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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, C. W. MINING COMPANY, *et al.* Plaintiffs, vs. UNITED MINE WORKERS OF AMERICA *et al.*, Defendants.	**MEMORANDUM IN OPPOSITION TO DEFENDANT MINERS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT** Civil No. 2:04CV00901 Judge Dee Benson

International Association of United Workers Union (IAUWU), C. W. Mining Company (CWM) *et al.* respectfully submit this memorandum in opposition to the Motion to Dismiss Plaintiffs' Second Amended Complaint filed by Defendants Ricardo Chavez, William Estrada, Hector Flores, Daniel Hernandez, Guillermo Hernandez, Alyson Kennedy, Berthilda Leon, Samuel Villa Miranda, Domingo Olivas, Celso Panduro, Rodrigo Rodriguez, Gonzalo Salazar, Jesus Salazar, Jose, Juan Salazar, and Ana Marie Sanchez (the Defendant Miners).

STATEMENT OF FACTS

On a motion to dismiss under Rule 12(b)(6) the court must accept as true all the factual allegations of a Complaint, and construe all reasonable inferences in the plaintiffs' favor. Timpanogos Tribe v. Conway, 286 F.3d 1195, 1204 (10th Cir. (Utah) 2002). Plaintiffs submit the facts in the Complaint as true for purposes of this motion, including the following:

1. IAUWU is and for over 20 years has continuously been the duly elected bargaining representative for the workers of C. W. Mining Company (CWM). Both the NLRB and the

UMWA were directly involved in the initial election, and recognized IAUWU as the exclusive bargaining representative of CWM's workers. [Complaint ¶ 76]

2. On or about September 22, 2004 CWM suspended Bill Estrada with intent to terminate for cause. Estrada did not seek IAUWU's help or otherwise challenge his termination through the grievance process of IAUWU's collective bargaining agreement. While management was meeting with Estrada, some of the workers gathered outside. When Estrada left the meeting he falsely told the waiting workers they had also been fired. This was a material misrepresentation of a presently existing fact, which Estrada made either intentionally or with reckless disregard of its truth or falsity. Estrada intended that the workers would rely on his misrepresentation, which they did reasonably rely on to their detriment by, among other things, leaving their jobs, and engaging in a wildcat strike. At all pertinent times Estrada was UMWA's agent. [Complaint ¶ 78]

3. UMWA and its agents, in violation of IAUWU's rights as the exclusive bargaining representative of CWM's workers, persuaded approximately 75 of CWM's workers to leave their jobs and picket CWM in violation of the National Labor Relations Act [NLRA] and the collective bargaining agreement between CWM and IAUWU, with the object of forcing IAUWU out and UMWA in as the workers' bargaining representative, and with the object of forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers. This was at a time when IAUWU had been certified as the representative of CWM's workers, both the National Labor Relations Board (NLRB] and CWM had lawfully recognized IAUWU as the bargaining representative of CWM's workers, and a question concerning IAUWU's representation of CWM's workers could not appropriately be raised under the NLRA. [Complaint ¶ 77]

4. IAUWU invited the workers to use the discharge and grievance procedures under the IAUWU/CWM collective bargaining agreement, but UMWA and its agents persuaded or coerced the workers to ignore the discharge and grievance procedures in order to pursue UMWA's unlawful objective. [Complaint ¶ 77]

5. UMWA and its agents induced workers and former workers of CWM, in violation of the NLRA and the collective bargaining agreement between CWM and IAUWU, to engage in a refusal in the course of their employment to process, transport, or otherwise handle materials or to perform services; to engage in an unauthorized, unlawful "wildcat" strike; to picket CWM; and to engage in secondary picketing of businesses other than CWM, all with the unlawful object of

forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers [Complaint ¶¶ 79, 80, 81]

6. In connection with these events, the Defendant Miners published defamatory statements including those quoted at paragraphs 89-105 of the Second Amended Complaint, incorporated here by reference.

