through July 31, 2021. As the result of the CBA ratification, the strike ended and Local 174 sent out a press release, appearing on Facebook and Local 174's website, stating that the strike was over and the drivers were back to work. In light of the ratification of the agreement, Glacier and GLY discussed scheduling the Vulcan Project mat pour early the next day, Saturday, August 19.

But there were rumors that drivers would not work on August 19. Because of these rumors, both Glacier and GLY wanted assurances from the union that the mat pour would be serviced if scheduled. At Glacier's request, Ted Herb, GLY president, called Hicks around 12:35 p.m. on August 18 to discuss whether the drivers would be available that night and early the next morning to service the mat pour. Herb alleged that Hicks told him that "'[t]he drivers have been instructed to respond to dispatch'" and that "'[w]e have specifically instructed the drivers to respond to dispatch.'" CP at 1648. After Herb told Glacier of Hicks's assurances, Glacier remained concerned about drivers servicing the mat pour, and it requested that Herb call Hicks again. Herb refused this request, as he was confident in Hicks's response because Hicks had given him the same answer twice. Glacier never spoke directly with Hicks, and Hicks denies making these statements.[6]

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[6] In Hicks's deposition, he denied providing any instructions to drivers about when to return to work and specifically denied telling Herb that he had told drivers to report to work on Saturday, August 19. A driver testified that Hicks told the members to go back to work on Monday, August 21. For purposes of summary judgment, we view the facts in the light most

Glacier and GLY allege they reasonably relied on Hicks's statement that the drivers would service the mat pour to dispel the rumors that drivers were not working that night. Glacier and GLY decided to move forward with the mat pour. Apparently consistent with Glacier's past practice in calling drivers for weekend work, Glacier's dispatch team called drivers before 5:00 p.m. to tell them of their work assignments and that they would be in violation of their contract if they failed to report; Glacier left voice mail recordings for those who did not answer the phone. It also provided a "call-out recording" with start times. Just before the job was due to be serviced that night, however, Glacier found out that not enough drivers were reporting for the mat pour. While 40 to 50 drivers were needed to complete the job, only 22 reported. By 1:00 a.m., only 11 drivers were on-site ready to deliver concrete. Glacier was forced to cancel the mat pour at 1:15 a.m., and it incurred losses in labor costs and approximately $100,000 paid to GLY for the cancellation. Glacier issued disciplinary warning letters to the 39 drivers who were called but did not report, citing failure to service the mat pour and thereby "engaging or participating in any interruption of work or production." *See, e.g.*, CP at 1696. Glacier was able to reschedule the mat pour, which was completed the next week.

III. Procedural History

On December 4, 2017, Glacier filed a complaint for damages in King County Superior Court against Local 174, alleging six claims. Based on the work stoppage

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favorable to Glacier as the nonmoving party and thus accept as true that Hicks made the alleged statements.

on August 11, Glacier sued Local 174 for conversion and trespass to chattels, tortious interference with contract, and civil conspiracy to destroy its concrete. Glacier also sued Local 174 for negligent misrepresentation, fraudulent misrepresentation, and intentional interference with contract based on Hicks's statements to Herb.

Soon after, Local 174 filed a complaint with the National Labor Relations Board (Board), alleging Glacier committed unfair labor practices under 29 U.S.C. § 158(a)(1) and (3) by retaliating against Local 174 members for engaging in a protected strike; threatening to file, and then filing, an "objectively baseless federally preempted lawsuit"; and abusing the discovery process to obtain information about protected activity. CP at 136.

Local 174 moved to dismiss all of Glacier's tort claims for lack of subject matter jurisdiction and failure to state a claim on which relief could be granted, arguing the claims were all preempted by 29 U.S.C. §§ 157, 158 (sections 7 and 8). The trial court agreed with Local 174 as to the three claims arising from the events on August 11, concluding that while those claims involved some economic harm when the concrete was destroyed, the drivers' conduct did not "touch[] an interest so deeply rooted in local feeling and responsibility, such as vandalism or violence, that it clearly falls outside the protection of [the] NLRA." 2 Verbatim Report of Proceedings (VRP) (Apr. 19, 2018) at 79–80. But the court refused to dismiss the remaining claims arising from the August 19 events because they involved conduct occurring after the ratification of the CBA on August 18, and were therefore not subject to the protections and

prohibitions federal law provides during the collective bargaining period.

In light of the trial court's ruling on the motion to dismiss, Local 174 moved for summary judgment on the claims arising from the August 19 events. The trial court granted summary judgment dismissal of those claims primarily on state law grounds. First, as to the merits of the misrepresentation claims, the trial court ruled that the undisputed facts showed Glacier could not have reasonably relied on Hicks's statements about drivers responding to dispatch; the drivers were not required to respond to dispatch under the terms of the CBA because Glacier had not provided the requisite notice nor had it complied with seniority requirements. For the intentional interference with contract claim, the trial court concluded Hicks's statement was not intended to breach or terminate Glacier's contract with GLY, and the statement did not proximately cause interference because the drivers were not obligated under the CBA to service the mat pour. As an alternative basis for dismissal, the trial court ruled that these claims were preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), because the trial court would have to interpret the CBA in analyzing the three claims.

Glacier appealed, and the Court of Appeals reversed the dismissal of the destruction of property claims but affirmed the dismissal of the misrepresentation claims. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 15 Wn. App. 2d 393, 475 P.3d 1025 (2020). The Court of Appeals recognized the applicable preemption standard from the leading case, *San Diego Bldg. Trades Council v.*

Garmon, 359 U.S. 236, 246, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). The court concluded that while the state claims involving conduct arguably protected by the NLRA are preempted, there was a "'clear determination'" from the United States Supreme Court and the Board that the destruction of concrete was unprotected conduct under section 7. *Glacier*, 15 Wn. App. 2d at 408 (quoting *Garmon*, 359 U.S. at 246). The Court of Appeals therefore reversed the trial court and concluded the claims arising from events on August 11, 2017 were not preempted.

Next, the Court of Appeals affirmed the summary judgment dismissal of the three claims arising out of Hicks's alleged misrepresentation. The Court of Appeals disagreed with the trial court's alternative ruling that these tort claims were preempted by section 301 of the LMRA, holding the claims did not necessarily require analysis of the CBA. *Id.* at 412–14 (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 126, 839 P.2d 314 (1992)). Nonetheless, the court affirmed summary judgment dismissal on the merits of each of these claims on state law grounds, though its reasoning differed from the trial court's ruling.

The Court of Appeals first analyzed Hicks's statement, which it recited as "'the drivers will respond to dispatch.'" *Id.* at 414. It concluded this was a promise of future performance, which is not actionable for a fraudulent or negligent misrepresentation claim. *Id.* (citing *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008)). Because both claims require a statement of existing fact, the Court of Appeals affirmed summary judgment dismissal without reaching the issues of

reasonable reliance or proximate cause, as the trial court had.

The Court of Appeals also affirmed the summary judgment dismissal of Glacier's intentional interference with contract claim. The Court of Appeals noted that Glacier did not have to prove a breach or termination of contract as a result of the misrepresentation because Washington cases recognize a section of the *Restatement (Second) of Torts* allowing recovery for tortious interference that causes a performance to be more expensive or burdensome. *Id.* at 415 (citing RESTATEMENT (SECOND) TORTS § 766A (AM. LAW INST. 1979)). But it nonetheless concluded that factual causation was not met as a matter of law because the undisputed terms of the CBA showed Glacier had not complied with the notice requirements for weekend work or the listed seniority requirements. *Id.* at 416–17. As a result, Glacier drivers had no obligation to service the mat pour when called by dispatch. The Court of Appeals concluded that "[e]ven had Hicks instructed the drivers to show up to work that night, Glacier has no evidence the drivers had any duty to comply with such an instruction." *Id.* at 417.

Local 174 petitioned for discretionary review in this court, seeking review of the Court of Appeals holding that Glacier's claims were not preempted by the NLRA. In its answer to Local 174's petition for review, Glacier cross petitioned for review of the Court of Appeals holding affirming the summary judgment dismissal of Glacier's misrepresentation claims and intentional interference with contract claim. We granted review of both Local 174's petition for review and Glacier's cross petition for review. *Glacier Nw.,*

Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, 197 Wn.2d 1001 (2021).

ANALYSIS

I. Glacier's strike-based claims are preempted because the conduct at issue is at least "arguably protected" by section 7 of the NLRA

The trial court dismissed Glacier's three claims based on the August 11 work stoppage for lack of subject matter jurisdiction under CR 12(b)(1) and for failure to state a claim under CR 12(b)(6). This court reviews whether a state court has subject matter jurisdiction de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). A court may grant a motion to dismiss for the failure to state a claim under CR 12(b)(6) when "'the plaintiff can prove no set of facts, consistent with the complaint, which entitle the plaintiff to relief.'" *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). We accept the factual allegations in the complaint as true, but we need not accept any legal conclusions stated in the complaint. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987).[7]

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[7] As the Court of Appeals recognized, both Local 174 and Glacier submitted evidence relating to Local 174's separate complaint to the Board. "While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6)." *Haberman*, 109 Wn.2d at 121. We may consider hypothetical facts supporting the complaint. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

A. *Garmon* holds that state law claims are preempted when they involve conduct "arguably" protected under section 7

Congress has the power to preempt state law based on the supremacy clause of the United States Constitution. U.S. CONST. art. VI, cl. 2. In preemption cases involving federal labor law, we have noted "our general prejudice against preemption. Federal preemption can often produce a harsh result, and we are hesitant to find no state jurisdiction absent clear congressional intent." *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 664, 880 P.2d 988 (1994). Nonetheless, we have recognized that federal labor legislation may preempt state law, and the United States Supreme Court has established theories of preemption when the federal legislation does not define the precise contours of when state law is preempted. *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 702–03, 807 P.2d 849 (1991).

Because Local 174 characterizes the work stoppage by truck drivers as a strike, the preemption theory of Glacier's property destruction claims asserted by Local 174 in this case derives from *Garmon*, 359 U.S. 236. *Garmon* concerns preemption based on sections 7 and 8 of the NLRA, protecting concerted activities in collective bargaining and prohibiting unfair labor practices respectively. 29 U.S.C. §§ 157 ("Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or

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Because we dismiss the property destruction claims as preempted as a matter of law, Local 174's motion to dismiss under CR 12(b)(6) is not converted into a summary judgment motion.

other mutual aid or protection."), 158(a)(1) ("It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.").[8] "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme." *Div. 1287, Amalg. Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Missouri.*, 374 U.S. 74, 82, 83 S. Ct. 1657, 10 L. Ed. 2d 763 (1963). And a walkout generally is a type of strike possibly protected by section 7. *E. Chi. Rehab. Ctr., Inc. v. Nat'l Labor Relations Bd.*, 710 F.2d 397, 402–03 (7th Cir. 1983); *see also Bob Evans Farms, Inc. v. Nat'l Labor Relations Bd.*, 163 F.3d 1012, 1023 (7th Cir. 1998).

The Court's recognition of preemption of state claims for damages based on sections 7 and 8 stems from the need to avoid even the potential risk of interference with the development of national labor policy under the expertise of the Board. *Garmon*, 359 U.S. at 243–44. In *Garmon*, the Supreme Court considered whether sections 7 and 8 preempted an employer's state law claim for injunction and damages

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[8] The Supreme Court has recognized two other types of preemption under federal labor law that are potentially implicated in this case. First, state claims are preempted when they involve conduct occurring during labor disputes that Congress intended to be left unregulated and "'to be controlled by the free play of economic forces.'" *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) (quoting *Nat'l Labor Relations Bd. v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971)). Second, Section 301 of the LMRA, 29 U.S.C. § 185(a), provides federal courts with exclusive jurisdiction over lawsuits involving the violation of collective bargaining agreements.

resulting from a union picketing the employer's place of business. *Id.* at 237–38. The state court had awarded damages, but no injunction, based on unfair labor practices under state tort law. *Id.* at 239. The Court noted that its role in deciding whether a state law claim is preempted is to limit the "potential conflict" between differing results of the Board and state courts in recognition that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242.

Respecting the expertise of the Board in interpreting national labor law, the Court highlighted that courts are not the proper forum for deciding whether particular conduct is subject to section 7 or section 8 in the first instance. *Id.* at 244–45. The Court therefore ruled that "[w]hen an activity is *arguably subject to* [*section*] *7 or* [*section*] *8 of the Act*, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245 (emphasis added). Because the state lawsuit alleged that the union's picketing was an unfair labor practice, and because that conduct was at least arguably prohibited under section 8, the Court held that the state lawsuit was preempted by federal law. *Id.* at 246. And the Court noted it was irrelevant that the Board had declined to exercise jurisdiction over the case; as long as there was not a "clear determination" from the Board that the conduct was protected by section 7 or prohibited by section 8, a state lawsuit is preempted

to avoid any state adjudication of conduct that would potentially conflict with the development of federal labor law. *Id.* The Court further highlighted that the Board's ability to grant only injunctive relief—rather than damages—was irrelevant and, indeed, possibly weighed in favor of preemption: "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Id.* at 247.

Pursuant to the principles announced in *Garmon*, labor conduct is "arguably protected" under section 7 when the party asserting preemption "advance[s] an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986) (quoting *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 184, 82 S. Ct. 1237, 1243, 8 L. Ed. 2d 418 (1962)). Following *Garmon*, this court has stated the preemption standard in terms of whether the activity is "'potentially subject to federal regulation.'" *Beaman*, 116 Wn.2d at 704 (quoting *Garmon*, 359 U.S. at 246). Regardless of the precise formulation, the principle animating *Garmon* preemption is the avoidance of potential conflict with the Board's development of federal labor law.

B. The Court of Appeals erred by characterizing the conduct here as unprotected intentional destruction of property subject to the "local feeling" exception to preemption

Garmon preemption is not absolute. The Supreme Court recognizes two exceptions to its preemption analysis: (1) where "the activity regulated was a merely peripheral concern of the Labor Management Relations Act" or (2) "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." *Garmon*, 359 U.S at 243–44. The second exception is potentially at issue here.

The "local feeling" exception involves state jurisdiction over claims 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." *Id.* at 247. This exception recognizes that "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." *Id.* (citing *Int'l Union, United Auto., Aircraft & Agric. Implement Workers v. Russell*, 356 U.S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151 (1957); *United Auto., Aircraft & Agric. Implement Workers v. Wis. Emp't Relations Bd.*, 351 U.S. 266, 274, 76 S. Ct. 794, 100 L. Ed. 1162 (1956); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025 (1954)).

The Supreme Court has observed that the focus of this exception is on whether the conduct involved "'intimidation and threats of violence.'" *Id.* at 248 (quoting *Russell*, 356 U.S. at 640). In a footnote in *Garmon*, the Court further elaborated on the type of intimidating or violent conduct warranting a preemption exception. *Id.* at 248 n.6. While it did approvingly cite a case that briefly mentioned destruction of property as warranting state jurisdiction, *Wis. Emp't Relations Bd.*, 351 U.S. at 274 (noting "[t]he dominant interest of the State in preventing violence and property damage cannot be questioned"), the Court framed the state interest as applying to conduct involving some sort of violence or danger that undermines public order. *Garmon*, 359 U.S. at 248 n.6 (describing the conduct in *Laburnum*, 347 U.S. at 666–68, as "violent conduct" and "involving violence or threats of violence" and noting that the Court had limited damages to the "the violent nature of the conduct" of mass picketing in *Russell*, 356 U.S. at 638–42).

The Court has further described this exception to *Garmon* preemption as creating a category of conduct that is not protected under section 7: "The Court has held that state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional distress, or obstruction of access to property is not pre-empted by the NLRA. But none of those violations of state law involves protected conduct." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 204, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978) (footnotes omitted). If the work stoppage in this case fits within this category of unprotected conduct, then

it is clearly not preempted and the state law claims may go forward.

The Court of Appeals concluded that intentional destruction of property was within the category of unprotected conduct covered by the "local feeling" exception in *Garmon*. *See Glacier*, 15 Wn. App. 2d at 408 (citing *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 136, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)). Glacier argues this is the proper analysis based on the United States Supreme Court's description of the type of claims states may exercise jurisdiction over. It is correct that the United States Supreme Court and some Washington Court of Appeals cases have included the destruction of property in describing matters over which states may exercise jurisdiction. *Lodge 76*, 427 U.S. at 136 ("Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States."); *Nat'l Labor Relations Bd. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253, 59 S. Ct. 490, 83 L. Ed. 627 (1939) ("The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property . . . ."); *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 190 Wn. App. 14, 26, 354 P.3d 31 (2015) (stating that "property damage" could possibly have provided a basis for the "local feeling" exception).

But *Garmon*'s reference to destruction of property was articulated primarily in terms of the violence of the labor conduct, which in turn implicated the State's interest in the domestic peace. 359 U.S. at 248 n.6. The Supreme Court has also allowed state claims to proceed for conduct that is considered "outrageous." *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290, 301, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977) (intentional infliction of emotional distress claim not preempted when based on outrageous conduct, threats, and intimidation); *see also Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 61–62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) (malicious libel). Properly understood, the "local feeling" exception links the State's interest in awarding damages for conduct arguably covered by the NLRA to violent or outrageous conduct. *Garmon*, 359 U.S. at 248 n.6 (emphasizing that in *Laburnum* "there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct").

If Glacier's claim could be characterized as based solely on the intentional destruction of property, the drivers' conduct may be the sort of tortious conduct marked by violence or outrageousness that invokes the State's interest in the maintenance of the public peace and that is categorically unprotected under the NLRA. *See Moore v. Gen. Motors Corp.*, 739 F.2d 311, 316 (8th Cir. 1984) (concluding that the "local feeling" exception did not apply to claims of fraud and misrepresentation because the complaint did "not involve outrageous or violent conduct").

This claim would be stronger if Glacier's trucks or facilities had been intentionally destroyed. But the incidental destruction of products during a strike, as opposed to property damage for its own sake, has not been sufficient to invoke the "local feeling" exception in any United States Supreme Court case. If viewed as product damage incidental to the strike, the drivers' conduct is closely tethered to the exercise of their section 7 rights and, at the same time, is attenuated from the State's general interest in regulating violent conduct, such as vandalism, which is the core concern of the "local feeling" exception. While the complaint alleges that the drivers "willfully and intentionally interfered" with Glacier's right to property by returning concrete trucks with perishable product inside, the description of this conduct as willful and intentional is not controlling of the preemption question. CP at 14. Even though we must accept the facts stated in the complaint as true, *Garmon* emphasizes that the "'type of conduct'" involved is what determines the preemption analysis. 359 U.S. at 247–48; *see also Amalg. Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 292, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971) ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."). The description of conduct as "intentional" does not equate to violent or outrageous conduct that is contemplated by the "local feeling" exception. Moreover, the concrete product damage caused by the drivers' conduct cannot be viewed in isolation; viewed in the context of the strike, it does not clearly come within "local feeling" exception, so it is not clearly or

categorically unprotected conduct under section 7 of the NLRA.

We disagree with the Court of Appeals that the conduct here is clearly and categorically unprotected. The appeals court's discussion of when intentional destruction of property invokes the "local feeling" exception is too expansive, and we must look further to Board precedent to assess whether the protected nature of the work stoppage and resulting concrete destruction has been "'authoritatively rejected' by the courts or the Board." *Int'l Longshoremen's Ass'n*, 476 U.S. at 395 (quoting *Marine Eng'rs*, 370 U.S. at 184). As will be discussed, if the conduct surrounding the work stoppage is arguably protected under the NLRA then the Act preempts Glacier's state law claims.

C. The work stoppage is arguably protected under section 7 because it involves two competing principles recognized in Board precedent

The Court of Appeals misread Board precedent in concluding the drivers' conduct was clearly unprotected under section 7. Specifically, the court improperly "harmonized" two competing principles recognized in the cases: (1) employees must take reasonable precautions to protect an employer's plant, property, and products and (2) economic harm may be inflicted through a strike as a legitimate bargaining tactic. Because it is unclear where the strike in this case falls on the spectrum between these two principles, the strike is, at least, arguably protected conduct under section 7.

