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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 MOTION TO DISMISS OF WILLIAM ESTRADA *et al.*** Civil No. 2:04CV00901 Judge Dee Benson

Plaintiffs 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 filed by Ricardo Chavez, William Estrada, Hector Flores, Natividad 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 (Defendants).

STATEMENT OF FACTS

Defendants offer no evidence to controvert the allegations of the Amended Complaint (the Complaint). Therefore, the facts it alleges and all reasonable inferences must be construed in favor of Plaintiffs. The Complaint cannot be dismissed under Rule 12(b)(6) if Plaintiffs can prove any set of facts in support of their claims, accepting the allegations of the complaint as true and construing them in the light most favorable to Plaintiffs. Yoder v. Honeywell, Inc., 104 F.3d 1215, 1224 (10th Cir. 1997). *cert. den.* 522 U.S. 812. When the court applies this standard, the court must deny Defendants' motion.

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 ¶ 62]

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 including most or all of Defendants 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. [Complaint ¶ 63]

3. Defendants Aguilar, Chavez, Hector and Natividad Flores, Daniel and Guillemo Hernandez, Kennedy, Leon, Olivas, Panduro, Rodriguez, González, Gonzalo, Jesus and Jose Juan Salazar, Sanchez, and Villa have claims against UMWA and Estrada for unfair labor practices, fraud, intentional interference with present and prospective economic relationships with CWM and IAUWU, civil conspiracy, and possibly other claims, including cross claims against UMWA and Estrada for lost wages and punitive damages, as well as claims for indemnity on any judgment that may be entered against them in this action. [Complaint 64]

4. UMWA and its agents induced Defendants, in violation of the National Labor Relations Act and the collective bargaining agreement between CWM and IAUWU, to engage in a refusal in the course of their employment to use, process, transport, or otherwise handle or work on materials or commodities or to perform services, and to engage in an unauthorized, unlawful "wildcat" strike to further UMWA's unlawful objectives. [Complaint ¶ 66]

5. UMWA's agents including Defendants persuaded and caused workers and/or former workers of CWM to picket CWM in violation of the National Labor Relations Act and the collective bargaining agreement between CWM and IAUWU, with the object of forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers, while IAUWU was certified as the representative of CWM's workers, and where both the 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 29 U.S.C. §159, and where such picketing was conducted without a petition under 29 U.S.C. §159(c). [Complaint ¶ 67]

6. UMWA's agents including Defendants persuaded and caused workers and/or former workers of CWM to engage in secondary picketing of businesses other than CWM in violation of the National Labor Relations Act and the collective bargaining agreement between CWM and IAUWU, with the object of forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers, while IAUWU was certified as the representative of CWM's workers, and where both the National Labor Relations Board 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 29 U.S.C. §159, and where such picketing was conducted without a petition under 29 U.S.C. §159(c). [Complaint ¶ 68]

7. Defendants, all UMWA's agents, participated in, authorized, and/or ratified the above unlawful acts, and are personally liable. [Complaint ¶ 70]

8. UMWA and agents including Defendants intentionally interfered with CWM's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives, and others, and with IAUWU's present and prospective economic relations with its bargaining unit workers. Defendants intentionally interfered with these economic relations by improper means or for a predominantly improper purpose, and conspired, planned, directed, instigated, advised, aided, encouraged, supported, participated in, mutually agreed to, and/or ratified the intentional interference, and are liable as though they had performed the acts themselves. [Complaint ¶¶ 144-146, 150-152]

9. Defendants collectively comprise a combination of two or more persons, which operated with a meeting of minds to accomplish the unlawful objects described in the Complaint. One or more of Defendants committed overt acts directed against Plaintiffs in furtherance of the combination and conspiracy, resulting in injury to Plaintiffs. [Complaint ¶¶ 163-164]

10. Defendants published numerous defamatory statements about Plaintiffs as set forth in the Complaint and as further described below.

ARGUMENT

Defendants "adopt and incorporate by reference the arguments presented in UMWA's Memorandum and Newspapers' Memorandum." With that single sentence, Defendants made their memorandum over fifty-five pages long. Plaintiffs move the Court to strike Plaintiff's memorandum to the extent it incorporates other memoranda and thereby becomes an overlength memorandum filed without leave of court.

