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

Advice Memorandum

DATE: October 20, 2017

TO: Peter Sung Ohr, Regional Director
Region 13

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: PrimeSource Building Products, Inc.
Case 13-CA-192066

506-0170-0000-0000
506-6090-3300-0000
506-6090-3400-0000
512-5009-0100-0000
512-5012-0125-0000
512-5012-9300-0000

The Region submitted this case for advice as to whether a lawsuit by the Employer seeking to enforce a non-disclosure provision in employment agreements against its former employees violates Section 8(a)(1) where the Region determined that the non-disclosure provision is unlawfully overbroad. We conclude that portions of the lawsuit had or have the illegal objective of seeking to enforce the non-disclosure provision's overbroad language and violate Section 8(a)(1). Additionally, portions of the lawsuit are preempted because they seek to enforce a contractual provision that is at least arguably prohibited by the Act. Thus, we further conclude that the Employer will independently violate Section 8(a)(1) if it continues to prosecute those portions of the lawsuit after receiving a *Loehmann's* letter from the Region.[1]

FACTS

The Employer, PrimeSource Building Products, Inc., distributes fasteners and other building products. The Charging Parties are five former (b) (6), (b) (7)(C) ("Employees") of the Employer. While working for the Employer, the Employees executed employment agreements including a non-disclosure provision identical or substantively equivalent to the following:[2]

---

[1] *See Loehmann's Plaza*, 305 NLRB 663, 671 (1991), *supplemented by* 316 NLRB 109 (1995), *affirmed sub nom. UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996).

[2] The differences between the variant provisions are irrelevant here. Thus, subsequent instances of "the non-disclosure provision" will refer to the provisions in each Employees' agreement.

> II. Employee shall not, at any time, disclose to any business entity or person any confidential information regarding the customers, suppliers, market arrangements, methods of operation or other information of PrimeSource. Without limiting the preceding provision, **PrimeSource and Employee hereby agree that all information not otherwise generally known to the public relating to** each of (A) the financial condition, businesses and interests of PrimeSource, (B) the systems, know-how and records, products, services, costs, inventions, computer software programs, marketing and sales techniques and programs, methods, methodologies, manuals, customer, price, and other lists, business plans and other trade secrets acquired or maintained by PrimeSource, and (C) **the nature and terms of PrimeSource's relationships with its** customers, suppliers, lenders, vendors, consultants and **employees is confidential and proprietary and not to be disclosed to anybody except to the extent necessary to conduct the business of PrimeSource or to comply with law**. At the termination of Employee's employment for any reason, Employee shall return to PrimeSource all copies of the foregoing and all other property of PrimeSource and not retain any property of PrimeSource in the possession or under the control of Employee and Employee shall delete permanently all PrimeSource information Employee has stored or accessible in electronic form. (emphasis added)

Four out of the five employees' agreements also include a non-compete provision.

In (b) (6), (b) (7)(C) 2016, the Employees voluntarily quit working for the Employer. Around the same time or shortly thereafter, they began working for Huttig Building Products, Inc., a distributor of building products that competes with the Employer.

On December 19, 2016, the Employer filed a lawsuit against the Employees in the United States District Court for the Northern District of Illinois. The original complaint included six counts, all but one of which were state-law claims: Breach of Covenant Not to Compete (Count 1); Breach of Non-Disclosure Agreement (Count 2); Violation of the Defend Trade Secrets Act (Count 3; the sole federal claim); Breach of the Illinois Trade Secrets Act (Count 4); Breach of Fiduciary Duty (Count 5); and

Conversion (Count 6).[3] In short, the complaint alleged that four of the Employees had breached their non-compete agreements by going to work for Huttig and that all five Employees had stolen the Employer's confidential information and have used or will inevitably use its confidential information and trade secrets in their work for Huttig.

Count 2 specifically alleged that the Employees had violated the non-disclosure provision of their respective employment agreements, which the complaint reproduced, by using the Employer's confidential information to carry out their work at Huttig. The Employer alleged that each such agreement "is a valid and enforceable contract." To remedy the alleged breach of the non-disclosure provision, the Employer sought, among other things, an injunction prohibiting the Employees from violating that provision.

