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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	**UMWA DEFENDANTS' MOTION TO DISMISS** (Oral Argument Requested) Civil Action No. 2:04CV00901 Honorable Dee Benson

MOTION TO DISMISS OF DEFENDANTS UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, CECIL ROBERTS, CARLO TARLEY, MIKE DALPIAZ, BOB BUTERO, ROBERT GUILFOYLE, LARRY HUESTIS, JIM STEVENSON, AND DALLAS WOLF

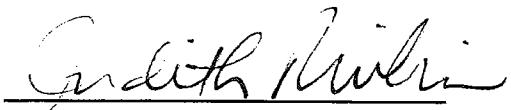
Defendants United Mine Workers of America, International Union (UMWA), Mike Dalpiaz, Cecil Roberts, Carlo Tarley, Bob Butero, Robert Guilfoyle, Larry Huestis, Jim Stevenson and Dallas Wolf, through their above-named attorneys, respectfully move to dismiss the above-captioned action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As fully discussed in the attached memorandum of law, Defendants submit that pursuant to well-established and long-settled principles of federal labor policy, Plaintiffs' claims are preempted and must be dismissed. Specifically, the doctrine of federal preemption set forth in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) requires that Plaintiffs' claims all yield to the exclusive jurisdiction of the National Labor

Relations Board. In addition, the alleged defamatory statements do not meet the legal standards to escape federal preemption, and are not actionable. Finally, the allegations are all premised on a common set of facts, and the preemption doctrine applies to all the claims in the Amended Complaint. For these reasons, Plaintiffs have failed to state a claim upon which relief may be granted. Accordingly, Defendants request that these actions be dismissed on the merits in their entirety, and with prejudice.

Defendants suggest that this Motion to Dismiss be considered at the same time that the Court considers the Motion to Dismiss already filed by Defendants The Salt Lake Tribune and The Deseret Morning News, as well as with any that other Defendants will file hereafter.

Defendants request oral argument.

Respectfully submitted,



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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	**ORDER GRANTING UMWA DEFENDANTS' MOTION TO DISMISS** Civil Action No. 2:04CV00901 Honorable Dee Benson

ORDER

For good cause shown, the Motion to Dismiss filed by the UMWA Defendants (United Mine Workers of America, International Union, Mike Dalpiaz, Cecil Roberts, Carlo Tarley, Bob Butero, Robert Guilfoyle, Larry Huestis, Jim Stevenson and Dallas Wolf) is granted. Accordingly, these actions are dismissed on the merits in their entirety, and with prejudice.

Dated this _____day of _____, 2005

BY THE COURT

_____

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	UMWA DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT (Oral Argument Requested) Civil Action No. 2:04CV00901 Honorable Dee Benson

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MEMORANDUM OF DEFENDANTS UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, CECIL ROBERTS, CARLO TARLEY, MIKE DALPIAZ, BOB BUTERO, ROBERT GUILFOYLE, LARRY HUESTIS, JIM STEVENSON, AND DALLAS WOLF IN SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT

Defendants United Mine Workers of America, International Union ("UMWA"), Cecil Roberts, Carlo Tarley, Mike Dalpiaz, Bob Butero, Robert Guilfoyle, Larry Huestis, Jim Stevenson, and Dallas Wolf, by their above-designated counsel, hereby submit this memorandum of law in support of their motion to dismiss the above-captioned case. As demonstrated below, application of well-settled doctrines of federal preemption developed to protect the comprehensive and uniform scheme of labor relations envisioned by Congress establishes that dismissal of this matter is required.

INTRODUCTION

This action was filed after labor disputes arose between the principal parties, and in the midst of a union organizing effort initiated by employees of Plaintiff C. W. Mining Company, d/b/a Co-Op Mining Company ("CW Mining" or "Employer"). The long list of Defendants includes many of the employees ("Co-Op workers") who are attempting to secure the right to have the UMWA serve as their collective bargaining representative in dealing with CW Mining.

The suit alleges unfair labor practices on the part of the UMWA, and numerous instances of "defamation," by the UMWA, the Co-Op workers, and countless others within the press and the community who have spoken about this prolonged labor dispute. The statements at issue pertain to the work conditions at the Co-Op Mine, and actions taken by and against the Co-Op workers in regard to their employment. The remaining claims – alleging torts and a civil conspiracy – all relate to the labor dispute.

The Amended Complaint raises nothing more than a traditional – and peaceful – labor relations' dispute. Consequently, even taking the factual assertions in the Amended Complaint as true, Plaintiffs fail to state a viable cause of action. Principles of federal labor law subsume and preempt Plaintiffs' claims, and the Amended Complaint altogether fails to state a claim upon

which relief may be granted. For these and other reasons explained below, as well as arguments put forth by other Defendants[1] these Defendants' Motion to Dismiss should be granted.

II. STATEMENT OF THE CASE

1.) The United Mine Workers of America is a labor union. Amended Complaint at ¶ 15.

2.) Defendant Cecil Roberts is the UMWA President. Amended Complaint at ¶ 16.

3.) Defendant Carlo Tarley was, during the material times, the UMWA Secretary-Treasurer. Amended Complaint at ¶ 17.

4.) Defendant Mike Dalpiaz is an International Executive Board Member of the UMWA. Amended Complaint at ¶ 18.

5.) Defendants Bob Butero, Robert Guilfoyle, Larry Huestis, Jim Stevenson, and Dallas Wolf are or were during the material times organizers or representatives of the UMWA. Amended Complaint at ¶¶ 19-20.

6.) There are a number of other individually-named Defendants who are Co-Op workers, who Plaintiffs allege to be agents of the UMWA. Amended Complaint at ¶¶ 21 - 23.[2]

7.) Plaintiffs' first claim alleges that the UMWA violated the rights of the International Association of United Workers Union ("IAUWU") by: a) persuading approximately 75 of the Employer's workers to leave their jobs and picket (Amended Complaint at ¶ 63); and violating

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[1]By the time this Motion is filed, a joint Motion to Dismiss and Memorandum in Support was already filed by The Salt Lake Tribune and The Deseret Morning News. The arguments within this Memorandum in Support are fully consistent with the contentions of those two Defendants, and we urge the Court to consider together these Motions to Dismiss.

[2]The UMWA does not concede that these other Defendants are agents of the UMWA; for purposes of the instant motion, nevertheless, their agency status need not be resolved, but may be presumed.