In analyzing preemption of Glacier's conversion and trespass to chattels claims, the Court of Appeals correctly noted that under Board precedent,

"employees [must] take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999). In *Marshall Car Wheel*, for example, the Board considered whether an employer's discharge of employees violated 29 U.S.C. § 158(a)(1), (3) for firing employees as a result of protected strike activity. *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315. In that case, the employer used a cupola furnace to melt metals to make car wheels, pipe, and other products. *Id.* About half of the employees walked out on a strike during a time when the cupola was particularly active. While there was no damage to the property, the Board concluded that the strike was unprotected because the employees failed to take reasonable precautions to protect the plant from imminent danger resulting from the cupola being unattended at a busy time. *Id.*

The other competing principle involved here is that employees are allowed to cause some economic harm to effectuate a strike and gain leverage in bargaining. *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294–95 (1984); *see also Falls Stamping & Welding Co. v. Int'l Union, United Auto. Workers, Aerospace & Agric. Implement Workers of Am., Region II*, 744 F.2d 521 (6th Cir. 1984) ("Federal labor law clearly permits employees to inflict economic harm on an employer for purposes of collective bargaining."). In the context of a work stoppage, the Board stated in *Johnnie Johnson* that "[t]he effect of such a work stoppage on production is incidental and does not preclude protection of the Act so long as the employees involved take reasonable precautions to avoid eminent danger

to the employer's physical plant which foreseeably would result from the work stoppage." 271 N.L.R.B. at 295. Moreover, the Board has confirmed that the possible loss of perishable product from a work stoppage does not render the strike unprotected as long as the strike is done for bargaining purposes. *Lumbee Farms Coop., Inc*. 285 N.L.R.B. 497, 503, 506–07 (1987); *Leprino Cheese Co*., 170 N.L.R.B. 601, 606–07 (1968) (diminution in the quality of cheese as a result of walkout did not render strike unprotected); *Cent. Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419, 435 (1959) ("No unusual circumstance, such as aggravated injury to personnel or premises, was created by the fact that the milk handled is perishable and loss might be sustained; loss is not uncommon when a strike occurs." (footnote omitted)).

Glacier attempts to distinguish these cases because none of them involved actual or proven product loss. Instead, it points to the Board decision the Court of Appeals relied on and quoted from at length in its application of these principles. *Boghosian Raisin Packing Co*., 342 N.L.R.B. 383 (2004). According to the Court of Appeals, in *Boghosian*, the Board ruled that an employee work stoppage was unprotected because the employees failed to take reasonable precautions to protect a product from spoiling in order to intentionally damage that product. *Id.* at 396–97. The Court of Appeals reasoned that Glacier's allegations similarly involved unprotected conduct because the drivers allegedly failed to take reasonable precautions to protect the equipment, plant, or batched concrete and intentionally stopped work at a time when the concrete was being loaded. *Glacier*, 15 Wn. App. 2d at 411.

In *Boghosian*, the Board reviewed an administrative law judge's (ALJ) decision that an employer violated section 8 of the NLRA by not reinstating employees who went on strike and by withdrawing its recognition of the union as a collective bargaining representative. 342 N.L.R.B. at 384. The employer owned a raisin plant, and it fired certain employees after a work stoppage resulted in the spoilage of some of the employer's raisins. *Id.* The ALJ stated that in addition to the employees losing protected status under section 8(d), the strike was unprotected—and the employer therefore could take adverse action against the striking employees—because the employees failed to take reasonable precautions to protect the raisins and "deliberately time[d] their strike to cause product damage." *Id.* at 397. However, given the ALJ's initial conclusion that the employees had lost protected status for failure to comply with other parts of section 8(d), the ALJ noted that this finding was not "critical to this decision." *Id.* at 396. On review, the Board agreed that no violation occurred because the strikers lost their protected status under section 8(d). *Id.* at 385. As a result, the Board found it "unnecessary to pass on the judge's alternative finding that the discharge of the strikers was lawful because they had intentionally walked out in the middle of their shift in order to damage the Respondent's product." *Id.* at 387 n. 13. The analysis quoted by the Court of Appeals is dicta from the ALJ that was also not adopted by the Board; it is therefore of limited value and not persuasive here. More persuasive are the other Board decisions holding that incidental product damage does not render a strike unprotected.

Glacier points to one federal Court of Appeals case and one Illinois state case to argue that abandonment of concrete during a strike is unprotected. Resp't/Cross-Pet'r Glacier's Suppl. Br. at 5 (citing *Nat'l Labor Relations Bd. v. Marsden*, 701 F.2d 238, 242 n.4 (2d Cir. 1983); *Rockford Redi-Mix, Inc. v. Teamsters Local 325*, 195 Ill. App. 3d 294, 551 N.E.2d 1333, 1334–41, 141 Ill. Dec. 805 (1990)). In *Marsden*, the Second Circuit held that a work stoppage was unprotected because the employees failed to associate the work stoppage with a specific demand related to the conditions of employment. 701 F.2d at 242–43. In a footnote, the court hypothesized that the strike probably would have been unprotected had it occurred during a delivery of concrete even if a proper demand were made. *Id.* at 242 n.4. This dicta is unpersuasive as it merely cites to *Marshall Car Wheel* without recognizing or fully analyzing the competing principle that strike activity generally will, and must be allowed to, inflict some economic harm including product loss. And in the other case, *Rockford*, an intermediate appellate court in Illinois concluded that a work stoppage by concrete delivery drivers was unprotected because it caused destruction of the trucks and bankrupted the company. *Rockford*, 551 N.E.2d at 1334–40. Although we are not bound by an out-of-state decision, this authority is also unpersuasive because Glacier's trucks were not destroyed during the strike and the loss was more in line with other cases involving merely incidental product damage. The Board has concluded in the context of strikes involving concrete business losses that the fact that conduct brings "inconvenience and economic loss" does not render it unprotected. *ABC*

Concrete Co., 233 N.L.R.B. 1298, 1304 (1977) (internal quotation marks omitted). Given the importance of viewing the work stoppage conduct in its full context, the Board is the proper place to balance the competing principles.

Read together, the relevant Board decisions show that economic harm due to the possibility of a product perishing does not render a strike *clearly unprotected* under section 7. These decisions further recognize that when a strike is done for collective bargaining purposes—which Glacier does not contest occurred in this case—the Board must balance the competing principles in context and "[t]he economic pressure flowing from such a strike must be weighed against the goals sought to be achieved by the strikers." *Lumbee Farms*, 285 N.L.R.B. at 506; *see also Nat'l Labor Relations Bd. v. A. Lasaponara & Sons*, 541 F.2d 992, 998 (2d Cir. 1976) (stating that a work stoppage was a protected strike because, unlike extreme cases of economic coercion like *Marshall Car Wheel*, "the economic pressure . . . clearly failed to reach a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected").

To fully analyze whether the conduct is unprotected under section 7 in this case, we would need to engage with the facts as a matter of first impression, balancing the economic pressure against the strikers' legitimate interest. Based on a full factual analysis, we might determine that the strike activity was unprotected because the drivers did not take reasonable precautions to protect Glacier's product or trucks. On the other hand, the strike could also be viewed as protected because the concrete loss was

incidental damage given the perishable nature of the concrete. In any event, *Garmon* makes clear that this kind of fact-specific determination is a function of the Board in the interest of the uniform development of labor policy. *See Columbia Portland Cement Co. v. National Labor Relations Bd.*, 915 F.2d 253, 257–58 (6th Cir. 1990) (balancing these competing principles and fully evaluating the facts to conclude that a work stoppage was protected activity when the employees took reasonable precautions to protect equipment even though the equipment was damaged).[9] State court adjudication would potentially interfere with important federal interests. Because it is debatable whether the work stoppage resulting in concrete loss was a protected strike, the drivers' conduct is at least arguably protected under section 7. Therefore, we conclude that the NLRA preempts Glacier's tort claims.

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[9] At oral argument, Glacier appeared to acknowledge that the balancing of relevant principles is fact specific. For example, when posed with a hypothetical about a grocery store employee walkout that resulted in the foreseeable loss of perishable fish, Glacier suggested such a walkout might be protected activity because it merely caused "production loss" rather than being intentionally timed to cause the concrete loss as alleged by Glacier. Wash. Supreme Court oral argument, *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, No. 99319-0 (Sept. 21, 2021), at 32 min., 14 sec. through 34 min., 18 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org. This distinction does not rest on any categorical or legal difference between the hypothetical facts and the present facts. Instead, Glacier's argument highlights why factual distinctions should be drawn by the Board and not by state courts.

D. Glacier's inability to obtain damages in a Board proceeding supports, rather than undermines, the argument for preemption

Glacier argues preemption of its state tort claims is unwarranted because this would leave it with no remedy for its losses. But *Garmon* rejected the notion that an employer's inability to obtain a remedy undermines a finding of preemption, noting that "[e]ven the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 359 U.S. at 247. In fact, the Court in *Garmon* concluded that the inability of the Board to grant a remedy for losses flowing from arguably protected conduct supports preemption of that claim in state court: "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Id.*; *see also Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986) (stating that "the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act"). This court has expressly recognized that the failure to obtain a remedy is not determinative of *Garmon* preemption. *Beaman*, 116 Wn.2d at 710–11 (citing *Garmon* and noting that "the fact that a given remedy cannot be granted by the [Board] does not necessarily mean his claim is not preempted"). Again, *Garmon* emphasized that it is the "'type of conduct'" involved,

rather than the remedy, that is controlling for the preemption analysis. 359 U.S. at 247–48.

Relatedly, Glacier argues that preemption is unwarranted because it has no means of bringing its claim to the Board, insisting that this case is similar to *Sears*. In *Sears*, the Court considered whether a trespass claim for a union's peaceful picketing was preempted because it was either arguably prohibited or protected under the NLRA. 436 U.S. at 190. Because the Board's consideration of the union's picketing would have focused on the objective of the picketing, rather than the location of the picketing and whether a trespass occurred, the Court concluded that the controversies presented to the Board and the state court were different. Thus, the Court held that the state trespass claim was not preempted under the "arguably prohibited" prong of *Garmon*. *Id.* at 198.

However, the Court in *Sears* emphasized the important values preserved by the preemption doctrine in deciding whether the picketing was arguably protected under section 7. Because state courts should not interfere with conduct actually protected by the act, the Court observed that "[c]onsiderations of federal supremacy, therefore, are implicated to a greater extent when labor-related activity is protected than when it is prohibited." *Id.* at 200. The Court highlighted the potential overlap in what the state court would consider and what the Board may eventually consider:

> Prior to granting any relief from the Union's continuing trespass, the state court was obligated to decide that the trespass was not actually protected by federal law, a determination which

> might entail an accommodation of Sears' property rights and the Union's [section] 7 rights. In an unfair labor practice proceeding initiated by the Union, the Board might have been required to make the same accommodation.

Id. at 201. Nonetheless, the Court concluded that this potential for overlapping jurisdiction did not exist in that case, in part because the employer was unable to have the Board decide whether the trespass was protected. *Id.* The Board's determination of whether the trespass constituted protected conduct would have occurred only if the union had filed a complaint with the Board that the employer had engaged in unfair labor practices. But because the union responded to the employer's demands to leave by stating that it would not cease picketing unless it were forced to do so by legal process, the Court concluded the employer had no "reasonable opportunity to either invoke the Board's jurisdiction . . . or else to induce his adversary to do so." *Id.* The Court therefore held preemption of a state claim was not warranted "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." *Id.* at 202–03.

Sears is distinguishable from this case because Local 174 has filed a complaint with the Board alleging retaliation for the exercise of Local 174 drivers' section 7 rights, and the Board has deferred action pending the outcome of this litigation. [10]

[10] The Board's deferral of a complaint is typical while the outcome of a concurrent or underlying state action is pending in state court; deferral does not suggest the Board intends for the

Amicus correctly points out that this complaint accentuates the possible conflict with the Board. Br. of Amicus Curiae at 10–14. Local 174's Board complaint alleges retaliation by Glacier in response to conduct protected by section 7, in part based on the lawsuit, so the Board will likely need to address the protected section 7 conduct in its decision. While Glacier argues that a state court must first decide the merits of its claims, the summary judgment motion pertains only to the misrepresentation claims, not the property loss claims possibly preempted by the NLRA. *See* Resp't/Cross-Pet'r Glacier's Answer to Br. of Amicus Curiae at 18–20; *Bill Johnson's Rests., Inc. v. National Labor Relations Bd.*, 461 U.S. 731, 737 n.5, 744–47, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) (noting the Board may enjoin suits that are preempted by federal law). The sole basis for dismissal of the property loss claims is federal preemption, without a merits determination. We hold that those claims involve arguably protected labor activity and are therefore preempted under section 7 of the NLRA.

Having found NLRA preemption of Glacier's claims arising from the August 11 events, we now turn to the three tort claims arising out of the alleged misrepresentation by Local 174's representative, Rick

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state court to exercise jurisdiction over a case involving arguably protected conduct. Instead, it serves the orderly administration of justice. In *Garmon*, for example, the Court concluded that the state court action was preempted even though the Board had completely declined to exercise jurisdiction, rejecting the California state court's conclusion that the Board declining jurisdiction showed that state jurisdiction was proper. 359 U.S. at 238.

Hicks, following the union's approval of the CBA on August 18.

II. The trial court properly dismissed Glacier's state claims alleging misrepresentation and intentional interference with contract

The trial court dismissed Glacier's three remaining claims for negligent misrepresentation, fraudulent misrepresentation, and intentional interference with contract at the summary judgment stage. We review summary judgment rulings de novo. *Binschus v. Dep't of Corr.*, 186 Wn.2d 573, 577, 380 P.3d 468 (2016) (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)). "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* We view the facts and reasonable inferences drawn therefrom in the light most favorable to Glacier as the nonmoving party. *Id.*[11]

A. Glacier's misrepresentation claims fail because the alleged misrepresentation was a promise of future performance, rather than a statement of existing fact

Glacier's claims for negligent and fraudulent misrepresentation should be treated together because

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[11] As noted, the trial court's ruling was based both on state and federal law. At this stage of the proceedings, no party challenges the Court of Appeals's conclusion that section 301 of the LMRA, 29 U.S.C. § 185(a), does not preempt the tort claims based on Hicks's statements. Moreover, because these claims must be dismissed on their merits under state law, we avoid any possible conflict with section 301 regardless of whether that section may preempt these tort claims.

they share a requirement in common that forms the basis of the dismissal for both claims. A fraudulent misrepresentation claim [12] and a negligent misrepresentation [13] claim both require the misrepresentation to be one of existing fact; a promise of future performance is therefore not an actionable statement. *See Adams*, 164 Wn.2d at 662 (future promise or agreement for the scope of a surgery was not a statement of existing fact for a fraud claim); *see also Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 182, 876 P.2d 435 (1994) (statement of existing fact is a prerequisite to a negligent misrepresentation claim).

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[12] To prove fraudulent misrepresentation, the plaintiff has the burden by clear and convincing evidence to prove the following elements:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

[13] The elements for negligent representation are similar and must also be proved by clear and convincing evidence:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

The Court of Appeals recognized that Hicks's statement was a promise of future performance. But the court did not precisely identify Hicks's statement to GLY President Ted Herb about whether the drivers would respond to dispatch and service the mat pour on August 19. Specifically, the court misquoted Hicks's response to Herb's inquiry as saying, "'the drivers will respond to dispatch.'" *Glacier*, 15 Wn. App. 2d. at 414. The Court of Appeals may have been quoting Herb's deposition testimony describing how he relayed Hicks's statement to another GLY employee: "I said that I asked him the question on would drivers respond to the pour and was told that the drivers will respond to dispatch." CP at 713. But Herb actually quoted Hicks's statement slightly differently. In response to Herb's question about servicing the mat pour, Herb alleged that Hicks responded in a similar way twice: "'[t]he drivers have been instructed to respond to dispatch'" and "'[w]e have specifically instructed the drivers to respond to dispatch.'" CP at 1648.

Glacier claims the Court of Appeals's misquote carries legal significance because Hicks's actual statement was a statement of existing fact—that the drivers were *instructed* to respond to dispatch—rather than a promise of future conduct. From a purely grammatical standpoint, this may be a fair interpretation, but in context Hicks's alleged statement still expresses a promise of future action, namely that the drivers would service the mat pour. Herb was asked by Glacier to contact Hicks because there were rumors that drivers would not work on August 19, the day after the new CBA was ratified. Both Glacier and GLY wanted assurances that the

mat pour would be serviced if it were scheduled. In his declaration, Herb stated he told Hicks that Glacier was "'trying to reschedule the mat pour for tonight and there's some concern about whether it will properly be serviced. So, I have been asked to call and get a response and some information on what will happen.'" CP at 1647. Herb's ultimate question to Hicks was "'will you service the mat pour or not?'" CP at 1647. Both Glacier and GLY sought an *assurance* from Hicks as to whether drivers would service the mat pour the next day, not whether he had in fact instructed them to do so. Herb's understanding of Hicks's statement as a promise for future performance was expressed in his deposition in which he stated that Hicks told him the drivers would respond to dispatch. And Glacier's ready-mix sales manager, Greg Mettler, said, "Responding to dispatch means reporting to work. Mr. Herb stated specifically that he had asked Mr. Hicks if the drivers were going to report to work the mat pour, and he was told that they were instructed to do so." CP at 1611. Therefore, considered in context, Hicks's response was a promise for future performance by the drivers to report to work, not a statement of presently existing fact. Absent any false or misleading representation of present fact, Glacier's claims fail as a matter of law.

B. The intentional interference was not a proximate cause of Glacier's losses

With respect to Glacier's claim for intentional interference with its contract rights, the Court of Appeals correctly recognized that any misrepresentation by Hicks was not a proximate cause of Glacier's losses relating to the cancellation of the mat pour. Generally, breach or termination of the

contract is an element of an intentional interference claim. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).[14] However, Washington has recognized that an interference resulting in a more expensive or burdensome performance of a contract may form the basis of an intentional interference claim, and this is what Glacier alleged in its complaint. *See Eserhut v. Heister*, 52 Wn. App. 515, 518, 762 P.2d 6 (1988) (citing RESTATEMENT (SECOND) OF TORTS § 766A)); CP at 19 (Glacier's complaint alleges that the intentional interference made Glacier's performance "more expensive or burdensome.").

We agree with the Court of Appeals that Glacier cannot show proximate cause in this case. Whether an alleged misrepresentation was a proximate cause of Glacier's losses requires Glacier to show both factual and legal cause. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Factual cause is met if "but for" the defendant's actions, the injury would not have occurred. *Id.* The legal causation analysis asks "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability

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[14] The elements of such a claim include:

> (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang, 131 Wn. 2d at 157.

will depend upon "'mixed considerations of logic, common sense, justice, policy, and precedent.'"" *Id.* at 478–79 (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974) (quoting 1 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 100, 110 (1906))). The section of the *Restatement (Second) of Torts* discussing legal causation in the context of an interference claim provides further guidance, focusing on whether the alleged losses were within the foreseeable risk of harm created by the misrepresentation. RESTATEMENT (SECOND) OF TORTS § 548A cmt. a (AM. LAW INST. 1977) ("In general, the misrepresentation is a legal cause only of those pecuniary losses that are within the foreseeable risk of harm that it creates."). While proximate cause is generally left to the jury, "where the facts are not in dispute, legal causation is for the court to decide as a matter of law." *Schooley*, 134 Wn.2d at 478.

Viewing the evidence in a light most favorable to Glacier, as we must in reviewing Local 174's motion for summary judgment, there is some evidence that Glacier would not have scheduled the mat pour for August 19 "but for" Hicks's misrepresentation and assurance that the drivers would respond to dispatch. But even assuming Hicks falsely communicated to Herb that the drivers would respond to dispatch, the causal relationship between Hicks's statements and Glacier's losses remains too attenuated as a matter of law. Given the context of the work stoppage and the CBA, the losses due to the canceled mat pour were not a foreseeable result of Hicks's statements.

First, under the terms of the CBA, the losses were not a foreseeable result of Hicks's statements because the drivers were not required to service the mat pour

even if they had been instructed to respond to dispatch. Glacier failed to comply with a number of the CBA provisions that would allow it to require the drivers to work a weekend job,[15] and Hicks's statement about instructing the drivers to respond to dispatch did not mention the terms of the CBA, which were known to both Glacier and the union. Second, the losses were not a foreseeable result of Hicks's statement because the union representative lacked the authority to bind the employees to work without regard to the CBA conditions.[16]

While Glacier could have required its employees to work, there is no allegation it took any steps to do so consistent with the CBA. Glacier relies solely on Hicks's alleged statement as the basis for the drivers to report to work, but as recognized this statement could not obviate compliance with the CBA. We affirm

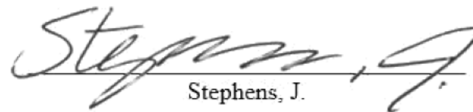
[15] The Court of Appeals correctly analyzed the terms of the CBA at length, specifically the CBA's requirements for advance notice and seniority call-out order to force drivers to work weekends. *Glacier*, 15 Wn. App. 2d. at 416–17. Glacier does not dispute the Court of Appeals's conclusion that it failed to comply with the CBA by not providing the requisite notices or calling in the correct seniority order to force drivers to work the mat pour on August 19.

[16] Melanie O'Regan, vice president of Glacier, stated in her declaration that Local 174, through Hicks, has control over whether drivers will return to work following a work stoppage. Accepting as true that Hicks had control over when the strike ended, Local 174 did not control the conditions under which drivers would be offered jobs or would take jobs once the strike had ended because that is governed by the CBA. It appears that at least some of drivers also had the understanding that they were not required to report to the mat pour that night.

the lower court's summary judgment dismissal of Glacier's intentional interference claim.