To the extent those memoranda of other parties directly apply to this motion, Plaintiffs support their opposition with their Memoranda in Opposition to those motions. However, *The Salt Lake Tribune* and the *Deseret Morning News* make arguments uniquely applicable to them as members of the press, and UMWA makes arguments uniquely applicable to it as a labor organization, that are not applicable to the Defendants bringing this motion to dismiss.

I. THIS COURT HAS JURISDICTION UNDER THE LABOR MANAGEMENT RELATIONS ACT.

This action invokes the jurisdiction of the Court under the Labor Management Relations Act, 29 U.S.C. §185. [Amended Complaint (Complaint) ¶ 58] The LMRA gives this court jurisdiction over Plaintiffs' first claim for relief:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.

29 U.S.C. §185(a).

Defendants Aguilar, Chavez, Estrada, Hector and Natividad Flores, González, Daniel and Guillemo Hernandez, Kennedy, Leon, Olivas, Panduro, Rodriguez, Gonzalo, Jesus and Jose Juan Salazar, Sanchez, and Villa, were all workers of CWM subject to a collective bargaining agreement between IAUWU and CWM. Their acts as alleged in the Complaint were violations of the IAUWU/CWM collective bargaining agreement, a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, bringing them squarely within the scope of 29 U.S.C. §185. Although members of IAUWU's collective bargaining unit, Defendants were also acting as agents of UMWA. 29 U.S.C.§187 provides:

> (a) It shall be unlawful, for the purpose of this section only, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States ...

In turn, 29 U.S.C. §158(b)(4) provides:

> It shall be an unfair labor practice for a labor organization or its agents ... (I) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> > (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
> >
> > (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title ...;
> >
> > (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title ...

Defendants, all CWM workers subject to the IAUWU/CWM collective bargaining agreement, who were also agents of UMWA, in violation of the collective bargaining agreement persuaded other CWM's workers to leave their jobs and engage in illegal recognitional picketing of CWM, 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 in violation of CWM's obligations under the collective bargaining agreement. IAUWU invited the workers to use the grievance procedures under the IAUWU/CWM collective bargaining agreement, but some or all of Defendants persuaded the other workers to ignore their contractual rights in furtherance of the illegal objectives of UMWA. In further pursuit of their unlawful objective, Defendants induced other workers of CWM to refuse to process, transport, or handle CWM's products, to picket CWM in an unlawful "wildcat" strike, and to engage in secondary picketing of other businesses. At all pertinent times IAUWU was

certified by NLRB as the representative of CWM's workers and had a collective bargaining agreement with CWM, a question concerning IAUWU's representation of CWM's workers could not appropriately be raised under 29 U.S.C. §159, and the picketing was conducted without a petition under 29 U.S.C. §159(c). These acts of Defendants, acting as agents of UMWA, constitute a violation of the collective bargaining agreement. As paragraphs 63, 66, 67, and 68 of the Amended Complaint show, the unfair labor practices of Defendants, who while acting as UMWA's agents were also subject to and violating the collective bargaining agreement.

29 U.S.C. §185 gives this Court jurisdiction. *See* Retail Clerks Intern. Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17, 27 (U.S. 1962), stating section 185 gives the district court jurisdiction over disputes involving all violations of contracts between an employer and a labor organization, or between labor organizations. "It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them." Defendants, agents of UMWA, were subject to the collective bargaining agreement. Their acts as agents of UMWA were clear violations of that agreement. LMRA Sections 187 and 158 extend the Court's jurisdiction to UMWA's unfair labor practices.

San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) and its progeny do not preempt the court's jurisdiction under the LMRA and 29 U.S.C. §185. *See* Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903 (1967), holding courts have jurisdiction over suits for conduct amounting to violations of collective bargaining agreements, even though the conduct is also an unfair labor practice within the jurisdiction of NLRB: "*Garmon* and like cases have no application to § 301 [29 U.S.C. §185] suits."

The six month limitation of 29 U.S.C. §160(b) deals with the procedure for the *Board* to issue complaints, not for aggrieved parties to file court actions. The LMRA does not have a statute of limitations for actions under section 185. Arguably, the limitation period is Utah's six year limitation on written contracts or four year limitation on other contracts, Utah Code Ann. §78-12-23. But even if the limitation period for this section 185 action is six months, this action is timely if commenced within six months of the last date Defendants violated 29 U.S.C. §§185, 187, and 158(b)(4). *See* Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 416, 80 S.Ct. 822 (1960) (A claim is not time barred where occurrences within the limitations period in and of themselves constituted unlawful acts). Defendants' violations of the LMRA and the collective bargaining agreement were

ongoing, and continued at least into May of 2004. *See* Complaint ¶¶ 81(pp), 83(f), 116. Plaintiffs commenced this suit on September 14, 2004, within four months of Defendants' violations of the LMRA and the collective bargaining agreement. Whether the limitation period is six years or six months, Plaintiffs timely commenced this action.

