

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: January 26, 2006

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: C.W. Mining Co., d/b/a Co-Op Mine
and 133-0600
Intl. Assn. of United Workers Union 512-5009-3300
Cases 27-CA-19529, 27-CB-4708 512-5009-6733-6700

This Bill Johnson's¹ case was submitted for advice as to whether the Employer and certified Union violated Sections 8(a)(1) and 8(b)(1)(A) by jointly filing and maintaining a Section 303 lawsuit against the United Mine Workers.

We conclude that the Region should issue complaint, absent settlement, alleging that the plaintiffs violated Section 8(a)(1) or Section 8(b)(1)(A) by filing and maintaining a lawsuit that includes baseless and retaliatory allegations and/or preempted allegations which attack Section 7 conduct.

FACTS

I. Background

The facts of this case relate to events detailed in two previous Advice memos.² Briefly, C.W. Mining operates a mine in Huntington, Utah. In 2003, the United Mine Workers of America (Union) began an organizing drive among a group of approximately 80 employees, all of whom were Mexican Nationals.³ The miners had long been represented by the independent, Board-certified, International Association of United Workers Union (IAUWU) and were subject to a collective-bargaining agreement between the Employer and

¹ Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

² See C.W. Mining, d/b/a Co-Op Mine, Cases 27-CA-19399-1, et al., Advice Memorandum dated July 8, 2005; C.W. Mining, d/b/a Co-Op Mine, Case 27-CA-18764-1, Advice Memorandum dated April 26, 2004.

³ There were approximately 220 miners employed at the mine. Eventually, 64 employees were determined to be in the unit.

the IAUWU. In May, during the open window period of that soon-to-expire contract, the Union filed a representation petition in Case 27-RC-8326 to represent the miners currently represented by the IAUWU.

In September 2003, the Employer discharged approximately 80 employees who had struck to protest the suspension and discharge of a fellow employee. In agreement with the Region, Advice authorized complaint proceedings alleging that the discharges violated Section 8(a)(3).⁴ The strikers remained on strike until summer 2004.⁵ During the strike, Union officials and employees walked picket lines, attended rallies, spoke to local media, and attended and spoke at various community events in order to publicize the strike and working conditions at the mine.

On June 29, the Employer entered into an informal Settlement Agreement remedying the alleged unlawful discharges of the 80 strikers, which provided for reinstatement and backpay. The Settlement Agreement preserved the Employer's right to an administrative hearing limited to determining backpay amounts.

The Employer received the Region's proposed backpay amounts from the June Settlement Agreement on November 10. On November 18, the Decision and Direction of Election (DDE) in the representation case issued.

On November 22, the Employer gave letters to 30 of the employees whose social security numbers appeared on a May 29 "no match" letter that the Employer had received from INS. The letters stated that employees had until December 9 to submit proper work authorization papers to the Employer, and that failure to do so would result in termination. On November 26, the Employer objected to the Region's backpay calculations resulting from the settlement of the Employer's discharges of the 2003 strikers, claiming the employees were undocumented and not entitled to backpay under Hoffman Plastics.⁶

⁴ Although Advice determined that the strike was protected, the Region found that the Union had engaged in subsequent conduct violative of Sections 8(b)(4) and 8(b)(7). Those charges, filed by the IAUWU, were settled in June 2004.

⁵ All dates are in 2004 unless otherwise noted.

⁶ Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

The Employer discharged the 30 affected employees on December 9.⁷ An additional employee was also discharged because the Employer's own review of its paperwork revealed that although his social security number did not appear on the "no match" letter, the employee's temporary work authorization had expired. Pursuant to Advice's authorization, the Region issued complaint in Cases 27-CA-19399-1, et al., alleging that the Employer's discharges violated Section 8(a)(3).

On December 17, the Board conducted the representation election in Case 27-RC-8326. The election resulted in two votes cast for the Union, five votes cast for the IAUWU, and 27 challenged ballots. Of the 27 challenged ballots, 24 belong to employees who were discharged on December 9 for failing to provide the Employer with proper work authorization.

II. Lawsuit Allegations

On September 24, the Employer and IAUWU filed a Section 303 lawsuit against the Union and individual employees in the federal district court in Utah.⁸ The factual basis for all seven counts of the lawsuit involves activity arising from the ongoing labor dispute. In Count 1 of the lawsuit, the Employer and IAUWU seek an order under the Declaratory Judgment Act⁹ declaring that the Union and individual employees criminally violated the Immigration Regulation and Control Act (IRCA). Specifically, the factual allegations recount the Employer's alleged discovery in May and June of 2004 that dozens of its employees were undocumented, its efforts to provide an opportunity for those "fraudulent workers" to resolve the matter, and its ultimate termination of those workers in December 2004.¹⁰ Based on this activity, the plaintiffs claim the workers violated 18 U.S.C. §§ 1028 and 1546 by knowingly using false documents to obtain

⁷ Twenty-three of the 30 employees had participated in the 2003 strike.

⁸ The plaintiffs filed an amended complaint on July 13, 2005. The following discussion concerns only the allegations pled in the amended complaint.