CONCLUSION

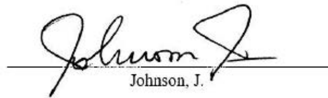
We reverse in part and affirm in part the decision of the Court of Appeals. Specifically, we hold that the NLRA preempts the property destruction claims because the concrete damage occurred incidental to a work stoppage and was therefore at least arguably protected under the NLRA. Summary judgment of dismissal is therefore appropriate as to those claims. Dismissal is also appropriate as to the remaining claims for misrepresentation and intentional interference because Hicks's statements were a promise for future performance, and Glacier cannot show that Hicks's statements proximately caused its losses. We remand this case to the trial court with instructions to dismiss Glacier's claims consistent with this opinion.



WE CONCUR:

González, C.J.

Gordon McCloud, J.

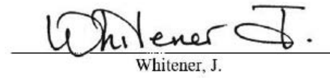

Johnson, J.

Yu, J.

Madsen, J.

Montoya-Lewis, J.

Owens, J.


Whitener, J.

APPENDIX B

FILED
11/16/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

GLACIER NORTHWEST, INC. d/b/a CALPORTLAND, Appellant, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174 Respondent.	No. 79520-1-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

Appellant, Glacier Northwwest, Inc., has filed a motion for reconsideration of the opinion filed in the above matter on August 31, 2020. Respondent, International Brotherhood of Teamsters, Local Union NO. 174, has filed a response to appellant's motion. The court has determined that appellant's motion for reconsideration should be denied, the opinion should be withdrawn, and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that the opinion filed on August 31, 2020, is withdrawn and a substitute opinion be filed.

Andrus, A.C.J.

Mann, C.J.

Dwyer, J.

FILED
11/16/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION ONE

GLACIER NORTHWEST, INC. d/b/a CALPORTLAND, Appellant, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174 Respondent.	))))))))))	No. 79520-1-I AMENDED PUBLISHED OPINION

ANDRUS, A.C.J. — Glacier Northwest Inc., who employs drivers represented by the International Brotherhood of Teamsters Local Union No. 174 (Union), filed this lawsuit against the Union for intentional destruction of property, misrepresentation, and tortious interference with a business relationship, relating to the Union's conduct during and immediately after an August 2017 strike. The trial court initially dismissed Glacier's property destruction claims, concluding they were federally preempted. It subsequently dismissed the misrepresentation and tortious interference claims on summary judgment, concluding Glacier failed to present a genuine issue of material fact on the elements of justifiable reliance or proximate cause.

We reverse the dismissal of Glacier's claims for intentional destruction of property because those claims are based on conduct neither actually nor arguably protected under section 7 of the National Labor Relations Act.[1] We affirm the dismissal of Glacier's remaining claims.

FACTS

Glacier sells and delivers ready-mix concrete throughout Washington State.[2] Its 80 or 90 truck drivers, who work out of Glacier's facilities in Seattle along the Duwamish River, and in Kenmore and Snoqualmie, are represented exclusively by the Union. Glacier's lawsuit was based on two instances of alleged Union misconduct at the beginning of a strike on August 11, 2017, and on the day the strike ended on August 18, 2017.

August 11 Work Stoppage

Glacier alleged that in the early morning hours of August 11, 2017, Glacier and its drivers began the process of batching and delivering concrete to Glacier customers. "Batching" is the process of preparing concrete for the immediate delivery to a customer, and generally requires measuring and mixing different ingredients (cement, sand, aggregate, admixture, and water) pursuant to a customer's specifications. Glacier places these raw materials into a hopper and blends them together. Once it is batched, Glacier discharges the concrete into a ready-mix truck for immediate delivery to a customer's project site. The trucks are specifically designed to maintain the

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[1] 29 U.S.C. § 157.

[2] Glacier Northwest Inc. does business as CalPortland.

integrity of the batched concrete in a revolving drum during transport.

Glacier further alleged that concrete is a perishable product because once at rest, it begins to harden immediately and can begin to set within 20 to 30 minutes. Once the raw materials are batched, the concrete cannot be saved for another day and must be delivered, poured, and finished. As a result, Glacier's drivers have a limited amount of time in which to deliver and pump the concrete or it becomes useless. If the drivers do not deliver the concrete within this short time period, the concrete is rendered unusable because the concrete's physical condition materially changes, and it eventually hardens. And if the batched concrete remains in the revolving drum of the ready-mix truck beyond its useful life span, the concrete will harden inside the revolving drum and cause significant damage to the truck. Once concrete starts to set, it begins to thicken, placing pressure on the hydraulic system of the rotating barrel of the truck. If a driver stops the rotation of the drum, the setting process commences and the concrete starts to harden inside. Glacier alleged the Union representatives and Glacier's drivers all knew of this perishable nature of batched concrete.

Glacier alleged that shortly before 7:00 a.m., on the morning of August 11, 2017, Union agents were physically present at Glacier's Seattle facility and observed drivers loading batched concrete onto its trucks. Glacier's collective bargaining agreement (CBA) with the Union had expired as of July 31, 2017, and the Union was in the process of negotiating a replacement CBA with Glacier and other concrete companies. Glacier further alleged that once the

Union representatives knew there was a substantial volume of batched concrete in Glacier's barrels, hoppers, and ready-mix trucks, they called for a work stoppage. Glacier alleged that the Union intentionally timed this cessation of work to ensure the destruction of all of the batched concrete.

According to Adam Doyle, Glacier's dispatch coordinator, at the time the Union called the strike, Glacier had mixer trucks already on job sites delivering concrete, drivers on the road with fully loaded trucks, drivers in the yard waiting to have their trucks loaded from Glacier barrels and hoppers, and drivers in the yard with fully loaded trucks ready to depart. Doyle notified the drivers that they were obligated to finish any job that Glacier had started. Normally, when drivers return to the yard after delivering concrete, they offload any leftover concrete into a "reclaimer" or into a form to make ecology blocks. They then rinse out the drum and return to the line to take on another load.

But on August 11, the drivers all brought their mixer trucks back to the yard between 7:00 a.m. and 7:45 a.m. Justin Denison, Glacier's ready-mix concrete manager, testified that some of the drivers, who were on their way to jobsites with trucks loaded with 9 to 10 cubic yards of concrete when the Union called the strike, returned their trucks to Glacier's Duwamish facility without delivering the concrete. He testified that at least 16 drivers came back with fully loaded trucks, and 9 drivers abandoned them in Glacier's yard without notice to Glacier. Seven drivers parked their trucks, notified Glacier of their return, and sought instructions for dealing with the concrete. Denison described the scene:

> I was present in the yard when the loaded trucks came rolling back in on August 11. . . . It was complete chaos. We had to offload the concrete from the barrels before it "set up." We had to dispose of the concrete in a timely manner to avoid costly damage to the mixer trucks and in a manner so as not to create an environmental disaster. We had to reorganize material storage bunkers into which we offloaded the concrete. We had to deal with settling ponds, treatment of material and filter presses to handle hundreds of cubic yards of concrete. It took us 5 hours to properly handle and clean-up the mess created by the drivers.

Glacier contended it took emergency measures to offload the hardening concrete into hastily constructed bunkers in an environmentally safe manner, and quickly washed out the trucks to prevent damage to them. But it was unable to save any of the concrete. Glacier had to subsequently bring in excavation equipment and trucks to break up the fully hardened concrete and haul it to a disposal site.

Glacier initially issued disciplinary letters to the 16 drivers who returned their loaded trucks to Glacier's facility for abandoning the trucks and violating Glacier's work rules and safety rules by deliberately putting Glacier's business in imminent harm. When Glacier's management learned that 7 of the drivers had given Glacier advance notice of the strike and their intent to return loaded trucks to Glacier's facility, Glacier withdrew the warning letters to these drivers.

<u>August 19 Mat Pour</u>

GLY Construction, a general contractor, had subcontracted with Glacier to supply concrete for a commercial project in the South Lake Union neighborhood of Seattle (the Vulcan Project). When the Union called the August 11 strike, GLY had a large mat pour,[3] as part of the Vulcan Project, scheduled for Saturday, August 12, 2017. Glacier canceled this job due to the strike.

In the early morning hours of August 18, 2017, the Union and Glacier agreed to a successor CBA covering August 1, 2017 through July 31, 2021. Around 11 a.m. that morning, the Union called a meeting with the drivers, during which they voted to approve the CBA (August 2017 CBA).[4] Immediately after the August 18 ratification vote, the Union drafted a press release announcing the vote, and posted it on the Union's website and Facebook page within a couple hours of the meeting. This release said that the Glacier strike was over and "everyone is now back to work."

That same day, GLY Construction employee Dane Buechler called Ted Herb, the president of the

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[3] A "mat pour" involves the delivery of concrete by several trucks, one after another, to pour a concrete foundation for a large commercial building. The work requires a substantial labor force including dispatchers, laborers, batch plant personnel, truck drivers, GLY personnel, and City of Seattle inspectors and police. Because a mat pour requires street closures, having a sufficient number of drivers to deliver concrete is essential.

[4] Union Secretary-Treasurer Rick Hicks signed the formal agreement on September 19, 2017, and Glacier Director of Industrial Relations Brian Sleeper signed on November 20, 2017. But the parties do not dispute that the drivers approved it before noon on August 18, 2017.

company, to inform him that the Union had ratified a new CBA with Glacier. Buechler wanted to proceed with the Vulcan Project mat pour after midnight that night but was unsure if the Glacier drivers would respond to work that night. Glacier managers had heard rumors that the drivers had been instructed not to answer phones for Saturday work. Glacier's vice president and general manager, Melanie O'Regan, was unwilling to mobilize for the mat pour without reason to believe the drivers would show up because Glacier would then be responsible for both Glacier's losses and GLY's mobilization costs and potentially liquidated damages.

Buechler asked Herb to call the Union's agent, Rick Hicks, with whom Herb had previously discussed the complexities of this concrete job, to find out if the rumors were true. Greg Mettler, Glacier's ready-mix sales manager, also spoke to Herb that afternoon and learned Herb intended to call Hicks to discuss the concerns about whether drivers would show up for the mat pour.

Herb called Hicks around 12:35 p.m. that afternoon, and Hicks confirmed the Union had approved the successor CBA. Herb told Hicks that GLY wanted to reschedule the Vulcan Project mat pour for shortly after midnight that night, on August 19. He recounted his conversation with Hicks:

> I told Mr. Hicks: "Dane is trying to reschedule the mat pour for tonight and there's some concern about whether it will be properly serviced. So, I have been asked to call and get a response and some information on what will happen." I asked:

"I've been asked by Dane to call you and get verification; will you service the mat pour or not?"

Herb testified that Hicks responded to his question by stating that "the drivers have been instructed to respond to dispatch." Herb asked the same question a second time and Hicks "responded exactly the same way both times." Hicks denied making this statement to Herb.

Herb communicated the contents of this conversation to O'Regan and Mettler around 1 p.m. They interpreted Hicks's statement that "the drivers have been instructed to respond to dispatch" to mean that the Union had instructed the drivers to show up to work the mat pour. O'Regan testified that she reasonably relied on Hicks's statement in making the decision to proceed that night to mobilize to the job. But no one from Glacier spoke to Hicks directly.

Glacier decided to proceed with the mat pour. Glacier dispatcher Dirck Armitage testified that generally, for weekend work, he will call drivers individually to inform them of their start time and to tell them to check a "call-out recording" listing all drivers' start times for that weekend work. On August 18, Armitage began calling drivers around 1:22 p.m. By 3:42 p.m., he had posted the call-out recording with start times. Armitage testified that he listened to the call-out recording to ensure it was functional, per standard practice, at 3:47 p.m. The last round of first calls ended at 4:01 p.m., and dispatchers called each driver a second time, beginning at 4:15 p.m.

Armitage and a second dispatcher spoke to some drivers personally and left voice mail messages with

others. According to Armitage's dispatch notes, 12 of the drivers answered this phone call, and the majority of those drivers indicated they would work the mat pour. Approximately 39 drivers did not answer.

The earliest assigned start time for the mat pour was at 12:30 a.m., and the latest start time was at 7:00 a.m., with the majority of drivers scheduled to arrive between 12:30 a.m. and 1:05 a.m. At 12:45 a.m. on August 19, Glacier employees realized they had a problem. By 1:00 a.m., only 11 or 12 drivers had arrived for the mat pour. Shortly before 1:15 a.m., only 17 of the 40–50 drivers needed showed up for the mat pour, while another 5 drivers indicated they were on their way. Knowing they could not complete the mat pour with only 22 drivers, Glacier cancelled the pour at 1:15 a.m.

On August 23, 2017, Glacier sent disciplinary warning letters to the 39 drivers who did not show up for the August 19 mat pour, contending the failure to report to work violated Glacier's work rule prohibiting the participation "in any interruption of work or production."

Procedural History

Glacier commenced this suit on December 4, 2017, alleging six separate causes of action. Glacier's first three claims related to the August 11 work stoppage: (1) wrongful sabotage and destruction of concrete, (2) intentional interference of Glacier's performance of its business relationships, and (3) civil conspiracy to commit sabotage and to destroy Glacier's concrete. Glacier's remaining claims related to the August 19 mat pour: (4) fraudulent misrepresentation and concealment, (5) negligent misrepresentation, and (6)

intentional interference with Glacier's performance of the GLY contract.

On December 15, 2017, the Union filed a grievance against Glacier with the National Labor Relations Board (NLRB), alleging Glacier had violated the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157–158, by retaliating against the Union drivers for engaging in a lawful strike, retaliating against drivers for not showing up for work in August 19, and filing "an objectively baseless federally preempted lawsuit" against the union in state court.

In January 2018, the Union moved to dismiss Glacier's claims under CR 12(b)(1) and 12(b)(6), arguing that all of Glacier's claims were preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). It maintained that under the *Garmon* preemption doctrine, state courts may not adjudicate any claims where the conduct at issue is actually or arguably protected under section 7, or actually or arguably prohibited under section 8 of the NLRA. 29 U.S.C. § 157–158.[5] It argued the August 11 work stoppage was lawful concerted activity and any alleged misrepresentations that workers would return to work were arguably covered by section 8(b)(3) of the

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[5] 29 U.S.C. § 157 provides in pertinent part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." And 29 U.S.C. § 158(b)(3) makes it an unfair labor practice for a labor union or its agents "to refuse to bargain collectively with an employer" when that union is the certified representative of that employer's employees.

NLRA, which prohibits dishonesty by a labor union during the bargaining process.

The trial court dismissed the three claims arising from the August 11 events. It concluded that the strike, in which Glacier drivers returned their loaded trucks to Glacier's Seattle facility, was protected work stoppage activity. The court acknowledged that while the economic losses from the strike were unfortunate, such losses did not "touch[] an interest so deeply rooted in local feeling and responsibility, such as vandalism or violence, that it clearly falls outside the protection of [the Act]." The trial court, however, declined to dismiss the three claims related to the August 19 mat pour. Accepting Glacier's factual allegations as true, the trial court concluded the alleged misrepresentations did not arguably fall within the scope of section 8 of the NLRA.

In October 2018, after conducting discovery, the Union moved to dismiss Glacier's remaining claims on summary judgment. The Union asked the court to dismiss the fraud and negligent misrepresentation claims, arguing that Glacier unreasonably relied on Hicks's alleged statement because Hicks did not say drivers would work the mat pour and only a handful of drivers actually answered the dispatch call before Glacier chose to proceed with it. The Union also maintained Glacier's reliance was unjustified because the Union could not require any drivers to work that night because Glacier had not given the drivers sufficient notice as required by the August 2017 CBA. The Union sought the dismissal of the remaining tortious interference claim, arguing GLY did not end its contractual relationship with Glacier after the drivers failed to show for the mat pour. GLY

rescheduled and completed the mat pour later in August 2017. Finally, the Union argued the trial court lacked jurisdiction to adjudicate these claims because they were preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185.[6]

On November 16, 2018, the trial court granted the Union's motion and dismissed Glacier's remaining claims. Glacier appeals the dismissal of two of its claims arising from the August 11 work stoppage and all three claims arising from the August 19 mat pour.[7]

ANALYSIS

Glacier raises three main arguments on appeal. First, it argues that the trial court erred when it concluded that Glacier's intentional destruction of property claims arising from the August 11 work stoppage were preempted under *Garmon*. Second, it argues that the trial court erred in its alternate conclusion that Glacier's misrepresentation claims

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[6] 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This provision of the LMRA has been held to preempt state law claims based directly on rights created by a CBA as well as claims that are "substantially dependent on an interpretation of a collective bargaining agreement." *Beals v. Kiewit Pac. Co.*, 114 F.3d 892, 894 (9th Cir. 1997).

[7] Glacier does not appeal the dismissal of its tortious interference claim arising out of the August 11 work stoppage.

were preempted by section 301 of the LMRA. Third, it maintains that the trial court erred when it dismissed its misrepresentation and tortious interference claims on summary judgment, contending there are issues of fact needing to be resolved at a trial.

We conclude the trial court erred in dismissing Glacier's August 11 work stoppage claims but did not err in dismissing the claims relating to the August 19 mat pour.

A. *Garmon* Preemption of Glacier's Property Destruction Claims

Glacier contends the trial court erred in concluding Glacier's intentional destruction of property claims were preempted under *Garmon*. We agree.

1. Standard of Review

This appeal arises out of a dismissal on the Union's motion to dismiss for lack of subject matter jurisdiction under CR 12(b)(1) and failure to state a claim under CR 12(b)(6). A motion to dismiss under CR 12(b)(1) may be either facial or factual. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 806, 292 P.3d 147 (2013). In a facial challenge, the sufficiency of the pleadings is the sole issue. *Id.* at 806–07. In a factual challenge, the trial court may weigh evidence to resolve disputed jurisdictional facts. *Id.* at 807. In this case, the Union's challenge to the trial court's jurisdiction appears facial, in that it relied on the allegations in Glacier's complaint but it also submitted evidence relating to the unlawful labor practice complaint it filed with the NLRB. In response, Glacier submitted, with the trial court's permission, declarations filed

with the NLRB. Although the Union did not concede any factual allegations made by Glacier in these pleadings, it did not offer evidence to dispute them. Thus, although the trial court reviewed evidence in addition to the complaint, in rendering its determination it does not appear it had to resolve any disputed jurisdictional facts. We thus assume for our analysis that the Union's motion was a facial challenge to subject matter jurisdiction.

When a court rules on a facial challenge, based on the complaint alone or the complaint supplemented by undisputed facts gleaned from the record, the existence of subject matter jurisdiction is a question of law that we review de novo. *Id.*; *see also Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002) (motion to dismiss for lack of subject matter jurisdiction is reviewed de novo). The party asserting subject matter jurisdiction bears the burden of proof on its existence. *Outsource Servs.*, 172 Wn. App. at 806.

The Union's motion also invoked CR 12(b)(6). We review dismissals under CR 12(b)(6) de novo. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Dismissal for failure to state a claim is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Cutler v. Phillips Petrol. Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Under this rule, the plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not part of the formal record. *Id.*

In this case, the trial court concluded as a matter of law that Glacier's state law claims were preempted by federal law. Whether a claim is preempted is a question of law reviewed de novo. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008); *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 190 Wn. App. 14, 21, 354 P.3d 31 (2015).

2. *Garmon* Preemption

In *Garmon*, a union sought recognition as the representative of nonunion employees of lumber suppliers. 359 U.S. at 237. The suppliers refused to recognize the union, and the employees began a peaceful picket at the suppliers' places of business. *Id.* A California state court enjoined the picketing and awarded damages for losses sustained by the companies. *Id.* at 237–38. The United States Supreme Court held that the suppliers' state law claims were preempted by federal labor law. *Id.* at 245.

Under what has become known as the *Garmon* preemption doctrine, when an activity is arguably subject to section 7 or section 8 of the NLRA, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* And it held that state courts should not determine whether conduct is arguably protected by the NLRA. *Id.* at 244. The court stated, "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to

decide whether such activities are subject to state jurisdiction." *Id.* at 246.

Here, we have a clear determination from the NLRB that the intentional destruction of property during a lawful work stoppage is not protected activity under section 7 of the NLRA. "Policing of actual or threatened violence to persons *or destruction of property* has been held most clearly a matter for the States." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 136, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) (emphasis added); *see also Cranshaw Constr. of New England, LP v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers*, 891 F. Supp. 666, 674 (D. Mass. 1995) (vandalism or the intentional destruction of property during a strike is not protected activity under the NLRA).

Moreover, the NLRB, as well as reviewing federal courts, has explicitly stated that workers who fail to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage may be disciplined by an employer for this conduct. In *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315 (1953), the Board stated:

> [T]he right of certain classes of employees to engage in concerted activity is limited by the duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work. We are of the opinion that this duty extends as well to ordinary rank-and-file employees whose work tasks are such as

> to involve responsibility for the property which might be damaged. Employees who strike in breach of such obligation engage in unprotected activity for which they may be discharged or subjected to other forms of discipline affecting their employment conditions.

