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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 UMWA'S 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 United Mine Workers of America *et al.* (UMWA).

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. While management was meeting with Estrada, some workers gathered outside. When Estrada left the meeting he falsely told them 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. UMWA and its agents induced CWM miners, in violation of the NLRA and IAUWU's rights as the miners' bargaining representative, 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]

5. UMWA published defamatory statements including those quoted at paragraphs 89-105 of the Second Amended Complaint, incorporated here by reference.

6. Taken in context, UMWA's 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]

7. UMWA's 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]

8. UMWA 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]

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

10. 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 UMWA. [Complaint ¶ 195]

ARGUMENT

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 workers' violations of federal law as agents of UMWA, and whether it lawfully terminated them. 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 forged 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 for them even to apply for, yet alone accept employment. Their employment was an ongoing violation of sections 1028(a and 1546.

UMWA's 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. They knew they were unauthorized aliens who obtained employment with CWM by fraudulent means. UMWA conspired with the miners to make CWM recognize UMWA when CWM could not lawfully do so, to coerce CWM into paying them higher wages and greater fringe benefits although they knew they could not legally 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. UMWA and its agents having devised a scheme to get more money from the miners' fraudulently obtained illegal employment, promoted their scheme by the other acts alleged in the Complaint. To accomplish that scheme, they caused scores of defamatory publications to be transmitted by wire, radio, or television communication in interstate commerce. [Complaint ¶¶ 55, 67] [1]

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. UMWA and its agents committed such acts by

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

causing their defamations to be published by the new media, including broadcast media and print media publishing for wire transmittal on the internet.

UMWA and its agents are an "enterprise" under 18 U.S.C. §1961(4). UMWA participated in the conduct of the enterprise's affairs through a pattern of racketeering activity, violating §1962(c). Their participation included the statements UMWA published, all of which were transmitted by wire, radio, or television; every "false light" invasions of privacy by UMWA; every intentional interference with CWM's economic relations, and every civil conspiracy with the other defendants. CWM's injuries include its damage to reputation and pecuniary losses including lost profits as alleged in the Complaint, all of which were sustained as a direct result of UMWA acting in furtherance of its scheme to obtain money by false pretenses.

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 were injured by UMWA's violation of section 1962. 18 U.S.C. §1964(c) on its face gives 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"). UMWA's contention CWM lacks standing to seek a declaration UMWA 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. 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.

UMWA' 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 UMWA.

A. The NLRA Does Not Preempt Defamation Claims.

In Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) the Court held the National Labor Relations Act (NLRA) does not preempt state common law defamation claims:

> The case before us presents the question whether, and to what extent, the National Labor Relations Act ... bars the maintenance of a civil action for libel instituted under state law ... for defamatory statements published during a union organizing campaign ... We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him.

Id. at 55. The Court has jurisdiction over Plaintiffs defamation claims. Plaintiffs alleged, and will prove at trial, that UMWA (a) circulated false and defamatory statements, (b) with malice (publishing a statement with knowledge or reckless disregard of its falsity, Id. at 65), (c) injuring Plaintiffs. Linn does not otherwise protect defamatory language. [2]

UMWA seeks to confuse the issue by arguing "Plaintiffs simply cannot demonstrate that the statements at issue were defamatory. Stated another way, Plaintiffs cannot meet the heightened "actual malice" requirement set forth in Linn..." These are two separate and distinct legal issues. Neither one is the other "stated another way."

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[2] 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.

As further support, Plaintiffs refer the Court to Point III, pages 8-10 of their Memorandum in Opposition to Defendant Miners' Motion to Dismiss the Second Amended Complaint.