Counts 3 and 4 alleged, respectively, violations of a federal and a state statute protecting trade secrets. The Employer alleged, in part, that "[i]nformation regarding the compensation, financial information, positions, duties, and/or any other non-public information specific to [its] employees" constituted trade secrets and/or confidential information known to the Employees. The Employer alleged, further, that it utilizes a number of measures to protect against the disclosure of such information, including requiring employees to sign non-disclosure and non-solicitation agreements. Next, the Employer alleged that the Employees will inevitably use its trade secrets and confidential information. As a remedy, the Employer requested, among other things, damages and injunctive relief prohibiting the use of its trade secrets.

On January 13, 2017,[4] the Employer filed a First Amended Complaint ("FAC"). The FAC substantially preserved each count of the original complaint.[5] Additionally, it added requests for punitive damages for Counts 5 and 6. It also added Huttig as a defendant for purposes of alleging a further violation: Tortious Interference with Contracts (Count 7). Count 7 alleges that Huttig unlawfully induced the Employees to breach their employment agreements. As a remedy, the Employer sought damages and injunctive relief against Huttig.

---

[3] Counts 1 and 6 were alleged against only a subset of the Employees, while the remaining counts were alleged against all Employees.

[4] Subsequent dates are in 2017.

[5] Counts 3 and 4 rephrased their definition of employee-related information as trade secrets and/or confidential information to read as follows: "Employee information, including identity, skill sets, compensation, and industry contacts."

On January 19, the Employer filed a motion requesting a temporary restraining order ("TRO"). The Employer sought a TRO to prohibit, among other things, the Employees "from accessing, using, or disclosing any of the information obtained from PrimeSource, including . . . [i]nformation regarding employees' performance and compensation."

On January 30, the Employees filed a charge alleging that the Employer had violated Section 8(a)(1) by maintaining and enforcing overbroad agreements and policies regarding non-disclosure of information impacting each of them. Shortly thereafter, in early February, the Employees and Huttig (collectively, "Defendants") opposed the Employer's TRO request and filed a motion to dismiss the FAC. The Defendants did not raise any defense in either pleading specifically addressing the non-disclosure provision's prohibition on disclosing information about the Employer's employees.

On March 2, the district court partly granted the Employer's TRO request. The TRO, as subsequently amended on April 19, requires the Defendants to return to the Employer any of its materials or documents in their possession. It also partly restricts the Employees from soliciting the Employer's customers.[6]

On July 12, the Employer filed a Second Amended Complaint ("SAC"). In pertinent part, the SAC modified Counts 3 and 4 such that their definition of trade secrets no longer includes any employee information. The Employer also added a request for punitive damages to Count 7, the tortious interference claim against Huttig. Finally, the Employer omitted its conversion claim, previously Count 6, and inserted in its place a claim for breach of employment agreement against an additional former employee of the Employer.

The Employees filed an answer to the SAC on July 31. Once again, they did not raise any defense specifically addressing the non-disclosure provision's prohibition on disclosing information about the Employer's employees.

On August 3, the district court ruled on the Defendants' motion to dismiss the FAC. The court dismissed, without prejudice, only Count 6 of the FAC (Conversion), which the Employer had already abandoned and replaced in the SAC.

In late August and early September, the court held a hearing to determine whether to issue a preliminary junction. The court has not yet ruled on that issue.

---

[6] The TRO does not prohibit the Employees from disclosing information about the Employer's employees.

During its investigation of the Employees' January 30 charge, the Region asked them for evidence that the Employer had filed its lawsuit to retaliate against any protected concerted activity by the Employees. Despite additional follow-up from the Region, the Employees did not respond to the Region's request.

ACTION

We conclude that portions of the lawsuit had or have the illegal objective of seeking to enforce the non-disclosure provision's overbroad language and violate Section 8(a)(1).[7] Additionally, portions of the lawsuit are preempted because they seek to enforce a contractual provision that is at least arguably prohibited by the Act. Thus, we further conclude that the Employer will independently violate Section 8(a)(1) if it continues to prosecute those portions of the lawsuit after receiving a *Loehmann's* letter from the Region.[8]

The Board may find that maintenance of a civil lawsuit violates Section 8(a)(1) under any of three theories: (1) the lawsuit has an "illegal objective" and would reasonably tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights;[9] (2) the lawsuit is preempted by the Act and would also have the aforementioned effect on Section 7 rights;[10] or (3) the lawsuit lacks a reasonable basis

---

[7] We concur with the Region's determination that the non-disclosure provision in the Employees' employment agreements is unlawfully overbroad. Employees would reasonably construe that provision to prohibit protected communications with other employees or with third parties concerning the terms and conditions of their employment. *See, e.g.*, *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 2 (June 10, 2016) (employer rule unlawfully prohibited disclosure of "information concerning customers, vendors, or employees"); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990) ("[T]he Board has found employees' communications about their working conditions to be protected when directed to other employees, an employer's customers, its advertisers, its parent company, a news reporter, and the public in general.") (footnotes omitted) (collecting cases).