The only other alleged agent of the UMWA is Archie Archuletta, a "former administrator of minority affairs for the Salt Lake City mayor's office." Amended Complaint at ¶ 21. Though named as a defendant, on behalf of Mr. Archuletta neither an answer nor any motion seeking an extension for time to reply has been filed with the court; accordingly, we discern he has not been served in this action.

the rights of both the IAUWU and the Employer[3] by b) Bill Estrada falsely telling the gathered employees of the Employer they had been also been fired (Amended Complaint at ¶ 64); c) inducing employees of the Employer to engage in a wildcat strike (Amended Complaint at ¶ 66); d) causing recognitional picketing of the Employer when the IAUWU was the recognized bargaining representative of the Employer's employees (Amended Complaint at ¶ 67); and e) causing secondary picketing (Amended Complaint at ¶ 68).

8.) The UMWA, through press releases and its Journal magazine, published statements describing the Co-Op workers' work situation, including representations about their terms and conditions of employment, the discipline of Defendant William (Bill) Estrada in September 2003[4] and the Co-Op workers' protest thereof, the Employer's termination of the Co-Op workers in September 2003, and the NLRB's handling of the labor dispute. Amended Complaint at ¶¶ 76,[5] 77,[6] 80.[7]

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[3]This part of the pleading is especially hard to understand, but counsel believes the claims are as set forth herein. See Amended Complaint at ¶¶ 63-72.

[4]CW Mining suspended Bill Estrada with intent to discharge on or about September 22, 2003, not "2004" as stated in the Amended Complaint at ¶ 64. See also, Appendix B-1, at Settlement Stipulation, par.4 (stipulations between Employer, UMWA and the NLRB concerning "the Employer's actions involving William Estrada in August and September 2003".) We suggest the error results from a typographical error, and does not constitute a disputed fact.

[5]The complained of language is:
At the United Mine Workers of America (UMWA) Special Convention last week in Las Vegas, UMWA International President Cecil Roberts pledged the union will assist the coal miners . . . who were fired from C.W. Mining Company's Bear Canyon Mine . . . Seventy-four miners' jobs were terminated after they protested the firing of one of their leaders for seeking union representation. Seven of the fired Co-op miners joined Roberts at the convention hall podium where their spokesman, Jesus H. Salazar Jr., described their plight -- earning between $5.25 and $7.00 per hour with "no health insurance and no benefits in an unsafe, underground mine." . . . "we were unjustly fired for defending our rights and protesting the mine's unsafe working conditions," Salazar said. "We are determined to fight until this mine becomes UMWA territory and we can put an end to the abuse and extreme level of exploitation we have endured." . . . The Co-op workers struck the mine on Sept. 22 after management . . . had suspended one of their co-workers, UMWA supporter William Estrada . . . It was the company's third attempt to victimize a UMWA supporter in recent weeks, according to the Co-op miners. "We all walked out in defense of our co-worker," explained Salazar . . . "The company refused to cooperate with us and fired us. We have been locked out because of our pro-union activity." . . . [The worker delegation said] "We are tired of the abuses, lies and trickery of the fake company-led union that Co-op has

9.) Other Defendants also made statements at union meetings, rallies, to the press, and other settings; their statements were defamatory and published, according to the Plaintiffs. Amended Complaint at ¶¶ 81 a.- qqq. (alleged defamations published by Defendant The Militant), 83 a. - o. (alleged defamations published by Defendant Salt Lake Tribune), 85 a.- m. (alleged defamations published by Defendant Deseret Morning News), 87 a.- f. (alleged defamations published by Emery County Progress), 89 a.- i. (alleged defamations published by Price Sun Advocate), 91 a. - b. (alleged defamations published by Provo Daily Herald), 93 a. - b; 95 - 97 (alleged defamations published by the Roman Catholic Church and other Catholic Church-related publications), and a variety of labor, press-related and other outlets. Amended Complaint at ¶¶ 98 - 126.[8]

10.) Plaintiffs' second claim alleges that the Defendants' conduct (without distinguishing between the various persons and entities), in speaking about the labor dispute, constituted unlawful defamation. Amended Complaint at ¶¶ 127, 135.

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maintained for years in the workplace."

[6]The complained of language is:
when miners at CWM halted production in a show of solidarity for Estrada, "Management responded by firing the workers and locking them out." [The press release] also repeated the miners'statement that they worked with no health insurance benefits and were forced to work in unsafe conditions that violate MSHA regulations. Tarley said, "Some of the conditions these miners describe to us are reminiscent of the early days of mining, when miners were treated more as property than as human beings."

[7]Here Plaintiffs claim only that a pamphlet distributed at an Immigration Workers Freedom Ride, which flyer they claim the UMWA prepared, "makes false and libelous statements against CWM and IAUWU of the same general nature as the defamations described elsewhere...."

[8]The allegedly defamatory statements are numerous; many represent re-publications of a particular allegedly defamatory statement. While the words complained-of are relevant to the court's consideration of this Motion, the Amended Complaint includes a very large amount of duplication. Regardless of how many times, or in how many different newspapers a comment may be published, the numerosity does not affect its legal status: either a comment is defamatory, or not. For the Court's convenience, and to reduce the bulk of this Motion, we attach as Appendix A a listing of all allegedly defamatory statements, including statements allegedly made by UMWA officers and employees, as well as all those attributable to the Co-Op workers listed in paragraph 23 of the Amended Complaint.

11.) Plaintiffs also contend that the complained-of statements were all false; made with knowledge of their falsity or with reckless disregard as to their truth or falsity; made with malice; directed against, or reasonably related to, applied to, or had personal application to and concerned the Employer's directors, officers, managers and supervisors, as well as the IAUWU's officers, who are named as additional Plaintiffs; and, to the extent the statements at issue impute criminal conduct, they were defamatory, *per se*. Amended Complaint at ¶¶ 130 - 135.

12.) Plaintiffs further contend that the UMWA and its agents are each jointly and severally liable for every re-publication of the allegedly defamatory statements. Amended Complaint at ¶ 136.

13.) Plaintiffs contend that the Defendants pursued frivolous claims before the NLRB against the IAUWU and the Employer. Amended Complaint at ¶ 156.

