

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>SUSQUEHANNA RADIO LLC</b>	§	
	§	
<b>Plaintiff</b>	§	
	§	
<b>v.</b>	§	<b>CIVIL ACTION NO. 3:23-CV-01746-S</b>
	§	
<b>JACOB KEMP and DANIEL MCDOWELL</b>	§	
	§	
<b>Defendants</b>	§	

**DEFENDANTS’ RESPONSE IN OPPOSITION TO INJUNCTIVE RELIEF**

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1. Defendants respond to Plaintiff's application to the Court for a temporary restraining order and a preliminary injunction. In short, Plaintiff's business is the operation of terrestrial radio stations – old media – and it was only in that business that Plaintiff employed Defendants. Plaintiff has realized only too late that it should have been moving into new media platforms for years now. Defendants' new venture does not compete with Plaintiff, and their words and actions have complied with the restrictive covenants of their employment contracts despite, as will be shown below, almost all of those covenants are illegal restrictions on Defendants' rights under the National Labor Relations Act. Defendants have already filed claims with the National Labor Relations Board and have responded to the Board's requests for information. The Board has been made aware of this suit and the emergency relief sought, and those two things now support amended claims for retaliation.

2. Plaintiff's Original Complaint contains a great number of false statements and misleading mischaracterizations of Defendants' words and actions (all sworn to by Plaintiff's corporate representative). The deficiencies in Plaintiff's likely evidence will prevent it from prevailing at trial.

3. Defendants are not competing with Plaintiff, have not disparaged Plaintiff, have not solicited Plaintiff's advertisers or its employees, and have breached no duties, contractual or otherwise, to Plaintiff. The lawsuit is made up from whole cloth and motivated by a desire to retaliate against Defendants for engaging in protected activities.

4. But even taking the allegations of the complaint as given for purposes of argument, all, or the large majority of, Plaintiff's claims are preempted by the National

Labor Relations Board's ("NLRB") exclusive and preexisting jurisdiction making any injunction in this case disserve the public's interest in the uniformity of decisions regarding the National Labor Relations Act's ("NLRA") provisions.

5. Finally, all of Plaintiff's claims are addressable in monetary damages and not irreparable.

#### Facts and Corrections of False Allegations

6. The declarations of Defendants are attached as Exhibits A and B.

7. As demonstrated in the attached declarations of Defendants and the verified evidence presented herein, the allegations of the Original Complaint are wildly out of line with the facts and circumstances of Defendants' unsuccessful contract negotiations and ultimate resignations.

#### *Protected Activity by Defendants*

8. Defendants Dan McDowell ("Dan") and Jake Kemp ("Jake") are popular radio personalities in the Dallas/Fort Worth terrestrial radio market. Dan worked at Plaintiff's radio station KTCK 1310 ("The Ticket") from 1999 to June 30, 2023, when he ceased employment by not going to work. Jake worked for The Ticket on and off since he was a high school student until June 30, 2023, when he ceased employment by not going to work. Dan and Jake submitted written notices of resignation to Plaintiff on July 17<sup>th</sup>, 2023.

9. In the months before they terminated their employment with The Ticket, Dan and Jake spent a large amount of time attempting to negotiate new contracts to remain employed by Plaintiff. In these efforts, Dan and Jake were acting in concert to improve working conditions both for themselves and for other employees of Plaintiff. These

efforts included securing Plaintiff's tentative agreement to increase the pay of other employees appearing on Dan and Jake's show "The Hang Zone." In the wake of Dan and Jake's departure, Plaintiff promptly refused to honor these raises.

10. In fact, throughout their employment at The Ticket, Dan and Jake sought to act in concert with each other and with other co-workers to improve working conditions for all of them. These efforts were met with illegal tactics by Plaintiff. When on-air personalities sought to line up the termination dates of their employment contracts to provide greater bargaining leverage, Dan Bennett, the affiant verifying the complaint, illegally told them to refrain from discussing compensation or contract terms.

