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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' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS 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 (hereinafter collectively referred to as "Defendant Miners"), through their above-named attorneys, reply to Plaintiffs' Opposition to Defendant Miners' Motion to Dismiss Plaintiffs' Amended Complaint as follows:

1. As set forth in Defendant UMWA's briefs in support of its Motion to Dismiss and Defendant Miners' Memorandum in support of its Motion to Dismiss, Plaintiffs'

First Claim for Relief is preempted and therefore should be dismissed. In its opposition, Plaintiffs argue that this Court has jurisdiction under 29 U.S.C. §185 ("Section 301"), claiming that the Defendant Miners violated the Plaintiffs' collective bargaining agreement. (Pls. Opp. pp. 4, 6). Even if Plaintiffs had a viable Section 301 claim (which they do not), they could not assert that claim against Defendant Miners. It is well-settled that "neither employers or unions may sue individual employees in damage suits." UFCW Local 951 v. Mulder, 31 F.3d 365, 370 (6th Cir. 1994); see also Complete Auto Transit v. Reis, 451 U.S. 401, 415 (1981). Not surprisingly, Plaintiffs fail to address this in their Opposition. But ignoring this argument does not make it go away.

It is indisputable that even if Plaintiffs First Claim for Relief is not preempted and this Court has jurisdiction over the First Claim of Relief under Section 301, the claims against Defendant Miners, each individual employees, must be dismissed.

2. In their Opposition Plaintiffs concede that their defamation claims against Defendant Miners are governed by the Supreme Court decisions in 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). (Pls. Opp. p. 8). Plaintiff argues that the defamation claim should not be dismissed because they alleged "false statements of fact" by these Defendant Miners. (Pls. Opp. pp. 9-14). However, merely alleging that the individuals made "false statements of fact" is by itself not enough to allege actionable defamation.

"Words are not defamatory unless they are understood in a defamatory sense." Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783 (9th Cir. 1980). As "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. "In such a heated and volatile setting, even seemingly 'factual' statements take on an appearance more closely resembling opinion than objective fact." Steam Press Holdings v. Hawaii Teamsters and Allied Workers Union Local 966, 302 F.3d 998, 1006 (9th Cir. 2002). Indeed, "[d]uring the course of a public debate or labor dispute, a reasonable audience would anticipate epithets, fiery rhetoric or hyperbole." Gilbrook v. City of Westminster, 177 F.3d 839, 862 (9th Cir. 1999). Thus, for example, a union officer describing the employer's representative as a "criminal" during the course of a labor dispute was "reasonably understood as a vigorous and hyperbolic rebuke" and not defamatory. Beverly Enterprises v. Trump, 182 F.3d 183, 187-188 (3rd Cir. 1999). A union officer accusing the employer of "hiding money" was not defamatory. Steam Press Holdings, 302 F.3d at 1006-1009. Similarly here, given the context of this prolonged labor dispute involving charges and countercharges by all parties to this dispute,[1] describing oneself as having been fired, or the working conditions as unsafe or stating that the incumbent union did not properly represent these employees is nothing more than fiery rhetoric or hyperbole and not actionable defamation.

An independent reason to dismiss the defamation claim is that Plaintiffs failed to plead sufficient facts of actual malice. Actionable defamation under Linn is a "daunting one," Howard v. Antilla, 294 F.3d 244, 252 (1st Cir. 2002), requiring a showing by "clear and convincing evidence" that the defendant published the statement with a "high degree of awareness of ... probable falsity" or "in fact entertained serious doubts as the truth of the publication." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

[1] For example, there were unfair labor practice charges filed by and against all of the principal entities in this lawsuit.

Furthermore, a motion to dismiss is not defeated by conclusory allegations instead of well-pleaded facts. Mitchell v. King, 537 F.2d. 385, 386 (10th Cir. 1976).

Here, Plaintiffs have not alleged any facts to show as to each Defendant Miner that he/she had a "high degree of awareness of ... probable falsity" or "in fact entertained serious doubts as the truth" of each alleged defamatory statement that Defendant Miner is accused of making. Rather, in its opposition to this motion to dismiss, Plaintiffs simply rely on the legal standard that they alleged in paragraph 131 of the amended complaint. (Pl. Opp. p. 14). It is well-established that simply parroting the legal standard is a conclusory allegation insufficient to plead the facts showing "actual malice" that Plaintiffs must allege. See, for example, Rohrlich v. Consolidated Bus Transit, 789 N.Y. 2d 689 (N.Y. S. Ct. 2005)("The plaintiff's conclusory allegation of actual malice was insufficient to defeat the motion to dismiss"); Adamasu v. Bronx Lebanon Hospital Center, 2005 WL 121746 *13 (S.D. N.Y. 2005)("Conclusory allegations are insufficient to show malice."); Howe v. Andereck, 882 So. 2d 240, 245 (Miss. App. 2004)(plaintiff's "obligation was to satisfy the court as to the availability of evidence that demonstrates [defendant] acted with ill-will or actual malice. The mere conclusory allegations and accusations in the complaint were insufficient"). Ecktenkamp v. Louden County Public Schools, 263 F.Supp. 2d 1043, 1062 (E.D. Va. 2003)("Although the facts as alleged in the complaint must be taken as true for the purpose of this motion to dismiss, such conclusory allegations do not state a claim for malice if the facts as alleged cannot otherwise support a finding of malice."); Howell v. Blecharczyck, 457 N.E. 2d 494, 505 (Ill. App. Ct, 1984)("A motion to dismiss admits only well-pleaded facts, not conclusions