14.) During this still on-going labor dispute, the UMWA has filed unfair labor practice charges against the Employer, and Plaintiff IAUWU (and its Local No.1-02) filed unfair labor practice charges against the UMWA. The charges the IAUWU filed against the UMWA have been settled and copies are attached in Appendix B-1.[9] The first unfair labor practice charge the UMWA filed against the Employer has also been settled and the settlement papers are included in Appendix B-1. A number of other unfair labor practice charges have been filed by the UMWA with the NLRB; they allege misconduct by the Employer, and are still pending. Appendix B-2.

15.) Plaintiffs' third claim alleges that the UMWA and its officers, agents and supporters, by an improper means or for an improper purpose, interfered with the Employer's present and prospective economic relations with its workers, customers, suppliers, bargaining representatives and others and that all Defendants are equally liable for the same. Amended Complaint at ¶¶ 143-146.

16.) Based on the conduct described in par. 15, above, CW Mining claims (unspecified) damages in excess of $1million; further because the conduct allegedly was the result of willful and

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[9]This matter is now before the Court on a 12(b)(6) motion to dismiss and the court may consider matters of public record. Boisjoly v Morton Thiokol, Inc., 706 F. Supp. 795, 808 (N.D. Utah 1988)(before the court on 12(b)(6) motion to dismiss).

malicious conduct, punitive damages of at least three times the compensatory damages are also claimed to be owing on a joint and several basis. Amended Complaint at ¶¶ 147-148.

17.) Plaintiffs' fourth claim alleges that the UMWA and its officers, agents and supporters, by an improper means or for an improper purpose, interfered with the IAUWU's present and prospective economic relations with its bargaining unit members and that all Defendants are equally liable for the same. Amended Complaint at ¶¶ 149-152.

18.) Based on the conduct described in par. 17, above, the IAUWU claims (unspecified) damages of an unspecified amount; further because the conduct allegedly was the result of willful and malicious conduct, punitive damages of at least three times the compensatory damages are also claimed to be owing on a joint and several basis. Amended Complaint at ¶¶ 153-154.

19.) Plaintiffs' fifth claim alleges that one or more of the Defendants breached a common law duty of ordinary care owed to Plaintiffs when they helped the UMWA pursue allegedly frivolous claims against the Employer and the IAUWU before the NLRB and that all Defendants are equally liable for the same. Amended Complaint at ¶¶ 155-158, 160.

20.) Based on the conduct described in par. 19, above, Plaintiffs claim (unspecified) damages of an unspecified amount tied to litigation before the NLRB; further because the conduct allegedly was the result of conduct manifesting a knowing and reckless indifference toward the Plaintiffs, punitive damages of at least three times the compensatory damages are also claimed to be owing on a joint and several basis. Amended Complaint at ¶¶ 159-161.

21.) Plaintiffs' sixth claim alleges that one or more Defendants committed overt acts against Plaintiffs in furtherance of a civil conspiracy, causing injury to Plaintiffs, and that all Defendants are equally liable for the same. Amended Complaint at ¶¶ 162-165.

22.) Based on the conduct described in par. 21, above, Plaintiffs claim (unspecified) damages of an unspecified amount, and for no particular reason; further because the conduct allegedly was the result of conduct manifesting a knowing and reckless indifference toward the Plaintiffs, punitive damages of at least three times the compensatory damages are also claimed to be owing on a joint

and several basis. Amended Complaint at ¶¶ 166-167.

23.) Plaintiffs' seventh claim alleges that based on everything else alleged, Defendants have caused Plaintiffs (unspecified) irreparable injury for which there is no remedy at law. Plaintiffs claim a right to an injunction to enjoin further defamation and tortious conduct, in addition to actual damages, exemplary damages, and attorneys' fees. Amended Complaint at ¶¶ 168-169.

SUMMARY OF ARGUMENT

It is well-settled, black letter law that Plaintiffs cannot pursue their unfair labor practice claim because the National Labor Relations Act preempts it. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Likewise, the Plaintiffs' defamation claim is preempted because it runs afoul of the well-settled and frequently-applied doctrine of federal labor preemption set forth by the Supreme Court in Garmon and its progeny. All of the other claims are also preempted, as the entire complaint is predicated on a common nucleus of facts that pertains to the labor dispute. Thus, the Amended Complaint must be dismissed in its entirety.

Garmon preemption seeks to protect the exclusive jurisdiction of the National Labor Relations Board ("NLRB") over activity that is "arguably protected" or "arguably prohibited" by the National Labor Relations Act ("NLRA"); it requires that both state and federal courts defer to the exclusive competence of the NLRB in such matters. The first claim directly alleges unfair labor practices and Garmon preemption requires its dismissal.

As for the defamation claim, when a party seeks to pursue a defamation action based upon statements made in the course of a labor dispute - like these Plaintiffs - they cannot avoid application of Garmon preemption unless they can establish, by clear and convincing proof, that such statements were made with "actual malice." Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966). The statements that form the basis for Plaintiffs' claim do not fall within the narrow actual malice exception, so the defamation claim, too, falls squarely within the purview of Garmon preemption, as applied in Linn and Austin. Moreover, Plaintiffs could not demonstrate that the statements at issue are

defamatory under applicable Utah state law. As a matter of law, the remarks are not capable of sustaining a defamatory meaning; also, they represent "opinions" as opposed to verifiable facts, some pertain to official proceedings and thus are entitled to the "official proceedings" privilege, and none are "of and concerning" the individually-named Plaintiffs.

The pendent state claims all arise out of the same common facts as the preempted unfair labor practice and defamation claims, so they too must be dismissed because the area of law has been completely preempted. As the federal and state claims are all preempted, and no state claim is even viable, it would further the principles of judicial economy for this Court to rule upon all the claims and dismiss the action in its entirety, and with prejudice.

ARGUMENT

1. Plaintiffs' First Claim Must be Dismissed Based on Garmon Preemption.

In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959), the Supreme Court enunciated a rule of preemption that protects the exclusive jurisdiction of the National Labor Relations Board ("NLRB") over unfair labor practices. Specifically, the Court held that when "activity is arguably subject to §7 or §8 of the [National Labor Relations Act], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." Id.[10] See also, Cumpston v. Dynacorp Technical Servs., Inc., No. 02-6268 (CA-10/JCP, August 13, 2003)[unpublished decision attached in Appendix C, pursuant to Local Rule 7-2]; Viestenz v. Fleming Cos., Inc., 681 F.2d 699, 703-04 (10th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982).