11. A key sticking point in the negotiations was Dan and Jake's desire to embark on other media content creation activities – activities not competing with Plaintiff – in part to help fund higher salaries for the other employees on their show as well as to provide similar content creation opportunities to other on-air personalities on The Ticket.

12. Instead of placing a value on these non-competitive content creation opportunities and compensating Dan and Jake for avoiding them, Plaintiff instead espoused the legally impossible position that its noncompete provisions grew, Borg-like, into whatever media business it imagined it might one day engage in regardless of whether it ever had and without any relationship to the actual, limited language of the restrictive covenants in Dan and Jake's contracts.

13. In the end, the terms being offered by Plaintiff simply weren't attractive, and Dan and Jake left to pursue other employment.

*The Podcast Does Not Compete with Plaintiff*

14. Plaintiff's claims that Dan and Jake have violated any enforceable, contractual terms of their employment is supported by nothing other than the *ipse dixit* of Plaintiff.

15. Dan and Jake have been publishing a video and audio recorded entertainment program called The Dumb Zone since July 20<sup>th</sup>, 2023, not before they left Plaintiff's employment as alleged in the complaint. It's funny: <https://www.youtube.com/@TheDumbZone>.

16. The Dumb Zone's only source of revenue is monthly subscriptions from viewers and listeners. It accepts no advertising, and Dan and Jake have not attempted to sell advertising.

17. The Dumb Zone has no live audience. It is simply released as a recorded program on a not very regular schedule that seems to correlate to when editing is finished. Therefore, it cannot take calls from fans, break news, provide a traffic or weather report, or do any of the other temporal activities that live, terrestrial radio does.

18. The Dumb Zone does not occur at any specific time. It is not published daily or even on five consecutive work days. There is nothing about The Dumb Zone that prevents or discourages listeners from listening to The Ticket at any time. To the contrary, Ticket listeners choose to listen to The Ticket based on the content The Ticket broadcasts. If Plaintiff suggests that its audience has shrunk, it's not difficult to identify the primary reason.

*Plaintiff Owns None of the Property it Alleges*

19. Plaintiff, in sworn pleadings, alleges that it owns 1) the name "The Dumb Zone," 2) The Dumb Zone logo, 3) thehangzone.com website, and 4) The Dumb Zone social media accounts. All these allegations are false.

*The Name*

20. The name “The Dumb Zone” originated from a humorous play on the name of Dan and Jake’s former show called The Hang Zone. It was used by on-air personalities to preface a question or statement that might make the speaker sound dumb. It was not a segment of the show; it was never owned, promoted, or otherwise used by Plaintiff; it is not protected by trademark.

21. In fact “The Dumb Zone” pre-dates Dan and Jake’s show and appears to have been used generically on The Ticket.<sup>1</sup>

*The Logo*

22. Plaintiff alleges it owns The Dumb Zone logo because it is a modification of The Hang Zone logo. Because Plaintiff never owned the Hang Zone logo, it also doesn’t own The Dumb Zone logo.

23. The Hang Zone logo was created by a listener to that show who created the logo by using the movie poster image from the art house cinema feature “House Party” starring Christopher “Kid” Reid and Christopher “Play” Martin of the hip hop group Kid ‘n’ Play. Kid has made many appearances on The Hang Zone and its predecessor show and performed voice acting for The Hang Zone.

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<sup>1</sup> This appears to be another host on the Ticket – Corby Davidson – using the phrase generically before Defendants’ use of the phrase <https://twitter.com/ATXdiehard/status/1689338973548605441?s=20>

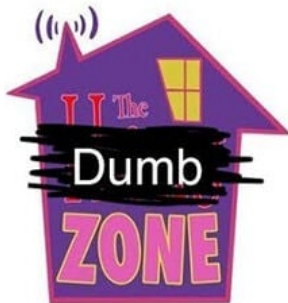




24. Here is the listener created logo for The Hang Zone:



And here is The Dumb Zone logo created by another listener:



25. Plaintiff never owned, promoted, or otherwise used either of these logos. The logos are humorous fan art utilizing a mark owned by LeBron James's SpringHill Company. To the extent they are fan art under the fair use doctrine, they are owned by the listeners who created them and are being used by Dan and Jake by permission.<sup>2</sup> Regardless, what is clear is that Plaintiff never owned either logo.