7. Taken in context, the Defendant Miners' statements were substantially and materially false, and were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity, and were made with malice. [Complaint ¶¶ 186-188]

8. The Defendant Miners' statements imputing wrongful conduct to Plaintiffs and otherwise impugning Plaintiffs reasonably related to, and were of and concerning CWM's directors, officers, and managers, and IAUWU's officers. [Complaint ¶¶ 189, 190]

9. The Defendant Miners gave publicity to these matters concerning Plaintiffs that placed Plaintiffs before the public in a false light that would be highly offensive to a reasonable person. The Jobs With Justice Defendants acted with knowledge of, or in reckless disregard as to, the falsity of the publicized matters and the false light in which Plaintiffs would be placed. [Complaint ¶ 201]

10. As a direct and proximate result, Plaintiffs have suffered damage to reputation, pecuniary losses and other injuries. [Complaint ¶ 194]

11. Besides being defamatory *per se*, actual injury in fact to Plaintiffs' reputations is evidenced by published comments of other persons who made conclusions as to Plaintiffs based on defamatory statements of the kind published by the Defendant Miners. [Complaint ¶ 195]

ARGUMENT

To the extent the Defendant Miners rely on their memorandum and reply memorandum in support of their motion to dismiss the amended complaint, UMWA's memoranda in support of its motions to dismiss the second amended complaint, and "UMWA's Newspapers' and *The Militant*'s Memoranda" [Defendant Miners' Memorandum, pg. 3], Plaintiffs adopt their memoranda in opposition to those memoranda.

I. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIM FOR DECLARATORY RELIEF.

A person has standing if there is an actual controversy before the court and he has a personal stake in its outcome. Beaver v. Clingman, 363 F.3d 1048, 1053 (10th Cir. 2004). CWM meets both criteria for standing to bring a claim under 28 U.S.C. § 2201:

> (a) In a case of actual controversy within its jurisdiction ..., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

CWM's declaratory relief claim alleges a controversy in the Court's jurisdiction, whether CWM was injured by the fraudulent workers' violations of federal law, and whether it lawfully terminated them. [1] CWM has a personal stake in the outcome of that controversy.

18 U.S.C. §§ 1028(a)(6) and 1546 make it unlawful to knowingly possesses or use a forged identification document, or other documents prescribed as evidence of authorized stay or employment in the United States. This includes Social Security cards and alien work permits or "green cards", U.S. v. Pineda-Garcia, 164 F.3d 1233, 1234 (9th Cir. 1999). The fraudulent workers used forged Social Security cards and green cards to obtain employment with CWM. It was fraudulent and illegal *ab initio* for them even to apply for, yet alone accept employment. Their employment at CWM was an ongoing violation of sections 1028(a and 1546.

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[1] CWM is the only party seeking relief under the First Claim for Relief of the Second Amended Complaint [the Complaint]. That Claim on its face does not seek relief against all of the "Defendant Miners," only against Ricardo Chavez, Berthila Leon, Domingo Olivas, Jesus Salazar, Jose Juan Salazar, Ana Maria Sanchez, and Raymundo Silva, described as the "fraudulent workers" (and against UMWA for a declaration it violated RICO).

The Defendant Miner's contention CWM does not clearly allege what relief it seeks is not well taken. The Prayer for Relief plainly asks for:

1. An Order declaring, as alleged in the First Claim for Relief:
   a. The fraudulent workers violated 18 U.S.C. §1028 and §1546 and 8 U.S.C. §1324a.
   b. The fraudulent workers violated 18 U.S.C. § 1343.
   c. The fraudulent workers, associated with the enterprise participated in the conduct of the enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).
   d. The fraudulent workers were agents of UMWA acting within the scope of their agency, and therefore UMWA violated 18 U.S.C. §1962(a).
   e. The fraudulent workers obtained employment with CWM through violations of 18 U.S.C. §1028 and §1546.
   f. CWM lawfully terminated the fraudulent workers's employment.