The Fifth Circuit affirmed this general statement of the law. *Nat'l Labor Relations Bd. v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955). The court agreed with the NLRB that the workers' conduct was unprotected activity because "the striking employees intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off, and . . . a lack of sufficient help to carry out the critical pouring operation might well have resulted in substantial property damage and pecuniary loss" to the employer. *Id.* at 411 (footnote omitted). The employer was able to prevent this damage from occurring by using employees who refused to honor the strike and its supervisory staff. *Id.* The court held that because the union "deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss" to the employer, the NLRB had no authority to compel the employer to reinstate the employees who participated in, authorized, or ratified the illegal activity. *Id.* at 413.

The NLRB's decision in *Marshall Car Wheel* has been recognized by federal courts and the NLRB for decades. *See Int'l Protective Servs., Inc.*, 339 N.L.R.B. 701, 702 (2003) (striking employees' failure to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable harm

is not protected activity).[8] In *Boghosian Raisin Packing Co.*, 342 N.L.R.B. 383 (2004), the NLRB determined that the employees, who walked off the job without protecting the employers' perishable products from spoilage, had engaged in unprotected activity under the NLRA:

> The Union apparently decided on the evening of September 30 to strike the next day, however rather than having employees not report for work, the Union did the opposite. The employees reported and began working, then at 7:15 a.m. word was passed to strike. While the employees did a mini cleanup, of the type required when they went on a short break, *there is no question that by leaving for the day, there was product damage.* . . . And there can be little question that the product damage was intentional. In such a situation, the action of employees is unprotected.
>
> The Board has long held that employees have the duty to take reasonable precautions when striking in order to avoid damage to the

[8] The NLRB said:

> Both the Board and the courts recognize that the right to strike is not absolute, and section 7 [of the NRLA] has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible. The Board has held concerted activity indefensible where employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work.

Int'l Protective Svcs., 339 N.L.R.B. at 702 (alteration in original) (citation omitted) (quoting *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999)).

> company's property. Necessarily a strike will cause some economic loss to an employer, as well as to the employees. But damage to the company's property goes beyond such loss and where strikers deliberately time their strike to cause product damage, then their activity is unprotected for which they can be disciplined or discharged.

Id. at 396–97 (emphasis added) (citation omitted).

Glacier's allegations are similar to those of *Boghosian Raisin*. Glacier alleged that "[o]n August 11, 2017, the Union and some or all of its officers, employees, and members consciously acted together . . . to sabotage, ruin and destroy Glacier's batched concrete." It further alleged the Union failed to take reasonable precautions to protect Glacier's equipment, plant, and batched concrete from "foreseeable imminent danger" resulting from the Union's sudden cessation of work. Glacier also claimed the Union drivers "knew their August 11, 2017 conduct was certain to, or substantially certain to, destroy or so materially alter the physical condition of Glacier's batched concrete as to deprive Glacier of possession or use of the batched concrete."

Because the trial court dismissed Glacier's claims on a CR 12(b)(1) and (b)(6) motion, we accept these allegations as true. And if we assume the Union ordered Glacier's truck drivers to wait to stop work until Glacier had batched a large amount of concrete and loaded it into the drivers' waiting trucks, and the Union did so with the intention of causing maximum product loss to Glacier, this conduct was clearly unprotected under section 7 of the NLRA. Because

the conduct Glacier has alleged here is neither actually nor arguably protected activity, there is no *Garmon* preemption. The trial court erred in concluding to the contrary.

B. LMRA Preemption of Glacier's Remaining Claims

Glacier next contends the trial court erred in dismissing Glacier's fraudulent and negligent misrepresentation claims relating to the August 19 mat pour, concluding the claims were preempted by section 301 of the LRMA.

1. Standard of Review

We review summary judgment rulings de novo. *Rhoads v. Evergreen Utils. Contractors, Inc.*, 105 Wn. App. 419, 423, 20 P.3d 460 (2001).

2. Section 301 Preemption

Section 301 of the LMRA provides exclusive federal court jurisdiction over claims that an employer or union violated a CBA. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 863, 93 P.3d 108 (2004). "LMRA supremacy 'ensure[s] uniform interpretation of collective-bargaining agreements, and thus . . . promote[s] the peaceable, consistent resolution of labor-management disputes.'" *Id.* (alterations in original) (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988)). Section 301 preemption occurs when the state claim is "'inextricably intertwined with consideration of the terms of the labor contract,'" *id.* (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)), and application of state law "'requires the interpretation

of a collective-bargaining agreement,'" *id.* (quoting *Lingle*, 486 U.S. at 413).

Glacier's claims are not based on the CBA but instead arise in tort. Our Supreme Court has recognized that "[a] different issue arises . . . when a plaintiff brings a claim that does not sound in breach of contract, but nevertheless arguably implicates the CBA." *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 126, 839 P.2d 314 (1992). The Union contends Glacier's tort claims implicate the CBA because its defense is based on specific provisions of that agreement. The Supreme Court, however, held in *Commodore* that such an indirect connection to a CBA does not trigger section 301 preemption. *Id.* at 139.

In *Commodore*, the trial court concluded a union member's claims for defamation, outrage, racial discrimination, and tortious interference with a business relationship against his employer were preempted by section 301 of the LMRA. *Id.* at 123. On review, our Supreme Court adopted the "Marcus model,"[9] which states that "[a] state statutory or common law claim is independent of the CBA—and therefore should not be preempted by section 301—if it could be asserted without reliance on an employment contract." *Id.* at 129 (emphasis omitted). The court held that section 301 preemption occurs

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[9] The "Marcus model" was based on a 1989 law review note in the *Yale Law Journal* by Stephanie Marcus, which interpreted the 1988 Supreme Court decision in *Lingle*. *Commodore*, 120 Wn.2d at 126; *see also* Stephanie R. Marcus, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE L.J. 209 (1989).

only in cases involving claims of breach of contract, claims of breach of the implied covenant of good faith and fair dealing, and claims based directly on violation of the CBA. *Id.* at 129–30. The court concluded that the union member's tort claims were not based on any violation of the CBA and thus not preempted by section 301. *Id.* at 139.

Here, Glacier alleged that the Union fraudulently or negligently misrepresented the Union's directive to its members regarding reporting to work for the mat pour. Glacier's claim is based on Hicks's statement to Herb that the drivers would "respond to dispatch." This claim is not directly based on any violation of the August 2017 CBA—that CBA did not define the phrase "respond to dispatch." Determining whether Hicks's statements were misrepresentations would not have required the trial court to interpret the August 2017 CBA. Although the Union raised provisions of the August 2017 CBA to undercut the reasonableness of Glacier's reliance on Hicks's statement, there was no dispute as to the meaning of these provisions. Under *Commodore*, Glacier's fraudulent and negligent misrepresentation claims can be resolved by tort law, and the trial court did not need to resolve any disputes in interpreting the August 2017 CBA's provisions. *Cf. Joy v. Kaiser Alum. & Chem. Corp.*, 62 Wn. App. 909, 816 P.2d 90 (1991) (court affirmed dismissal of plaintiff's tort claim against employer because claim required court to interpret employer's promises to plaintiff in CBA). The trial court erred in concluding otherwise.

C. Glacier's Misrepresentation and Tortious Interference Claims

Although the trial court erred in holding that Glacier's claims for misrepresentation were preempted by the LMRA, it also addressed the merits of these claims, concluding Glacier failed to present a genuine issue of material fact. We conclude the trial court correctly dismissed these claims on their merits but do so on alterative grounds. *See Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990) (appellate court can affirm the dismissal claims on any ground established by the pleadings and supported by the evidence).

1. Fraudulent and Negligent Misrepresentation

A claim of fraudulent misrepresentation requires proof of a representation of an existing fact. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 905, 247 P.3d 790 (2011).[10] It is well established in Washington that a promise of future performance is not an actionable representation of existing fact required for a fraud claim. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008) ("a false promise does not constitute the representation of existing fact"). A false representation of presently existing fact is also a

[10] The nine elements of fraud are

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stieneke v. Russi, 145 Wn. App. 544, 563, 190 P.3d 60 (2008).

prerequisite to a negligent misrepresentation claim. *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 197, 49 P.3d 912 (2002).

Hicks's alleged statement that "the drivers will respond to dispatch" is a promise that the drivers will do something in the future. As such, it is not an actionable statement of existing fact. Summary judgment dismissal of Glacier's fraudulent and negligent misrepresentation claim was appropriate on this alternative ground.

2. Tortious Interference

Glacier next maintains the trial court erred in dismissing its claim that the Union tortiously interfered with its performance of the GLY contract. Glacier argued below that the Union interfered with its performance of its contractual obligations to GLY by falsely stating that drivers would show up for the mat pour. The trial court concluded that there was no evidence that Hicks's statement "intended to breach or terminate Glacier's relationship with GLY" or that the alleged representation caused Glacier's injury because the drivers had the discretion to refuse to work under the August 2017 CBA. While we agree with Glacier that the trial court applied an incorrect legal standard, we nevertheless affirm the trial court's conclusion that Glacier's evidence failed to establish a question of fact on the element of proximate cause.

The trial court relied on *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 374, 617 P.2d 704 (1980), for the proposition that Glacier had to prove that the Union caused a breach or termination of Glacier's business relationship or contract with GLY. While *Brown* correctly set out the necessary elements of a claim

under *Restatement (Second) Torts* Section 766 (Am. Law Inst. 1979) (tortious interference causing a breach of contract with a third person), that case did not address a claim arising under *Restatement (Second) Torts* Section 766A (tortious interference preventing plaintiff from performing under a contract with a third person). Section 766A provides "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for pecuniary loss resulting to him." Washington recognizes claims under section 766A. *Eserhut v. Heister*, 52 Wn. App. 515, 518, 762 P.2d 6 (1988); *see also Pac. Typesetting Co. v. Int'l Typographical Union*, 125 Wash. 273, 216 P. 358 (1923) (union coerced employees to strike to render it impossible for employer to complete printing contract with other companies). Under section 766A, Glacier did not have to prove the Union caused it to breach its contract with GLY or that GLY terminated the contract with Glacier as a result of the mat pour cancellation. It only had to establish that the Union used improper means to make Glacier's performance of its contract with GLY more expensive or burdensome. Glacier presented evidence to establish this element of its tortious interference claim.

However, the trial court correctly concluded that Glacier failed to establish that the Union, through Hicks's statement, proximately caused the losses associated with canceling the mat pour on August 19. Although causation is usually an issue for the jury, where inferences from the facts are remote or

unreasonable, factual causation is not established as a matter of law. *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 805, 699 P.2d 217 (1985) (affirmed dismissal of tortious interference claim). The undisputed evidence in this case showed that Glacier's truck drivers had no contractual obligation to show up for work that night, regardless of any instruction to do so from Hicks.

Although the August 2017 CBA gave Glacier the exclusive power to make work assignments, it was required to follow a specific procedure for doing so. Article 3.02 of the August 2017 CBA provided that Glacier was required to advise drivers by noon on Thursday before the weekend whenever it anticipated weekend work. CP 569, 1677. This notice permitted drivers to volunteer for such jobs. CP 1678. Article 3.02 gave Glacier two options for enlisting volunteers. First, it could offer the weekend job by seniority to employees paid for 32 or fewer hours that week. CP 569, 1678. Or if it could not recruit enough volunteers through this process, it could offer the job by seniority to employees paid that week for more than 32 hours. *Id.* If, by 5 p.m. on Friday, Glacier did not obtain a sufficient number of volunteers, it could force a driver to work by using a third option of assigning work by inverse seniority to employees. CP 569, 1679.

But the mandatory assignment process in Article 3.02 remained subject to Article 3.10, which provides that the employer must notify drivers by 9 a.m. each workday if they would be scheduled for work some time that day. CP 570, 1679. If work became available after 9 a.m., the employer "may call drivers" but it could not discipline any employee who declined to report for work. Drivers have no contractual

obligation to take dispatch calls after 9:00 a.m. and, if they do, they may accept or decline work without repercussion. CP 570, 1679. Finally, any driver who is scheduled to begin work between 12:00 a.m. and 4:59 a.m. must be given at least 10 hours' notice. CP 570, 1679.

It was undisputed that Glacier did not notify drivers of the midnight mat pour by noon on Thursday, August 17, or by 9:00 a.m. on Friday, August 18. Glacier also called drivers by seniority, rather than by inverse seniority. CP 1680. And because Glacier did not begin contacting drivers until approximately 1:30 p.m. on Friday afternoon, for report times beginning that night at 12:30 a.m., many did not receive the mandatory 10 hours' notice. CP 1703–07. Thus, under the unambiguous terms of the August 2017 CBA, the workers had no obligation to perform work on the night of August 18 or the early morning of August 19.

Glacier concedes the August 2017 CBA did not require any of its drivers to report to work for the mat pour. Glacier argues, however, that the terms of the August 2017 CBA are irrelevant because the Union representative promised the workers would come to work. Even if we accept this assertion as true, there is nothing in this record to support the notion that the Union had any authority or ability to order drivers to work when the August 2017 CBA did not require them to do so. Even had Hicks instructed the drivers to show up to work that night, Glacier has no evidence the drivers had any duty to comply with such an instruction. Under these circumstances, no reasonable jury could conclude that Hicks's statement caused Glacier's losses. For this reason, summary

judgment dismissal of the tortious interference claim was appropriate.

CONCLUSION

We reverse the dismissal of Glacier's property destruction claims arising out of the August 11 work stoppage. Glacier alleged conduct by the Union—sabotage and the intentional destruction of property—that the NLRB has clearly held is not protected under section 7 of the NLRA. We affirm the dismissal of the tort claims arising out of the August 19 mat pour.

Affirmed in part, reversed in part.

Andrus, A.C.J.

WE CONCUR

Mann, C.J. Dwyer, J.

APPENDIX C

HONORABLE JOHN ERLICK

FILED
KING COUNTY, WASHINGTON
NOV 19 2018
SUPERIOR COURT CLERK
BY Kim Dunnett-Graham
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON FOR KING COUNTY

GLACIER NORTHWEST, INC., d/b/a CalPortland, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174, Defendant.	Case No. 17-2-31194-4 KNT **~~[PROPOSED]~~ ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on Defendant Teamsters Local 174's motion for summary judgment. The Court heard the oral argument of counsel, and considered the following when reaching its decision:

1. Defendant's Motion for Summary Judgment;
2. Declaration of Counsel Darin Dalmat in Support of Defendant's Motion for Summary Judgment, and the exhibits attached thereto;
3. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment;
4. Declaration of Brian Lundgren in Support of Plaintiff's Opposition to Defendant's Motion for

Summary Judgment and the exhibits attached thereto;

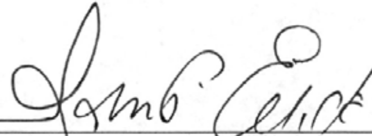
5. Declaration of Dirck Armitage in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
6. Declaration of Dane Buechler in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment and the exhibits attached thereto;
7. Declaration of Paul Cronin in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment and the exhibits attached thereto;
8. Declaration of Justin Denison in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
9. Declaration of Rob Johnson in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment and the exhibits attached thereto;
10. Declaration of Greg McKinnon in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment and the exhibits attached thereto;
11. Declaration of Greg Mettler in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
12. Declaration of Melanie O'Regan in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;

13. Declaration of Ron Summers in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
14. Declaration of Ted Herb in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
15. Declaration of Adam Doyle in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
16. Defendant's Reply in Support of Its Motion for Summary Judgment;
17. Declaration of Jennifer Woodward in Support of Defendant's Motion for Summary Judgment and the exhibits attached thereto;
18. Declaration of Mark Hislop in Support of Defendant's Motion for Summary Judgment and the exhibits attached thereto;
19. Declaration of Michael Walker in Support of Defendant's Motion for Summary Judgment and the exhibits attached thereto; and
20. Plaintiff's Objection to Admissibility of Evidence and Arguments Improperly Raised in Summary Judgment Reply.

Being fully advised on the matter, for the reasons stated in open Court on November 16, 2018, the Court hereby rules as follows:

1. Defendant's motion for summary judgment is GRANTED;
2. Counts IV, V, and VI of Plaintiffs complaint are DISMISSED WITH PREJUDICE.
3. The Court hereby enters JUDGMENT in favor of the Defendant on all claims; the Plaintiff shall take nothing; and the case is DISMISSED.
4. Costs are AWARDED to Defendant, in an amount to be determined following Defendant's submission of a bill of costs in accordance with CR 54.
5. This Court's oral ruling on November 16, 2018, is incorporated by reference into this Order.

It is so ORDERED this 14th day of November, 2018.



The Honorable John Erlick
King County Superior Court Judge

Presented by:

s/Darin M. Dalmat

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APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

GLACIER NORTHWEST INC., Plaintiff,	)	FILED KING COUNTY, WASHINGTON APR 20 2018 SUPERIOR COURT CLERK BY Kim Dunnett-Graham DEPUTY
v.	)	No. 17-2-31194-4 KNT
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174, Defendant.	)	ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PURSUANT TO CR 12(b)(1) AND CR 12(b)(6)

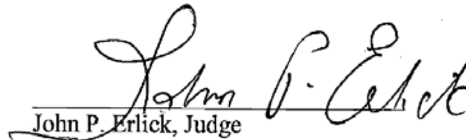
THIS MATTER is before the court on Defendant's Motion to Dismiss Pursuant to CR 12(b)(1) and CR 12(b)(6). The court heard oral argument from counsel on Friday, March 30, 2018 and considered all of the pleadings filed in this matter, including:

- Defendant's Motion to Dismiss Pursuant to CR 12(b)(1) and CR 12(b)(6)
- Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant to CR 12(b)(1) and CR 12(b)(6)
- Defendant's Reply in Support of Motion to Dismiss Pursuant to CR 12(b)(1) and CR 12(b)(6)

- Declaration of Dmitri Iglitzin in Support of Defendant's Reply in Support of Motion to Dismiss Pursuant to CR 12(b)(1) and CR 12(b)(6)
- Declaration of Brian Lundgren Supplementing the Record in Defendant's Pending CR 12(b)(1) and CR 12(b)(6) Motion to Dismiss Pursuant to Order Entered by the Court on March 23, 2018
- Out-of-State Authorities provided by the parties for consideration in this matter

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Pursuant to CR 12(b)(1) and CR 12(b)(6) is GRANTED IN PART, hereby dismissing Plaintiff's causes of action numbers 1 through 3, and DENIED IN PART WITHOUT PREJUDICE, as to Plaintiff's causes of action numbers 4 through 6 in the complaint filed on December 4, 2017 in this case. The court hereby incorporates its oral ruling presented in court on Thursday, April 19, 2018.

DATED this 20th day of April, 2018.



John P. Erlick, Judge

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GLACIER NORTHWEST, INC., d/b/a CalPortland, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174, Defendant.	FILED Court of Appeals Division I State of Washington 4/8/2019 2:42 PM King County Superior Court No. 17-2-31194-4 KNT COA No. 79520-1 Volume II

Verbatim Transcript from Recorded Proceedings
Before The Honorable John Erlick

April 19, 2018
King County Courthouse
Kent, WA

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Grace Hitchman, AAERT, CET-663

* * *

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(The Honorable John Erlick presiding)
(Thursday, April 19, 2018)
--o0o--

(Recording begins, 2:03 p.m.)

THE COURT: This is Teamsters Local 174. This is King County Cause No. 17-2-31194-4 KNT. And we are at this hearing for the Court's ruling on the defendant's CR 12(b)(1) and 12(b)(6) motions.

If I could please have counsel identify themselves for our record. I will begin with plaintiff's counsel please, Marcy.

MR. LUNDGREN: Brian Lundgren, Davis Grimm Payne & Marra for Glacier Northwest, the plaintiff.

THE COURT: All right. Thank you, counsel. And for the defense?

MR. IGLITZIN: Dmitri Iglitzin, Schwerin Campbell Barnard Iglitzin & Lavitt for defendant Teamsters Local 174.

THE COURT: All right. Very good. Thank you, counsel.

Counsel, as you know, I heard oral argument on this motion a few weeks ago. I reviewed the submissions

again as well as the case law and am prepared to make the following ruling. This will be an oral ruling only with orders to be submitted by prevailing parties. Thank you.

This matter is before the Court on defendant

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Teamsters Local 174, which will be referred to as the Union, motion for 12(b)(1) and 12(b)(6) dismissal of plaintiff's claims.

Plaintiff, Glacier, brought this state court action alleging inter alia sabotage, property destruction, misrepresentation, fraud, and intentional interference with contract. The defendant Union has moved for dismissal pursuant to Civil Rule 12(b)(1) on jurisdictional grounds and Civil Rule 12(b)(6) grounds that all plaintiff's tort claims are preempted by either or both Sections 7 and 8 of the National Labor Relations Act, the NLRA. The effect of this claim preemption prevents state tort claims for damages caused by actions that are actually or arguably regulated by the NLRA as well as those that Congress intended to leave unregulated to allow the parties relative economic power to dictate resolution of labor disputes.