The Court's holding in Garmon was based upon the underlying reasoning "that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." Id. at 242. The preemption doctrine set forth in Garmon was also motivated by a desire to avoid "conflict with a complex and interrelated federal scheme of law, remedy, and administration" embodied in the NLRA. Id. at 243. The Supreme Court has consistently reaffirmed its view of the exclusive jurisdictional grant accorded the NLRB by Congress. See, e.g., Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982) ("[A]s a general rule, federal courts do not have jurisdiction over activity which is arguably subject to §7 or §8 of the

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[10]Section 7 of the National Labor Relations Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The rights provided and guaranteed by Section 7 are afforded protection by Section 8 of the Act, which proscribes various unfair labor practices. Those provisions are consistent with the Congressional declaration that it is to "be the policy of the United States" to promote the public interest "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of collective bargaining and other mutual aid and protection." 29 U.S.C. § 151. (Emphasis supplied). See also 29 U.S.C. §141.

[NLRA]' and they must defer to the exclusive competence of the NLRB"); ILA, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 200 (1970)("[T]he jurisdiction of the National Labor Relations Board is exclusive and preemptive as to activities that are 'arguably subject' to regulation under §7 and §8 of the Act.")[11]

There can be no real question that the alleged conduct which provides the bases for Plaintiffs' first claim constitutes activity that is "arguably subject" to the provisions of the NLRA. To begin with,

jurisdiction is predicated on the NLRA. Amended Complaint at ¶ 63. Second, Plaintiffs introduce their first claim for relief with the description "unfair labor practices." Amended Complaint at p. 6. Third, the conduct at issue all pertains to matters clearly encompassed by the NLRA: the IAUWU's status as the workers' bargaining representative and when a question concerning representation could be raised, allegations of a "wildcat" strike, as well as of improper recognitional and secondary picketing. Amended Complaint at ¶¶ 63-64, 66-68. Fourth, the first claim for relief alleges that the "UMWA committed unlawful labor practices under the NLRA." Amended Complaint at ¶ 69.[12]

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[11]The principles of labor preemption, which derive from Garmon, are well-established. In the NLRA, Congress established a "comprehensive amalgam of substantive law and regulatory arrangements ... to govern labor-management relations affecting interstate commerce." Local 926, Operating Eng'rs v. Jones, 460 U.S. 669, 675-76 (1983). "A critical element of that amalgam is the NLRB's primary jurisdiction in interpreting and enforcing federal labor law." Richardson v. Kruchko & Fries, 966 F.2d 153, 155 (4th Cir. 1992)(citing Garmon, 359 U.S. at 242-45.) Labor preemption serves to ensure that other tribunals do not frustrate either the substantive policies established by the NLRA or the regulatory mechanisms through which those policies are implemented. "[T]he broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce" the federal labor laws "necessarily imply that potentially conflicting rules of law, of remedy, and of administration cannot be permitted to operate." Vaca v. Sipes, 386 U.S. 171, 179 (1967) (quoting Garmon, 359 U.S. at 242). "[C]entralized administration of specially designed procedures [is] necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid [the] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 192 (1978)(quoting Garner v. Teamsters, Local Union No. 776, 346 U.S. 485, 490 (1953)).

[12]There is an exception to Garmon preemption whereby states may exert jurisdiction, however that exception is inapposite to the instant matter. The exception lies when the labor activity includes "conduct marked by violence and imminent threats to the public order." Garmon, 359

This matter is also due to be dismissed pursuant to the applicable statute of limitations and under the principles of res judicata or issue preclusion. The conduct that allegedly constitutes the unfair labor practices at issue here occurred in the summer and fall of 2003. Amended Complaint at ¶¶ 63-64.[13] The NLRB has a six-month statute of limitations, so this action – filed a full year after the conduct - is now time-barred. 29 U.S.C. §160 (b). See e.g., Mathews v. Kennecott Utah Copper Corp., 54 F. Supp.2d 1067, 1075 (D. Utah 1999). In addition, unfair labor practice charges were filed with and pursued before the NLRB.[14] Indeed, the charges the IAUWU filed against the UMWA in October, 2003 are nearly identical to the allegations filed herein. Compare, e.g. conduct alleged in charge nos. 27-CP-155 and 27-CP-876 (included within Appendix B-1) with allegations in Amended Complaint at ¶¶ 63, 66-68. Through resort to the NLRB's procedures, Plaintiffs' claims have already been resolved. See Appendix B-1. For claims arising under §185 of the NLRA, Plaintiffs have no right to a second bite at the apple for the same conduct that was the subject of charges before, and fully resolved by, the NLRB.

Plaintiffs also failed to properly state a cause of action under §185 of the NLRA. 29 U.S.C. §185. That provision provides federal jurisdiction to consider actions for alleged violations of contracts *between* labor organizations and employers. However, the only parties to

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U.S. at 247.

[13]Though no time period is specified for the conduct delineated in ¶¶ 67-68 of the Amended Complaint, the matters are addressed in the unfair labor practice charges the IAUWU filed against the UMWA (copies included in Appendix B-2); reading those charges it is apparent that the conduct referenced in the Amended Compliant, which allegedly constituted the unfair labor practice, occurred in 2003.

[14]Attached as Appendix B are NLRB settlement papers addressing these issues (B-1), as well as more-recently filed (and still pending) unfair labor practice charges (B-2) and a representation petition concerning the on-going effort of the UMWA to become the employees' collective bargaining representative (B-3). Notwithstanding that this matter is before the Court on a 12(b) motion to dismiss, under 12(b)(6) standards, in addition to the complaint, the court may consider such matters of public record. Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 808 (N.D. Utah 1988)(before the court on 12(b)(6) motion to dismiss).
Note that although the IAUWU did not join in the settlement of the charges it filed with the NLRB, neither did it challenge the settlement, though it had that right under NLRB procedures.

the only labor agreement at issue here are *both* Plaintiffs. And there is no allegation that either party to that contract breached it. Accordingly, Plaintiffs' claim must be dismissed for failing to state a cause of action. United Food and Commercial Workers, Local 1564 v. Quality Plus Stores, 961 F. 2d 904, 906 (10th Cir. 1992). Also see, United Mine Workers v. Covenant Coal Corp., 977 F.2d 895, 897 (4th Cir. 1992); Int'l Union, Security, Police, and Fire Professionals v. United Government Security Officers of America, 2004 U.S. Dist LEXIS 26309 (D. Kansas 2004); Kirk v. Transport Workers Union of America, 934 F. Supp. 775, 794 (S.D. Tex. 1995).

