Richard Rosenblatt
Richard Rosenblatt and Associates L.L.C.
8085 E. Prentice Ave.
Greenwood Village, Colorado 80111
(303) 721-7399

Arthur F. Sandack (USB#2854)
8 East Broadway Ste. 510
Salt Lake City, Utah 84111
(801) 532-7858

Attorneys for Defendant Miners

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

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, *et al,* Plaintiffs v. UNITED MINE WORKERS OF AMERICA, *et al.,* Defendants	MOTION TO DISMISS AMENDED COMPLAINT Civil Action No. 2:04CV00901 Honorable Dee Benson

Defendants 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[1] (hereinafter collectively referred to as "Defendant Miners"), through their above-named attorneys, move to Dismiss Plaintiffs'

[1] In addition to these named Defendants, in paragraph 23 of the Complaint, Plaintiffs allege Juan Salazar as an employee or former employee of C.W. Mining Company. Defendant Miners do not believe that there was a Juan Salazar employed at the mine, only Defendant Jose Juan Salazar. Furthermore, upon information and belief, Defendant Miners believe that Gerardo Aguilar was never served with a Complaint. Finally, in paragraph 23 of the Complaint, Plaintiffs allege Samuel Villa as one of the Defendant Miners. Samuel Villa's actual name is Samuel Villa Miranda as is so described above.

Amended Complaint purusant to Rule 12(b)(1) and 12b(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

Date: March 1, 2005

Richard Rosenblatt
Richard Rosenblatt & Associates LLC
8085 E. Prentice Ave.
Greenwood Village CO 80111
303-721-7399
720-528-1220 (fax)
rrosenblatt@cwa-union.org

Arthur F. Sandack
8 East Broadway, Ste. 510
Salt Lake City, Utah 84111
801-532-7858
801-363-1715 (fax)
asandack@itower.net

Richard Rosenblatt
Richard Rosenblatt and Associates L.L.C.
8085 E. Prentice Ave.
Greenwood Village, Colorado 80111
(303) 721-7399

Arthur F. Sandack (USB#2854)
8 East Broadway Ste. 510
Salt Lake City, Utah 84111
(801) 532-7858

Attorneys for Defendant Miners

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

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, *et al,* Plaintiffs v. UNITED MINE WORKERS OF AMERICA, *et al.,* Defendants	DEFENDANT MINERS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AMENDED COMPLAINT Civil Action No. 2:04CV00901 Honorable Dee Benson

I. INRODUCTION

Defendants 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[1] (hereinafter collectively referred to as

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"Defendant Miners"), through their above-named attorneys, submit this Memorandum in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint. For the reasons described in United Mine Workers of America Defendants' Memorandum in Support of Their Motion to Dismiss Complaint (hereinafter "UMWA's Memorandum) and Defendants Salt Lake Tribune and Deseret Morning News Memorandum in Support of their Motions to Dismiss (hereinafter "Newspapers' Memorandum"), this lawsuit is without merit and should be dismissed against all Defendant Miners.

II. FACTS

Each of these Defendant Miners has been an employee of Plaintiff C.W. Mining Company (hereinafter referred to as "Company")(Complaint ¶23).[2] In September 2003, the Company suspended and then discharged Defendant Miner William Estrada. (Complaint ¶64).[3] The other Defendant Miners and many other mine employees walked out in protest and allegedly were locked out and discharged by the Company. (Complaint ¶64, also see, for example ¶¶76, 81). Unfair labor practice charges were filed with the National Labor Relations Board (hereinafter "NLRB") on behalf of the workers. (App. B-1, attached to UMWA's Memorandum). The Company settled these charges; in settling, the Company agreed to offer Estrada, the other Defendant miners and all other workers who had walked out immediate and full reinstatement, removal of any reference to discipline and/or work stoppage from their personnel files, and to make each of these

[2] At paragraph 23 of the Complaint, Plaintiffs describe the Defendant Miners as "workers or former workers" of the Company. However, subsequent to the filing of this Complaint and just days before an NLRB-conducted representation election, the Company fired those Defendant Miners who had not left the employ of the Company. Charges alleging these firings as illegal under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), are pending before the National Labor Relations Board. See Appendix B-2, attached to UMWA's Memorandum).