The fraudulent workers' argument CWM failed to plead fraud with particularity ignores what CWM alleged: "The fraudulent workers had provided the social security numbers to CWM from what appeared to be legitimate social security cards they presented when applying for work, along with what CWM has since determined to be falsified green cards or other government or documentation of work authorization. The employment applications stated, 'In signing this application, I certify that all of the foregoing information is a complete and accurate statement of the facts and understand that, if any misrepresentation, omission or falsification is discovered, it will constitute grounds for dismissal.' CWM relied on the employment applications and the validity of the fraudulent workers' social security cards and other documentation in hiring the fraudulent workers." [Complaint ¶ 57] That alleges the circumstances constituting fraud with particularity.

The fraudulent workers sought to maintain their employment through a scheme for obtaining money by false pretenses. The fraudulent workers were unauthorized aliens who obtained their employment with CWM by illegal and fraudulent means, and they knew it. After knowingly and fraudulently representing to CWM they were legally employable, they worked hand in glove with UMWA, to make CWM recognize UMWA when CWM could not lawfully do so. They did this with the object of coercing CWM into paying them higher wages and greater fringe benefits although they knew they could not legally even work for CWM. Everything they did to win UMWA representation was an ongoing violation of 18 U.S.C. §§ 1028(a)(6) and 1546. Everything they said to the media was a violation of 18 U.S.C. § 1343.

18 U.S.C. § 1343 makes it unlawful for a person, having devised a scheme for obtaining money by false pretenses, to cause wire, radio, or television transmissions in interstate commerce of any writings, signs, signals, pictures, or sounds for the purpose of executing the scheme. The fraudulent workers, having devised a scheme to replace IAUWU with UMWA, with the purpose of getting more money from their fraudulently obtained illegal employment both for UMWA and for themselves, promoted their scheme by all the acts complained of in the other Claims for Relief of the Complaint, including their defamatory publications. [Complaint 55] [2] To accomplish that scheme, they caused scores of defamatory publications to be transmitted by wire, radio, or television communication in interstate commerce. [Complaint ¶ 67]

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[2] The Worker Defendants overlook paragraph 55 of the Complaint, which plainly incorporates into the claim for declaratory relief all other allegations of the Complaint.

Violations of 18 U.S.C. §§ 1028, 1343, and 1546 are acts of "racketeering activity under 18 U.S.C. §1961(1)(B). Each fraudulent worker committed such acts by using false identification documents to obtain and maintain employment. Each Worker Defendant committed more such acts by causing their defamations to be published by the new media, including broadcast media and print media publishing for wire transmittal on the internet.

The fraudulent workers, with UMWA and its agents, including the other Defendant Miners, are an "enterprise" under 18 U.S.C. §1961(4). The fraudulent workers participated in the conduct of the enterprise's affairs through a pattern of racketeering activity, which violates 18 U.S.C. §1962(c). [Complaint 71-72] Their participation in the conduct of the enterprise's affairs included their use of forged identification documents. Their participation included every defamation they published, every one of which has been the subject of a wire, radio, or television transmission. The conduct of the enterprise's affairs includes every "false light" invasions of privacy, every intentional interference with CWM's economic relations, and every civil conspiracy with the other defendants alleged in the Complaint. CWM's resulting injuries include its damage to reputation and pecuniary losses, all of which were sustained as a direct and proximate result of the fraudulent workers acting in furtherance of their scheme to obtain money by false pretenses, in an amount greater than $1 million. For the Defendant Miners to suggest CWM was not injured by the fraudulent workers' violation of section 1962 is ludicrous.

Under 18 U.S.C. §1964(c), any person injured in his business or property by a violation of 18 U.S.C. §1962 may sue in United States district court. Plaintiffs have been injured by the fraudulent workers' violation of section 1962. 18 U.S.C. §1964(c) on its face gives civil litigants including CWM authority to allege civil claims for violations of RICO, which always require proof of predicate acts constituting violations of federal criminal statutes. *See* 18 U.S.C. §1961(1) defining "racketeering activity" as meaning violations of specific federal criminal statutes, §1961(5) defining "pattern of racketeering activity" as meaning two or more acts of racketeering activity, and §1962 defining prohibited acts in terms of a pattern of racketeering activity. A Westlaw search for "Civil RICO" cases gave over four thousand hits (for which CWM declines to give a string citation) including Rotella v. Wood, 528 U.S. 549, 120 S.Ct. 1075 (2000) ("A person injured by a RICO violation may bring a civil RICO action").