Additionally, the NLRA grants the National Labor Relations Board, NLRB, exclusive jurisdiction over labor disputes and related conduct, and state courts must defer ot the exclusive competence of the Board where conduct is arguably protected or prohibited by the Act.

Both sides have cited extensively to the Garmon principle in outlining the issues to be analyzed by this Court. The Garmon preemption doctrine preempts

state regulation, including the award of damages for state tort

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claims, when the conduct at issue is actually or arguably protected by Section 7 of the NLRA or prohibited by Section 8 of the NLRA.

State causes of action are preempted by federal law if they concern conduct that is actually or arguably protected or prohibited by the NLRA or if they concern conduct that Congress intentionally left unregulated so that in the context of labor disputes, the parties may resolve their labor dispute issues relative to their economic powers. And, again, that's San Diego Building Trades Council v. Garmon at 356 U.S. 236. This has further been applied in analyses by the Washington state courts. Under Garmon, federal law preempts state regulation of conduct arising from a labor dispute even where the conduct is only arguably protected or prohibited by the Act. Walmart Stores Inc. v. UFCW International Union, 190 Wn.App at 21, citing Garmon. To be preempted, a cause of action need only be potentially subject to Section 7 or 8 of the NLRA.

A party asserting preemption, in this case the Union, must put forth sufficient evidence for the Court to conclude that the conduct at issue is potentially subject to the NLRA. International Longshoremen's Association AFL CIO v. Davis, 476 U.S. 380 at 397.

The, quote, critical inquiry in determining whether the conduct at issue is arguably prohibited by the NLRA and

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hence within the exclusive jurisdiction of the NLRB is whether the controversy presented to the state court is identical with that which could be presented to the Board. And that's from Belknap Inc. v. Hale at 463 U.S. 491, cited by Walmart Stores Inc. v. UFCW International Union at 190 Wn.App at 21.

As stated in Amalgamated Association of Street Electronic Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 1971 case, it is the conduct being regulated that must be the focus of the preemption analysis.

Glacier's reference to NLRB v. Marsden, 701 F.2d 238, 2nd Circuit 1983, is instructive. The Marsden case involved a work stoppage by unorganized construction employees who walked off the job due to light rain. The NLRB found that the conduct did not involve protected exercise of Section 7 concerted rights, and accordingly, the employer did not commit unfair labor practice in discharging the employee who led the other workers off the job. The Board found that where the employees decided on an ad hoc basis to cease work during the rain without communicating any demand regarding any desired change in terms of conditions of employment, that there was no protected concerted effort. The lack of any demand for change in Marsden's policies was not a trivial matter. Once a load of concrete was delivered, it cannot be returned, saving for

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another day or simply left to harden. Once poured, it must be finished. It is clear, therefore, that if the weather issue is not to be at Marsden's discretion, a

specific policy must be negotiated which accommodates employee desires with business imperatives. If Marsden must bear the burden of a walkout, he is at least entitled to some notice of the employees' grievances so that he may attempt to respond with a proposal of his own. A walkout here expressed no such grievance but was merely an ad hoc reaction to one day's weather. It is therefore not protected by the Act.

In United Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656, 1954 Supreme Court case, the Court held that damages were restricted to those directly and proximately caused by wrongful conduct chargeable to the defendant. Similarly in International Union United Automobile Aircraft and Agriculture Implement Workers v. Russell, 356 U.S. 634, 1958 Supreme Court case, the Supreme Court noted that the damages must have a proximate relation between the violence and threats of force and violence complained of in the loss of wages allegedly suffered.

When the object of a Union's conduct is protected but the tactics used to attain that end are not, damages should be awarded only for those losses resulting from the

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unlawful activity. See Rainbow Tours Inc. v. Hawaii Joint Council of Teamsters, 704 F.2d 1443, 9th Circuit 1983, and Perry v. International Transport Workers Federation, 750 F.Supp 1189, 1990 case.

A strike such as occurred here characteristically causes inconvenience and economic loss to the employer. Striking employees are under no general

duty to minimize the destruction by, for example, notifying the employer in advance of the strike to enable the employer to prepare for the strike. Johnnie Johnson Tire Company, 271 NLRB 293, Go-Lightly Footwear Inc., 251 NLRB 42.

If the striking employees take reasonable precautions to avoid imminent danger to the employer's physical plant, the effect of a work stoppage does not preclude the NLRA protection. Striking employees may lose the NLRA's protection, however, if the abandonment of their job poses a foreseeable risk of damage to their employer's plant and equipment, also from Johnnie Johnson.

Additionally, the NLRA does not protect striking employees who commit acts of vandalism or sabotage against their employer. Clear Pine Moulding Inc., 268 NLRB 1044 and Columbia Portland Cement Company versus NLRB, 915 F.2d 253, 6th Circuit, 1990.

With respect to the alleged property damage claim, this court concludes that the conduct regulated here was a

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protected work stoppage. Although the unfortunate consequences of that stoppage may well have been economic loss, it is not such that the regulated activity touches an interest so deeply rooted in local feeling and responsibility, such as vandalism or violence, that it clearly falls outside the protection of NLRA. Rather, as noted above, damages are restricted to those directly and proximately caused by wrongful conduct chargeable to the Union. United Construction Workers versus Laburnum Construction Corporation, 347 U.S. 656. And

damages should only be awarded for the losses directly resulting from the unlawful activity. Rainbow Tours Inc., v. Hawaii Joint Council of Teamsters. Based on this Court's finding that an underlying conduct of work stoppage was arguably protected activity, the Court concludes that the claims for alleged property damage resulting from the arguably protected conduct is preempted.

A similar analysis is applied with respect to plaintiff's complaints of intentional interference with contractual relationships, fraud, and misrepresentations as set forth in Paragraphs 3.32.to 3.53 of plaintiff's factual allegations in its complaint and plaintiff's second cause of action, Paragraphs 4.8 to 4.14 and 4.19 to 4.40 in the Third and Fourth causes of action.

With respect to the civic claims of fraud, this

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court considers the 9th Circuit reasoning in Operating Engineers Pension Trust v. Wilson, 915 F.2d 535—

Is everyone still there? Or did we get—did we lose someone?

MR. LUNDGREN: Brian Lundgren still here, Your Honor.

THE COURT: Okay. I think someone may be calling in.

MR. IGLITZIN: No, I'm here, Your Honor.

THE COURT: Mr. Iglitzin, are you there?

MR. IGLITZIN: Yes, I am.

THE COURT: Okay. We've got Mr. Lundgren and Mr. Iglitzin. I was getting bad elevator music. Okay.

I was citing to Operating Engineering Pension Trust v. Wilson, 915 F.2d 535, 1990. In that case, plaintiff's fraud and inducement claim was found not to be preempted under Section 301 because the Court did not need to reference a collective bargaining agreement itself.

Now, I realize this is not in and of itself a Section 301 claim, but I'm using this case by analogy. In that case, the Court noted, we hold the plaintiff's state court claim for fraud and the inducement is not preempted by Section 301 because it does not require reference to a collective bargaining agreement. Similar holdings in Kroger v. Consolidated Freightways at 255 F4d 695. Plaintiff's

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violation of privacy claim was not preempted because the Court was required only to look at the agreement rather to interpret it, and similarly in Burnside v. Hewitt, Pacific Corp, 491 F.3d 1077, because the Court there held that the plaintiff's claim was not granted because the claim was to be resolved by at most merely looking to the CBAs.

Now, this is a 12(b)(1) and 12(b)(6) analysis. And under that analysis, this Court is dutybound to consider the allegations of plaintiff's complaint as truth. This Court would determine that if the factual allegations involved ongoing collective bargaining and ongoing negotiations, and the alleged misrepresentations and fraud were part of economic leverage, then this Court would find such conduct was arguably protected as part of the collective bargaining negotiations, and, therefore, it would fall under Sections 7 and/or 8 of the NLRA.

On the other hand, if the complaint were to be read that the new labor agreement had been ratified and the Union's agent made these alleged misrepresentations independent of negotiations of the collective bargaining agreement, then such activity would not be arguably protected and, accordingly, not preempted.

Based on a broad liberal reading, the plaintiff's complaint for damages, which is required by this Court under CR 12(b)(1) and a 12(b)(6) analysis, this Court concludes

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that the allegations putatively assert that such conduct occurred after the labor negotiations were completed and the new labor agreement had been ratified. As such, this court concludes that if true, resolution of the state law claim does not require either construction of the collective bargaining agreement or consideration of negotiations of labor negotiations subject to Section 7 or 8 of the NLRA. Citing to Lingle v. Norge Division of Magic Chef Inc., 486 U.S. 407. And that these claims were allegedly not part and parcel of the labor negotiations which are claimed by the plaintiff to have been completed. Accordingly, the alleged tortious conduct would not be arguably protected and therefore not preempted by the NLRA.

For the foregoing reasons, defendant Union's motion to dismiss pursuant to 12(b)(1) and 12(b)(6) is granted in part with respect to the alleged property damage and denied in part with respect to the alleged tortious conduct involving GLY.

Counsel, it's a split decision, so we need an order granting and denying. I suppose the Court—maybe it would be best if I just prepared one, unless counsel would prefer to. Mr. Iglitzin?

MR. IGLITZIN: I'm fine with having the Court prepare one, Your Honor.

THE COURT: Okay.

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MR. IGLITZIN: (indiscernible)

THE COURT: I will incorporate by reference my oral ruling of today. Mr. Lundgren, is that acceptable to you?

MR. LUNDGREN: Perfectly acceptable, Your Honor.

THE COURT: All right. Are there any questions?

MR. IGLITZIN: Your Honor, (indiscernible)

THE COURT: Go ahead, Mr. Iglitzin.

MR. IGLITZIN: Yes. (indiscernible) designate in your oral ruling exactly which of the six counts fall under which part of your order. If you could do that in the final order, that would be convenient for the parties.

THE COURT: All right. I'm not exactly sure I'll be able to do that, and the reason for that is I think that some—and I need to grab the complaint here—but I think some of the allegations overlap—I'm sorry. I believe some of the causes of action overlap the factual allegations. Mr. Lundgren, is that true?

MR. LUNDGREN: No, Your Honor. I can just tell you right now. The Fourth, Fifth and Sixth causes of action are related to—

THE COURT: Only—

MR. LUNDGREN: —the conduct involving GLY.

THE COURT: Okay. So Fourth, Fifth, and Sixth is just GLY.

MR. LUNDGREN: That's right., Your Honor.

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THE COURT: Okay.

MR. LUNDGREN: And the First, Second and Third are related to the property damage.

THE COURT: Okay. Okay. That makes it easy. So thank you, Mr. Iglitzin, for raising that issue and Mr. Lundgren for clarifying that.

So, for the record, the Court grants the defendant Union's motion to dismiss the First, Second, and Third causes of action and denies without prejudice dismissal of the Fourth, Fifth, and Sixth causes of action. And it's without prejudice because this is just 12(b)(1) and 12(b)(6), and I am relying upon the factual assertions as true. That doesn't preclude any further motions practice.

All right. Mr. Iglitzin, any—

MR. IGLITZIN: Your Honor, the defendant does not have any further questions.

THE COURT: Mr. Lundgren, any questions?

MR. LUNDGREN: No, Your Honor.

THE COURT: Very good. Thank you all for being available this afternoon. You'll probably get that order in about ten days because I'll be on leave the next week.

Thank you. I hope the rest of your week goes well. Be well. Thank you. Court is in recess.

APPENDIX F

29 U.S.C. § 157
Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158
Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by

such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe

its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(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);

(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;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises

of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction,

for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be

construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an

intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or

[1] So in original. Probably should be "unenforceable".

manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience

qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

APPENDIX G

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CASE NUMBER: 17-2-31194-4 KNT

HONORABLE JOHN ERLICK
Noted for Hearing with Oral Argument
February 9, 2018, at 10:15 a.m.

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON FOR KING COUNTY

GLACIER NORTHWEST, INC., d/b/a CalPortland, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174, Defendant.	Case No. 17-2-31194-4 KNT **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO CR12(b)(1) and 12(b)(6)**

I. <u>INTRODUCTION</u>

The Union obfuscates the Federal labor preemption doctrines to attempt to avoid clear lability for its tortious conduct under state law. The Union fails to address the actual conduct that forms the basis of Glacier's state law Complaint. Glacier alleges two acts of tortious conduct under state law: (1) the Union's intentional destruction of Glacier's property, and (2) the Union's false representations to GLY inducing the scheduling of the mat pour. Glacier's causes of action are premised entirely upon those two acts of tortious conduct. Glacier seeks damages that

flow only from those two acts of tortious conduct. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 292 (1971) (it is the conduct being regulated that must be the focus of the preemption analysis).

The Union must affirmatively prove that intentional destruction of property and fraudulently inducing a mat pour are arguably subject to the National Labor Relations Act (the "Act"). *Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 394–395 (1986). To carry this burden, the Union must show the state law claim prohibits the identical Union conduct that is arguably prohibited by the Act. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 196–197 (1978); *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983). Or, alternatively, the Union must make a strong showing that its conduct is arguably protected by the Act and the injured party (*i.e.*, Glacier) has a means of bringing the dispute before the National Labor Relations Board (the "Board"). *Davis*, 476 U.S. at 393, n.10; *Golden State Transit Corp. v. City of Los Angeles,* (*Golden State II)*, 493 U.S. 103, 110 n.7 (1989); *Sears*, 436 U.S. at 202–203 (there is insufficient justification for preempting state jurisdiction over arguably protected conduct where the injured party has no acceptable means of bringing the issue to the Board).

The fallacy of the Union's argument is that the Union ignores clear precedent establishing that intentional destruction of Glacier's property is not arguably protected under Section 7 of the Act, 29 U.S.C. § 157. The Union completely fails to prove to the Court that Glacier has the legal means to bring such a dispute before the Board. Unsurprisingly,

intentional destruction of property is not protected strike activity under Section 7 of the Act. Likewise, there is no Board charge that Glacier could file to resolve the Union's intentional destruction of Glacier's property.

When a strike is timed to cause perishable concrete to be destroyed in ready-mix trucks resulting in financial harm to an employer, the conduct is an intentional tort that is not preempted by the Act. *Rockford Redi-Mix, Inc. v. Teamsters Local 325, Gen. Chauffeurs, Helpers & Sales Drivers of Rockford*, 551 N.E.2d 1333, 1337–1340 *appeal denied* 561 N.E.2d 707 (1990). Causing concrete to be destroyed in ready-mix trucks while the concrete is being delivered is not protected activity under the Act. *NLRB v. Marsden*, 701 F.2d 238, 242 n.4 (2nd Cir. 1983) (Concrete cannot be "saved for another day or simply left to harden. Once poured, it must be finished."). Sabotage, intentional conversion, or despoiling of an employer's property during a strike are unlawful acts that are not protected by Section 7 of the Act. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939). Deliberately timing a strike with the purpose of causing maximum damage and financial loss to an employer's property is unprotected activity condemned by the Supreme Court. *NLRB v. Marshall Car Wheel & F. Co.*, 218 F.2d 409, 413 (5th Cir. 1955). The Union's intentional destruction of Glacier's property is not protected by the Act.

Glacier has no means of bringing the dispute against the Union before the Board. Instead, Glacier must resort to state court to recover damages for the Union's intentional destruction of Glacier's property. *Fansteel*, 306 U.S. at 253–254. An employer has the

right to discharge the participating employees and the right to "resort to the state court to recover damages." *Id.* (emphasis added). Recovery must occur in state court because Congress did not supplant traditional state court procedure for collecting damages caused by tortious conduct. *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663–669 (1954). To conclude otherwise would mean a union "may destroy property without liability for the damage done." *Id.* at 669.

The Board itself directs that claims for intentional damage to employer property be brought in state court. A state court, not a Board proceeding, is the proper tribunal for an award to an employer for damage to property caused by a union. *Local 30, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, AFL-CIO, ("Associated Builders")*, 227 NLRB 1444 (1977); *Iron Workers Local 783 ("BE&K Const.")* 316 NLRB 1306, 1310 (1995); *J. J. Jordan Geriatric Center*, 312 NLRB 90, 102 (1993).

As for the GLY counts, the Union manufactures allegations of bad faith bargaining that appear nowhere in the Complaint. The Union's motion creates false allegations, such as: "in order to induce Glacier to enter into a successor contract, [the Union] falsely represented (to Glacier directly and to Glacier through one of its customers, GLY) that the strike would end if it did so." (Union Brf., p.2). There is no such allegation in Glacier's Complaint. *See* Complaint ¶¶ 3.32–3.53. Based upon these nonexistent allegations, the Union contends that its false representations to GLY to induce the scheduling of the mat pour are arguably prohibited bad faith bargaining under Section 8(b)(3) of the Act, 29 U.S.C.

§ 158(b)(3). Glacier's Complaint does not allege bad faith bargaining. There is no such allegation in the Complaint. The Union's false representation was made to GLY—not Glacier.

Procedurally, the only type of Board charge that could even conceivably be brought before the Board in connection with the Union's tortious state law conduct alleged in the Complaint, would be what is commonly referred to as a "*Bill Johnson's*" charge alleging objectively baseless and retaliatory litigation. *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 529–537 (2002). To bring this type of charge, the Union would have to frivolously claim that Glacier's state law litigation before this Court is itself objectively baseless and retaliatory. *Id*. A *Bill Johnson's* charge does not bar the instant lawsuit. In fact, the Board holds such charges in abeyance pending the conclusion of the state court lawsuit, *Beverly Health & Rehabilitation Services, Inc.*, 331 NLRB 960, 961 (2000), because the plaintiff has a First Amendment right to have state law questions decided by the state court judicial system. *Id*.

II. STATEMENT OF THE FACTS

While damages to Glacier's business from the Union's protected strike activity are not recoverable, Glacier does not seek any such damages. Glacier's Complaint requests relief for two acts of tortious conduct under state law: (1) the Union's intentional destruction of Glacier's property, and (2) the Union's false representations to GLY inducing the scheduling of the mat pour. Glacier's causes of action are premised entirely upon those two acts of tortious conduct. Complaint ¶ 2.2. Glacier seeks damages

that flow only from those two acts of tortious conduct. Glacier's Complaint is summarized below. The Union must be held accountable for its tortious acts.

1. The August 11, 2017 destruction of Glacier's property.

The Union intentionally created a crisis placing Glacier's plant, equipment and product at immediate risk of harm. If batched concrete is not timely delivered to a Glacier customer, it is substantially certain to harden. This places Glacier's plant, equipment and product at immediate risk of harm. Complaint ¶¶ 3.3–3.10. The Union was aware of the nature of Glacier's batched concrete and Glacier's customer delivery operations on August 11, 2017. Complaint ¶¶ 3.10–3.11. With the intent to cause Glacier financial harm, the Union initiated a scheme to sabotage Glacier's batched concrete. Complaint ¶¶ 3.13–3.15. The Union carried out that scheme, placing Glacier's plant, equipment and product at immediate risk of harm. Complaint ¶¶ 3.16–3.23. Glacier attempted to mitigate the emergency and was able to prevent damage to the plant, equipment and waste water system. But the batched concrete was destroyed. Complaint ¶¶ 3.16–3.27. The Union's conduct caused Glacier damages. Complaint ¶¶ 3.27–3.31. By destroying Glacier's concrete, the Union interfered with Glacier's August 11, 2017 performance of Glacier's contracts by causing Glacier's performance to be more expensive or burdensome. Complaint ¶ 3.28.

The factual circumstances underlying Glacier's allegations were extensively investigated prior to the filing of Glacier's Complaint with the Court. By way

of example only,[1] Business Agent Walker (Complaint ¶¶ 1.6, 3.17) was observed physically making a slashing sign "cut signal" across his neck, signaling the beginning of the action to damage Glacier's property. Walker was a concrete ready-mix driver for many years at a Glacier competitor. Glacier Dispatch almost immediately instructed Glacier Drivers of the obligation to finish a concrete pour that had been started. Upon information and belief, Glacier Drivers who were acting as Union Shop Stewards, Picket Captains, or in a similar agency role, stated "return your vehicle to your domicile immediately." Other statements included "I was told to go park my truck," "Leave the fucker running," "We will not be dumping them or rinsing them out. Somebody else's problem," and "Consequences are Consequences." Other Glacier Drivers simply laughed, abandoning their loaded ready-mix trucks and walking away with perishable concrete left in the drum. When Glacier responded to the emergency, there were ready-mix trucks loaded with concrete parked everywhere (*e.g.*, wash rack, under the batch plant, in the yard).

2. The Union's August 18–19, 2017 false representations to GLY inducing the scheduling of the mat pour.

Contrary to the Union's invented allegation, Glacier has not alleged a claim about bargaining. Glacier has not alleged that the Union "in order to induce Glacier to enter into a successor contract, falsely represented

[1] A court may consider hypothetical facts supporting a plaintiff's claim in a motion to dismiss. *Kinney v. Cook*, 159 Wn.2d 837, 842 (2007). These facts are provided to assist the Court in understanding the allegations in Glacier's Complaint.