2. Plaintiffs' Second Count, Alleging Defamation, Must be Dismissed.

A. Garmon Preemption, as Applied toDefamation Claims in Linn, Requires Dismissal.

The second claim alleges that numerous statements about matters at the Co-Op Mine that were made by the UMWA and its officers and employees (and others alleged to be agents of the UMWA, as well as numerous members of the press and the community at large) constitute unlawful defamation. These claims are properly preempted under Garmon as well as Linn v.United Plant Guard Workers of America, 383 U.S. 53 (1966). In Linn, the Court applied the principles of labor preemption developed in Garmon specifically to a defamation claim based upon certain statements made in the course of a labor dispute. The Court recognized that such a case required "accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against defamatory attacks." Id. at 58. In Linn, the Court adopted the same, heightened standard for malice that was previously articulated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Though generally applying the New York Times standard, the Court imposed an even higher standard of proof before damages may be recovered in the context of a labor dispute: instead of just proof of actual malice, a complainant must also prove actual injury. Linn at 64-65.[15]

[15]The test is not whether the Plaintiffs have adequately *plead* "actual malice" or "reckless disregard," but whether the alleged defamatory statements can be considered defamatory *as a matter of law*. To prevail in a suit involving defamatory statements made in the context of a labor dispute, the plaintiff must plead and prove it suffered actual damages, and that the damages

The Linn Court acknowledged that "[l]abor 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. Moreover:

> representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

Id. The Court also noted that the NLRB "has given frequent consideration to the type of statements circulated during labor controversies, and that it has allowed wide latitude to the competing parties." Id. at 60. The Court recognized that the NLRB "has concluded that epithets such as "scab," "unfair," and "liar" are commonplace in these struggles and not so indefensible as to remove them from the protection of §7, even though the statements are erroneous and defame one of the parties to the dispute." Id. at 60-61. Indeed, Linn determined that the National Labor Relations Act clearly reflected "a congressional intent to encourage free debate on issues dividing labor and management." Id. at 62.

After reviewing the above considerations, the Linn Court explained that

> it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the [NLRA], but that such suits might be used as economic weapons. Moreover, in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employees.

Id. at 64. Thus, the Court reasoned that "[i]n order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such

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arose out of the unprotected speech. Linn, 383 U.S. at 65. The Court need not accept conclusory allegations. Southern Disposal, Inc. v. Texas Waste Mgmt., 161 F.3d 1259, 1262 (10th Cir. 1998). Moreover, the burden of proof is on the plaintiff to prove proximate causation. See Sack on Defamation (PLI, 3d ed. 1999) §10.53 at 10-43-46 (as plaintiffs tend to attribute every post-publication woe to the alleged defamation, the link between publication and injury must be clearly shown.) And while damages may flow from unlawful conduct that occurs within the context of constitutionally protected activity, damages cannot be owing for the consequences of activity that is protected. See e.g., NAACP v. Clairborne Hardware, 458 U.S. 886, 933-34 (1982).

consequences must be minimized." Id. Accordingly, Linn "limit[ed] the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." Id. at 64-65. In so ruling, the Court emphasized that "the fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that this rule be followed." Id. at 65.[16]

The significant limitation imposed by Linn upon a party seeking to bring a state defamation action arising out of statements made during a labor dispute was reaffirmed in Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264 (1974). In Austin, the Court examined an executive order, which "establish[ed] a labor management relations system . . . remarkably similar to the scheme of the [NLRA]." The issue there - like the question resolved by Linn - was "the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a tenet of federal labor policy." Austin, 418 U.S. at 270.

In resolving this issue, the Court reviewed its earlier decision in Linn and reemphasized that "unrestricted libel actions under state law could easily interfere with federal labor policy" which fostered "freewheeling use of the written and spoken word" in labor disputes and "uninhibited, robust and wide open debate." Id. at 271, 272- 273. Furthermore, Austin stated that despite its potential for generating hostility, such heated verbal activity is, nevertheless, protected under federal law as part of the legitimate give and take of the labor relations process. The Court explained that

> Linn recognized that 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.

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[16]"Actual malice" in these types of cases must be demonstrated by clear and convincing evidence. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991); see also Beverly Hills Foodland v. Food & Commercial Workers, Local 655, 39 F.3d 191, 195 (8th Cir. 1994)(state libel and slander action may be maintained within the context of a labor dispute only if the defamatory publication is shown by clear and convincing evidence to be made "with knowledge that it was false or with reckless disregard of whether it was false or not.")(citations omitted).

Id. at 283.

The Court in Austin determined that the protections Linn afford "turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." 418 U.S. at 279. The issues discussed by the various Defendants herein fall well within this very broad umbrella of free speech protection. Each and every statement Plaintiffs claim to be defamatory refers to labor conditions or labor relations at the Co-Op Mine, or to the parties' labor dispute.[17] Indeed, the statements typify the freewheeling debate intended to be protected and encouraged by federal labor law in order to foster "uninhibited, robust and wide open debate" between management and labor. Linn, 383 U.S. at 60, 62; Austin, 418 U.S. at 273. Because they represent nothing more than the kind of "imprecatory language" and "rhetoric" anticipated by Linn and Austin, they are protected by federal labor law.

To escape the NLRA's preemption, a plaintiff must first prove the words had a defamatory meaning. See Linn, 383 U.S. at 58, n.2. A defamatory meaning must be established even before the malice test would be applied. Austin, 418 U.S. at 284. See also, Robert E. Murray, et al. v. Carlo Tarley, No. C2-01-693 (S.D. Ohio, Feb. 20, 2002)[unpublished decision attached in Appendix C, pursuant to Local Rule 7-2], at slip op.15.

Under the well-established free-speech principles protecting language used during labor disputes, 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 and reaffirmed in Austin. Thus, the defamation claim is preempted under federal labor law.

B. Even Under State Law, the Allegedly Defamatory Statements are Not Actionable.

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[17]The Salt Lake Tribune and The Deseret Morning News organized the allegedly defamatory statements into four general categories: those regarding the lock-out, those regarding the IAUWU, those regarding working conditions at the Mine, and those regarding NLRB proceedings and rulings. Memorandum in Support at p. vi.