[8] *See Loehmann's Plaza*, 305 NLRB at 671.

[9] *See, e.g.*, *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540 (2005); *see also Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5. (1983).

[10] *See Loehmann's Plaza*, 305 NLRB at 670; *Webco Industries*, 337 NLRB 361, 363 (2001).

in law or fact and was commenced with the motive of retaliating against the exercise of Section 7 activity.[11] As explained below, we conclude that the first and second theories are applicable here while the third is not.

A. "Illegal Objective" Theory

An employer may violate Section 8(a)(1) by filing and maintaining a lawsuit with an "illegal objective,"[12] and the Board may enjoin such lawsuits even if they are "otherwise meritorious."[13] A lawsuit has an illegal objective where it seeks a result that is incompatible with Board law.[14] However, such a lawsuit violates the Act only "[i]f it is unlawful under traditional NLRA principles."[15] Thus, to constitute a violation of Section 8(a)(1), the lawsuit must have "a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."[16]

The Board has found efforts to enforce, in litigation or grievance proceedings, a contract provision that is itself unlawful under the Act to be unfair labor practices

---

[11] *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 (Nov. 26, 2014), *enforced*, 653 F. App'x 62 (2d Cir. 2016); *see also Bill Johnson's Restaurants*, 461 U.S. at 748–49.

[12] *Dilling Mechanical Contractors*, 357 NLRB 544, 546 (2011); *see also Bill Johnson's Restaurants*, 461 U.S. at 737 n.5 (noting that the Board may enjoin suits that have an objective "that is illegal under federal law"); *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 150–51 (D.C. Cir. 2003).

[13] *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 20 (Oct. 28, 2014) (quoting *Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992)), *enforcement denied in part on other grounds*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017).

[14] *See Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 & n.7 (1991), *enforced*, 973 F.2d 230 (3d Cir. 1992); *see also, e.g.*, *Dilling Mechanical*, 357 NLRB at 546 (employer's discovery request seeking names of those of its employees who were union members had illegal objective in light of settled law that "an employer who seeks to obtain the identities of employees who engage in union activities violates the Act").

[15] *Manufacturers Woodworking Assn.*, 345 NLRB at 540 (alteration in original) (quoting *Teamsters Local 776*, 305 NLRB at 835).

[16] *Id.*

under an illegal-objective theory.[17] For example, in *Murphy Oil*, the Board found that a motion the employer filed in federal district court to compel arbitration and dismiss its employees' collective wage and hour lawsuit violated Section 8(a)(1) by seeking to enforce an unlawful mandatory arbitration agreement.[18] The Board noted that the Supreme Court had long ago recognized its authority "to prevent an employer from benefitting from 'contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the [Act].'"[19]

Here, the Employer has sought, through various parts of its lawsuit, to enforce a non-disclosure provision that violates Section 8(a)(1) due to its overbreadth. First, Count 2 of each complaint alleged or alleges that the Employees breached this provision, and, as one of several remedies, sought or seeks an injunction of subsequent breaches. Second, Counts 3 and 4 of the original complaint and FAC also sought to enforce the overbroad provision, and specifically the unlawful language concerning employee information, because they explicitly relied on the provision to assert that employee information constitutes confidential information and/or trade secrets.[20] The Employer's TRO request was a further attempt to enforce the overbroad provision because it asked the district court to prohibit the Employees from disclosing information regarding its employees' performance and compensation.

By seeking to enforce the overbroad non-disclosure provision, the pleadings noted above had or have an illegal objective and would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The pleadings would reasonably have such an effect because they would exacerbate the chilling

---

[17] *See, e.g.*, *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, 19–20; *Elevator Constructors (Long Elevator),* 289 NLRB 1095, 1095 (1988) (finding that union violated Section 8(b)(4)(ii)(A) by filing a grievance "predicated on a reading . . . of [a provision] of the collective-bargaining agreement that would convert it into a de facto hot cargo provision, in violation of Section 8(e)"), *enforced*, 902 F.2d 1297 (8th Cir. 1990).