Defendants' argument that this action is barred by a settlement of charges before the NLRB is frivolous. UMWA's Exhibit B-1 upon which Defendants rely shows only a "unilateral settlement agreement" signed by UMWA alone, which is not contract enforceable against any plaintiff. IAUWU, the charging party, did not agree and never became a party to that or any other settlement agreement. CWM was not even a party to the charge filed with the NLRB, yet alone a settling party. Defendants have failed to even mention the elements of *res judicata*, yet alone show how those elements are met. Res judicata requires that the prior suit must have ended with a judgment on the merits. Nwosun v. Gen. Mills Rests., Inc., 124 F.3d 1255, 1257 (10th Cir.1997). The NLRB charge was closed with no decision on the merits.

Based on the above, this Court has jurisdiction pursuant to the LMRA, 29 U.S.C. §§185 and 187, and pursuant to section 187 over Plaintiffs' claims under 29 U.S.C. §158(b)(4).

With federal statutory subject matter jurisdiction over Plaintiffs' LMRA claims, this Court has pendent jurisdiction over Plaintiffs' state claims including the defamation claim against Defendants. 28 U.S.C. §1367(a) provides:

> ... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The Court has jurisdiction over pendent state claims when the state and federal claims, as in this case, "derive from a common nucleus of operative fact." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130 (1966).

Plaintiffs can maintain an action against individual workers on their pendent state claims. Kerry Coal Co. v. United Mine Workers, 637 F.2d 957 (3d Cir.), *cert. den.* 454 U.S. 823 (1981), upheld a verdict against individual union officers. Kerry, a coal producer who had no bargaining relationship with picketing unions, won a jury verdict against unions, and also against individual members, for illegal secondary picketing, harassment of employees, and destruction of equipment.

On appeal, the court upheld the verdicts against individual defendants for intentional interference with contractual relationships. Id. at 964-66.

This Court has original jurisdiction over Plaintiff's First Claim for Relief. Under § 1367(a), this Court has jurisdiction over state claims that form part of the same case or controversy, including claims involving joinder of additional parties. Plaintiff's LMRA claims and their defamation claims are joined at the hip. They involve a common nucleus of operative facts, part of the same case or controversy. Because the Court has federal subject matter jurisdiction over Plaintiffs' LMRA claim, and supplemental jurisdiction over the defamation claim against Defendants, the Court should deny the motion to dismiss.

II. PLAINTIFFS' DEFAMATION CLAIMS ARE PROPERLY BEFORE THE COURT.

A. Defendants' Publications Are Actionable under the Linn Rule.

In Linn v. Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657 (1966), the Court observed that while the NLRB "tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving 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." Id. at 61. Further,

> [I]t 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. ... Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. ... The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function. ...
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.

Id. at 63-64. The Linn Court held that when agents of a labor organization circulate false and defamatory statements during a union organizing campaign, the court has jurisdiction over state common law defamation actions, when the statements were made with "malice," defined as "with knowledge of their falsity or with reckless disregard of whether they were true or false," and upon proof of harm, "which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." Id. at 65. accepting the allegations of the complaint as true and

construing them in the light most favorable to Plaintiffs, Yoder, *supra*, Defendants' statements were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity, and were made with malice, and caused Plaintiffs injury to reputation and pecuniary losses. [Complaint ¶¶ 131-132, 138]

B. Defendants' Publications Are Defamatory.

It only takes one libelous statement to commit defamation. Defendants published many such statements, too numerous to repeat here. The following are only examples of statements Defendants made that are not mere "intemperate, abusive or insulting language," but false statements of fact. [1]

Bill Estrada, Celso Panduro, Samuel Villa Miranda, Gerardo Aguilar, Guillemo Hernandez, Rigo Rodriguez, Gonzalo Salazar, Daniel Hernandez, Jesus Salazar, Alyson Kennedy, Natividad Flores, Ana Maria Sanchez, and Jose Juan Salazar joined in a published statement, set forth in full at ¶89(b) of the Complaint. (The reference in the Complaint to "Florez" is to Natividad Flores. Defendants' contention at page 6 fn. 5 of their supporting memorandum, that the Complaint makes no allegation against him, is therefore mistaken.) The statement says among other things that CWM forced workers to use equipment MSHA inspectors had deemed unsafe, that mechanics would tag equipment for needed servicing which supervisors ignored, and that CWM forced them to risk their lives working in an unsafe mine area. It also said that workers were forced to chose between their safety and their income, that if a worker refused to carry out a unsafe work practice he would risk losing bonuses and supplementary pay, and that the mine owners raked in large profits by exploiting the miners. It also said CWM sent supervisors to disrupt a union meeting, threw the workers out of the mine, told them they were fired, used the sheriff to keep them off the property, and threatened them with deportation.