⁹ 28 U.S.C. § 2201 (West 1994).

¹⁰ As noted above, in our previous Advice memorandum dated July 8, 2005, we concluded that these terminations were in retaliation for protected activity in violation of Section 8(a)(3). The Region has issued complaint in that case.

employment, 8 U.S.C. § 1324 by transporting or harboring undocumented workers, and 18 U.S.C. § 1343 by devising schemes and using wire fraud to obtain money by false pretenses. The plaintiffs also allege in Count 1 that the Union and individual employees engaged in racketeering activity, based on the defendants' alleged wire fraud. The plaintiffs' wire fraud allegation, in turn, is premised on the defendants' dissemination of alleged defamatory statements contained in Count 3.¹¹

In Count 2 of the suit, the plaintiffs seek damages against the defendants under Sections 301 and 303 of the LMRA for various activities related to the 2003 strike.¹² Count 2 also includes paragraph 78, alleging that a Union agent intentionally mislead employees into striking by falsely informing them that they had been discharged. Count 3, as noted above, details alleged defamatory statements made by the defendants on the picket line, to local media, and at community events in support of the strike, and in order to publicize working conditions at the mine. Counts 4 through 7 allege, in order, Invasion of Privacy, Intentional Interference with Economic Relations, Negligence, and Civil Conspiracy under Utah state law. All of these counts are based on the above-referenced allegations. The lawsuit has not yet concluded; the district court is scheduled to hear the defendants' Motions to Dismiss the plaintiffs' Amended Complaint on February 17, 2006.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and the IAUWU violated Section 8(b)(1)(A) by filing and maintaining a lawsuit that contains allegations which are baseless and retaliatory and/or preempted allegations which attack Section 7 activity.

I. Some of the plaintiffs' counts are baseless and preempted

¹¹ The plaintiffs seek treble damages, as allowed by a civil RICO action, in Count 3.

¹² In our previous Advice memorandum dated April 26, 2004, we concluded that the 2003 strike was protected. The allegations concerning that strike were resolved by the Region in an informal settlement agreement.

With regard to determining whether lawsuits lack a reasonable basis and/or are retaliatory, the Supreme Court in Bill Johnson's established the authoritative standard for judging whether ongoing lawsuits violate the Act. In Bill Johnson's, the Supreme Court held that First Amendment considerations insulate the filing and prosecution of a reasonably based lawsuit from being enjoined or punished as an unfair labor practice, even if the lawsuit was filed to retaliate unlawfully against an employee.¹³ Accordingly, an ongoing lawsuit cannot be halted unless the lawsuit both: (1) lacks a reasonable basis; and (2) was filed by the plaintiff to retaliate against protected conduct.¹⁴ A lawsuit lacks a reasonable basis where the plaintiff asserts "plainly unsupported inferences from the undisputed facts" or makes "patently erroneous submissions with respect to mixed questions of fact and law," or where the legal issue is plainly foreclosed as a matter of law.¹⁵

However, the Board is not precluded from enjoining lawsuits that are beyond the jurisdiction of the courts because of federal-law preemption.¹⁶ Thus, in San Diego Bldg. Trades Council v. Garmon,¹⁷ the Supreme Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the 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." Thus, Garmon preemption is designed to prevent judicial interference with the Board's interpretation and

¹³ Bill Johnson's, 461 U.S. at 742-43.

¹⁴ Id. at 744. A majority of the Court in BE & K Construction v. NLRB, 536 U.S. 516, 536-37 (2002), however, suggested that the Board would consider a concluded, reasonably based lawsuit to be an unfair labor practice if it was filed solely to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity. Two Justices opined that the decision in BE & K implies that the Court, in an appropriate case, will rule that the Board can never find a reasonably based lawsuit to be unlawful. Id. at 537-38 (Scalia, concurring). The Court in BE & K did not re-articulate the standard for determining whether an ongoing lawsuit is baseless, so the standard set forth in Bill Johnson's remains authoritative.

¹⁵ Bill Johnson's, 461 U.S. at 745 n.11, 747.

¹⁶ Id. at 737 n.5.

¹⁷ 359 U.S. 236, 245 (1959).

enforcement of the integrated scheme of regulation established by the Act.¹⁸

In Sears, Roebuck & Company v. Carpenters,¹⁹ the Court held that a state is free to regulate "arguably protected" conduct "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." Nevertheless, state regulation may be inappropriate if the exercise of state jurisdiction would "create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct."²⁰ In Loehmann's Plaza,²¹ the Board, interpreting Garmon and Sears, held that when the conduct a state is attempting to regulate constitutes arguably protected activity, preemption occurs only upon Board involvement in the matter. Board involvement first occurs when the General Counsel issues a complaint regarding the same activity that is the subject of the state court lawsuit.²² At that point, the pending lawsuit is preempted and the plaintiff must seek a stay of that lawsuit within seven days of the issuance of the complaint to avoid Section 8(a)(1) liability.²³

A. Count 1 - Declaratory judgment regarding allegations of immigration violations, fraud, and RICO

As a general matter, each of the plaintiffs' counts pleads that "[a]ll preceding and following allegations are incorporated here by reference." Thus, each count incorporates the defendants' entire alleged course of conduct described above, and will be analyzed accordingly.