#### *The Website*

26. Plaintiff claims to own the website thehangzone.com. In fact, over the years Dan was forced to buy multiple website urls and pay for the hosting fees for the websites and the promotional material he published for Plaintiff's benefit because Plaintiff would not.

27. Over many years, Dan and his previous broadcast partner Bob Sturm paid not only for the websites and their operation, they paid from their own funds to hire a contractor for the editing, production, and publishing of "The BaD Radio Weekly Wrap-up Podcast" and "The Hang Zone Weekly Wrap-up Podcast," which were expensive exercises meant only to benefit Plaintiff's business. Jake later did the same with The Hang Zone. Plaintiff repeatedly refused to contribute to these promotional exercises, which Defendants were under no obligation to perform.

28. Plaintiff *could* have owned thehangzone.com but chose not to.<sup>3</sup>

#### *Waiver*

29. Plaintiff has always interpreted its own restrictive covenants to apply to terrestrial radio only. Employees that have gone on to television have been allowed to do so, for good or ill.<sup>4</sup>

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<sup>2</sup> To the extent they exceed fair use, Dan and Jake have heard no objection from Mr. James.

<sup>3</sup> Plaintiff's behavior is consistent with its notorious reputation for asking prospective sales people to provide their own laptops to be considered for employment.

30. Other hosts from The Ticket with presumably identical restrictive covenants are, today, making identical content to Dan and Jake with Plaintiff's apparent consent.<sup>5</sup>

31. But perhaps the most stark example of waiver is the fact that Defendant Jake Kemp is the co-host of one of the oldest podcasts on the internet. He has monetized this podcast for many years with express notice to Plaintiff. The content of that podcast frequently has overlapped with his on-air work for Plaintiff.<sup>6</sup>

32. Plaintiff has never enforced its rights to prevent republication of its content on the internet. The popular site The Unticket has republished the terrestrial radio content on the internet for many years.<sup>7</sup> Other Ticket listeners have been allowed to republish content on usaveit.com.<sup>8</sup>

#### *The Social Media Accounts and Channels*

33. Plaintiff claims, again under oath, to own multiple social media accounts that belong to Dan and Jake.

34. The X (formerly Twitter) account now branded "@thedumbzone" is a personal account created by Dan in March of 2011 and used by him to promote personal topics, share humorous videos unrelated to Plaintiff, and also to promote his work for Plaintiff.

35. Plaintiff has never owned, used, or had access to this X account. It does not have the password for the account and never acquired or attempted to acquire the account from Dan, its sole owner.

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<sup>4</sup> <https://sports.yahoo.com/report-ex-espn-host-rachel-nichols-to-join-richard-sherman-as-undisputed-co-host-alongside-skip-bayless-184253339.html>

<sup>5</sup> Bob Sturm's substack <https://bobsturm.substack.com/>; Gordon Keith's Twitch <https://www.twitch.tv/actualgordonkeith>

<sup>6</sup> <https://www.patreon.com/itsjustbanter>

<sup>7</sup> <https://www.theunticket.com/>

<sup>8</sup> [https://www.dropbox.com/scl/fi/6iprq2hizum1h0e4l46sx/Fwd\\_-Email-Showing-that-Ticjet-Management-is-Aware-of-USave.it.pdf?rlkey=ml16e5mt595n5365if1jkh0z1&dl=0](https://www.dropbox.com/scl/fi/6iprq2hizum1h0e4l46sx/Fwd_-Email-Showing-that-Ticjet-Management-is-Aware-of-USave.it.pdf?rlkey=ml16e5mt595n5365if1jkh0z1&dl=0)

36. Instead, Plaintiff operates its own popular X account with seven times the followers of Dan's personal account. Plaintiff actively uses the account currently branded "@dfwticket" where it requires its employees to post promotional material for the radio station.