William (Bill) Estrada, a ringleader of the conspiracy, said he was singled out for discipline on false charges of working unsafely and failing to do proper maintenance on equipment, that he was fired for trying to organize a union, that CWM threatened to fire anyone who considered organizing with UMWA, that the other workers walked out of the mine protesting unsafe working

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[1] The Court should keep in mind Plaintiffs' Sixth Claim for Relief, that Defendants are liable for civil conspiracy, for entering into a combination that operated with a meeting of minds to injure Plaintiffs, and that Defendants committed overt acts directed against Plaintiffs in furtherance of the conspiracy, resulting in injury to Plaintiffs, making them liable for each others' torts.

conditions and the suspension of Estrada for union activity, that CWM, its executives, and "the Kingstons" fired everyone for union activity, that CWM locked them out, called in the sheriff to kick them off the property and keep them off, and threatened to call immigration officials. Estrada said that CWM mine operators forced workers to operate dangerous equipment that CWM (meaning its production foremen) ordered illegal cuts into the coal seam, that CWM failed to make its roof control plan available, and that workers are exposed to diesel exhaust due to inadequate ventilation. He also said no preventative maintenance was done in the mine from September 22, 2003 until CWM rehired the workers. Estrada said that CWM charges its miners for any tools they use, that CWM deducts from their pay if they report an accident or damage equipment, that CWM uses bonuses and supplementary pay to discipline workers, that if workers report an accident, both are taken away, and that an injured worker either works while injured or risks losing his job. Estrada said CWM falsely claimed the officers of IAUWU were bosses, that IAUWU's officers were not elected, and that they organize production, give or take away raises, evaluate, suspend and fire workers, and that Dana Jenkins in particular was a foreman who performed boss's duties including disciplining workers. He said that IAUWU has never defended a worker from company attacks, and that IAUWU was a company concoction, a "yellow-dog" union owned by CWM and run by the Kingston family, designed to preclude employees from airing legitimate grievances.

Alyson Kennedy said when workers stood up in defense of Estrada, IAUWU representatives took the side of CWM, that CWM told those who walked off the job that they were fired, and that the NLRB upheld UMWA's charge that the miners were illegally fired for union activity. She said female workers didn't have a separate place to shower or change, that she had to find her own place to change, that CWM offered the use of "the bosses' bathhouse," but that the bosses would walk in on her. Kennedy said Cyril Jackson, a supervisor, said Charles Reynolds instructed him to write her up on a trumped-up charge of low work performance after she spoke at a rally about "brutal conditions the Co-Op bosses impose on the miners." She said IAUWU is a fake company-led union maintained by CWM, that IAUWU does not have meetings or elections, that IAUWU's owners are bosses, that few workers belonged to the union, and that CWM began calling its bosses "lead men" so they could be union members.

Celso Panduro said CWM fired him because he supports UMWA, and that IAUWU's president would not defend him. He said IAUWU is a fake company union which has bosses as

members and represents only the bosses. Panduro said, "Every time we had asked for better working conditions they told us to keep our heads down and keep working or we could be out the door." He said the bosses intimidated workers to operate unsafe equipment and took away pay if you questioned anything, and that many miners injured themselves working on machinery the bosses refused to fix. He said the roof bolting crew had to work with broken and defective equipment that CWM's supervisors refused to repair.

Gonzalo Salazar said CWM fired the workers for union activity and protesting unsafe working conditions. He said when miners asked to see their contract, they were told to either get back to work or be fired. Salazar said CWM tried to obtain a ban on the miners' picket trailer. He said CWM threatened to fire any worker who voted for UMWA and to shut down the mine rather than recognize UMWA, and that CWM promised raises to workers who sided with IAUWU. He said IAUWU is composed of bosses "and they are all members of the Kingston family." He said he was forced to work in violation of MSHA regulations, and that "If I call in sick for just one day, I lose my bonus for as long as the bosses want me to lose it."