(to Glacier directly and to Glacier through one of its customers, GLY) that the strike would end if it did so." (Union Brf., p.2). Glacier has no understanding as to why the Union has invented such an allegation. The allegations in the Complaint do not state what the Union claims the allegations state.

On August 18, 2017, the Union, through its agent Hicks, made intentional and knowingly false representations to GLY, a Glacier customer, to induce the scheduling of a mat pour for August 19, 2017. This caused financial harm to Glacier. Complaint ¶¶ 3.32–3.48. The Union's false representations were not made to Glacier. Complaint ¶¶ 3.40. The Union's false representations occurred after the ratification of a new labor agreement. Complaint ¶¶ 3.39. The Union's representations were knowingly false. Complaint ¶¶ 3.41–3.42. The Union's false representations were made to induce the scheduling of a complicated mat pour for August 19, 2017. Complaint ¶¶ 3.43–3.46. The Union's false representations caused the scheduling of the mat pour for August 19, 2017. Complaint ¶¶ 3.47–3.49. There were not enough Glacier drivers necessary to perform the mat pour. The mat pour was cancelled. Complaint ¶¶ 3.50–3.51. The scheduling of the mat pour for August 19, 2017, directly and proximately caused Glacier damages. Complaint ¶¶ 3.50–3.53.

Contrary to the Union's manufactured allegation, Glacier's Complaint does not reference any conduct occurring during bargaining. By way of example only,[2] Ted Herb, CEO of GLY, is anticipated to testify

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[2] *See* footnote 1, *supra*.

to the facts as outlined in the Complaint. GLY is not a bargaining agent of Glacier. Presently, and for many years, four concrete companies—Glacier, Cadman, Stoneway and Salmon Bay—have engaged in coordinated bargaining. Upon completion of the bargaining, the four companies enter into separate and nearly identical labor agreements with the Union. GLY is not involved in this bargaining. GLY is a contractor.

First Cause of Action: Conversion, trespass to chattels and equitable restitution. Complaint ¶¶ 4.1–4.7. The Court's inquiry is whether the Union intentionally caused destruction of Glacier's batched concrete or caused it to be so materially altered in its physical condition as to change its character. Restatement (Second) of Torts § 226 (1965); *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78 (2008). This is not protected activity under Section 7 of the Act. This state law claim is not identical to any prohibition under Section 8 of the Act.

Third Cause of Action: In the Alternative—August 11, 2017 Civil Conspiracy. Complaint ¶¶ 4.15–4.18. This was pleaded in the alternative to the liability under common law agency principles. This cause of action is based on the unprotected intentional destruction of Glacier's property. The Court's inquiry is the same. This is not protected activity under Section 7 of the Act. This state law claim is not identical to any prohibition under Section 8 of the Act.

Fourth and Fifth Causes of Action: Fraudulent and Negligent Misrepresentation. Complaint ¶¶ 4.19–4.34. The Court's inquiry is whether the Union intentionally or negligently made a misrepresentation

of fact, opinion, intention, or law to GLY to induce the scheduling of the mat pour on August 19, 2017. Restatement (Second) of Torts § 525 (1977); Restatement (First) of Torts § 870 (1939); Restatement (Second) of Torts § 552 (1977). This is not protected activity under Section 7 of the Act. This state law claim is not identical to any prohibition under Section 8 of the Act.

Second and Sixth Causes of Action: Intentional Interference with Glacier's performance. Complaint ¶¶ 4.8–4.14; 4.35–4.40. The Court's inquiry is whether the Union intentionally and improperly sabotaged, ruined and destroyed Glacier's batched concrete, and made the false representations to GLY inducing the scheduling of the mat pour, which caused Glacier's performance under its customer contracts to be more expensive. Restatement (Second) of Torts § 766A[3]; *Scymanski v. Dufault*, 80 Wn.2d 77, 83 (1971) (en banc). This is not protected activity under Section 7 of the Act. This state law claim is not identical to any prohibition under Section 8 of the Act. The conduct—destruction of property and fraudulent representations—are the type of conduct left to the states to regulate.

III. STATEMENT OF THE ISSUE

Has the Union carried its burden to prove that state law claims of intentional destruction to property and fraudulent inducement of the scheduling of a mat pour are preempted by the *Garmon* or *Machinists* doctrines?

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[3] Glacier has not alleged a claim under Restatement (Second) of Torts § 766. The facts do not support such a claim.

IV. EVIDENCE RELIED UPON

Glacier relies upon the actual allegations and claims set forth in its Complaint.

V. AUTHORITY

A motion to dismiss is granted sparingly. *Kinney v. Cook*, 159 Wn.2d 837, 842 (2007). "Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" *Id*. "The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." *Id*. The Union may not raise new issues in its reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) (en banc).

1. The State's interest in destruction of property and false representations.

The state's interest "is no less worthy of recognition" simply because it does not concern protection from physical injury. *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 291 (1977). The Union's suggestion to the Court that it must relinquish its jurisdiction over the Union's tortious conduct unless there is violence is not true. Whether by direct physical contact, or by act of sabotage such as placing nails in front of a truck's wheel, sand in the gas tank, or leaving equipment in a position where damage is imminent, the intentional destruction of property is actionable. "Peaceful" act is not the test.

Destruction of property is clearly a matter left to the states. It is not preempted. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n ("Machinists")*, 427 U.S. 132, 136 (1976).

Violence or "peaceful" act is not the test. *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 55 (1966) (claims for false and defamatory statements are not preempted); *Farmer*, 430 U.S. at 302 (intentional infliction of emotional distress claim not preempted despite that conduct was arguably prohibited by the Act); *Sears*, 436 U.S. at 205–208 (claim based upon peaceful trespassory picketing not preempted); *Belknap*, 463 U.S. at 509–512 (misrepresentation and breach of contract claims not preempted).

The state "surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm...." *Belknap*, 463 U.S. at 511; *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401, 1417 (9th Cir. 1991), *as amended on denial of reh'g* (May 4, 1992) (fraudulent representations were not "arguably prohibited by the Act" as bad faith bargaining). Federal labor law does not create an exemption from state law liability for misrepresentations or promises that are not specifically privileged as a matter of federal policy. *Belknap*, 463 U.S. at 512; *Sun Carriers*, 960 F.2d at 1417; *Windfield v. Groen Div., Dover Corp.*, 890 F.2d 764, 770 (5th Cir. 1989).

Glacier's state law claims based upon the Union initiating an intentional destruction of Glacier's property, and the Union's false representations inducing the scheduling of the mat pour, are clearly the type of tortious conduct the Supreme Court has left to the state.

2. What is the primary jurisdiction of the Board?

The Board has primary jurisdiction over activities regulated by Sections 7 and 8 of the Act. Section 7 protects certain conduct of employees. 29 U.S.C. § 157. Section 7 protects employee rights, not the rights of unions or employers. *Id.* Section 8 prohibits certain conduct of employers and labor organizations. 29 U.S.C. §§ 158. Section 8 provides a list of specific prohibitions against certain union and employer conduct. *Id.*

A. The right to strike does not protect destruction of employer property.

The Union falsely claims that its initiation of the destruction of Glacier's property is arguably protected by the Act. While certainly Section 7 protects an employee's right to strike, the Act does not protect destruction of property. *Machinists*, 427 U.S. at 136. The right to strike under the Act does not protect the right to cause concrete to be intentionally destroyed, causing financial harm to an employer. *Rockford Redi-Mix*, 551 N.E.2d at 1337–1340. Such acts are destructive acts unprotected by the Act. *Id.*; *Marsden*, 701 F.2d at 242 n.4 (causing concrete to be destroyed in ready-mix trucks while the concrete is being delivered is a destructive act not protected by the right to strike under the Act).

In conclusory fashion, the Union's brief repeatedly asserts that Glacier seeks damages for peaceful strike activity. This is patently false. State court damages for intentionally destroying batched concrete in ready-mix trucks are "not awarded for striking or any other 'economic coercion,' but for the destruction of

property." *Rockford Redi-Mix*, 551 N.E.2d at 1338. This conduct is not protected and, therefore, not subject to being preempted by Federal labor preemption. *Id*. Where the object is protected, but the tactics used unlawful, the courts award damages for the losses directly resulting from the unlawful activity. *Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters*, 704 F.2d 1443, 1448 (9th Cir. 1983).

The Union is completely wrong in claiming it has a protected right to intentionally cause destruction of Glacier's property during a strike. The Supreme Court has long held that sabotage, intentional conversion, or despoiling of an employer's property during a strike are unlawful acts that are not protected by Section 7 of the Act. *Fansteel*, 306 U.S. at 253; *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (while "the absence of violence was a fortunate feature of the affair" the danger to the employer's vessel was certainly present); *Marshall Car Wheel*, 218 F.2d at 413 ("the union deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss to" the employer); *Marshall Car Wheel*, 107 NLRB 314, 315 (1953) (right to strike under the Act does not include intentional act of sabotaging an employer's operation by timing a strike to place the plant, equipment and property at immediate risk of harm from the sudden cessation of work); *In Re Int'l Protective Servs., Inc.*, 339 NLRB 701, 702 (2003) (the right to strike does not protect unlawful conduct including the failure to protect the employer's plant, equipment or products from immediate danger and the test is not whether notice of the strike was or was not provided.)

Again, while the object may be lawful, the means were not. When a union intentionally damages the employer's property, the employer has its normal rights of redress against such unprotected acts, including the right to discharge employees and the right to "resort to the state court to recover damages...." *Fansteel*, 306 U.S. at 254 (emphasis added). Likewise, here, Glacier has the right to resort to this Court to recover damages for the Union's unlawful tortious means resulting in destruction of Glacier's property. There is no other remedy but this state court action.

B. The prohibitions under the Act do not supplant traditional court lawsuits for damages caused by tortious conduct.

The Union falsely claims that its fraudulent representations to GLY are prohibited by the Act. With respect to the prohibitions against labor organization conduct under the Act, the 1947 Labor Management Relations Act ("LMRA"), also known as the Taft-Hartley Act, 29 USC §§ 141–197, modified the Act. The LMRA "prescribed a new preventive procedure against unfair labor practices on the part of labor organizations…." *Laburnum Constr. Corp.*, 347 U.S. at 666. This Congressional action was "consistent with an increased insistence upon the liability of labor organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices." *Id.* at 667. Congress did not supplant "traditional state court procedure for collecting damages for injuries caused by tortious conduct." *Id.* at 663–664. To conclude otherwise would mean a union "may destroy property without liability for the damage done." *Id.* at 669.

These new LMRA preventive procedures against labor organizations were set forth in the prohibitions of Section 8(b) of the Act. 29 U.S.C. § 158. These prohibitions are for the following types of union conduct: coercion of employees [8(b)(1)(A)], coercion of employees in their choice of representatives [8(b)(1)(B)], causing or attempting to cause an employer to discriminate against employees [8(b)(2)], collective bargaining (violations) [8(b)(3)] and [8(d)], secondary boycotts [(8(b)(4)], jurisdictional disputes [8(b)(4)(D) and 10(k)], excessive or discriminatory fees [8(b)(5)], "featherbedding" [8(b)(6)], recognitional picketing [8(b)(7)], "hot cargo" agreements [8(e)], and election-related conduct. 29 U.S.C. § 158.

As can be seen, Congress did not include union sabotage and destruction of employer property in these prohibitions. Congress did not include union false representations to induce harm in these prohibitions. When Congress has not prescribed a procedure for dealing with the consequences of tortious conduct, there is no basis for concluding that liabilities for tortious conduct have been eliminated by the Act. *Laburnum Constr. Corp.*, 347 U.S. at 665. Thus, there is no federal preemption when, for example, there was no compensatory relief under the Act for the consequences of the tortious conduct. *Int'l Ass 'n of Machinists v. Gonzales*, 356 U.S. 617, 625, n.6 (1958) (the union's conduct did not violate Sections 8(b)(1) or 8(b)(2) of the Act, and the Board could not have provided the relief that was sought in the state court lawsuit).

In the instant case, Glacier's Complaint falls squarely within the principle cited in *Rainbow Tours*, 704 F.2d 1443. "[W] hen the object of a union's

conduct is protected but the tactics used to attain that end are not, we believe the district court should award damages only for the losses directly resulting from the unlawful activity." *Id*. at 1448. Here, there is no compensatory relief under the Act for the Union's sabotage of Glacier's property or for its false representations inducing the scheduling of the mat pour. Glacier's state law claims are not identical to any prohibition under Section 8 of the Act.

C. The Board does not have authority to award damages for the Union's tortious conduct.

Preempting Glacier's claim would prevent any remedy for the Union's intentional destruction of property. *Sears*, 436 U.S. at 206–207 (refusing to find preemption because preempting the employer's state law claim for peaceful trespassory picketing would "deny the employer access to any forum in which to litigate").

Congress did not give the Board the authority to award damages for state law tort conduct. The Act "sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay." *Laburnum Const. Corp.*, 347 U.S. at 665. The "one instance" in which the Act prescribes judicial recovery of damages for unfair labor practices is for unlawful secondary boycotts under Section 8(b)(4), 29 U.S.C. § 158(b)(4). *Id*. Here, there is no Section 8(b)(4) secondary boycott allegation in Glacier's Complaint.

The Board itself recognizes the limits of its jurisdiction to remedy state law torts. The Board conclusively holds that it does not have jurisdiction to

award damages for tortious conduct. *Associated Builders*, 227 NLRB at 1444. Board precedent holds that a state court proceeding, not a Board proceeding, is the proper tribunal for an award to the employer for the damage to property caused by the union's tortious acts. *Id*. The Board's reasoning is that employers "legally damaged by the tortious conduct of unions" are better served pursuing private remedies before tribunals (*i.e.*, the state courts) which have more experience and are better equipped than the Board to measure the impact of tortious conduct. *Id*.

Even if Congress had created an unfair labor practice charge covering the Union's tortious conduct alleged in the Complaint, the Board would tell Glacier to proceed to state court to recover damages for the union's tortious conduct. The Board's holding in *Associated Builders* is the unwavering position of the Board. *See BE&K Const*. 316 NLRB at 1310 (destruction of employer property caused by union's violation Section 8(b)(1)(A) of the Act and employer's request for an award of property damages were denied because Board is not proper tribunal for damages caused by tortious conduct); *J. J. Jordan Geriatric Center*, 312 NLRB at 102 (destruction of employer property caused by union's violation of Section 8(b)(1)(A) of the Act and employer's request for an award of property damages from the Board denied because "assessment of such damages to automobiles and other property is a matter which can be handled more efficiently and effectively by state courts").

3. <u>*Garmon* Preemption</u>

Rather than recognize this Court's primary jurisdiction to remedy tortious damage to property

and false representations, the Union demands the Court surrender its jurisdiction under *Garmon* preemption. The Supreme Court announced the "*Garmon*" preemption doctrine in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), which was subsequently refined by the Supreme Court in *Sears*, 436 U.S. 180. *Sun Carriers*, 960 F.2d at 1413–14 (*Sears* refined the *Garmon* analysis).[4]

Under its present formulation, *Garmon* preempts state court jurisdiction only if the state law prohibits the identical conduct that is arguably prohibited by the Act, *Sears*, 436 U.S. at 190–198; *Belknap*, 463 U.S. at 510, or if the conduct is arguably protected under the Act and the injured party has a means of bringing the dispute before the Board, *Sears*, 436 U.S. at 199–207; *Belknap*, 463 U.S. at 510; *Davis*, 476 U.S. at 393 n.10; *see also Golden State II*, 493 U.S. at 110 n.7 (providing concise statement of Supreme Court's current formulation of the *Garmon* preemption doctrine).

The "arguably prohibited" and "arguably protected" questions must be analyzed separately because they raise different legal considerations. *Sears*, 436 U.S. at 190. The Supreme Court in *Sears* recognized an additional consideration necessary to conclude that conduct is arguably protected under Section 7 of the Act. This additional consideration requires that the injured party (*i.e.* Glacier) have a means of bringing the dispute before the Board. *Davis*, 476 U.S. at 393, n.10; *Golden State II*, 493 U.S. at 110 n.7; *Sears*, 436

[4] The Union omits the Supreme Court's *Sears* decision in its briefing to the Court.

U.S. at 202–203 (there is insufficient justification for preempting state jurisdiction over arguably protected conduct where the injured party has no acceptable means of bringing the issue to the Board).

After this inquiry, if the Union's conduct alleged in the state court action is determined to be arguably protected or prohibited by the Act such that *Garmon* preemption applies, the conduct may still survive *Garmon* preemption under the exceptions for conduct that touches interests deeply rooted in local feeling and responsibility. *Belknap*, 463 U.S. at 498 (citing *Sears*, 436 U.S. at 200).

A. The "arguably protected" question and the Union's destruction of property.

There is a case directly on point. In *Rockford Redi-Mix, Inc.*, an employer sued a union, its agents, and members, named and unnamed, for damages resulting from destruction to the employer's concrete trucks. 551 N.E.2d 1333. Pursuant to an instruction by a union representative, the *Rockford Redi-Mix* drivers reported to work, filled their mixer trucks with concrete, left the employer's facility, and waited for the union to meet with the employer to demand the employer sign a collective bargaining agreement. *Id.* The union met with the employer. *Id.* The employer refused to sign the agreement. *Id.* The union responded that "a strike was in progress." *Id.*

The union in Rockford claimed it instructed the drivers to make their deliveries to the jobsite. *Id.* After some effort to locate the customer, the drivers decided to leave the concrete trucks at the jobsite, with the ignitions off and drums stopped. *Id.* When the employer (*Rockford Redi-Mix*) located its mixer

trucks at the jobsite, the concrete had hardened in the trucks. *Id*. at 1336. The employer attempted to rotate the drums of the mixer trucks to mitigate the damage, causing the mixer trucks' hydraulic lines to blow. *Id*. All but one of the employer's mixer trucks were taken out of operation, causing the employer to lose business. *Id*.

The *Rockford* employer brought a state law intentional tort claim to recover the damages. *Id*. at 1337. The court ruled the claim for intentional damage to the employer's property was not preempted by *Garmon*. *Id*. at 1337–1338. The court reasoned that the damages in the case were not awarded for striking or for any other lawful economic coercion contemplated by the Act, but for destruction of property, which is not a protected activity subject to preemption by Federal labor law. *Id*. at 1339. The court reasoned that the Act did not protect the conduct of the strikers because the conduct was destructive and therefore unprotected by Section 7 of the Act. *Id*. The *Rockford* court reasoned that "the tort claim entailed little risk of interference with the jurisdiction of the Board." *Id*. (quoting *Sears*, 436 U.S. at 196–197). As in *Rockford*, Glacier has not asserted tort claims that entail a risk of interference with the jurisdiction of the Board. The act of striking is not unlawful. The tactic of initiating the destruction of Glacier's property was tortious and unlawful.

The Union asks the Court to conclude that its intentional destruction of Glacier's property is arguably protected strike activity under Section 7 of the Act, 29 U.S.C. § 157. The *Rockford* court explained the difference, reasoning that in *Machinists* the Supreme Court held that peaceful refusals to work

are protected by federal law, but also held that destruction of property is most clearly a matter for the states. *Id*. at 1339 (citing *Machinists*, 427 U.S. at 136). Intentional torts are not preempted by Federal labor law. *Id*. at 1340. The Union makes the same misplaced argument as was rejected in *Rockford*. Glacier does not seek damages for strike activity. Glacier seeks damages for the initiation of destruction of property by the Union, which is a matter for the state court. *Id*. at 1338.

The Union has not made a strong showing that the conduct outlined in Glacier's Complaint is arguably protected by the Act and that Glacier has a means of bringing the dispute before the Board. *Sears*, 436 U.S. at 199–208; *Davis*, 476 U.S. at 393, n.10 (1986); *Golden State II*, 493 U.S. at 110 n.7. Board precedent authoritatively holds that the Union's conduct was not protected activity under the Act. There is no question that Glacier has no means of bringing this dispute before the Board.

The Union cites *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984) (which involved a state casino legislation in New Jersey) to argue that the Union's sabotage and destruction of Glacier's property is arguably protected under Section 7 of the Act. (Union Brf., pp. 7–8 and 10). *Brown* provides no authority to conclude that destruction of property is protected by Section 7 of the Act. In fact, as has been shown, it is neither actually, nor even arguably, protected by Section 7 of the Act.

The cases cited by the Union (Union Brf., p.10) do not involve the initiation of sabotage or destruction of property. The Union cites *Garmon* where the

employer's claim was for damages for peaceful picketing, not for destruction of property. 359 U.S. at 237. The claim in *Garmon* literally requested damages for peaceful picketing. *Id*. The Union cites *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton* where the employer sought damages in state court for peaceful secondary activities to induce customers to cease doing business with the employer, which is regulated under Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4). 377 U.S. 252, 253 (1964). Glacier has not alleged a claim based upon secondary activities. The Union cites *Kaufman v. Allied Pilots Ass'n*, where airline passengers brought state law claims against a union for conducting a sick-out, not for intentional destruction of property. 274 F.3d 197, 200 (5th Cir. 2001). Glacier has not alleged a claim requesting damages for a sick-out.