[3] As explained in UMWA's Memorandum, Plaintiffs erroneously stated that Estrada was disciplined in September 2004. As can be seen from the context of the allegations and the settlement documents, (Appendix B-1,attached to UMWA's Memorandum), the actual year was 2003.

individuals whole for any loss of wages or other benefits as a result of their work stoppage. (See App. B-1, attached to UMWA's Memorandum.)

In May, 2004 the United Mine Workers of America (hereinafter "UMWA") timely filed a petition with the NLRB for an election to represent the Company's workers.[4] (See App.B-3, attached to UMWA's Memorandum; App. D, attached to Newspaper's Memorandum). In the weeks and days prior to the election, the Company fired many of the workers, including all of the Defendant Miners still employed at that time. Unfair labor practice charges over those discharges were filed with the NLRB and are still pending. (See App.B-2, attached to UMWA's Memorandum.). On or about the same time just preceding the NLRB election for union representation, Plaintiffs served each of the Defendant Miners and other defendants with this Amended Complaint. Also, objections and challenges to the election are now pending before the NLRB. (Attached to this brief, as App. A.).

As one can see from above, the parties have been engaged in a long and bitter labor dispute. This lawsuit represents nothing more than another form of retribution by Plaintiffs against Defendant Miners for lawfully protesting the working conditions and seeking different union representation. Moreover, as fully explained in Defendants UMWA's and Newspapers' Memoranda, this retributive lawsuit is frivolous and should be dismissed.

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[4] Under the National Labor Relations Act, where workers are represented by a union and covered by a collective bargaining agreement, a representation petition can be filed by another union during the "open period" (the 30 day period that is between 90 and 60 days prior to the expiration of the collective bargaining agreement) or after the expiration date of a three year or shorter collective bargaining agreement. Deluxe Metal Furniture Co. 121 NLRB 995 (1958). Here, UMWA filed the representation petition during the open period of the collective bargaining agreement between the Company and its fellow Plaintiff International Association of United Workers Union ("IAUWU").

III. ARGUMENT.

Defendant Miners adopt and incorporate by reference the arguments presented in UMWA's Memorandum and Newspapers' Memorandum as reasons why each of Plaintiffs' claims should be dismissed against each of the Defendant Miners. To avoid duplication of the well-reasoned and articulated reasons for dismissal that are set forth in Defendants UMWA's and Newspapers' Memoranda, Defendant Miners just summarize the reasons for dismissing each of the claims against them.

A. Plaintiffs' First Claim of Relief Is Preempted.

Under San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959) and its progeny, where the alleged conduct is "arguably subject to §7 and §8 of the [National Labor Relations Act], then state and federal courts must defer to the exclusive jurisdiction of the NLRB." Here, Plaintiffs' first claim for relief accuses UMWA and its agents, including Defendant Miners, of committing conduct that is undeniably "subject to §7 and §8" of the National Labor Relations Act. Therefore, this claim is preempted and must be dismissed. See UMWA's Memorandum, pp. 1-2.

Even if somehow this Court had jurisdiction to hear these unfair labor practice allegations, then these claims would be barred by the applicable statute of limitations or under the principles of res judicata. The conduct that Defendant Miners are accused of committing occurred more than six months prior to the filing of the original Complaint in this case and the National Labor Relations Act has a six month limitation period. See 29 U.S.C. 160(b); UMWA's Memorandum, p. 3. Also, these unfair labor practice charges were filed and pursued with the NLRB, resulting in a settlement. See App. B-1, attached

to UMWA's Memorandum. Plaintiffs are precluded from once again pursuing these same charges in a different forum. See UMWA's Memorandum, p. 3.