of law or conclusions of fact unsupported by allegation of specific facts upon which the conclusions are based.")

3. Defendant Miners have asserted that Plaintiffs' state claims, the Third through Sixth Claims for Relief, are preempted.[2] Plaintiffs argue that the intentional interference with economic relations claim (Third and Fourth Claims) is not preempted because the improper means element of this claim "are not exclusively, or even necessarily, unfair labor practices." (Pls. Opp. p. 19). In fact, this argument concedes that this state claim is preempted. In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959), the Supreme Court held that neither state courts nor federal courts have jurisdiction over suits concerning "activity [which] is arguably subject to § 7 or § 8 of the [National Labor Relations] Act." (emphasis added). Here, by conceding that the conduct of improper means is at least partially, and might entirely be, an unfair labor practice (which is a fair interpretation of "not exclusively, even necessarily"), Plaintiffs have agreed that the alleged improper means is "arguably subject to §7 of the Act." And with good reason. Here, Plaintiffs complain about Defendant Miners' conduct that is arguably protected concerted activity as Plaintiffs point to Defendant Miners' conduct in which they complain about terms and conditions of employment of the employees at the mine. See Georgia Power Company, 341 NLRB No. 77, 2004 WL 768145 *15 (2004)("The Board has upheld as protected concerted activities under the Act, the conduct of a single employee seeking to further employees' objectives for improvement or protection of their wages, hours, and terms and conditions of employment.")

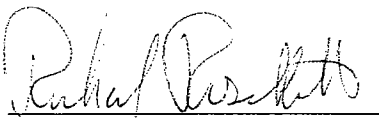
[2] Defendant Miners also assert that the Fifth Claim for Relief is not actionable under the Noerr-Pennington doctrine. E.R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). Plaintiffs offer no opposition to this nor any reason why this claim is not preempted. Plaintiffs oppose Defendant Miners argument that the civil conspiracy claim (Sixth Claim for Relief), but offer no analysis or explanation as to why Defendant Miners' argument that this claim is preempted is wrong.

In any event, Plaintiffs' intentional interference claim is preempted against the Defendant Miners by Section 301, 29 U.S.C. §185. A state claim for intentional interference with business relations is preempted by Section 301 if adjudication of this claim will "require a court to address relationships that have been created through the collective bargaining process." Mattis v. Massman, 355 F.3d 902, 907 (6th Cir. 2004). Here, Plaintiffs concede that their state claim is based on Defendant Miners' alleged failure not to abide by the collective bargaining agreement. (Pls. Opp. p. 20). Thus, resolution of this claim would require the Court to address the relationship created by this contract, i.e. whether the collective bargaining agreement required employees to not walkout during the term of the agreement and even if so required, whether it was violated keeping in mind that the employees were protesting an alleged unfair labor practice.[3] cf. Cramer v. Consolidated Freightways Inc., 255 F.3d 683, 691 (9th Cir. 2001)("where the suit involved an employer's alleged failure to comport with its contractually established duties – it is preempted.") Accordingly, this intentional interference claim (Third and Fourth Claims for Relief) is preempted and should be dismissed.

[3] It is well-settled that a no-strike clause in a collective bargaining agreement does not waive employees' right to strike "where the strike is in protest of employer unfair labor practices, [citation omitted] which are "serious" in nature, or where the employer has materially breached a fundamental contractual obligation to its employees, [citation omitted] unless the language of the no-strike provision explicitly waives the right to strike in protest thereof." 631 F.2d 669, 675 (10th Cir. 1980).

For the reasons stated above and in Defendant Miners' Memorandum in Support of its Motion to Dismiss, UMWA's and Newspapers Memoranda and Replies, Plaintiffs' claims against Defendant Miners should be dismissed with prejudice.

Respectfully submitted,



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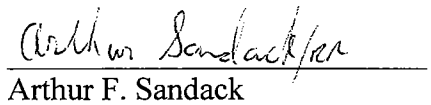

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CERTIFICATE OF SERVICE

I do hereby certify that on this 22nd day of April 2005, a true copy of the foregoing *Defendant Miners' Reply Brief* was served via U.S. first-class mail, postage prepaid, upon the following:

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