Though the defamation claim must be dismissed under controlling federal labor law principles, even application of Utah's state law would yield the same result. In order to sustain a cause of action for defamation under Utah law, Utah Code Ann § 45-2-1,[18] a plaintiff must establish the existence of an actionable statement of fact as opposed to a non-actionable statement of opinion. To meet the standard, the statement must: a) contain a false and defamatory statement of fact; b) be the subject of an unprivileged publication to a third party; c) be publicized with fault; and d) cause special harm or be actionable irrespective of special harm. Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988). Whether a statement is to be categorized as opinion or fact is a question of law for the court and may properly be resolved through a motion to dismiss. West v. Thomson Newspapers, 872 P. 2d 999, 1008 (Utah 1994). Moreover, a

> publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even if it makes a false statement about the plaintiff. Thus, an embarrassing, even though false, statement that does not damage one's reputation is not actionable as libel or slander. If no defamatory meaning can reasonably be inferred by reasonable persons from the communication, the action must be dismissed for failure to state a claim.

Cox v. Hatch, 761 P. 2d at 561.

The first inquiry must be whether the statements Plaintiffs allege to be defamatory constitute verifiable fact or statements of opinion. Thomson Newspapers, 872 P.2d at 1018. There are four factors to review when determining whether particular speech represents "fact" or "opinion" for the purposes of applying state law defamation principles: a) common usage or meaning of the words; b) whether the statement is capable of being objectively verified as true or false; c) the full context of the particular statement; and d) the broader context in which the

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[18] Defamation is defined as:(1) "Libel" means a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.(2) "Slander" means any libel communicated by spoken words.

statement was made. Id. These factors all weigh in favor of finding the statements at issue here represent opinions, not facts. Not only are most of the statements matters not objectively verifiable,[19] but their context – both immediate and overall – indicate that the statements were made as part of an on-going campaign to improve the workers' conditions at CW Mining. Further, many of the alleged statements specifically include quotations or otherwise reveal that they represent the speaker's perspective.[20] Most importantly though, are that they arose in the overall context of what became a very public story that has commanded significant public interest, both locally and nationally.[21] The context for the statements thus supports the conclusion that they properly fall within the sphere of non-defamatory, non-actionable, opinion-speech.[22]

Further, when special damages are *not* pleaded, as in the instant matter, statements cannot constitute actionable defamation unless they meet the higher standard of "defamation, per se."

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[19] Most of the statements use subjective language, e.g. Estrada "unjustly" disciplined; workers not provided "adequate" training; the IAUWU is a front for the mine management and is a "phony" union; workers unjustly fired for protesting the mine's unsafe working conditions; CW Mining is one of the most brutal employers in the country....

[20]UMWA has *called* IAUWU a front for the mine management..., workers' *contend* they were fired and locked out because of concerted activities....

[21]The very long list of articles referenced in the Amended Complaint underscores how substantial is the interest that this labor dispute has generated.

[22]Only if the court would determine that the statement(s) at issue *may* be capable of a defamatory meaning as a matter of law, need it even turn to the second issue: how the statements were understood by their audience. Determining how reasonable persons would understand particular statements would require considering the language in its proper context. Thomson Newspapers, 872 P.2d at 1009. Here, the statements were all made in the context of the long and bitter labor dispute in which a large number of low-wage employees lost their jobs for about nine months. This is precisely the context in which strong, passionate language would be expected, especially coming from the workers themselves and the labor union trying to help them, the UMWA. Linn; Austin; see also, e.g., Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998), *cert. denied*, 982 P.2d 88 (dismissing defamation claims arising out of spirited public debate because as matter of law statements could not meet the defamatory standard). In Mast, the Court found that "because the statements were published in the context of a political debate on a public issue and the audience was thus not apt to take them at face value, there was no likelihood of damage to Mast's reputation and the statements, therefore, were not defamatory." Id. at 933. Writing further, the Court opined that "statements made in the course of such debate do not become compensable merely because they "include vehement, caustic, and sometimes unpleasantly sharp attacks." Id. at 934 (quoting from NY Times, 376 U.S. at 270).

Cox v. Hatch.[23] To constitute defamation per se the statement must allege: a) criminal conduct; b) loathsome disease; c) conduct that is incompatible with the exercise of a lawful business, trade, profession, or office; or d) unchastity of a woman. Baum v. Gillman, 667 P.2d 41, 43 (Utah 1983); Allred v. Cook, 590 P.2d 318, 320-21 (Utah 1979). "Whether the defamatory words are actionable per se is to be determined from their injurious character. The words must be of such common notoriety that damage can be presumed from the words alone." Baum v. Gillman, 667 P. 2d at 43; see also P & G v. Haugen, 222 F.3d 1262, 1276-77 (10th Cir. 2000)(representations that distributor of consumer products contributed to the Church of Satan and placed the Devil's mark on its products found *not* to be inconsistent with P & G's business, and not defamatory per se); Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 800 (D. Utah 1988).

The only one of these four criteria for establishing defamation per se that even arguably could be implicated by the alleged facts would be element "c," conduct that is incompatible with the exercise of a lawful business, trade, profession, or office. Yet, Utah's common law reveals that the kind of statements challenged herein do not meet the heightened "per se" threshold. P & G v. Haugen, 222 F.3d at 1276-77. As in P & G, while the allegedly defamatory statements may be "incompatible with conducting a *respected* or *successful* business, they are not incompatible with conducting a *lawful* business." P & G v. Haugen, 1999 U.S. Dist Lexis 22143, at *7-8 (D. Utah 1999), *aff'd*, P & G v. Haugen, 222 F.3d 1262 (10th Cir. 2000)(emphasis in original).

Finally, some of the comments pertain to proceedings before the NLRB and thus constitute privileged reports of governmental proceedings. Rather than repeat the material so ably presented by the newspapers, Defendants hereby incorporate and adopt herein the argument set forth in Section V, at pp 20-23 of the Memorandum in Support of Motion to Dismiss filed by The Salt Lake Tribune and The Deseret Morning News. In addition, as to the inability of the individual

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[23]Under federal law, of course, labor speech is protected *beyond* what may constitute defamation per se under state law. As the Linn Court stated: "[l]abor 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.

Plaintiffs to pursue their defamation claims, Defendants further incorporate and adopt herein the argument set forth in Section VI, at pp 23-25 of that same Memorandum in Support of Motion to Dismiss.