37. Dan was never under any obligation to promote Plaintiff's business on his personal X account. Instead, Plaintiff placed this in his employment contract:

**2.4 Social Media Platforms.** During the Employment Period, the Employee, as directed by the Company, shall use and operate the designated Company owned social media platforms in furtherance of the Job Duties hereunder for the sole and exclusive benefit of the Company. In all cases Employee shall not use broadcast tools or content, or the Station's promotional tools, including but not limited to, Company owned and controlled social media platforms to promote and further the Employee's separate and independent controlled social media platforms, unless approved in writing by the Company.

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38. Plaintiff never provided a "Company owned social media platform" to Dan or Jake. Defendants are unaware of any social media platforms owned by Plaintiff.

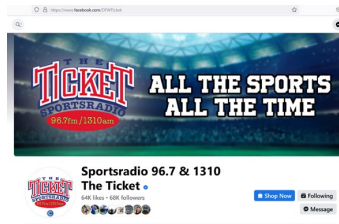
39. The Dumb Zone YouTube channel is Dan's personal channel owned by him. Plaintiff has never owned, used, or had access to this channel. It does not have the password for the account and never acquired or attempted to acquire the channel from Dan, its sole owner.

40. Defendants are unaware of Plaintiff owning or operating any YouTube channel, and a cursory search of that platform using search terms "1310 the ticket," "the ticket," and "ticket radio" turned up no such channel.

41. Plaintiff claims that Defendants converted Plaintiff's Facebook account, but a search of Facebook shows The Ticket's account still active and still presumably operated by Plaintiff:

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<sup>9</sup> Jake's contract is identical in this provision.



42. Similarly to the other social media accounts Plaintiff has falsely claimed to own, Dan created a Facebook account years ago for personal use as well as promoting Plaintiff's business. Plaintiff never owned, promoted, or otherwise used this account and has never had access to it.

43. Dan rarely used his account on Facebook, and it has few followers.

*Dan and Jake have not Disparaged Plaintiff*

44. As the Court will see below, the non-disparagement provision of Jake's contract is subject to the exclusive jurisdiction of the National Labor Relations Board and cannot be adjudicated by this Court.

45. Regardless, Dan and Jake have meticulously avoided disparaging Plaintiff.<sup>10</sup>

46. Dan and Jake have consistently called for listeners to keep listening to The Ticket or even "listen more."<sup>11</sup> In direct contrast to Plaintiff's claim that Dan and Jake disparaged the on-air talent that took over their time slot on The Ticket, they were actually enormously complimentary of these entertainers who are also their close friends.<sup>12</sup>

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<sup>10</sup> Dan's contract contains no non-disparagement clause, but he has also chose to take the high road.

<sup>11</sup> Keep listening to The Ticket <https://www.dropbox.com/scl/fi/cd0quwd0tgi7visj1x0yy/7-20-2-keep-listening-to-the-ticket.mp3?rlkey=4aqk8v3t2516js23a33cawk0&dl=0>

<sup>12</sup> Dan and Jake comments on new lineup <https://www.dropbox.com/scl/fi/98z609mz5n9yscrqsig99/8-1-1-opinion-of-new-lineup.mp3?rlkey=bbri1wtkhrm0vq0u54n9k08qj&dl=0>

47. Dan and Jake's farewell YouTube broadcast was very respectful of The Ticket and done with the prior knowledge of Dan Bennett.<sup>13</sup>

48. Dan and Jake have uniformly described the end of their contract negotiations with Plaintiff in businesslike terms not designed to harm Plaintiff in any way.<sup>14</sup>

*Dan and Jake Have Not Solicited Advertisers or Employees of Plaintiff*

49. This is one of the most baffling of Plaintiff's claims. Jake has not spoken to any of Plaintiff's advertisers since leaving his employment, and his only contact with Plaintiff's employees has been to say goodbye or for other personal reasons. He hasn't asked anyone to leave The Ticket.

50. Dan has spoken to Plaintiff's advertisers for personal reasons, but he has not solicited their advertising nor sought to interfere with their relationship with Plaintiff. In fact, on two occasions, he encouraged advertisers to continue their relationships with The Ticket. He also has not asked any of Plaintiff's employees to leave employment.