Jesus Salazar said the workers walked out in defense of Estrada, and were fired and locked out for defending their rights, for protesting unsafe working conditions, and for pro-union activity, that "they threw the cops on us and kicked everybody out of mine property," and that guards at the mine entrance had a list of miners to keep out. He said CWM always forced workers to operate unsafe equipment, that "even after an MSHA inspector tagged equipment out of service, the foremen would order the workers to operate it unrepaired, after the inspector left. Numerous injuries occurred because of it." Salazar said IAUWU is a false union that has never supported the workers, that union officers are bosses who are responsible for setting production goals and disciplining and firing workers, that IAUWU is the same as CWM, and that IAUWU has never represented the workers.

Jose Juan Salazar said "We are winning back pay for our illegal firings last year from the Co-op mine." He said CWM pressured state agencies to revoke UMWA's permit for a picket trailer. Salazar said workers are forced to work when they are injured, that he broke his arm and was forced to do dangerous jobs wearing a cast, that workers compensation was never offered, that the workers have no health insurance, and that medical expenses for on-the-job injuries are taken

from their checks. He said that CWM created IAUWU just to get in the way of the workers organizing themselves into a real union, and that IAUWU does not have meetings or elections.

Ricardo Chavez published statements that what the workers were told by IAUWU's officers was always in defense of the company, and that Nevin Pratt in particular would speak as if he were speaking directly for the company. Chavez also said a CWM boss sent a worker to tell him to stay for a second shift after coming off a 12-hour graveyard shift.

Hector Flores said he was written up for not having his safety glasses on while he was cleaning them during lunch break, and that the section supervisor then went on to give the same warning to another miner for the same offense.

One miner, believed to be Timoteo Gonzalez, said CWM tells foremen when MSHA inspectors come to stop miners from carrying out their normal work until the inspectors leave. Gonzalez was identified as saying, "They tell us to stop welding and clean the area or cover it up and to clear any smoke that's in the shop." While workers are expected to maintain their work areas, the claim that CWM makes them stop working during MSHA inspections is untrue.

Daniel Hernandez published a statement that "the company unjustly fired and locked out 75 miners for standing together in solidarity with a co-worker they had suspended for three days with intent to discharge. The company called the sheriff to order us off the property. We had been talking to the UMWA about organizing a union. The company has a so-called union and all of the officers are bosses." If Mr. Hernandez had been talking to UMWA, CWM had no knowledge of it. It is true CWM had suspended Estrada for cause. Otherwise, this statement is untrue.

Berthila Leon said, "it is important to stand up against years of injustice. ... We would sometimes force them to fix some unsafe situation if we pushed hard enough, but in general you would point out the problems and the boss would do nothing." She also claimed she had to undress in the same room as the male workers.

Domingo Olivas attended an event where he claimed he was taken advantage of because of his ethnicity, that he had no health insurance benefits, and was forced to work in violation of MSHA regulations. He published statements that "We are here because ... we're tired of all the mistreatment, abuses, and lies we've endured for years at Co-Op mine—and all at minimum wage! ... No longer should any worker go through the years of exploitation that we have endured. ... We as miners at Co-op have endured decades of exploitation."

Rigo Rodriguez, besides joining in the letter published in the October 21, 2003 *Price Sun Advocate*; Complaint ¶ 89(b), published statements that "This mine is very dangerous. After roof falls at the entry way, the bosses sent us in through a hole in the return. That is the only entry and only exit now. We were never sure if we were going to come out after we went in. If the roof collapses there, you're trapped."

Ana Maria Sanchez published statements that CWM had no separate locker or bathroom facilities for the women miners, that she had to undress in the same room as the male workers, that it was not uncommon for miners to keep working with fractured arms and legs under conditions imposed by the mine owners, that CWM's bosses were members of IAUWU, that IAUWU never represented the workers or did anything for them, that working conditions were bad and dangerous, that for days before September 22, 2003 the workers were protesting the conditions at the mine, that the roof of the mine was in cave-in condition, that workers were not provided with proper safety or work equipment, or if they were, it was at an outrageous price, charged by the company, that tensions had been brewing, and that she was fired for aligning with "the pro-unionizers."