[18] 361 NLRB No. 72, slip op. at 2, 19–20.

[19] *Id.*, slip op. at 19 (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940)).

[20] We conclude that Counts 3 and 4 of the SAC do not seek to enforce the overbroad provision because they omit the earlier complaints' contentions that employee information constituted confidential information and/or trade secrets. This omission, however, does not cure the unlawful nature of the earlier iterations of Counts 3 and 4 or affect the remedies available to address them.

effect of the overbroad non-disclosure provision. Maintenance of that provision itself violates Section 8(a)(1) because employees would reasonably construe the provision to prohibit them from making protected communications about their terms and conditions of employment with other employees or third parties.[21] The Employer's attempted enforcement of that provision through a lawsuit against former employees would reasonably make employees—former and current—even more wary of violating it through protected activity.[22] Such a chilling effect is particularly likely here because the Employer has asked the court to prohibit disclosure of employee-related information, thereby specifically invoking the overbroad language of the non-disclosure provision that prohibits disclosing "the nature and terms of PrimeSource's relationships with its . . . employees." Furthermore, if the court were to grant the requested relief, the Employees would reasonably act even more restrained in making protected disclosures for fear of placing themselves in contempt of court.

The fact that the lawsuit has not explicitly sought relief against protected concerted activity does not mitigate its potential chilling effect. The Board has recognized, with court approval, that the enforcement of an overbroad provision may chill protected activity even when the provision is enforced against conduct an employer could have lawfully proscribed.[23] To be sure, the Employer's lawsuit might present a comparatively smaller risk of chilling Section 7 activity if it sought relief only against wholly unprotected conduct.[24] However, the lawsuit is not so limited; it seeks prospective relief enjoining any violation of the non-disclosure provision, regardless of whether such a violation would constitute protected concerted activity.

---

[21] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 2; *Kinder-Care Learning Centers*, 299 NLRB at 1171.

[22] *See Continental Group, Inc.*, 357 NLRB 409, 411 (2011) ("[B]ecause the mere maintenance of an overbroad rule creates a potential chilling effect on the exercise of protected rights, it is reasonable to infer that the enforcement of such a rule would have a similar, or perhaps even greater, chilling effect on the exercise of protected rights.").

[23] *See id.* (explaining that discipline for violation of an overbroad work rule has a "chilling effect on the exercise of protected rights, even if it is enforced against activity that could have been proscribed by a properly drawn rule"); *accord Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005).

[24] *See Continental Group*, 357 NLRB at 412 ("[T]he chilling effect is much less significant [when a rule is enforced against wholly unprotected conduct] than it would be if the employee's conduct were not wholly unprotected.").

Thereby, the Employer has reinforced the reasonable inference of both current and former employees that even protected activity could subject them to a lawsuit.[25]

Based on the foregoing, we conclude that Counts 2 of each complaint, Counts 3 and 4 of the original complaint and FAC, and the Employer's TRO request, had or have an illegal objective and violate Section 8(a)(1) insofar as they sought or seek, and only insofar as they sought or seek, to enforce the overbroad portions of the non-disclosure provision. It follows from this conclusion that Count 7 of the FAC and SAC, the Employer's tortious interference claim against Huttig, is likewise partly unlawful. Through this claim, the Employer seeks damages and injunctive relief against Huttig based on Huttig's alleged inducement of the Employees to breach their employment agreements. Thus, the tortious interference claim, although directed against Huttig, is another attempt to enforce the employment agreements *in toto*, including the unlawfully overbroad language. Thus, insofar as Count 7 seeks enforcement of the overbroad language, that claim also violates Section 8(a)(1).[26]

Two additional notes are warranted. First, because portions of the Employer's lawsuit were unlawful from their inception, the Employer is liable for any incremental expenses and legal fees, with interest, that the Defendants reasonably incurred in opposing the unlawful aspects of the suit.[27] However, we believe it likely that the Defendants did not incur any such incremental costs. Significantly, the Defendants' motion to dismiss the FAC, answers to the SAC, and response to the Employer's TRO request raised no defenses specific to those aspects of the lawsuit that have an illegal objective.

---

[25] Although, pursuant to *Continental Group*, the Board finds enforcement of an overbroad work rule against wholly unprotected conduct through employee discipline to be lawful in certain circumstances, *id.*, the Board has never applied *Continental Group* to a lawsuit enforcing an overbroad rule. In any event, the Employer's pleadings here do not seek to enforce the non-disclosure provision only against unprotected conduct.