The Defendant Miners' contention CWM lacks standing to seek a declaration that they committed predicate acts of racketeering activity is not well taken. Since proof of the predicate acts is part of a civil RICO claim, sections 1962 and 1964 give CWM that standing.

Under 28 U.S.C. § 2201, in a case of actual controversy any U.S. Court with jurisdiction may declare the rights of any interested party even if further relief is not sought. CWM could have alleged a claim for RICO violations including treble damages. It has instead asked the Court to declare RICO violations occurred. There is an actual controversy before the Court on that issue, and CWM has a personal stake in its outcome. CWM clearly has standing to ask the Court to declare CWM's rights under RICO.

With federal question jurisdiction over CWM's RICO declaratory judgment claim, the Court has supplemental jurisdiction over CWM's claims under state law. The fraudulent workers put CWM in the position of having unknowingly hired unauthorized aliens. 8 U.S.C. §§ 1324a makes it unlawful for an employer, after hiring an alien for employment, to continue to employ the alien knowing he is an unauthorized alien. Upon discovery that he has hired an unauthorized alien, an employer is required by federal law to fire the worker. CWM fired the fraudulent workers upon discovering they were unlawful aliens. The fraudulent workers' employment applications stated, "In signing this application, I certify that all of the foregoing information is a complete and accurate statement of the facts and understand that, if any misrepresentation, omission or falsification is discovered, it will constitute grounds for dismissal." The fraudulent workers intentionally misstated their status in their employment applications. On this issue, there again is an actual controversy and CWM has a personal stake in its outcome. CWM clearly has standing to ask the Court to declare, as a matter of state contract law as well as federal immigration law, that CWM lawfully terminated the fraudulent workers's employment.

II. THE SECOND CLAIM FOR RELIEF STATES VALID CLAIMS.

The Defendant Miners' arguments for dismissal of the Second Claim for Relief are a repeat of the arguments they raised in their Motion to Dismiss the First Amended Complaint. In response, Plaintiffs adopt and incorporate by reference Point I, pages 4-8 of their April 7, 2005 Memorandum in Opposition to Motion to Dismiss of William Estrada *et al.*, incorporated here by reference.

III. PLAINTIFFS STATE VIABLE DEFAMATION CLAIMS AGAINST THE DEFENDANT MINERS.

In Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) the Court addressed whether the National Labor Relations Act (NLRA) pre-empted state defamation law. The Court held it did not. The NLRA does not give "either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. In such case the one issuing such material forfeits his protection under the Act." Linn at 61. Although the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management, ... *it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned* ..." Id. at 62-63 (emphasis added). The Defendant Miners' arguments about the right to merely intemperate language is irrelevant. [3]

The Linn Court also said at 65:

> We therefore limit the availability of state remedies [in an action between participants in a labor dispute] for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage. ... Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.

Plaintiffs agree that under Linn they bear the burden at trial to prove the Defendant Miners, as participants in a labor dispute, published with malice (i.e., knowing their statements were false or with reckless disregard of their falsity) and that Plaintiffs where injured as a result. But beyond that, Linn does not otherwise protect defamatory language during a labor dispute. Linn also says nothing about a burden of clear and convincing evidence. The burden of proof at trial is irrelevant to this motion, as the Court must take as true all facts alleged in the Complaint and construe all reasonable inferences from those facts in the plaintiffs' favor.

[Complaint ¶¶ 186-187] While fraud must be pleaded with particularity, "malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. Proc. 9(b). After listing the defamatory statements, the Complaint alleges "Taken in context,

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[3] Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) is not on point. A union had called those who refused to join the union "scabs," which, given that one of the definitions of "scab" was "one who refuses to join a union" was literally true. Plaintiffs agree that simply calling a non-union worker a scab, without more, is not defamation. But this is not such a case.