3. The Remaining State Claims are also Preempted and Must be Dismissed.

The remaining state claims must also be dismissed as preempted, under Garmon and its progeny. The Plaintiffs' third claim alleges that the UMWA and its officers, agents and supporters, by an improper means or for an improper purpose, interfered with the Employer's present and prospective economic relations with their workers, customers, suppliers, bargaining representatives and others, and that all Defendants are equally liable for the same. Amended Complaint at ¶¶ 143-146. Their fourth claim alleges that the UMWA and its officers, agents and supporters, by an improper means or for an improper purpose, interfered with the IAUWU's present and prospective economic relations with its bargaining unit members, and that all Defendants are equally liable for the same. Amended Complaint at ¶¶ 149-152. The fifth claim contends that the Defendants committed unfair labor practices and pursued frivolous claims before the NLRB. Amended Complaint at ¶¶ 162 - 167. The sixth count, alleges a civil conspiracy. Amended Complaint at ¶¶ 164-167. The seventh count does not include make an additional claim, but seeks injunctive relief, which is also preempted.

Since Garmon, state and federal courts alike have found state-based tort claims to be generally preempted. Only by finding that the state-based tortious interference counts alleged herein are preempted can this Court ensure the requisite uniform enforcement of our national labor policies. See e.g., United Mine Workers v. Covenant Coal, 997 F.2d 895 (4th Cir. 1992). These alleged state claims all arise out of the same facts as those in the first two claims: the alleged unfair labor practice and the alleged defamation. Indeed, Plaintiffs have alleged no separate or additional facts in support of these state claims. Insofar as these claims turn on the conduct alleged to constitute unfair labor practices or defamation, upon a finding that those first two claims are preempted, so too must these claims be preempted because this entire area of law

has been completely preempted.

Only when there is a *void* in the national labor policy is there space for overlapping state laws to be enforced. See e.g., Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 148-149 (1976). For example, in Local 20, Teamsters v. Morton, 377 U.S. 252, 261 (1964), the Supreme Court found that state tort claims based on peaceful secondary activity, like that alleged herein, is completely preempted by the NLRA: "[s]ubstantive state law [based on secondary activities] must yield to federal limitations...this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal regulations which they affect must be deemed governed by federal law having its source in those statutes, rather than by state law'." Id. (citation omitted). And as the Court explained in Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669 (1983), when the conduct is arguably protected or prohibited by the NLRA it is generally preempted under Garmon, because that "implements the congressional desire to achieve *uniform* as well as *effective* enforcement of the national labor policy. 460 U.S. at 681(italics in original).[24] In this case, and for the conduct alleged to be unlawful, the NLRA exercises complete jurisdiction and there is simply no void for the alleged state claims to fill.[25]

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[24]Additional support can be found in: Iron Workers v. Perko, 373 U.S. 701 (1973), *reh'g denied*, 375 U.S. 872 (1963); BE & K Construction v. Carpenters, 90 F.3d 1318 (8th Cir. 1996); Ehredt Underground v. Commonwealth Edison, 888 F. Supp. 1083, 1095 (N.D. Ill. 1993); Delta-Sonic Carwash v. Building Trades Council, No. 96-134 (N.Y. Sup. Ct. 1995) [unpublished decision attached in Appendix C, pursuant to Local Rule 7-2]; Wallulis v. Dynowski, 895 P.2d 315, 322 (Or. Ct. App. 1995); Mitchell v. Sherman, 523 N.W.2d 738, 745 (Wis. Ct. App. 19954); but see, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (finding that claims alleging violence not preempted); Printpack Inc. v. Graphic Communications, Local 761-S, 988 F. Supp. 1201 (S.D. Ind. 1997); Krantz v. ALPA, 427 S.E.2d 326 (Va. 1993).

[25]Even if Utah's state law would be applied, the result would be the same as the Plaintiffs failed to state a claim for tortious interference with economic relations. Utah recognizes as a common-law cause of action the "intentional interference with prospective economic relations." Leigh Furniture & Carpet v. Isom, 657 P.2d 293, 304 (Utah, 1982). To recover damages under this theory, a plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. However, these claims cannot properly be sustained in this matter because there is no allegation that any *particular* economic relations were disturbed. See St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 201 (Utah, 1991).

As for Plaintiffs' fifth claim, application of the Noerr-Pennington doctrine provides an additional defense for Defendants. This doctrine provides generally that unions may bring litigation or petition governmental agencies without fear of state tort claims. It was first established by United Mine Workers v. Pennington, 381 U.S. 657 (1965) and E. R. R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), *reh'g denied*, 365 U.S. 875 (1961) and has since been expanded to protect unions engaged in bona fide advocacy and/or litigation from a malicious prosecution claim. See, Cheminor Drugs v. Ethyl Corp., 168 F.3d 119 (3rd Cir. 1999), *cert. denied*, 528 U.S. 871 (1999). Insofar as the Plaintiffs' claims challenge the propriety of the unfair labor practice charges filed by the UMWA,[26] resolution of the initial unfair labor practice charge underscores that the charge was bona fide: after suffering approximately nine months out of work, the Employer's employees were reinstated with a backpay award, and all references to the discipline of Bill Estrada were removed from his personnel records. See Appendix B-1.

Finally, as for the claim seeking injunctive relief, this court does not have jurisdiction to issue an injunction concerning conduct arising out of a peaceful labor dispute. 29 U.S.C. § 101, *et seq.* ("Norris LaGuardia Act".) The Norris LaGuardia Act expressly prohibits federal courts from issuing injunctive relief that would interfere with one's right to give publicity to labor disputes (absent fraud or violence), or to assemble peacefully to act or organize with regard to one's interests in a labor dispute. 29 U.S.C. §104 (e),(f); also see, Marine Cooks v. Panama S.S. Co., 362 U.S. 365, 369 (1960)(Norris LaGuardia prompted by desire to withdraw federal courts from labor controversies); Utilities Services Engineering, Inc., v. Colorado Building Trades, 549 F.2d 173, 176 (10th Cir. 1977); Lee Way Motor Freight Inc. v. Keystone Freight Lines, 126 F.2d 931,

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Concerning the sixth claim, no conspiracy claim could prevail against the individual Defendants for the alleged secondary activity, as there is no suggestion anywhere in the Amended Complaint that any of the conduct at issue was anything but peaceful activity. See, R. D. Construction Co. v. Kansas Sand and Concrete, 1977 U. S. Dist. LEXIS 17109 (D. Kansas 1977). Moreover, Plaintiffs failed to plead the requisite elements for a civil conspiracy. Tremelling and Brang v. Ogio Int'l, Inc., 919 F. Supp 392, 397 (D. Utah 1996).