B. The Court Does Not Have Jurisdiction Over Plaintiffs' First Claim Under Section 301.

Furthermore, to the extent that Plaintiffs argue that this claim is brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, it still must be dismissed. Section 301 provides federal jurisdiction for actions alleging a "violation of contracts between an employer and a labor organization." The only contract here is between two Plaintiffs – the Company and IAUWU. Not only are Defendant Miners not an employer or a labor organization, but they do not have a contract with either Plaintiff. See UMWA's Memorandum, pp. 3-4.

An additional and independent reason that any of the individual Defendant Miners cannot be found liable under Section 301 is that a money judgment "shall not be enforceable against any individual member or his [or her] assets." 29 U.S.C. §185(b). "The "penumbra" of §301(b), [citation omitted], as informed by its legislative history, establishes that Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by their union to strike." Complete Auto Transit v. Reis, 451 U.S. 401, 415 (1981). Accordingly, a Section 301 claim seeking money damages, as in this case, must be dismissed against Defendant Miners.

C. Plaintiffs' Second Claim Alleging Defamation Does Not Raise Actionable Claims Against Defendant Miners.

Plaintiffs' second claim for relief alleges defamation by almost anyone who spoke out or published any comments during the labor dispute that either the Company or

IAUWU viewed as contrary to their interests.[5] As shown by the UMWA's Memorandum and the Newspapers' Memorandum, for a variety of reasons this defamation claim must be dismissed.

There is no question that under Linn v. United Plant Guards of America, 383 U.S. 53 (1966) and Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264 (1974), the Supreme Court has made it clear that in labor disputes the courts must apply a heightened standard requiring clear and convincing evidence of actual malice and proof of actual injury by the complaining party. The Court has recognized that "labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Linn, 338 U.S. at 58. "[N]or will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in "uninhibited, robust, and wide-open" debate." Steam Press Holdings v. Hawaii Teamsters, 302 F.3d 998,1009 (9th Cir. 2002). Indeed, labor disputes "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." Linn, 338 U.S. at 58. Thus, "federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. Austin, 418 U.S. at 283.

Here, in the context of this long and bitter labor dispute, Plaintiffs have failed to allege published statements by any of the Defendant Miners that rise above the permissible language allowed in labor disputes without fear of restraint or penalty. The

[5] In their Amended Complaint, Plaintiffs do not allege any defamation by Defendant Miner Natividad Flores and therefore if only the defamation claim were to survive this motion to dismiss, the lawsuit would

alleged defamatory statements against these Defendant Miners focuses on their comments in the heat of a long period that they were on the street and legitimately believed that they had been fired by the Company.[6] Many of the comments alleged to be defamatory focus on their status during this period, see, for example, Complaint ¶¶ 76, 81(i), 81(j), 81(q),81(y), 81(kk), 81(ss), 81(uu), 81(eee), 83(b), 83(e), 85(f), 89(a), 91(b), 110, 115 and 120, and can hardly be characterized as beyond the "intemperate, abusive or insulting language" permissible in a labor dispute. Other statements do nothing more than criticize IAUWU, see, for example, Complaint ¶¶76, 91(a), 81(l), 81(x), 81(y), 81(hh), 81(ss), 81(uu), 81(zz), 81(aaa), 81(bbb), 81 (ccc), 81(ddd), 81(jjj), 81(lll), 83(b), 83(g), 83(vv), 83(j), 85(h), 89(a), 89(f), 118.[7] These are common and permissible utterances in the "uninhibited, robust, and wide-open debate" that occurs when individuals are seeking different union representation. Similarly understandable and permissible in the "uninhibited, robust, and wide-open debate" of a labor dispute are the sometimes "intemperate, abusive or insulting" criticisms of the Company or working conditions, see, for example, Complaint ¶¶81(l), 81(h), 81(j), 81(r), 81(w), 81(q), 81(cc), 81(tt), 81(vv), 81(zz), 81(bbb), 81(iii), 81(jjj), 81(lll), 81(ppp), 83(b), 83(c), 83(e), 83(j), 83(o), 85(a), 89(a), 89(b), 93(a), 99, 110 and 118. But significantly, none of these statements rise to the level of unlawful defamation in a labor dispute. See UMWA's Memorandum, pp. 5-7; Newspapers' Memorandum, pp. 12-16.