B. UMWA Published False and Defamatory Statements.

"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). UMWA does not even attempt to show how its statements could not possibly tend to injure Plaintiffs' reputations. Since UMWA does 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, UMWA said that the NLRB ruled in favor of the miners on an unfair labor practice charge and ordered C.W. Mining to reinstate the miners with full back pay, that CWM forced miners to work in unsafe conditions that violate MSHA regulations, and that IAUWU is a totally fake organization the bosses use to stop the workers from organizing themselves. The evidence at trial will show, as Plaintiffs have alleged, that these and other statements of UMWA are false. These statements impeach Plaintiffs' integrity and have a tendency to injure their reputations. Under Utah law, that makes them defamations. It is a question for a jury to determine if they in fact defamed Plaintiffs, *see* Point III(D) below, which cannot be resolved on a Rule 12(b)(6) motion.

C. UMWA Published with Malice.

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, 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 UMWA said that The NLRB ruled in favor of the miners on an unfair labor practice charge filed by UMWA, and ordered C.W. Mining to reinstate the miners with full back pay, it is reasonable to infer UMWA knew it was false. When UMWA said that CWM forced miners to work in unsafe conditions that violate MSHA regulations, and that IAUWU is a totally fake organization the bosses use to stop the workers from organizing themselves, it is reasonable to infer UMWA knew or was at least reckless whether those statements were false. Construing the facts and reasonable inferences in Plaintiffs favor, the Complaint adequately alleges the "malice" requirement of Linn.

D. Plaintiffs Were Injured by UMWA's Publications.

The Complaint describes a multitude of instances showing Plaintiffs' reputations have suffered injury in actual fact as a direct result of UMWA's publications. All of the publications described in the Complaint originated from the Defendant Miners. They were acting as UMWA's agents. Their statements so injured Plaintiffs' reputation in the eyes of led 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 UMWA and its agents.

Cox, *supra*, does not say that where special damages are not pleaded, a statement is not defamatory unless *per se*, is a gross misrepresentation. But even if that was the law, UMWA made statements that were defamatory *per se*, and Plaintiffs pleaded special damages.

UMWA mischaracterizes the "*per se*" analysis in Proctor & Gamble Co. v. Haugen, 222 F.3d 1262 (10th Cir. 2000). That there be no confusion, that decision said at 1277:

> Disparaging words, to be actionable per se ... must affect the plaintiff in some way that is peculiarly harmful to one engaged in [the plaintiff's] trade or profession. Disparagement of a general character, equally discreditable to all persons, is not enough unless the particular quality disparaged is of such a character that it is peculiarly valuable in the plaintiff's business or profession.

> [*quoting* Restatement (Second) of Torts § 573 comment e] For example, "charges against a clergyman of drunkenness and other moral misconduct affect his fitness for the performance of the duties of his profession, although the same charges against a business man or tradesman do not so affect him." Id. at comment (c). Although offensive to many, an allegation of Devil worship, like drunkenness, is "[d]isparagement of a general character, equally discreditable to all persons" and does not pertain to a quality that is peculiarly valuable in plaintiffs' professional activities of manufacturing and selling household consumer goods.

UMWA's publications about Plaintiffs were not disparagements "of a general character, equally discreditable to all persons." Just as charges against a clergyman of moral misconduct affect his fitness for the performance of his profession, UMWA's false charges that CWM and its managers (and IAUWU and its officers as CWM's stooges) violated federal labor laws, and charges of other specific unlawful acts by CWM against its employees, are charges against the fitness of Plaintiffs for the performance of their professional duties, making them defamatory *per se*.

UMWA also said CWM's miners were forced to work in unsafe conditions that violate MSHA regulations. 30 U.S.C. §820(d) provides, "Any operator who willfully violates a mandatory health or safety standard ... shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both." Therefore UMWA's statement imputed criminal conduct to CWM and its managers, and was defamatory *per se*.

UMWA uses tunnel vision in arguing the Complaint does not allege special damages. All other allegations of the Complaint are incorporated both in the defamation claim and in the intentional interference claim. [Complaint ¶¶ 86, 207] The Complaint further alleges UMWA intentionally interfered with CWM's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives, and others, and intentionally interfered with IAUWU's present and prospective economic relations with its bargaining unit workers, by improper means including UMWA's defamations [Complaint ¶¶ 208, 209], and prays for an award of damages for injury to reputation and pecuniary damages, and including among other things lost profits to CWM in an amount greater than $1 million. At a minimum, CWM has alleged special damages in the form of more than a million dollars in lost profits.