*Dan and Jake Neither Infringe any Valid Trademark nor Cause Confusion in the Marketplace*

51. As discussed above, the name The Dumb Zone is not associated with The Hang Zone, is dissimilar from The Hang Zone, and is too generic to be a protectable mark.

52. As for confusion in the marketplace, the audio linked in the complaint, herein, and in Dan and Jake's declarations conclusively demonstrates that no one on earth could be confused. By not accepting advertising, Dan and Jake cannot confuse

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<sup>13</sup> Farewell <https://www.dropbox.com/scl/fi/r5sutl6wna6iyjarfrqdg/7-20-0-Dan-and-Jake-Ticket-goodbye-FULL.mp3?rlkey=xvivlosymu4eo5k9rdfvwmqzu&dl=0>

<sup>14</sup> All parties will be good <https://www.dropbox.com/scl/fi/ldlmpdx75468ckor8pjwu/7-20-3-all-parties-will-be-fine.mp3?rlkey=8qm9yzot8d93bxxbjy3oaw5qb&dl=0> and we part on good terms <https://www.dropbox.com/scl/fi/6v5ctiq7zugvelhntjvww/7-20-1-we-part-on-good-terms.mp3?rlkey=0315abdyfill5lgapnwjvqscu9&dl=0>

advertisers. By detailing over the course of long discussions their reasons for leaving The Ticket and the process it followed, Dan and Jake have made listeners to The Dumb Zone all too aware that it is not associated with Plaintiff.

Standard for Injunctive Relief

53. There are four prerequisites for the extraordinary relief of preliminary injunction or temporary restraining order. A court may grant such relief only when the movant establishes that:

(1) There is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest.

*Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir.1987) citing *Canal Auth. of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (*en banc*).

54. The party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary restraining order or preliminary injunction can be granted. *Mississippi Power and Light Co. v. United Gas Pipeline*, 760 F.2d 618, 621 (5th Cir. 1985); *Clark*, 812 F.2d at 993. Otherwise stated, if a party fails to meet *any* of the four requirements, the court cannot grant the temporary restraining order or preliminary injunction. See *Medlin v. Palmer*, 874 F.2d 1085, 1091 (5th Cir. 1989).

55. A movant seeking to show irreparable harm must show that: (a) harm to the movant is imminent; (b) the injury would be irreparable; and (c) the movant has no other

adequate legal remedy. *Mannatech, Inc. v. Wellness Quest, LLC*, Civ. Action No. 3:14-CV-2497-K, 2014 WL 11515729, at \*1 (N.D. Tex. Nov. 4, 2014) (Kinkeade, J.) (citing *Conlay v. Baylor Coll. of Med.*, Civ. Action No. H-08-1038, 2010 WL 774162, at \*5 (S.D. Tex. Mar. 3, 2010)).

56. For purposes of injunctive relief, an adequate remedy at law exists when the situation sought to be enjoined is capable of being remedied by legally measurable damages. *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 848 (5th Cir. 2004).

57. Loss of income, compensable after trial on the merits, or financial distress, does not constitute irreparable injury. *Dig. Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 781 (N.D. Tex. 2012) (Lindsay, J.) (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). The "exception to [this] general rule that damages cannot be compensable in monetary relief . . . applies only in cases 'where the potential economic loss is so great as to threaten the existence of the movant's business' or where a business 'would suffer a substantial loss of business and perhaps even bankruptcy' absent injunctive relief." *Id.* (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)). Loss of customers or goodwill is only an irreparable harm when the movant shows that the loss cannot be measured in money damages. *Id.* at 778 (citing *Millennium Rests. Grp., Inc. v. City of Dallas*, 181 F. Supp. 2d 659, 666 (N.D. Tex. 2001) (Fish, J.)).

58. A party requesting a temporary restraining order must show reasonable diligence in presenting his or her request. *Stacy v. JPMorgan Chase Bank, N.A.*, No. 3:19-cv-446-M-BN, (N.D. Tex. 2020) citing *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018).