The media published numerous statements attributed to "the workers" and "the miners" which includes Defendants, including by example: "The miners" and "the workers" said that when they talked about forming a union, "their leader," Bill Estrada was fired for trying to organize the workers with the UMWA. They said they were illegally fired by a foreman in violation of U.S. labor law when they stopped work to protest Estrada's discharge and for seeking UMWA representation, that they were locked out and escorted by sheriff's deputies off the property, and that when some tried to return to work the next morning, Charles Reynolds met them at the gate and allowed only a handful on a company checklist onto the property, and that it took a NLRB decision to return them to work. The miners said they were forced to work in unsafe conditions that violate MSHA regulations, to use defective machinery MSHA had deemed inoperable, and to work with inadequate roof supports. The workers said many of them never received training required by law on basic safety conditions underground, and that CWM's bosses sent five men into the mine with only one self-rescuer [a personal breathing unit]. The workers said they were forced to work with injuries and without workers compensation or health insurance benefits. One worker said, "If you report an accident, you are laid off for three days and your pay is cut." Another said when he reported an injury to his foreman, he was told, "I don't want to hear you complaining

about your boss or you won't have a job here anymore." The workers said IAUWU is a fake, bogus, company created and controlled "yellow dog" union, made up entirely of Kingston family members and mine supervisors, that its officers are all mine bosses and management, that workers are forced to pay dues to IAUWU, and that it never represented the workers or their interests. The miners said that IAUWU never held meetings, that CWM, not the union members, replaced IAUWU's former president with Chris Grundvig, and that CWM's bosses coerced workers into signing the 2001 collective bargaining agreement. Plaintiffs are entitled to conduct discovery to find just which individuals published these defamatory statements.

Defendants statements were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity, and made with malice. [2] [Complaint ¶¶ 130-132] As the U.S. Supreme Court said in Linn, *supra*, "[M]alicious 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."

Defendants' statements were not mere rhetoric. They were not mere statements of opinion. Even statements of opinion, if they are regarding facts, are subject to claims for defamation. *See* West v. Thomson Newspapers, 872 P.2d 999, 1015 (Utah 1994) (opinions are not protected if they imply facts that are false and defamatory); Jenkins v. Weis, 868 P.2d 1374, 1381 *fn* 2 (Utah App. 1994) ("Opinions regarding facts are not unconditionally privileged. ... [I]f the substance of a statement couched in opinion language is capable of being proven true or false, it is subject to suit."). Defendants' statements can be objectively verified as true or false. Taken in context, they amount to affirmative claims of specific acts done by CWM and its management, and IAUWU and its officers, constituting tortious conduct, breach of the IAUWU/CWM collective bargaining agreement, and systematic violations of federal and state labor law. They are actionable statements of fact, not opinion. They are statements of conduct incongruent with the exercise of a lawful business, and so are defamatory *per se*.

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[2] Defendants offer no evidence whatever to support their attorney's argument that they "legitimately believed that they had been fired." Any question on this point would be an issue of fact that must be resolved in favor of Plaintiffs. In particular, there is no evidence as to CWM's subjective intent in offering to re-employ the workers who quit. For present purposes, it would be reasonable to infer that CWM may have done so for altruistic reasons.

Defendants' argument about "privileged reports of governmental proceeding" is without merit. In response to Defendants' incorporation of the argument in *The Salt Lake Tribune* and the *Deseret Morning News*' motion to dismiss, Plaintiffs refer the Court to the applicable responses in their Memorandum in Opposition to Motion to Dismiss of *The Salt Lake Tribune*, the *Deseret Morning News*, *et al.* Among other things, any privilege only applies to *truthful* reporting of governmental proceedings. Publications that the NLRB ruled CWM had committed unfair labor practices by firing the miners, and ordered CWM to reinstate the miners with back pay, were not truthful. The only NLRB order, entered with the charging party's stipulation, actually dismissed unfair labor practice charges against CWM. It did not order CWM to reinstate anyone, and did not order CWM to pay even one cent of back pay to anyone.

Defendant's argument that their publications were not "of and concerning" the individual Plaintiffs is without merit. As shown above, Defendants said things not only about CWM and IAUWU as entities, but also made specific comments about individual Plaintiffs both as individuals and as groups or classes, including statements referring to CWM's executives and mine operators (references to the directors, officers and shareholders of CWM); CWM's supervisors, mine operators, foremen, bosses, they, them, and Cyril Jackson, and Charles Reynolds (references to the on-site management personnel of CWM); and IAUWU's owners, its officers, its representatives, its president, they, them, Dana Jenkins, Nevin Pratt, and Chris Grundvig (specific references to the officers of IAUWU). They and all other individuals were defamed as members of small, discrete, identifiable groups or classes of people.