E. UMWA Published Statements of Fact, Satisfies Fed. R. Civ. Proc. 8, Were Not Privileged, and Were Of and Concerning the Individual Plaintiffs.

Plaintiffs adopt the following arguments in their Memorandum in Opposition to *The Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint as equally applicable to UMWA:

In response to UMWA's contention its statements were of opinion and not fact, Plaintiffs adopt the argument in Point I(C), pages 10-12. In response to UMWA's argument that Plaintiffs' defamation claim against UMWA does not satisfy Fed. R. Civ. Proc. 8, Plaintiffs adopt the argument in Point I(A), pages 4-6. In response to UMWA's argument that its publications of proceedings before the NLRB were privileged, Plaintiffs adopt the argument in Point I(D), pages 12-14. In response to UMWA's claim "as to the inability of the individual Plaintiffs to pursue their defamation claims," Plaintiffs adopt the argument in Point I(E), pages 14-15.

Based on the above, the Court should deny UMWA's motion to dismiss Plaintiffs' defamation claims against UMWA.

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

Plaintiffs' invasion of privacy claims are not preempted for the same reasons their defamation claims are not preempted, *see* Point III(A) above.

The National Labor Relations Act (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. Plaintiffs' state law claims can be resolved without even glancing at any collective bargaining agreement. Those claims are not preempted.

State law is not preempted where the activity addressed is a peripheral concern of the NLRA, or touches overriding local interests. "[T]he key to determining the scope of preemption is not how the complaint is cast, but whether the claims can be resolved only by referring to the terms of the collective bargaining agreement." Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1540 (9th Cir. 1992), *citing* Allis-Chalmers *supra.*, holding the NLRA did not preempt a claim for intentional interference with economic relations.

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, interfering with CWM's economic relations with its employees, suppliers, customers and others, and interfering with

IAUWU's economic relations with its bargaining unit workers. None of those acts by UMWA are even arguably protected by the NLRA. *See* Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (NLRA does not preempt state law fraud claim); Linn, *supra* (NLRA does not preempt state law defamation claim), rationale equally applicable to "false light" invasion of privacy claims. Where Plaintiffs' claims for defamation, invasion of privacy, and intentional interference with economic relations (through fraud and other improper means) are not preempted, Plaintiff's claim for civil conspiracy to commit those torts also is not preempted. Therefore the Court should deny UMWA' motion to dismiss Plaintiffs' state claims.

V. THE COURT SHOULD USE ITS DISCRETION IN DETERMINING WHETHER TO EXERCISE SUPPLEMENTAL SUBJECT MATTER JURISDICTION OVER PLAINTIFFS STATE LAW CLAIMS.

This Court has federal question subject matter jurisdiction over the First and Second Claims for Relief. All other claims are state common law claims over which the Court does not have diversity jurisdiction. They are before the Court only as supplemental claims under 28 U.S.C. §1367(a). Subpart (c) provides, "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, [or] (3) the district court has dismissed all claims over which it has original jurisdiction ..." Should the Court dismisses the First and Second Claims on the merits, it will be left only with Plaintiffs' state law claims. Plaintiffs' defamation, invasion of privacy, intentional interference, and conspiracy claims involve complex issues of state law. Those claims substantially predominate over Plaintiffs' federal question claims. In that event, the better course of action would be for the Court to exercise its discretion under section 1367(a) and decline to exercise supplemental jurisdiction of Plaintiffs' state law claims.

VI. UMWA IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES.

In response to UMWA's argument for an award of attorney fees, Plaintiffs adopt the argument in Point V, page 19 of Plaintiffs' Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint as equally applicable to UMWA.

CONCLUSION

For the reasons given above, the Court should deny UMWA's Motion to Dismiss.

DATED September 30, 2005.

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CERTIFICATE OF SERVICE

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2712-p.004 oppose UMWA mot to dismiss