Defendants' statements as described above were substantially and materially false," and "were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity." This satisfies the pleading requirement of Rule 9(b). But even if it did not standing alone, the Court must construe all reasonable inferences from the facts alleged in favor of Plaintiffs. When a worker says he was illegally fired, it is reasonable to infer he knew whether he was fired or quit. When one says CWM's bosses forced him to work with a broken arm, it is reasonable to infer he knew whether this was true. When a worker says IAUWU's officers are CWM managers, it is reasonable to infer he knew whether this was true, or said it in reckless disregard of the truth.

"Under Utah law, a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule. At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation. Thus, in determining whether a particular statement fits within the rather broad definition of what may be considered defamatory, the guiding principle is the statement's tendency to injure a reputation in the eyes of its audience." West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994). The Defendant Miners do not even attempt to show how their statements could not possibly tend to injure Plaintiffs' reputations. Since the Defendant Miners do not even attempt to meet burden on this point, their motion should be denied.

The question is whether "a publication might be considered defamatory by a reasonable person." Cox v. Hatch, 761 P.2d 556, 561 (UT 1988). A reasonable person might consider UMWA's publications defamatory, that is, tending to injure Plaintiffs' reputations. For example. they said that IAUWU's officers are all bosses, and it has never defended any worker from company attacks; if workers report an accident, CWM takes away their supplementary pay and production bonuses; that CWM forced Juan Salazar to do dangerous jobs with a broken arm; and that CWM's bosses illegally fired the workers for protected union activity. The evidence at trial will show, as Plaintiffs have alleged, that these and other statements of the Defendants Miners are false. These statements impeach Plaintiffs' integrity and have a tendency to injure their reputations. Under Utah law, that makes them defamations.

The Complaint describes a multitude of instances showing Plaintiffs' reputations have suffered injury in actual fact as a direct result of the Defendant Miners' publications. All of the publications described in the Complaint originated from the Defendant Miners. Their statements

so injured Plaintiffs' reputations in the eyes of the president of Utah NOW as to lead her to say, "They break labor laws, they don't pay their workers a decent wage. ... It is some of the worst exploitation in the U.S." [¶ 195(e)] They induced Bishop George Niederauer to conclude the rights to fair wages, safe working conditions, and to associate as workers were all being denied to the workers at CWM, and for Father Donald E. Hope to remark, "What is needed here ... is the development of a conscience on the part of the C.W. Mining Co." [¶ 195(i), (k)] The statements led Susan Vogel of Salt Lake City CodePINK to say "They treat women, children and workers like garbage, and the way they've treated these miners is an example of that." [¶ 195(x)] These are only a few examples showing Plaintiffs in fact suffered injury to their reputations as a direct result of publications by the Defendant Miners.

The Defendant Miners' argument that Plaintiffs have not alleged facts that show the defamatory statements are false, is also without merit. It's like saying a law-abiding plaintiff fails to allege sufficient facts when he alleges, "Defendant falsely said Plaintiff was convicted of rape," or, when a traffic light was green, that a plaintiff does not allege sufficient facts when he alleges, "Defendant falsely said the traffic light was red." To state a claim upon which relief could be granted, the plaintiff doesn't have to allege, "Defendant said the traffic light was not green. This was false because the traffic light was red." It is enough to state a claim, to quote what the defendant said and allege it was false. For example, the Defendant Miners said the NLRB ruled CWM fired them illegally. [Complaint ¶¶ 91(4), 95(b), 102(h), 105(l)] This statement was false [Complaint ¶ 186], and since it impeaches the integrity of CWM and its managers, is defamatory under Utah law. That is enough to state a claim upon which relief can be granted. [4]

In response to the Defendant Miners' contention their statements were of opinion and not fact, Plaintiffs adopt the argument in Point I(C), pages 10-12 of Their Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint, incorporated here by reference.

Based on the above, the Court should deny the Defendant Miners' motion to dismiss the defamation claim.