[26]As to these claims, the Amended Complaint provides no factual specificity.

932-33 (10th Cir. 1942). These decisions confirm that the NLRB commands exclusive jurisdiction to adjudicate labor disputes involving peaceful conduct, such as that which is alleged herein.

Further, insofar as Plaintiffs seek relief from defamation, an injunction would also be improper as that would constitute a prior restraint. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Indeed, courts generally have held that "equity will not enjoin a libel." Metropolitan Opera Ass'n v. Local 100, HERE, 239 F.3d 172, 177 (2d Cir. 2001).

Insofar as all the claims are properly preempted, no relief is warranted, whether in law or equity.

4. This Court has Jurisdiction to Consider, and Should Resolve, the Pendent State Claims.

The subject matter jurisdictional basis for this federal action is the NLRA. Amended Complaint at ¶ 58. Plaintiffs have also plead that this Court has supplemental subject matter jurisdiction over their "pendant [sic] state claims" pursuant to 28 U.S.C. 1367 § (a). Amended Complaint at ¶ 59. Clearly all the counts here arise out of a set of common facts: the first count alleges an unfair labor practice, and the second count contends that various statements pertaining to the labor dispute constitute defamation - presumably within the meaning of Utah Code Ann § 45-2-1. Indeed, no new or different facts are plead in connection with the remaining counts, counts three through seven. Amended Complaint at ¶¶ 143-169.

The authority of a federal court to consider state claims first arose in common law. As the Supreme Court explained in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the federal courts may exercise "pendent jurisdiction" when there is a substantial relationship between the federal and state claims, such that the entire action before the court essentially constitutes one "case." Id. at 725. Gibbs taught that federal courts were empowered to exercise discretion in choosing whether to exercise pendent jurisdiction in any case, considering judicial economy as well as convenience and fairness to the parties. Id. at 726. After the Supreme Court's decision in Gibbs, Congress codified the common law and established a statutory basis by which federal courts may exercise jurisdiction over state claims: 28 U.S.C. 1367 (a).

Federal courts within this Circuit have applied the teachings of Gibbs, to exercise pendent

jurisdiction over various state claims. Anglemyer v. Hamilton County Hosp., 58 F.3d 533 (10th Cir. 1995) (finding broad federal court discretion to consider state claims); Sullivan v. Scoular Grain Co. of Utah, 930 F.2d 798, 803 (10th Cir. 1991); Thatcher Enterprises v. Cache County Corp. 902 F.2d 1472 (10th Cir. 1990); Int'l Union, Security, Police, and Fire Professionals v. United Government Security Officers of America, 2004 U.S. Dist LEXIS 26309, at *26 (D. Kansas 2004). Based on the common law principles set forth in Gibbs, and the discretion granted federal courts in 28 U.S.C. 1367 (a), this court has jurisdiction to resolve the state law claims Plaintiffs raised herein.

Moreover, whenever the federal claim is "substantial," and the federal and state claims derive from a common nucleus of facts such that the parties would expect to try them in a single action, the federal court is "well-suited" to exercise its jurisdiction over the state claims. Jones v. Intermountain Power Project, 794 F.2d 546, 549 (10th Cir. 1986). First, Plaintiffs' NLRA and defamation claims, even though not giving rise to viable causes of action, clearly constitute federal claims. They therefore meet the "substantiality" test, as described in Gibbs and Jones. This is true even when though the federal claims are all due to be dismissed for failing to state a claim upon which relief may be granted. United Int'l Holdings, Inc., v. The Wharf Holdings Ltd., 210 F.3d 1207, 1219 (10th Cir. 2000) (scope of federal court's jurisdiction does not fluctuate with the fate of the federal claim); see also United Mine Workers v Covenant Coal Corp., 759 F. Supp. 1204, 1208 (D. WV 1991), *aff'd*, 977 F. 2d 895 (4th Cir. 1992). As the factual setting for the federal and state claims in this case springs from a common nucleus of facts, it makes most sense for all the claims all be tried together.

Moreover, resolving the state claims will further the goal of judicial economy, and no party will be injured. Not only did Plaintiffs select this federal forum for adjudication of both their federal and state claims, but the state law claims are inherently related to the federal unfair labor practice claim, they do not predominate over the federal claims, and the state claims are not novel or complex. Compare, Anglemyer v. Hamilton County Hosp, 58 F.3d at 541. Indeed, this Court is uniquely empowered to put an end to this vexatious litigation and the UMWA

Defendants urge the Court to do so.

5. The Court Should Award Defendants Their Costs and Attorney Fees.

Defendants seek their costs and attorney fees in this action. Defendants are on notice that Plaintiffs and their counsel have initiated a substantial number of legal actions against those critical of the Kingston family enterprises, or their leaders. The allegations herein are broad and sweeping, and not well-predicated on viable legal theories arising from the facts. Filing and serving the lawsuit on the fifteen or so of the most outspoken leaders among CW Mining's low-wage workforce – not to mention members of a bargaining unit Plaintiff IAUWU is supposed to be representing – represents nothing more than hard-ball tactics intended to chill their free speech, not to mention their rights under federal labor law.

It would be consistent with the Court's power to award fees and costs to compensate Defendants for their defense of this action. *See, e.g.*, Chambers v NASCO, 501 U.S. 32 (1991); Agee v. Paramount Communications, Inc., 114 F. 3d 395, 398 (2d Cir. 1997). The UMWA Defendants further adopt and incorporate that part of the Memorandum in Support of Motion to Dismiss that The Salt Lake Tribune and The Deseret Morning News which addresses: a) Utah's Citizen Participation in Government Act, Utah Code § 78-58-101 (the Anti-SLAPP Statute); and b) the allowance for attorney fees and costs upon a finding that the action was brought "without merit and not brought or asserted in good faith." Utah Code § 78-27-56(1). At pp 26-28. The UMWA Defendants thus urge the Court to award the UMWA its attorney fees and costs.

CONCLUSION

Wherefore, for the reasons set forth above, the Amended Complaint should be dismissed in its entirety and on the merits so as to be dismissed, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 25th day of February, 2005, a true copy of the foregoing UMWA Defendants' Motion to Dismiss and Memorandum in Support of Their Motion to Dismiss Complaint were served via U.S. first-class mail, postage prepaid, upon the following:

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