*Plaintiff is Unlikely to Prevail on the Merits at Trial*



59. The Court will see below that the Plaintiff's causes of action sounding in contract are all preempted and subject to the exclusive jurisdiction of the NLRB, but Plaintiff cannot demonstrate a likelihood of success on the merits regardless because Dan and Jake simply have not violated any enforceable provision of a valid contract.

60. Plaintiff cannot demonstrate a likelihood of success on the merits on its statutory and tort claims because Dan and Jake's words and actions do not satisfy the elements of those claims. They haven't converted anything, they haven't diverted business, they are not infringing any trademark, and no consumer or advertiser on earth is confused about whether they still work for Plaintiff.

*Garmon Preemption and the NLRB's Exclusive Jurisdiction*

61. As will be obvious to the Court, Defendants' briefing and argument on preemption will later be urged as a 12(b)(1) motion along with Defendants' other 12(b) pleadings. It is presented here in the context of Plaintiff's applications for temporary restraining order and preliminary injunction for the purpose of demonstrating that any injunctive relief in this case would disserve the public and that Plaintiff has other adequate remedies at law through the NLRB process.

*Unfair Labor Practices Generally*

62. Section 7 of the NLRA provides that "[e]mployees 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." 29 U.S.C. § 157. The NLRA protects these Section 7 rights by making it an "unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section [7]" and empowering the NLRB "to prevent any person from engaging in any unfair labor practice." 29 U.S.C. § 158(a)(1); 29 U.S.C. § 160(a).

63. The NLRB's process for preventing unfair labor practices begins when an individual files a charge alleging that an unfair labor practice has occurred "with the Regional Director for the Region in which the alleged violations have occurred or are occurring." 29 C.F.R. § 101.2. Once the charge is filed, the charging party promptly provides evidence in support of the charge and a member of the Region's field staff is assigned to investigate the charge. 29 C.F.R. § 101.4. If, after investigation, the Regional Director determines that the charge has merit, the Regional Director typically "institutes formal action by issuance of a complaint and notice of hearing." 29 C.F.R. § 101.8. However, if the case involves "novel and complex issues," the Regional Director "must submit the case for advice from the General Counsel before issuing a complaint." 29 C.F.R. § 101.8. After a complaint is issued, an administrative law judge ("ALJ") holds a hearing where the ALJ listens to evidence and testimony relevant to the complaint and then subsequently issues a decision and recommended order in the case. 29 C.F.R. §§ 101.10-101.11. The parties may file "exceptions" to the ALJ's decision and recommended order to the Board. 29 C.F.R. § 101.12. If a party files exceptions, then the Board hears those exceptions prior to issuing its own decision and order in the case. 29 C.F.R. § 101.12(a). If a party does not file exceptions, then the ALJ's decision and recommended order "automatically become the decision and order of the Board." 29 C.F.R. § 101.12(b).

64. Periodically, the General Counsel of the NLRB publishes memorandums outlining certain types of unfair labor practice charges that Regional Directors must submit to the

General Counsel for advice pursuant to the process outlined in 29 C.F.R. § 101.8. See, e.g., Subject: Mandatory Submissions to Advice, Memorandum GC 21-04, 2021 WL 3662454 (Aug. 12, 2021); Subject: Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights, Memorandum GC 23-02, 2022 WL 16646853 (Oct. 31, 2022). These memorandums indicate areas of Board law that the General Counsel wants to modify or develop by processing a relevant case through the Board process described above. In some cases, the General Counsel's memorandums even outline the precise legal position that the General Counsel intends to take on the kinds of cases that the General Counsel is requiring Regional Directors to submit for advice. See, e.g., Subject: Non-Compete Agreements That Violate the National Labor Relations Act, Memorandum GC 23-08, 2023 WL 3750775 (May 30, 2023).

#### *Garmon Preemption Generally*

65. After the NLRA was enacted, the NLRB's sweeping power to prevent unfair labor practices "inevitably gave rise to difficult problems of federal-state relations." *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 239 (1959). All kinds of state regulation came into conflict with the Board's application of the NLRA, often in idiosyncratic and unanticipated ways, generating frequent litigation about how to resolve these conflicts. *Id.* at 240-241.