[26] *See Haynes Mechanical Systems*, Case 27-CA-171581, Advice Memorandum dated July 25, 2016, at 14 n.36 (concluding that claim by former employer against employee's new employer for interference with contract provision that was overbroad under the Act violated Section 8(a)(1)).

[27] *See, e.g., Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 n.6 (Nov. 30, 2015) (ordering the respondent to reimburse the charging party-employee for reasonable attorneys' fees and litigation expenses, including interest, incurred in opposing its motion to strike, which sought to enforce an illegal agreement), *enforcement denied on other grounds*, 866 F.3d 635 (5th Cir. 2017).

Second, we note that the SAC, which was filed after the Region submitted this case for advice, names another former employee of the Employer as a defendant and asserts that that employee breached [redacted] employment agreement. If this new defendant is an employee subject to the Act's protections,[28] the illegal-objective analysis above is applicable to the Employer's claim against [redacted] as well.

B. Preemption Theory

Once the Region issues its complaint alleging that the non-disclosure provision is unlawfully overbroad, portions of the lawsuit that still seek enforcement of the provision will be preempted, and the continued prosecution thereof will violate Section 8(a)(1). In *San Diego Bldg. Trades Council v. Garmon*, the Supreme Court held 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 [Board]."[29] In such circumstances, the Board must exercise its "primary jurisdiction" and determine in the first instance whether the activity is protected or prohibited by the Act, thereby potentially divesting the states of all jurisdiction.[30] Thus, *Garmon* preemption is designed to prevent state and local interference with the Board's interpretation and enforcement of the integrated scheme of regulation established by the Act.[31] The *Garmon* Court, however, recognized that not every state cause of action involving arguably protected or prohibited activity is preempted. The two exceptions the Court noted involve activity that is "a merely peripheral concern" of the Act and activity that touches interests "deeply rooted in local feeling and responsibility."[32]

Preemption of lawsuits involving arguably protected or prohibited activity occurs when the General Counsel issues a complaint regarding that activity.[33] Afterwards, a

---

[28] According to the SAC, the employee was a [redacted] at the time [redacted] left the Employer.

[29] 359 U.S. 236, 245 (1959).

[30] *Id.*

[31] *See Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224–25 (1993).

[32] *Garmon*, 359 U.S. at 243–44.

[33] *Loehmann's Plaza*, 305 NLRB at 670.

respondent's continued maintenance of a preempted lawsuit can be condemned as an unfair labor practice if the suit is unlawful under traditional Board principles.[34] Thus, a violation of Section 8(a)(1) is established if it is shown that the lawsuit has a tendency to interfere with the exercise of Section 7 rights.[35]

Here, continued prosecution of the SAC after the Region issues complaint would be preempted under *Garmon* insofar as the SAC seeks to enforce the overbroad language in the non-disclosure provision. As stated above, Counts 2 and 7 of the SAC currently seek precisely that. Because the non-disclosure provision is at least arguably overbroad and therefore prohibited by the Act, the Board must address the lawfulness of that provision in the first instance "if the danger of state interference with national [labor] policy is to be averted."[36]

Neither *Garmon* exception to preemption applies here. First, the legality of the non-disclosure provision is not merely a peripheral concern of the Act. That provision is reasonably construed to prohibit core Section 7 activities, including discussions with other employees or third parties about their working conditions.[37] Second, the provision does not touch on interests deeply rooted in local feeling and responsibility. Whether state regulation should be permitted under that exception involves "a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens."[38] Here, a Board finding that the allegedly overbroad portion of the non-disclosure provision violates Section 8(a)(1) would render at least that portion unenforceable.[39] Causes of action to enforce an unenforceable contract provision

---

[34] *See id.* at 671; *Webco Industries*, 337 NLRB at 363.

[35] *Loehmann's Plaza*, 305 NLRB at 671.

[36] *Garmon*, 359 U.S. at 245; *see also Webco Industries*, 337 NLRB at 362 (Board had exclusive jurisdiction to determine legal effect of severance agreements discriminatees had signed because there was clear potential "for State interference with national labor policy" if employer's state claims for breach of those agreements were allowed to proceed).

[37] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 2; *Kinder-Care Learning Centers*, 299 NLRB at 1171.