Defendants are ineptly attempting to argue that the individual Plaintiffs' defamation claims are barred by the so-called "group defamation rule." Lynch v. Standard Pub. Co., 170 P. 770, 773 (Utah 1918) is Utah's most recent commentary the rule:

> [W]here words defamatory in their character seem to apply to a particular class of individuals, and are not specifically defamatory of any particular member of the class, an action can be maintained by any individual of the class who may be able to show the words referred to himself.

Under Lynch, the individual Plaintiffs have defamation claims if they may be able to show Defendants' words referred to them. The rationale for the rule adopted in Lynch was expounded in Fenstermaker v. Tribune Pub. Co., 43 P. 112, 114 (Utah Terr. 1895) (Fenstermaker I):

> Where the words used seem to apply only to a class of individuals, and not to be specially defamatory of any particular member of that class, still the action can be maintained by any individual of that class who can satisfy the jury that the words

> referred especially to himself. ... [W]here the words, by any reasonable application, impute a charge to several individuals, under some general description or general name, either one coming within such description may successfully maintain an action, if the jury determine that the words have a personal application to the person bringing suit.

Fenstermaker I says that where words seem only to apply to a class, an action can be maintained by anyone who can convince a jury that the words referred to him. In other words, it is a question of fact for the jury.

Utah was admitted as a state, and its Constitution came into effect on January 4, 1896, immediately following Fenstermaker I. Article 1 Section 11 of the Utah Constitution states: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial ..." Shortly after statehood, the newly formed Utah Supreme Court decided Fenstermaker v. Tribune Pub. Co., 45 P. 1097, 13 Utah 532 (Utah 1896) (hereinafter Fenstermaker II), which held:

> One who publishes matter about a [group] in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and would permit indiscriminating reference to the deeds of a single member of the [group] as the deeds of all collectively, while the odium should rest legally and morally only upon the member of the [group] who is guilty.

When litigating state claims in federal court, the Court applies the substantive law of the forum state. The Fenstermaker cases should be read in harmony with the Utah Constitution. One who publishes matter about a group in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and so would violate Utah's unique "open courts" state constitutional requirement that every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law. Fenstermaker I says each individual Plaintiff has an action if he or she "can satisfy the jury that the words referred especially to himself." Fenstermaker II says Defendants assume the risk of group defamations being defamatory as to any member of a group. And Lynch says Defendants are liable for "group defamation" to any member of a group "who may be able to show the words referred to himself."

Earl Stoddard, Dorothy Sanders, and Charles Reynolds are CWM's directors and officers. A jury can readily find that Defendants' statements about CWM's executives and mine operators referred to and concerned these individuals.

Charles Reynolds is, and Wendell Owen was, CWM's mine manager. Ken Defa is CWM's mine superintendent. Cyril Jackson is a CWM maintenance supervisor. Rodney Anderson, Robert Brown, Jared Stephens, Freddy Stoddard, Jim Stoddard, Shain Stoddard, and Ethan Tucker are CWM foremen. Randy Defa, Kevin Peterson, and Elden Stephens are CWM managers. A jury can readily find that Defendants' statements about CWM's supervisors, mine operators, foremen, and bosses referred to and concerned these individuals. Therefore, they have valid claims under Utah's group defamation rule as set forth in the Lynch and Fernstermaker cases. To the extent Cyril Jackson and Charles Reynolds were defamed by name (and they were), the group defamation rule does not apply at all.

Ronald Elden Mattingly, Nevin Pratt, and Vickie Mattingly are or were officers of IAUWU. Chris Grundvig, Dana Jenkins, and Warren Pratt are officers of IAUWU Local 1-02. A jury can readily find that Defendants' statements about IAUWU's officers, representatives, and president referred to and concerned these individuals. Therefore, they have valid claims under Utah's group defamation rule as set forth in the Lynch and Fernstermaker cases. To the extent Dana Jenkins, Nevin Pratt, and Chris Grundvig were all defamed by name (and they were), the group defamation rule does not apply at all.