66. The Supreme Court resolved this problem in *Garmon* by declaring 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." *Id.* at 245. In order to establish that *Garmon* preemption applies, "a

party asserting pre-emption must advance an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been ‘authoritatively rejected’ by the courts or the Board” and must then “put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.” *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1411 (2023) (quoting *Int’l Longshoremen’s Ass’n, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986)). “If the court determines that the party has met its burden to show that ‘there is an arguable case for pre-emption,’ it generally must grant the party’s preemption defense and await the Board’s resolution of the legal status of the relevant conduct. After that, ‘only if the Board decides that the conduct is not protected or prohibited [by the NLRA] may the court entertain the litigation.’” *Ibid.* (quoting *Int’l Longshoremen’s Ass’n, AFL-CIO v. Davis*, 476 at 397 (1986)) (internal citations omitted).

*The Non-Compete and Coworker Non-Solicitation Provisions are Subject to Garmon Preemption*

67. In Memorandum GC 23-08, titled “Non-Compete Agreements that Violate the National Labor Relations Act,” the General Counsel of the NLRB declared that, in her view, “carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions,” “concertedly seeking or accepting employment with a local competitor to obtain better working conditions,” and “soliciting [one’s] co-workers to go work for a local competitor as part of a broader course of protected concerted activity” are “protected under Section 7 of the Act.” 2023 WL 3750775 at \*2. The General Counsel also declared that, in her view, “the proffer, maintenance, and enforcement of a non-competes provision that reasonably tends to chill employees from engaging in Section 7 activity as described above violate Section 8(a)(1) unless the

provision is narrowly tailored to special circumstances justifying the infringement on employee rights. In this regard, a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense.” *Id.* at \*2. The memorandum concludes by directing the NLRB “Regions [to] submit to Advice cases involving non-compete provisions that are arguably unlawful under the analysis summarized herein.”

68. This memorandum makes it clear that Defendants' concerted resignation, concerted pursuit of employment through a podcast, and soliciting of one another to work for that podcast are arguably protected activity under Section 7 of the NLRA and that Plaintiffs maintenance and enforcement of the non-compete provision and non-solicitation provision is arguably a violation of Section 8(a)(1) of the NLRA. The fact that the General Counsel of the NLRB is stating this in a guidance memorandum also indicates that the NLRB will likely issue a complaint in the unfair labor practice charges that the Defendants have already filed with the NLRB and that the Board reasonably could uphold a claim based on this interpretation. Accordingly, *Garmon* preemption applies and the Plaintiffs claims based on these two provisions should be dismissed.

*The Confidentiality and Non-Disparagement Provisions are Subject to Garmon Preemption*

69. Section 7 of the NLRA “protects employee communications to the public that are part of and related to an ongoing labor dispute.” *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007) (citing *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980)). These rights “are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the

employee and the employer, and the Board has repeatedly affirmed that such rights extend to former employees.” *Mclaren Macomb*, 372 NLRB No. 58, slip op. at 7 (Feb. 21, 2023). These rights “extend to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,” including through “newspapers, the media, social media, and communications to the public.” *Id.*

70. “Employee critique of employer policy pursuant to the clear right under the Act to publicize labor disputes is subject only to the requirement that employees’ communications not be so “disloyal, reckless or maliciously untrue as to lose the Act’s protection.” *Id.* at 9 (quoting *Emarco, Inc.*, 284 NLRB 832, 833 (1987)). Communications are considered disloyal enough to lose protection when they are made with a “malicious motive” and constitute “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies.” *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979); *Valley Hospital Medical Center, Inc.*, 351 NLRB at 1252 (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953)). Communications are considered maliciously untrue “if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.” *Valley Hospital Medical Center, Inc.*, 351 NLRB at 1252. “The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue.” *Id.* at 1253. Communication “that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer.” *Hacienda De Salud-Espanola*, 317 NLRB 962, 966 (1995) (quoting *NLRB v. Circle Bindery*, 536 F.2d 447, 452 (1st Cir. 1976)).