[38] *Operating Engineers Local 926 v. Jones*, 460 U.S. 669, 676 (1983).

[39] *See Murphy Oil*, 361 NLRB No. 72, slip op. at 19–20; *Webco Industries*, 337 NLRB at 365 (Board's determination that agreements were unlawful precluded action for breach of those agreements).

cannot be said to embody state interests of significant weight. Moreover, the concurrent prosecution of state claims aimed at enforcing those portions would "threaten undue interference with the federal regulatory scheme."[40] Thus, we conclude that Counts 2 and 7 are, in part, preempted under *Garmon*.

For reasons explained in Section A above, continued maintenance of the lawsuit in its current form would also violate Section 8(a)(1) under traditional NLRA principles. Accordingly, the Board may find that continued prosecution violates the Act.

Based on the foregoing, the Region should issue complaint, absent settlement, alleging that the non-disclosure provision in the Employees' employment agreements are unlawfully overbroad and that the Employer violated Section 8(a)(1) by seeking to enforce the overbroad provision in its lawsuit against the Employees. The Region should also issue a *Loehmann's* letter to the Employer directing it to take affirmative action within seven days of issuance of the Region's complaint to stay or dismiss adjudication of the preempted portions of the lawsuit.[41] (b) (5)

[42] (b) (5)

---

[40] *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977); *cf. Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 198 (1978) (applying exception where adjudication of state claims would have created "no realistic risk of interference with the . . . Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices").

[41] *See Loehmann's Plaza*, 305 NLRB at 671. (b) (5) . *See* OM Memorandum 97-50, "Makro, Inc. and Renaissance Properties d/b/a Loehmann's Plaza," dated July 30, 1997.

[42] In the event the Employer opts for a stay of either scope, the Employer can resume prosecuting the SAC in its entirety if the Board decides that the non-disclosure provision is lawful. *See Webco Industries*, 337 NLRB at 365 (employer was free to reinstate claims that lost preempted character based on issuance of Board decision).

(b) (5) .[43]

(b) (5) .[44]

C. Baseless/Retaliatory Motive Theory

We conclude that the Employer did not violate Section 8(a)(1) under a baseless/retaliatory motive theory because there is insufficient evidence to show that the Employer commenced its suit to retaliate against Section 7 activity.[45] Relevant factors for discerning a retaliatory motive include whether the lawsuit was filed in response to protected concerted activity; evidence of the plaintiff's prior animus toward protected rights; and the plaintiff's claim for punitive damages.[46] Additionally, the Board will consider a lawsuit's baselessness as a factor in its analysis of motive,[47] but baselessness alone is insufficient to prove unlawful retaliation.[48]

---

[43] The Employer may continue to seek enforcement of the language "the nature and terms of PrimeSource's relationships with" insofar as it relates to persons and entities other than "employees."

[44] *See, e.g., Sharp v. Webco Industries, Inc.*, 265 F.3d 1085, 1089–90 (10th Cir. 2001) (affirming Section 10(j) order temporarily enjoining state court lawsuit on preemption grounds).

[45] In light of our conclusion that the Employer did not have the requisite retaliatory motive, we do not reach the issue of whether any portions of the Employer's lawsuit are baseless. In any event, the district court's TRO and refusal to dismiss all but one claim on a motion to dismiss suggest that the General Counsel would have difficulty proving baselessness.

[46] *Atelier Condominium*, 361 NLRB No. 111, slip op. at 5.

[47] *Id.*

[48] *Allied Mechanical Services*, 357 NLRB 1223, 1234 (2011).

Here, there is little evidence that the Employer filed the lawsuit in response to any protected concerted activity by the Employees, or that it harbored any animus against their protected rights. Although, as explained above, the suit sought to enforce an overbroad non-disclosure provision, it did not specifically seek to enjoin protected activity or obtain damages on the basis of such activity. Rather than evincing a retaliatory motive, the Employer's pursuit of enforcement of the non-disclosure provision appears motivated to prevent employees' unprotected disclosures of confidential information and trade secrets to Huttig. Even assuming *arguendo* that the lawsuit is baseless, the only additional evidence that might evince retaliatory motive is two requests for punitive damages against the Employees. We conclude this evidence is insufficient to support a baseless/retaliatory motive theory.

/s/
J.L.S.

ADV.13-CA-192066.Response.PrimeSourceBuildingProducts.(b) (6), (b) (7)