Instead of addressing the initiation of tortious sabotage and destruction of property alleged in the Complaint, the Union lists immaterial cases about strikes, lockouts, sick-outs or picketing. *See, e.g*, *Katz v. Westlawn Cemetery Ass'n, Inc.*, 673 N.E.2d 1053, 1055–1056 (1996) (a cemetery customer brought action against cemetery during a gravediggers strike because the customer was unable to bury her mother due to the employer lockout, not for tortious destruction of property); and *Mobile Mech. Contractors Ass 'n, Inc. v. Carlough*, 664 F.2d 481, 483 (5th Cir. 1981) (employer association sued unions to enjoin an unlawful strike under 29 U.S.C. § 186(e), which relief was granted, and subsequently requested damages under state law caused by that peaceful but unlawful strike). None of these cases have anything

to do with the initiation of sabotage or intentional destruction of property.

The Union cites to employee discharge cases under Board law. (Union Brf. pp. 14–15). Discharge cases are most certainly a subject for regulation by the Board. Glacier has not alleged an employee discharge cause of action in its Complaint. Glacier could not bring an employee discharge case before the Board to remedy the damage to Glacier's property. The state law in Glacier's Complaint is different than any discharge prohibitions under the Act. The inquiries are different.

The Union's unsupported assertion that its initiation of destruction of Glacier's property was protected under the Act is legally insufficient. The Court does not credit any argument by the Union. Instead, the Court must assess the strength of the argument that Section 7 does in fact protect the disputed conduct. *Sears*, 436 U.S. at 205. The state court is fully permitted as part of its preemption analysis "to evaluate the merits of an argument that certain activity is protected" or prohibited by the Act, and such evaluation by the state court "does not create an unacceptable risk of interference" with Board jurisdiction. *Id.* at 204–206 (analyzing Board precedent with respect to peaceful trespassory picketing in preemption analysis); *Linn*, 383 U.S. at 60–61 (analyzing Board precedent with respect to libel and defamation in preemption analysis).

The discharge cases cited by the Union support Glacier's position. *See, e.g.*, *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257–58 (6th Cir. 1990), *supplemented*, 919 F.2d 140 (6th Cir. 1990) (the

Act does not protect abandonment of jobs if it poses a foreseeable risk of damage to the employer's plant because the Act does not protect striking employees who commit acts of vandalism or sabotage against their employer); *Fishman & Sons, Inc.*, 122 NLRB 1436, 1447 (1959) (the Board and courts hold that intentionally timing a strike to cause damage to the employer's property is not protected activity).

The Union's case *Oklahoma Milk Producers*, 125 NLRB 419, 435 (1959) further illustrates the issue for the Court. In *Oklahoma Milk Producers*, the Board found the perishable nature of milk created no unusual circumstances that might cause loss to be sustained, and the employer was able to promptly take action to get the milk to market. *Id*. at 415. Glacier's Complaint does not allege that employees engaged in harmless actions posing no immediate risk of harm. In footnote 10, the Board in *Oklahoma Milk Producers* specifically distinguished the harmless milk circumstance from the circumstance of immediate harm in *Marshall Car Wheel*, where the Board's precedent provides that the right to strike under the Act does not include sabotaging an employer's operations by timing the strike to place the plant, equipment and property at immediate risk of harm as foreseeably would result from the sudden cessation of work. 107 NLRB at 319. *Oklahoma Milk Producers* does not involve the intentional tort of destruction of property.

Contrary to the Union's assertion, deliberately timing a strike with the purpose of causing damage and financial loss to an employer is <u>unprotected activity</u> condemned by the Supreme Court. *Marshall Car Wheel*, 218 F.2d at 413 (citing *Fansteel*, *supra*)

Marshall Car Wheel, 107 NLRB at 315; *Boghosian Raisin Packing*, 342 NLRB 393, 396 (2004) ("there can be little question the product damage was intentional" and "[n]ecessarily a strike will cause some economic loss to an employer," but intentional damage to the employer's product "goes beyond such loss and where strikers deliberately time their strike to cause product damage, then their activity is unprotected...."); *Int'l Protective Servs.*, 339 NLRB at 702; *Marsden*, 701 F.2d 242, n.4; *Rockford Redi-Mix*, 551 N.E.2d at 1337–1340; *Machinists*, 427 U.S. at 136; *Fansteel*, 306 U.S. at 253.

As shown, the Union's claim that its initiation of sabotage and destruction of Glacier's property is protected strike activity has been authoritatively rejected by the Supreme Court and the Board. A "party asserting preemption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Davis*, 476 U.S. at 395; *Wal-Mart Stores, Inc.*, 190 Wn.App. at 21 (citing *Davis*, 476 U.S. at 397). The precondition for preemption, "that the conduct be 'arguably' protected or prohibited, is not without substance." *Davis*, 476 U.S. at 394. The party asserting preemption "must make an affirmative showing that the activity is arguably subject to the Act." *Id*. at 394–399.

The Union has failed to make any such affirmative showing. Likewise, there exists no means by which Glacier could bring this dispute before the Board. Glacier's claims, based upon the Union's intentional destruction of Glacier's property, are not preempted under *Garmon*.

B. The "arguably prohibited" question and the Union's false representation.

The Union has likewise failed to establish that the Court's inquiry with respect to the Union's false representation to GLY to induce the scheduling of the mat pour is identical to any prohibition under the Act. Throughout, the Union completely misrepresents Glacier's Complaint. The Complaint makes no allegation of statements made to Glacier relating to bargaining. Nor does the Complaint cover any of the alleged factual circumstances the Union invented and then analyzed in its Brief. (Union Brf., pp. 18–21).

The Act does not regulate the alleged false representations the Union made to GLY. The Union is not the authorized representative of GLY's employees. GLY is not a bargaining agent for Glacier. "A union cannot compel an employer to bargain for employees the union does not represent." *Operating Eng'rs Pension Tr. v. Wilson*, 915 F.2d 535, 540 (9th Cir. 1990) (state law tortious misrepresentation claim against union was not preempted because union did not have a bargaining relationship with the entity to whom it made the misrepresentation and was thus not engaged in bargaining); *Nw. Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1028 (6th Cir. 2001) (state law tortious misrepresentation claim against union is not preempted because union did not have a bargaining relationship with the entity to whom it made the misrepresentation and was thus not engaged in collective bargaining).

Glacier's Complaint does not allege any discussions or conduct occurring during collective bargaining. State law tort claims of fraudulent inducement or

false representations cannot be bad faith bargaining when they occur outside the collective bargaining process. *Sun Carriers*, 960 F.2d at 1416 (claims of fraud and misrepresentation were not preempted under *Garmon* as bad faith bargaining because nowhere do the claims assert that the lies occurred during the collective bargaining or negotiations); *Wells v. Gen. Motors Corp.*, 881 F.2d 166, 171 (5th Cir. 1989) (the parties had completed collective bargaining and the alleged fraudulent inducements had no bearing on the collective bargaining process and were not offered to obtain ratification of an agreement); *Voilas v. Gen. Motors Corp.*, 170 F.3d 367, 380 (3rd Cir. 1999) (state law fraud claims are not preempted by *Garmon* as bad faith bargaining when they are made independent of the bargaining process); *Hernandez v. Creative Concepts, Inc.*, 862 F.Supp.2d 1073, 1088 (D. Nev. 2012) (state law fraudulent misrepresentation claims are not preempted by *Garmon* as bad faith bargaining where they occurred outside the completed collective bargaining process).

Glacier's Complaint does not allege bargaining conduct. Glacier's Complaint does not contain the factual allegations the Union analyzes in its arguments about the Union's false representations to GLY. The Union has failed to affirmatively prove that fraudulent misrepresentation in the circumstance described in Glacier's Complaint is identical to conduct that is arguably prohibited by the Act. *Sears*, 436 U.S. at 193–198; *Belknap*, 463 U.S. at 510. The claim is not preempted.

C. Tortious interference with Glacier's performance.

The Union spends significant briefing focused on Glacier's tortious interference claims despite that they are based on the same unprotected conduct as the other claims—intentional destruction of Glacier's property and fraudulent inducement of the mat pour. While certainly claims for tortious interference with contract are often preempted by *Garmon*, preemption occurs frequently because such claims involve conduct that is also prohibited by the Act. Glacier's claim does not involve any such prohibited conduct under the Act.

For a common-law tort action for interference with a contract to be preempted by the Act, it must be founded on conduct that is arguably within the ambit of § 7 or § 8. *Local 926, Int'l Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 677 (1983). The Act contains no express preemption provision. *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218, 224 (1993). The Supreme Court is reluctant to infer preemption. *Id.* "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Id.*

Due only to the destruction of property on August 11, 2017, and the scheduling of the mat pour for August 19, 2017, Glacier alleges interference with Glacier's own performance of its customer contracts, which caused Glacier's own performance to be more expensive under Restatement (Second) of Torts § 766A. Glacier **has not** alleged a claim under Restatement Second of Torts § 766, which involves

interfering with the performance of a contract between another (*i.e.*, Glacier) and a third person (*i.e.*, Glacier customers) to induce or cause the third person (*i.e.*, Glacier customers) to not perform the contract (*i.e.*, cease doing business with Glacier).

In contrast to Restatement § 766A, Restatement § 766 claims are Section 8(b)(4) secondary boycott type claims (if a union and employer are involved). *See Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 943 (9th Cir. 2014) (describing secondary boycott claims). These Restatement § 766 / Section 8(b)(4) type state law tortious interference claims are frequently preempted unless the union coercion involved violence. *Id.* at 955–66 (citing *Morton*, 377 U.S. at 260–61). The cases cited by the Union in its brief (Union Brf., pp. 11–12) are these types of tortious interference claims. These are the cases the Union cites to the Court when it claims "violence" is required to avoid preemption. The Union seems to argue that if there is no violence, they are home free. Such is not the law.

Glacier's tortious interference claims are different. Glacier's tortious interference claims involve Union interference with Glacier's own performance due to the initiation of property damage and the misrepresentation to GLY. This type of claim does not raise any arguable protection or prohibition under the Act. The Act's "secondary boycott activity" applies to Union conduct towards a neutral employer, not conduct towards a primary employer such as Glacier. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672–674 (1951) (the applicable proscriptions of Section 8(b)(4) are limited); *Local 1976, United Bhd. Of Carpenters and Joiners of Am., AFL-CIO v. NLRB*,

537 U.S. 93, 98 (1958) (no sweeping prohibition was intended by Section 8(b)(4), it does not speak generally of secondary activity, and instead describes and condemns specific union conducted directed to specific objects.)

We start with the basic assumption that Congress did not intend to displace state law. Glacier's Restatement § 766A tortious interference claims are premised upon interference with Glacier's own performance, not arguable secondary boycott activity. Glacier's § 766A claims do not involve conduct arguably protected or prohibited by the Act. Glacier's intentional interference claims are even further removed from the ambit of the Act because both of Glacier's tortious interference claims are based entirely upon conduct that is not within the protection of the Act. These claims are traditionally left to the states to regulate—destruction of property and false representations. The Union has failed to identify any arguable prohibition under the Act. As the Act is not implicated, one does not even get to the violence exception to preemption. Glacier's state law tortious interference claims entail little risk of interference with the jurisdiction of the Board. *Sears*, 436 U.S. at 196–197.

The claims of intentional interference with Glacier's performance are not preempted. Glacier does not have to show violence. Violence is an exception to claims that are within the Act's arguable protections or prohibitions such as secondary boycott claims. Glacier's claims are not within the arguable protections or prohibitions of the Act. There is no conflict with the Act.

D. The exceptions to preemption would apply even if the Union established any conduct that was arguably protected or prohibited under the Act.

Conduct that touches interests deeply rooted in local feeling and responsibility is not preempted. *Belknap*, 463 U.S. at 498 (citing *Sears*, 436 U.S. at 200). Intentional destruction of property is most clearly a matter left to the state and is not preempted. *Machinists*, 427 U.S. at 136. The state has "a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm..." *Belknap*, 463 U.S. at 492 (1983) (misrepresentation claim not preempted).

Any possible connection between Glacier's Complaint and conduct arguably protected or prohibited under the Act would be so remote and peripheral to the Act that the local interest exception to preemption would readily apply. Likewise, preemption is inappropriate because Glacier does not have a means of bringing the dispute before the Board. *Davis*, 476 U.S. at 393, n.10; *Golden State II*, 493 U.S. at 110 n.7; *Sears*, 436 U.S. at 202–203 (there is insufficient justification for preempting state jurisdiction over arguably protected conduct where the injured party has no acceptable means of bringing the protection issue to the Board).

4. *Machinists* preemption.

Machinists preemption precludes both state law and Board interference in conduct that Congress intended to be unregulated and left to the free play of economic forces. *Machinists*, 427 U.S. at 140; *Belknap*, 463 U.S. at 499–500. *Machinists* preemption forbids

both the states and the Board from regulating certain conduct. *Retail Prop. Tr.*, 768 F.3d at 951. For example, a union strike that drains an employer of its profits is fair game. Similarly, an employer lockout can seriously impact a union.

Machinists preemption does not apply to Glacier's claims. For *Machinists* preemption to apply, one would have to reach the preposterous conclusion that Congress intended to allow the parties to a labor dispute to intentionally destroy one another's property and to engage in fraudulent misrepresentation without any regulation. Damage to property is a matter most clearly left to the state to regulate. *Machinists*, 427 U.S. at 136. Likewise, federal labor law does not create an exemption from state law liability for misrepresentations or promises that are not specifically privileged as a matter of federal policy. *Belknap*, 463 U.S. at 492; *Sun Carriers*, 960 F.2d at 1417; *Windfield*, 890 F.2d at 770.

VI. CONCLUSION

The Union has not affirmatively proved that the allegations set forth in Glacier's Complaint are arguably protected or prohibited by the National Labor Relations Act or that Glacier has a means to bring this dispute before the National Labor Relations Board. The claims are not preempted by Federal labor law preemption. The Union's motion to dismiss must be denied.

RESPECTFULLY SUBMITTED this 29th day of January, 2018.

DAVIS GRIMM PAYNE & MARRA

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I certify that this memorandum contains 8,300 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2018, I caused the foregoing *Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant to CR 12(b)(1) and 12(b)(6)* to be electronically filed with the Clerk of the Court using the King County Superior Court CM/ECF system.

I further certify that I served a true and correct copy of the same document via e-service through the King County Superior Court CM/ECF system to:

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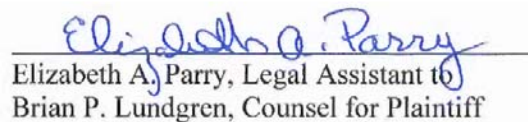

APPENDIX H

FILED
2019 MAR 08
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 17-2-31194-4 KNT

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17 DEC 04 PM 4:15

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 17-2-31194-4 KNT

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON FOR KING COUNTY

GLACIER NORTHWEST, INC., d/b/a CalPortland, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174, Defendant.	Case No. **COMPLAINT FOR DAMAGES**

COMES NOW the Plaintiff, by and through its attorneys of record, and states and alleges as follows:

I. PARTIES

1.1 Plaintiff Glacier Northwest, Inc., d/b/a CalPortland, (hereinafter "Glacier") is, and at all times mentioned in this Complaint was, a Washington Corporation doing business in Washington state, engaged in the sale and delivery of ready-mix concrete and aggregates to various customers in King County, Washington and other Washington counties.

1.2 Defendant International Brotherhood of Teamsters Local Union No. 174 (hereinafter "Union") is, and at all times mentioned in this Complaint was,

a labor organization representing employees. The Union transacts business in, and its principal office, officers and agents are located in, King County, Washington.

1.3 At all times material with respect to the allegations in this Complaint, the Union was, and for many years has been, the exclusive bargaining representative for drivers employed by Glacier in King County, Washington who are members of the Union (hereinafter "Glacier Drivers").

1.4 At all times material with respect to the allegations in this Complaint, Richard Hicks (hereinafter "Hicks") was Secretary-Treasurer of the Union, an agent and employee of the Union, and acting within the course and scope of that agency and employment. On this basis, the Union is liable for the consequences resulting from Hicks' conduct with respect to the allegations in this Complaint.

1.5 At all times material with respect to the allegations in this Complaint, Carl Gasca (hereinafter "Gasca") was a Business Agent of the Union, an agent and employee of the Union, and acting within the course and scope of that agency and employment. On this basis, the Union is liable for the consequences resulting from Gasca's conduct with respect to the allegations in this Complaint.

1.6 At all times material with respect to the allegations in this Complaint, Michael Walker (hereinafter "Walker") was a Business Agent of the Union, an agent and employee of the Union, and acting within the course and scope of that agency and employment. On this basis, the Union is liable for the

consequences resulting from Walker's conduct with respect to the allegations in this Complaint.

II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over this dispute and venue in this action is proper because the tortious acts that have caused Glacier damages occurred in King County, and the Union transacts business in King County.

2.2 This Court has subject matter jurisdiction over this dispute because this dispute involves traditional Washington state law tort actions subject to state regulation, and the state has a substantial interest in protecting citizens from the wrongful, damaging and tortious acts of destruction of property; false, fraudulent and material representations; and interference with performance of contractual and business relationships.

III. FACTS

3.1 Glacier enters into contracts, agreements and/or business relationships with Glacier's customers for the sale and delivery of concrete, aggregate and associated services and products from Glacier to Glacier's customers (hereinafter "concrete customers").

3.2 Glacier services its concrete customers in King County through several of Glacier's facilities, including Glacier facilities located in Seattle, Kenmore and Snoqualmie, Washington.

A. The Events of August 11, 2017.

3.3 Concrete contains environmentally sensitive chemicals and mixtures that must be disposed of promptly, safely and correctly.

3.4 To prepare concrete for immediate delivery to a concrete customer, the concrete is "batched," which generally means measuring and mixing the different ingredients of the concrete (*e.g.*, cement, sand, aggregate, admixture and water) subject to the concrete customer's specifications.

3.5 Batching occurs when the raw materials for the concrete are moved into a weigh hopper pursuant to the specific design of the given concrete customer. Once the raw materials are blended together to meet the specific design request, the raw materials cannot be separated or "unblended." The raw materials are then discharged from the weigh hopper into either a hopper or a barrel, depending upon the batch plant. The hopper or barrel batches the concrete by mixing and folding the raw materials together into concrete.

3.6 Once batched, concrete is immediately discharged from the hopper or barrel into a concrete ready-mix truck for immediate delivery to the concrete customer for ultimate discharge into the concrete customer's project. Concrete ready-mix trucks are specifically designed to maintain the integrity of the batched concrete in a revolving drum (located at the back of the ready-mix truck) during transport to the concrete customer's location.

3.7 When the concrete is discharged from the hopper or barrel into the ready-mix truck, the raw materials for the next load are discharged from the weigh hopper into the hopper and barrel and the batching and mixing of the next load of concrete commences.

3.8 Concrete is a highly perishable product. Once at rest, concrete begins hardening immediately, and

depending upon the mix can begin to set within 20 to 30 minutes. Once batched, a load of concrete cannot be saved for another day. It must be delivered to a customer, poured and finished. A limited amount of time exists for the concrete to be transported in a ready-mix truck from Glacier's facility to a concrete customer and discharged before the concrete becomes useless.

3.9 If batched concrete remains in the revolving drum of the ready-mix truck beyond its useful life span, the batched concrete is certain or substantially certain to harden in the revolving drum and cause significant damage to the concrete ready-mix truck. Once it starts to set, the concrete begins to thicken, placing pressure on the hydraulic system in the barrel of the ready-mix truck when the revolving drum is rotating. When the revolving drum is not rotating, the setting process commences and the concrete begins to harden inside the drum of the ready-mix truck.

3.10 If batched concrete is not timely delivered to a Glacier concrete customer, the batched concrete is certain or substantially certain to harden so as to be destroyed by being so materially altered in its physical condition as to deprive Glacier of possession or use of the batched concrete.

3.11 Commencing in the very early hours of August 11, 2017, Glacier and the Glacier Drivers were engaged in servicing a number of Glacier's contracts, agreements and business relationships with Glacier's concrete customers through the batching and delivery of concrete to Glacier's concrete customers. This work was scheduled to continue throughout the day.

3.12 The Union and some or all of its officers, employees and members were aware of the perishable nature of batched concrete, of Glacier's operations, and of Glacier's servicing of the contracts, agreements and business relationships with Glacier's concrete customers on August 11, 2017.

3.13 On August 11, 2017, the Union and some or all of its officers, employees and members consciously acted together pursuant to an understanding, plan or agreement among them, to sabotage, ruin and destroy Glacier's batched concrete and thereby interfere with Glacier's performance of Glacier's contracts, agreements and business relationships with Glacier's concrete customers by preventing Glacier's performance and causing it to be more expensive or burdensome.