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[4] As to this particular defamation, the Complaint also alleges that while management was meeting with William Estrada, some of the workers gathered outside. When Estrada left the meeting he falsely told the waiting workers they had also been fired. The workers relied on Estrada's false statement by leaving their jobs. [Complaint ¶ 78]

IV. PLAINTIFFS' OTHER STATE TORT CLAIMS ARE NOT PREEMPTED.

Defendants apply the wrong test. This is an action under the NLRA, 29 U.S.C. §185. The NLRA preempts state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S.Ct. 1904 (1985). Conversely, state-law rights and obligations that exist independently of private agreements are not preempted. *See* Sprewell v. Golden State Warriors, 266 F.3d 979, 990 (9th Cir. 2001) (citations omitted):

> A state law claim is preempted by section 301 [29 U.S.C. §185] when it is "substantially dependent" on analysis of a CBA [collective bargaining agreement]. Stated alternatively, "[i]f the plaintiff's claim cannot be resolved without interpreting the applicable CBA ... it is preempted." "[T]he bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation," however, does not require that the state-claim be extinguished. ...

State law is not preempted where the activity addressed is a peripheral concern of the LMRA, or touches overriding local interests. This includes common law defamation and *prima facie* tort in particular. Rodgers v. Grow-Kiewit Corp, 1981 WL 2390 (S.D. N.Y. 1981).

Under Utah law, there is an "intentional interference" tort if a defendant intentionally interferes with the plaintiff's existing or potential economic relations for an improper purpose or done by improper means, causing injury to the plaintiff. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991). Improper means include those contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Id. at 201. Construing the facts and reasonable inferences in favor of Plaintiffs, the Defendant Miners intentionally interfered with CWM's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives, and others, by improper means or for a predominantly improper purpose. The Defendant Miners also intentionally interfered with IAUWU's present and prospective economic relations with its bargaining unit workers, by improper means or for a predominantly improper purpose. [Complaint ¶¶ 144-45, 150-51] The improper means are not exclusively, or even necessarily, unfair labor practices. Common law defamation and fraud are not protected, proscribed, or preempted by the LMRA. The improper means include the fraud of Estrada that caused workers to quit their jobs, and the defamations by the Defendant Miners which violated common-law rules, St Benedict's *supra*. *See* Sprewell, *supra* at 991, *quoting* PMC, Inc. v. Saban Entm't, Inc., 52 Cal. Rptr.2d 877, 891 (1996):

> Defendant's liability may arise from improper motives or from the use of improper means. [The defendant's actions] may be wrongful by reason of a statute or other regulation, or a recognized rule of common law or perhaps an established standard of a trade or profession. Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., ... misrepresentation, ... defamation ...."

Thus, fraud and defamation are improper means by which a defendant can be liable for intentional interference with economic relations. In Sprewell, the defendants' conduct that interfered with Sprewell's economic relationships was a media campaign designed to portray Sprewell "in a false and negative light." In other words "false light" invasion of privacy is an improper means under the "intentional interference" tort.

Those claims can be resolved without interpreting IAUWU's collective bargaining agreement. They can "be litigated without reference to the rights and duties established in a CBA," and therefore are not preempted by section 301. In this case, the Defendant Miners' conduct that interfered with Plaintiffs' economic relations also included a media campaign designed to portray Plaintiffs in a false and negative light. This was intentional interference by an improper means, a wrong independent of the terms of any agreement between labor and management, and outside the scope of the LMRA, the NLRA, and the jurisdiction of NLRB. Through the artifices of defamation, fraud, and invasion of privacy, UMWA and its agents including at least some of the Defendant Miners caused other workers of CWM and members of IAUWU's bargaining unit not to perform their employment contract. That clearly establishes interference with particular economic relationships between the workers, CWM, and IAUWU. Similarly, the allegations that the Defendant Miners interfered with CWM's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives are sufficient to survive a motion to dismiss.

Where the underlying torts of fraud, defamation, invasion of privacy, and intentional interference with economic relations are not pre-empted, Plaintiff's claim for civil conspiracy to commit those torts also is not preempted. Therefore the Court should deny the Defendant Miners' motion to dismiss Plaintiffs' state claims.

CONCLUSION

For the reasons given above, the Court should deny the Defendant Miners' Motion to Dismiss.

DATED September 30, 2005.

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CERTIFICATE OF SERVICE

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2712-p.004 oppose Estrada et al mot to dismiss