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still be dismissed against Natividad Flores.

[6] Obviously even the Company recognized the legitimacy of the Defendant Miners' belief that they had been fired since it resolved that dispute with the full remedy available as if these individuals had prevailed before the NLRB: offering each of these individuals and many others full reinstatement and the make whole remedy.

[7] For a review of the actual statements allegedly made by the various Defendant Miners that Plaintiffs allege are defamatory and are cited in this paragraph see App. A, attached to UMWA's Memorandum.

Even under Utah law, these alleged defamatory statements would not be actionable. See UMWA Memorandum, pp. 7- 10; Newspapers' Memorandum, pp. 12-16.

Furthermore, clearly in the context of this long and bitter labor dispute these statements by the Defendant Miners amount to nothing more than opinion. As the court explained in Information Control Corp. v. Genesis One Computer, 611 F.2d 781, 784 (9th Cir. 1980), "even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole.'" These alleged statements of opinion are not actionable as defamation. See Newspapers' Memorandum, pp. 16-20.

Also, many of the statements alleged as defamatory against Defendant Miners concern proceedings before the NLRB. See, for example, Complaint ¶¶81(tt), 81(uu), 81(zz), 81(ddd), 81(eee), 81(iii), 81(lll), 81(ooo), 81(ppp), 83(m), 83(n). These statements constitute privileged reports of governmental proceedings and are not actionable. See Newspapers' Memorandum, pp. 20-23.

If the defamation claim were not completely dismissed, then the claims of the individual plaintiffs should be dismissed because the articles are not "of and concerning" those individuals.[8] See Newspapers' Memorandum, pp. 23-25.

[8] Though in their Complaint Plaintiffs do not delineate between defamation allegedly made against one or the other Plaintiff, it should be noted that there are no allegations of defamatory statements by Defendant Miners Ricardo Chavez, Hector Flores, Daniel Hernandez, Domingo Olivas, Rodrigo Rodriguez and/or Samuel Villa Miranda against IAUWU.

D. Plaintiffs' Third, Fourth, Fifth and Sixth Claims for Relief Are Also Preempted.

Plaintiffs' Third through Sixth Claims for Relief are preempted by federal law. These claims alleging tort causes of action offer no additional factual allegations but rather are based on the same set of facts as the underlying NLRB matters. As stated earlier, under Garmon, "conduct that is the basis of liability is actually or arguably protected or prohibited by the NLRA ... is preempted by the NLRA." Wallulis v.Dymowski, 895 P.2d 315, 322 (Or. Ct. of App, 1995)(finding the tort action for intentional interference for economic relations preempted by the NLRA); cf. Kolentus v. Avco Corp. 798 F.2d 949 (7th Cir. 1986)(as the common law fraud claim against the company was indistinguishable from an unfair labor practice claim, the court found it preempted.) Accordingly, these preempted claims should be dismissed. See UMWA's Memorandum, pp. 11-12.

There is an additional and independent reason to dismiss the fifth claim of relief. Applying the Noerr-Pennington doctrine, E.R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965), this claim seeking damages for participating before the NLRB, is not actionable. See UMWA's Memorandum, p. 13.

E. Requested Injunctive Relief Is Inappropriate.

In its Seventh and Final Claim for relief, Plaintiffs seeks injunctive relief. However, pursuant to the Norris-LaGuardia Act, 29 U.S.C. §104(e(f), this Court does not have the jurisdiction to issue an injunction concerning this alleged conduct that arose out of a peaceful labor dispute. See UMWA's Memorandum, pp. 13-14. Moreover, an

injunction against Defendant Miners' speech would constitute prior restraint and such an injunction would be improper. See UMWA Memorandum, p. 14.