3.14 The Union and some or all of its officers, employees and members knew the August 11, 2017 sabotage, ruination and destruction of Glacier's batched concrete was certain to, or substantially certain to, interfere with Glacier's performance of its contracts, agreements and business relationships with Glacier's concrete customers by preventing Glacier's performance and causing it to be more expensive or burdensome.

3.15 The Union and some or all of its officers, employees and members participated in the August 11, 2017 sabotage, ruination and destruction of Glacier's batched concrete with the improper purpose to harm Glacier by causing Glacier's batched concrete to be destroyed and to thereby interfere with Glacier's performance of its contracts, agreements and business relationships with Glacier's concrete customers by

preventing Glacier's performance and causing it to be more expensive or burdensome.

3.16 The sabotage, ruination and destruction of Glacier's batched concrete began shortly before 7:00 a.m. on August 11, 2017, when Union agents Hicks, Gasca, and Walker were present at Glacier's Seattle facility while Glacier Drivers were engaged in the process of loading and/or delivering batched concrete to Glacier's concrete customers.

3.17 At that time, Union agents Hicks, Gasca, Walker and unnamed Union members engaged in a sudden cessation of work at Glacier's Seattle, Kenmore and Snoqualmie facilities when Glacier's concrete was being mixed and batched, when Glacier's ready-mix trucks were loaded and being loaded with batched concrete, and when ready-mix trucks were in the process of delivering batched concrete to Glacier's concrete customers.

3.18 The Union and some or all of its officers, employees and members knew or had reason to know that the August 11, 2017 batched concrete was Glacier's batched concrete and was to be delivered from Glacier to the immediate possession of Glacier's concrete customers. They also knew or had reason to know there were substantial volumes of batched concrete in Glacier's barrels, hoppers and ready-mix trucks.

3.19 Rather than taking reasonable precautions to protect Glacier's equipment, plant and batched concrete from the foreseeable imminent danger resulting from the August 11, 2017 sudden cessation of work, the Union and some or all of its officers, employees and members acted tortiously and

indefensibly by sabotaging, ruining and destroying Glacier's undelivered and perishable batched concrete.

3.20 With the improper purpose of sabotaging, ruining and destroying Glacier's batched concrete, the Union and some or all of its officers, employees and members intentionally timed the August 11, 2017 sudden cessation of work for a time of day when they knew Glacier's concrete was being mixed and batched, when ready-mix trucks were loaded and being loaded with batched concrete, and when ready-mix trucks were in the process of delivering batched concrete to Glacier's concrete customers.

3.21 The Union and some or all of its officers, employees and members knew their August 11, 2017 conduct was certain to, or substantially certain to, destroy or so materially alter the physical condition of Glacier's batched concrete as to deprive Glacier of possession or use of the batched concrete.

3.22 The Union, Hicks, Gasca, Walker and unnamed Union members instructed, commanded, supervised, led, encouraged, urged, instigated, aided and abetted, approved, confirmed, ratified, adopted, acquiesced, participated in and acted pursuant to the understanding, plan or agreement among them to intentionally sabotage, ruin and destroy Glacier's batched concrete, and to interfere with Glacier's performance of its contracts, agreements and business relationships with Glacier's concrete customers by preventing Glacier's performance and causing it to be more expensive or burdensome on August 11, 2017.

3.23 Pursuant to that understanding, plan or agreement, Glacier Drivers sabotaged, ruined and

destroyed Glacier's batched concrete by immediately and suddenly ceasing all concrete delivery activity work, and abandoning or discharging at the Glacier facilities the batched concrete under their control.

3.24 In response to the August 11, 2017 understanding, plan or agreement to sabotage, ruin and destroy Glacier's batched concrete, Glacier immediately attempted to mitigate the emergency situation by, among many other remedial actions, constructing bunkers on Glacier's property where the batched concrete could be offloaded, offloading the hardening batched concrete into the constructed bunkers, ensuring washout of the ready-mix trucks, and preventing damage to Glacier's plant, equipment and waste water system.

3.25 As a result of its immediate actions, Glacier was able to offload the semi-solid concrete in an environmentally correct manner without destruction of Glacier's ready-mix trucks, plant and equipment; however, the batched concrete was destroyed by hardening in Glacier's yard and in the constructed bunkers.

3.26 The August 11, 2017 sabotage, ruination and destruction of Glacier's batched concrete necessitated Glacier bringing in excavating equipment and trucks to break up the August 11, 2017 fully hardened concrete and to haul it away to offsite disposal sites.

3.27 The above-described conduct of the Union and some or all of its officers, employees and members caused Glacier's concrete to be destroyed by materially altering its physical condition so as to deprive Glacier of possession or use of the concrete, resulting in financial loss to Glacier, including but not

limited to damage to the lost concrete, associated cleanup costs and expenses, other consequential costs and expenses, back charges, lost profits and other damages.

3.28 By destroying Glacier's concrete, the above-described conduct of the Union and some or all of its officers, employees and members prevented Glacier's August 11, 2017 performance of Glacier's contracts, agreements and business relationships with Glacier's concrete customers and caused Glacier's performance to be more expensive or burdensome, resulting in financial loss to Glacier, including but not limited to damage to the lost concrete, associated cleanup costs and expenses, other consequential costs and expenses, back charges, lost profits and other damages.

3.29 At all times material with respect to the sabotage, ruination and destruction of Glacier's concrete and the resulting interference with Glacier's performance as described above, the Union and some or all of its officers, employees and members acted together with knowledge of the conditions and intending the conduct or its consequences, and combined to accomplish the wrongful and unlawful sabotage, ruination and destruction of Glacier's concrete.

3.30 At all times material with respect to the above-described conduct in this Complaint, the Union and those Union officers, employees and members were the agents, servants and representatives of each other, and were at all times acting with the permission, consent, knowledge and ratification of each other, and were acting consciously together within the course and scope of their agency.

3.31 As a direct and proximate result of the above-described conduct, Glacier was caused to suffer property damage, unanticipated costs and expenses, lost profits and other damages in an amount, scope and extent not fully known and subject to proof at trial. The Union is liable for these damages.

B. The Events of August 18 and 19, 2017.

3.32 At all times material with respect to the allegations in this Complaint, Glacier and its concrete customer, GLY Construction, Inc. ("GLY"), had a contract, agreement and business relationship requiring Glacier to furnish ready-mix concrete to the Vulcan Block 31 commercial project ("Vulcan Project"), which is a massive commercial building project in Seattle's South Lake Union area.

3.33 At all times material with respect to the allegations in this Complaint, the Union and its agent Hicks were aware of Glacier's contract, agreement and business relationship with GLY for the Vulcan Project.

3.34 After the sudden cessation of work on August 11, 2017, Glacier and GLY postponed an August 12, 2017 mat pour which Glacier was contractually obligated to complete for the Vulcan Project and of which the Union and its agent Hicks were aware.

3.35 A mat pour involves the continuous delivery by a large number of ready-mix trucks of a massive volume of concrete to pour a concrete slab that acts as the foundation for a large commercial building.

3.36 Mat pours are complex operations requiring substantial planning and coordination including, among many other coordinated and timed tasks, traffic planning, obtaining street use permits,

retaining testing labs, scheduling labor for the pour, obtaining concrete pumps and backup equipment, and hiring off-duty police, mechanics, clean-up personnel and pour watch personnel.

3.37 Large mat pours like that for the Vulcan Project often occur at night and sometimes on a weekend due to the complexity, coordination and traffic disruptions associated with the mat pour.

3.38 Ted Herb ("Herb"), CEO of GLY, had responsibility on behalf of GLY for determining whether the Vulcan Project mat pour would occur on August 19, 2017.

3.39 Herb contacted Hicks at the Union on August 18, 2017, to determine if the Glacier Drivers had ratified a new labor agreement and would be returning to work at Glacier, and if the Glacier Drivers intended to respond to work the Vulcan Project mat pour on August 19, 2017.

3.40 In the August 18, 2017 discussion between Herb and Hicks, Hicks confirmed that the Glacier Drivers had ratified a new labor agreement and the Glacier Drivers intended to and would respond to work the Vulcan Project mat pour on August 19, 2017. Hicks stated to Herb that the Union had "specifically instructed the drivers to respond to Dispatch." Hicks both impliedly and specifically assured Herb that the Glacier Drivers intended to work the August 19, 2017 Vulcan Project mat pour and would respond by working the August 19, 2017 Vulcan mat pour.

3.41 Upon information and belief, the Union had in fact instructed Glacier Drivers to not answer calls from Glacier Dispatch and/or to not report to work if the Glacier Drivers received a call from Glacier

Dispatch for the August 19, 2017 Vulcan Project mat pour.

3.42 Hicks' August 18, 2017 statements and assurances to Herb were false, fraudulent and material representations.

3.43 Hicks' August 18, 2017 false, fraudulent and material representations to Herb were express and implied misrepresentations of fact, opinion or intention for the purpose of inducing the scheduling of the Vulcan Project mat pour for August 19, 2017.

3.44 Hicks concealed and never informed or even suggested to Herb that his August 18, 2017 statements and assurances were false, or that the Union had instructed Glacier Drivers to not answer calls from Glacier Dispatch or to not report to work if the Glacier Drivers received a call from Glacier Dispatch to work the August 19, 2017 Vulcan Project mat pour.

3.45 Hicks made the August 18, 2017 false, fraudulent and material representations to Herb intending or having reason to expect that the substance of those statements and assurances would be communicated to Glacier, and that it would influence GLY and Glacier in scheduling the Vulcan Project mat pour for August 19, 2017.

3.46 Hicks intended or had reason to expect that GLY and Glacier would be influenced by and act upon Hicks' August 18, 2017 false, fraudulent and material representations to Herb by scheduling the Vulcan Project mat pour for August 19, 2017.

3.47 On August 18, 2017, after his discussion with Hicks, Herb informed Glacier of the substance of his above-described conversation with Hicks and, based

upon Hicks' false, fraudulent and material representations, Herb advised Glacier that the Glacier Drivers intended to and would respond to Glacier Dispatch to work the Vulcan Project mat pour on August 19, 2017.

3.48 At all times material with respect to the allegations in this Complaint, Hicks concealed and did not disclose, or otherwise make known to GLY or Glacier, that Hicks' August 18, 2017 statements and assurances were false, or that the Union had in fact instructed Glacier Drivers to not answer calls from Glacier Dispatch or to not report to work if the Glacier Drivers received a call from Glacier Dispatch for the August 19, 2017 Vulcan Project mat pour.

3.49 GLY and Glacier justifiably relied upon Hicks' August 18, 2017 false, fraudulent and material representations by scheduling the Vulcan Project mat pour for August 19, 2017.

3.50 On August 18, 2017, Glacier left messages with approximately 60 Glacier Drivers providing their start times for the August 19, 2017 Vulcan Project mat pour, posted a "call tape" with each Glacier Driver's start time, and "overbooked" the number of Glacier Drivers in the event there were any "no shows" for the August 19, 2017 Vulcan Project mat pour.

3.51 On August 19, 2017, approximately 17 Glacier Drivers had clocked in at their scheduled time to perform the Vulcan Project mat pour, and approximately 5 more Glacier Drivers showed up later. At least 40 Glacier Drivers were needed and scheduled for Glacier to perform the Vulcan Project

mat pour. The August 19, 2017 Vulcan Project mat pour was cancelled.

3.52 Scheduling of the Vulcan Project mat pour for August 19, 2017, (which ultimately failed to occur) resulted in Glacier being contractually responsible to GLY for approximately $100,000 in out-of-pocket expenses/damages as a direct and proximate result of the Union and its agent Hicks' false, fraudulent and material representations to Herb on August 18, 2017.

3.53 The Union and its agent Hicks' false, fraudulent and material representations to Herb on August 18, 2017, directly and proximately caused Glacier to suffer additional damages, lost profits and unanticipated costs due to the scheduling of the Vulcan Project mat pour for August 19, 2017, in an amount, scope and extent not fully known and subject to proof at trial. The Union is liable for these damages.

IV. CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(August 11, 2017 Wrongful Sabotage, Ruination and Destruction of Batched Concrete)

4.1 Glacier realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 3.53 above as though fully set forth herein.

4.2 The August 11, 2017 wrongful, unlawful, willful, intentional and malicious sabotage, ruination and destruction of Glacier's batched concrete constitutes common law conversion and/or trespass to chattels for which Glacier is entitled to legal damages and/or equitable restitution.

4.3 At all times material with respect to the allegations in this Complaint, Glacier possessed a possessory or property interest in Glacier's batched concrete on August 11, 2017.

4.4 The Union and its officers, employees and members willfully and intentionally interfered with Glacier's batched concrete by intentionally causing the batched concrete to be destroyed, or so materially altered in its physical condition as to change its identity and character, depriving Glacier of use and possession of the concrete.

4.5 The Union and its officers, employees and members' misuse, sabotage, ruination and destruction of Glacier's batched concrete was a serious violation of Glacier's right to control the use of the batched concrete, making it just to require the Union to pay Glacier full value of the batched concrete and the resultant clean-up and consequential costs of its conduct.

4.6 The Union, with knowledge of the conditions, intended the wrongful interference with Glacier's batched concrete and its consequences.

4.7 The wrongful interference directly and proximately caused Glacier to suffer damages in an amount, scope and extent not fully known and subject to proof at trial, including but not limited to Glacier being deprived of the possession or use of the batched concrete, damage to the lost concrete, associated cleanup costs and expenses, other consequential costs and expenses, back charges, lost profits and other damages.

SECOND CAUSE OF ACTION

(August 11, 2017 Intentional Interference with Glacier's Performance)

4.8 Glacier realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 4.7 above as though fully set forth herein.

4.9 On August 11, 2017, Glacier had valid contracts, agreements and business relationships with its concrete customers.

4.10 The Union and some or all of its officers, employees and members knew, or reasonably should have known, of the existence of those contracts, agreements and business relationships.

4.11 The August 11, 2017 sabotage, ruination and destruction of Glacier's concrete wrongfully, unlawfully, willfully, intentionally and maliciously interfered with Glacier's performance of Glacier's contracts, agreements and business relationships by preventing Glacier's performance and causing Glacier's performance to be more expensive or burdensome.

4.12 The wrongful interference with Glacier's performance of its contract, agreements and business relationships was intentional and done with an improper purpose and by an improper means to harm Glacier.

4.13 The Union, with knowledge of the conditions, intended that wrongful interference and its consequences.

4.14 The wrongful interference directly and proximately caused Glacier to suffer damages in an amount, scope and extent not fully known and subject

to proof at trial, including but not limited to Glacier being deprived of the possession or use of the batched concrete, damage to the lost concrete, associated cleanup costs and expenses, other consequential costs and expenses, back charges, lost profits and other damages.

THIRD CAUSE OF ACTION

(In the Alternative – August 11, 2017 Civil Conspiracy)

4.15 Glacier realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 4.14 above as though fully set forth herein.

4.16 The Union and some or all of its officials, employees and members combined to accomplish the wrongful and unlawful purpose of sabotaging, ruining and destroying Glacier's batched concrete on August 11, 2017, and to thereby interfere with Glacier's performance of its contracts, agreements and/or business relationships on August 11, 2017.

4.17 The Union and some or all of its officials, employees and members engaged in that combination to accomplish an unlawful purpose or to act by unlawful means.

4.18 That wrongful conduct directly and proximately caused Glacier to suffer damages in an amount, scope and extent not fully known and subject to proof at trial, including but not limited to Glacier being deprived of the possession or use of the batched concrete, damage to the lost concrete, associated cleanup costs and expenses, other consequential costs and expenses, back charges, lost profits and other damages.

FOURTH CAUSE OF ACTION

(August 18, 2017 – Fraudulent Misrepresentation and Concealment)

4.19 Glacier realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 4.18 above as though fully set forth herein.

4.20 On August 18, 2017, the Union and its agent Hicks represented that the Glacier Drivers intended to and would respond to work the August 19, 2017 mat pour, and that the Union had instructed the Glacier Drivers to respond to Glacier Dispatch.

4.21 The Union and its agent Hicks' August 18, 2017 representations were material to the scheduling and conducting of the Vulcan Project mat pour.

4.22 The Union and its agent Hicks' August 18, 2017 representations were false and fraudulent.

4.23 The Union and its agent Hicks intended that the August 18, 2017 false, fraudulent and material representations be acted upon by GLY and Glacier with the improper purpose to harm Glacier.

4.24 GLY and Glacier were ignorant of the falsity of the Union and its agent Hicks' August 18, 2017 false, fraudulent and material representations, and the Union and its agent Hicks concealed and did not disclose or otherwise make known the truth.

4.25 In scheduling the Vulcan Project mat pour for August 19, 2017, GLY and Glacier relied upon the Union and its agent Hicks' August 18, 2017 false, fraudulent and material representations.

4.26 GLY and Glacier had a right to rely upon the truth of the Union and its agent Hicks' August 18,

2017 representations when scheduling the Vulcan Project mat pour for August 19, 2017.

4.27 The Union and its agent Hicks' false, fraudulent and material representations to Herb on August 18, 2017, directly and proximately caused Glacier to suffer damages in an amount, scope and extent not fully known and subject to proof at trial, including but not limited to Glacier being contractually responsible to GLY for approximately $100,000 in out-of-pocket expenses/damages, other consequential costs and expenses, lost profits and other damages.

<u>FIFTH CAUSE OF ACTION</u>

(August 18, 2017 – Negligent Misrepresentation)

4.28 Glacier realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 4.27 above as though fully set forth herein.

4.29 On August 18, 2017, the Union and its agent Hicks supplied information for GLY and Glacier in their Vulcan Project business transaction that was false or misleading.

4.30 The Union and its agent Hicks knew or should have known the information was supplied to guide GLY and Glacier in that Vulcan Project business transaction.

4.31 The Union and its agent Hicks were negligent in communicating the false information.

4.32 When scheduling the Vulcan Project mat pour for August 19, 2017, GLY and Glacier relied upon that

false information communicated by the Union and its agent Hicks.

4.33 GLY and Glacier's reliance on that false information was reasonable.

4.34 The Union and its agent Hicks' supplying of that false information on August 18, 2017, directly and proximately caused Glacier to suffer damages in an amount, scope and extent not fully known and subject to proof at trial, including but not limited to Glacier being contractually responsible to GLY for approximately $100,000 in out-of-pocket expenses/ damages, other consequential costs and expenses, lost profits and other damages.

SIXTH CAUSE OF ACTION

(August 18, 2017 – Intentional Interference with Glacier's Performance)

4.35 Glacier realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 4.34 above as though fully set forth herein.

4.36 On August 18 and 19, 2017, Glacier had a valid contract, agreement and business relationship with GLY.

4.37 The Union and its agent Hicks knew, or reasonably should have known, of the existence of that contract, agreement and business relationship between Glacier and GLY.

4.38 By making the August 18, 2017 false, fraudulent and material representations, the Union and its agent Hicks wrongfully interfered with Glacier's performance of its contract, agreement and business relationship with GLY by preventing

Glacier's performance and causing Glacier's performance to be more expensive or burdensome.

4.39 The Union and its agent Hicks' wrongful interference with Glacier's performance of its contract, agreement and business relationship with GLY was intentional and done with an improper purpose and by improper means to harm Glacier.

4.40 The Union and its agent Hicks' wrongful interference directly and proximately caused Glacier to suffer damages in an amount, scope and extent not fully known and subject to proof at trial, including but not limited to Glacier being contractually responsible to GLY for approximately $100,000 in out-of-pocket expenses/damages, other consequential costs and expenses, lost profits and other damages.

V. RIGHT TO AMEND

5.1 Plaintiff reserves the right to amend this Complaint either before or during trial, which amendments may include but are not limited to additional parties, additional claims or legal theories for liability or damages incurred, or to conform the pleadings to the proof offered at the time of trial.

V. PRAYER FOR RELIEF

WHEREFORE, having fully stated its causes of action, Plaintiff hereby prays for relief as follows:

(1) For judgment against the Defendant for general and special damages, lost profits, and consequential costs, in an amount to be proven at trial, arising out of the August 11, 2017 wrongful damage and destruction to Plaintiff's batched concrete and wrongful interference with Plaintiff's performance of its contracts,

agreements and business relationships, and/or for equitable restitution;

(2) For judgment against the Defendant for general and special damages, lost profits, and consequential costs, in an amount to be proven at trial, arising out of the August 18, 2017 false, fraudulent and material representations and wrongful interference with Plaintiff's performance of its contracts, agreements and business relationships, and/or for equitable restitution;

(3) For all of Plaintiff's taxable costs and expenses herein;

(4) For Plaintiff's reasonable attorney fees incurred in pursuit of these claims, to the extent permitted under applicable law;

(5) For prejudgment and post-judgment interest as allowed by law and at the statutorily prescribed rate; and

(6) For such other and further relief as the Court deems just and equitable under the circumstances.

DATED at Seattle, Washington, this 4th day of December, 2017.

DAVIS GRIMM PAYNE & MARRA

/s/ Brian P. Lundgren

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