71. Based on this well-settled Board law, Defendants' communications to the public through The Dumb Zone podcast about their labor dispute with Plaintiff are arguably protected activity under Section 7 of the NLRA and Plaintiff's effort to enjoin these communications should be dismissed under *Garmon* preemption.

72. Additionally, maintaining and enforcing work rules and contractual provisions that have a "reasonable tendency to chill employees from exercising their Section 7 rights" presumptively violates Section 8(a)(1) of the NLRA. *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2. (August 2, 2023). This presumption may be rebutted by "proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." *Id.* Overbroad non-disparagement clauses and confidentiality clauses that, by their terms, would prevent employees from exercising their Section 7 rights by speaking out publicly about their workplace violate Section 8(a)(1) of the NLRA. *McLaren Macomb*, 372 NLRB No. 58, slip op. 8 (Feb. 21, 2023) (employer's "nondisparagement and confidentiality provisions interfere with, restrain, or coerce employees' exercise of Section 7 rights" and thereby "violated Section 8(a)(1) of the Act.").

73. Defendants have already filed unfair labor practice charges alleging that the maintenance and enforcement of the non-disparagement and confidentiality provisions at issue in this case violate Section 8(a)(1) of the NLRA. Based on these authorities, it is clear that these contractual provisions at least arguably violate Section 8(a)(1) of the NLRA and that the Board reasonably could uphold a claim based on that interpretation. Accordingly, *Garmon* preemption applies and the Plaintiff's claims based on these two provisions should be dismissed.

*The Unauthorized Recording Handbook Rule is Subject to Garmon Preemption*

74. Dan and Jake did not make recordings of any co-workers, and the Court can determine from the recordings linked in their declarations that the alleged recordings were a joke.<sup>15</sup> But if they had recorded co-workers, this is protected activity under Section 7.

75. “Photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.” *Whole Foods Market., Inc.*, 363 NLRB 800, 802 (2015). “Such protected conduct may include ... documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.” *Id.* No-recording rules that “unqualifiedly prohibit all workplace recording ... reasonably chill employees in the exercise of their Section 7 rights” and are thereby violations of Section 8(a)(1) of the NLRA. *Id.* at 803. This is true even where state law has made secret recordings illegal. *Starbucks Corp.*, 372 NLRB No. 50, slip op. at 7 (Feb. 13, 2023) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)). See also *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 19 (Aug. 2, 2023). Texas is a one-party consent state. Tex. Penal Code § 16.02.

76. Based on these authorities, had Defendants recorded conversations with other employees during contract negotiations, those recordings would be arguably protected activity under Section 7 of the NLRA. Also based on these authorities, Plaintiff's

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<sup>15</sup> Joke about recording calls <https://www.dropbox.com/scl/fi/vukmyknaaacic0qfcxpc2/7-20-5-Jake-joke-about-recording-calls-SHORT.mp3?rlkey=qleie68qp20zew6jf9nv8vxgt&dl=0>



maintenance and enforcement of the no-recording rule arguably violates Section 8(a)(1) of the NLRA. Defendants have already filed unfair labor practice charges based on this no-recording rule and the Board reasonably could uphold their claim. Accordingly, *Garmon* preemption applies and the Plaintiff's claims based on the no-recording provisions should be dismissed.

77. As the Court can see, the majority of the claims of the complaint are subject to the exclusive jurisdiction of the NLRB. The Court should not attempt to exercise jurisdiction over them even for the purpose of emergency relief.

78. As for the remainder of Plaintiff's claims, it has wholly failed in its burden to show the likelihood of success at trial. Its sworn facts alleged to support emergency relief are comprehensively debunked by Defendants' sworn statements and evidence. Its attempt to obtain *ex parte* relief from this Court so many days after filing its application without any attempt at notice to Defendants and despite having their counsel's contact information is extremely troubling.

79. But even if Plaintiff could overcome these obstacles, it simply does not have any credible allegation of irreparable harm. It has not even alleged that the damage to its business would be severe, much less force it into bankruptcy.

Respectfully submitted,

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