IV. CONCLUSION

For the reasons stated above and in UMWA's and Newspapers Memoranda, Plaintiffs' claims against Defendant Miners should be dismissed with prejudice.

Respectfully submitted,

Richard Rosenblatt by AFS

Date: March 1, 2005

Richard Rosenblatt
Richard Rosenblatt & Associates LLC
8085 E. Prentice Ave.
Greenwood Village CO 80111
303-721-7399
720-528-1220 (fax)
rrosenblatt@cwa-union.org

Arthur F. Sandack

Arthur F. Sandack
8 East Broadway, Ste. 510
Salt Lake City, Utah 84111
801-532-7858
801-363-1715 (fax)
asandack@itower.net

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 27

C. W. Mining, d/b/a Co-Op Mine, Employer	)	
	)	
and	)	
	)	
United Mine Workers of America, Petitioner	)	
	)	**CASE NO. 27-RC-8326**
and	)	
	)	
International Association of United Workers Union, Intervenor Union	)	
	)	

PETITIONER UNITED MINE WORKERS OF AMERICA'S OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

COMES NOW Petitioner, United Mine Workers of America (hereinafter "UMWA" or "Union") and, pursuant to Section 102.69 of the Rules and Regulations of the Board, submits the following timely objections to conduct affecting the results of the election held on Friday, December 17, 2004, in Case No. 27-RC-8326, and requests that a hearing be held to take evidence on these objections.

1. The employer unlawfully fired approximately 30 employees, consisting of nearly all the eligible voters, shortly before the election.
2. The employer, in an effort to intimidate voters, filed a lawsuit naming the employees as defendants, and served them with the lawsuit shortly before the election.

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3. The employer engaged in conduct that affected the results of the election when it encouraged ineligible employees to vote in the representation election.

4. By the foregoing and by other acts and conduct, the employer, through its agents, engaged in conduct that affected the results of the election when it interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act.

Respectfully submitted,

UNITED MINE WORKERS OF AMERICA

By: _____

Robert Butero, Regional Director
UMWA Region IV
6525 West 44th Avenue
Wheat Ridge, CO 80033

Dated: February 18, 2005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 18, 2005 copies of the foregoing Petitioner's Objections to Conduct Affecting Results of Election were served upon the following via pre-paid mail service:

Carl Kingston
3212 S. State St.
Salt Lake City, UT 84115

Mark Hansen
431 North 1300 West
Salt Lake City, UT 84116

_____
Robert Butero

CERTIFICATE OF SERVICE

I do hereby certify that on this1st day of March 2005, a true copy of the foregoing *Defendant Miners' Motion to Dismiss* and *Memorandum in Support of Their Motion to Dismiss Amended Complaint* was served via U.S. first-class mail, postage prepaid, upon the following:

Michael Patrick O'Brien
Jones Waldo Holbrook & McDonough
170 South Main Street, Suite 1500
Salt Lake City, UT 84101

Jeffrey J. Hunt
David C. Reymann
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, UT 84111

F, Mark Hansen
F. Mark Hansen, PC
431 North 1300 West
Salt Lake City, UT 84116

Carl E. Kingston
3213 South State Street
Salt Lake City, UT 84115

Steven K. Walkenhorst
Utah Attorney General's Office
160 East 300 South, 6th Floor
P O Box 140856
Salt Lake City, UT 84114-0856

Randy L. Dryer
Parsons Behle & Latimer
201 South Main, Suite 1800
Salt Lake City, UT 84111

Joseph E. Hatch
5295 S. Commerce Dr., Suite 200
Murray, UT 84107

Judith Rivlin, Esq.
UMWA
8315 Lee Highway
Fairfax, VA 22031-2215

Katherine Moulton by AFS.
Katherine Moulton
Secretary