Plaintiffs can show actual damage to reputation. The statements of every other person quoted in the Complaint show Plaintiff's reputations was damaged in their eyes, as a direct result of their giving credence to Defendants' defamations. As with the defamations themselves, the proof of injury to reputation is too lengthy to repeat in full here. A few examples suffice:

The reporters and editors of *The Militant* formed opinions of Plaintiffs' reputation, as a result of Defendants' defamations, that CWM's owners and managers are notorious for their brutality against workers; that they are widely hated among working people for vicious antilabor practices; that the bosses are engaged in a brutal offensive against workers; that CWM's bosses want to go on exploiting and abusing the workers, and violating their rights; and that the bosses are still living in the epoch of the cave-dwellers.

Bishop Niederauer of the Roman Catholic Church concluded from Defendants' defamations that the right to fair wages, for safe working conditions, and for the right to associate as workers were all being denied to the workers at CWM. Father Donald E. Hope said, "What is needed here

over the long term is the development of a conscience on the part of the C.W. Mining Co. They need to take the necessary steps to give their workers basic human rights."

Upon listening to Defendants' defamations, George Neckel of Utah Jobs With Justice concluded that "They're exploiting people, plain and simple." Byron Cannon, a history professor at the University of Utah, concluded from Defendants' defamations that CWM's workers are "being exploited like slaves so the mine owners can make millions of dollars." Mel Logan, a contributor to the Utah Indymedia, concluded "These miners were exploited while they were expecting to improve the quality of their family's lives." Logan and Utah Indymedia also opined that those controlling CWM were "regressing to the dark age of business morality." Mark Downs, a retired member of ILWU Local 19 in Seattle, decided CWM's workers are "super-exploited." ILWU Local 19 adopted a resolution stating CWM's workers were "persecuted for trying to affirm their hope to establish a decent and human workplace." Hans G. Ehrbar, a professor at the University of Utah Economics Department, went so far as to make Defendants' defamations a topic in his Fall 2003 Economics 5080 course, as a result of which his students and he formed opinions of Plaintiffs' reputations that "Through this mining operation the Kingston clan has been able to exploit the mostly Latino workers in order to make millions in profits;" that "CWM created IAUWU to give the owners control over any worker disputes, and not allow them to have real representation; that CWM's managers used the undocumented status of immigrant workers to exploit them; and that CWM has engaged in decades of mistreatment of laborers.

Besides these examples, every single one of Defendants' defamations was picked up and repeated by others, resulting in a damaged reputation for Plaintiffs in the minds of many that conformed with Defendants' defamations.

Harming a person's good name and reputation is more pernicious, more unjust, more wicked than hurting his property. One can always repair a broken window. But how does one fix a broken reputation? That is why defamations are actionable, if possible to stem the tide, and if not, to remedy the wrong. "To be defamatory under Utah law, a communication must impeach an individual's honesty, integrity, virtue, or reputation or publish his or her natural defects or expose him or her to public hatred, contempt, or ridicule." Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988). Defendants' publications as alleged in the Complaint easily meet this standard. Therefore, the court should deny Defendants' motion to dismiss the defamation claim.

III. PLAINTIFFS' OTHER COMMON LAW 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, to establish intentional interference with economic relations, a plaintiff must show that a defendant intentionally interfered with the plaintiff's existing or potential economic relations for an improper purpose or done by improper means, and that the interference caused injury to the plaintiff. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991). Improper means are present where the means used are 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, Defendants 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. Defendants 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] Those claims can be resolved without even glancing at, much less interpreting the collective bargaining agreement. Defendants' 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. Defendants' improper means include the fraud of Estrada that caused workers to quit their jobs, and the defamations by Defendants 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." This was "wrongful conduct" under California law, or an "improper means" under Utah law, and a wrong independent of the terms of the collective bargaining agreement. It could "be litigated without reference to the rights and duties established in a CBA," and therefore was not preempted by section 301. In this case, Defendants' 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 and fraud, UMWA and its agents caused other workers of CWM, members of IAUWU's bargaining unit, not to perform their employment contract. [3] That clearly establishes interference with particular economic relationships between the workers, CWM, and IAUWU. Similarly, the allegations that Defendants 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, 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 Defendants' motion to dismiss Plaintiffs' state claims.

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[3] It requires no analysis of the terms of the collective bargaining unit to establish the workers' complete failure to perform, or that their failure resulted from the acts of Defendants.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion to dismiss.

DATED April 7, 2005.

Attorney for IAUWU and its Officers

Attorney for C. W. Mining Company
and its Directors, Officers, and Management

CERTIFICATE OF SERVICE

I certify on April 7, 2005 copies of the above were served by first class mail to:

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2712-p.002 oppose workers mot to dismiss