¹⁸ See Building & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224-25 (1993).

¹⁹ 436 U.S. 180, 202-203 (1978).

²⁰ Id. at 203.

²¹ 305 NLRB 663, 669-70 (1991).

²² Id. at 670.

²³ Id. at 671. Although Sears and Loehmann's factually involved state court lawsuits, they both explicated the Supreme Court's decision in Garmon which, as noted above, did not differentiate between state and federal courts. Thus, at a minimum, Loehmann's/Garmon principles apply to the purely state law claims involved in the federal lawsuit here only as a matter of pendent jurisdiction.

We conclude that the portions of Count 1 seeking a declaratory judgment related to the Union's and employees' alleged immigration violations are baseless because the district court has no jurisdiction under the Declaratory Judgment Act to find, in a civil action, that the Union and employees engaged in criminal conduct.²⁴ First, to the extent that the plaintiffs allege IRCA as a jurisdictional basis for the court, this allegation must fail, because federal courts have no jurisdiction over criminal matters unless they are filed and prosecuted by the government.²⁵ That leaves only the Declaratory Judgment Act as a basis for jurisdiction over the plaintiffs' IRCA claims. However, the Supreme Court has held that the Declaratory Judgment Act itself does not confer jurisdiction upon federal courts, but only expands the available range of remedies.²⁶ Therefore, because the district court has no basis for jurisdiction over the plaintiffs' IRCA claims, they are baseless.

We reach a different conclusion with respect to the plaintiffs' RICO allegation.²⁷ Because the plaintiffs request treble damages for the defendants' alleged defamatory statements -- the underlying factual basis for their RICO claim -- we conclude that, unlike the other paragraphs in Count 1, the plaintiffs' RICO claim is a civil action. The RICO allegation appears to satisfy the standards of specificity detailed in Federal Rule 9(b),²⁸ as

²⁴ Paragraphs 60-66 and 73-74 of the plaintiffs' amended complaint allege violations of IRCA.

²⁵ See, e.g., United States v. Singleton, 165 F.3d 1297, 1299-1300 (10th Cir.), cert. denied 527 U.S. 1024 (1999) (federal court cannot assert jurisdiction over criminal case unless filed and prosecuted by U.S. Attorney or assistant).

²⁶ See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). See also Woods v. City & County of Denver, 62 Fed.Appx. 286, 289-90 (10th Cir. 2003) (unpublished) (construction of federal statute was not a "cause of action;" therefore, left only with request for declaratory judgment, court lacked subject matter jurisdiction to grant declaratory relief).

²⁷ Paragraphs 67-72 of the plaintiffs' amended complaint allege violations of RICO and related conduct.

²⁸ FRCP 9(b) states:

Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances

required by the Tenth Circuit.²⁹ In this regard, the plaintiffs allege that the wire fraud underlying the RICO claim is based on the defendants' alleged defamatory statements detailed with specificity in Count 3 of the lawsuit. [FOIA Exemptions 2 and 5

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B. Count 2 - Violation of Labor Agreement/Unfair Labor Practices

Count 2 alleges that the Union and its agents violated Sections 301 and 303 by its involvement in the 2003 strike. The plaintiffs have a right to seek compensatory damages in federal court for the Union's alleged Section 8(b)(4) conduct under Section 303.³⁰ [FOIA Exemptions 2 and 5

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constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

²⁹ See Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) applies to civil RICO actions and requires particularity in pleading RICO mail and wire fraud).

³⁰ See Construction Workers v. Laburnum Contr. Corp., 347 U.S. 656, 665-66 (1954). See also ILWU v. Juneau Spruce Corp., 342 U.S. 237, 244 (1952) (remedies for Section 303 court action and 8(b)(4) administrative action independent of each other).

³¹ [FOIA Exemptions 2 and 5

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³² See Teamsters v. Morton, 377 U.S. 252, 260-61 (1964).

are baseless because they seek damages in excess of actual, compensatory damages.

Furthermore, the Tenth Circuit will not find the Union liable for a breach of contract under Section 301 because the Union was not a party to the plaintiffs' collective-bargaining agreement.³³ Therefore, Paragraph 79 of the amended complaint, which alleges that the Union induced employees to breach the plaintiffs' contract by engaging in the 2003 strike, is baseless.

Moreover, we conclude that paragraph 78, which alleges that a Union agent intentionally misled employees into striking by falsely informing them that they had been discharged, is baseless. We conclude, given the title of Count 2, as well as the substance of the other paragraphs in Count 2, that Paragraph 78 alleges that the Union agent's conduct was an unlawful inducement of either a breach of contract under Section 301, or a strike under Section 303. As noted above, the Union is not a party to the plaintiffs' contract; therefore, a Union agent will not be found liable for a contract violation under Section 301.³⁴ Moreover, Paragraph 78 does not allege a secondary object violative of Section 8(b)(4) but rather, at most, a false reason to strike in protest of his own discharge. This is concerted activity in support of a primary labor dispute. Therefore, Paragraph 78 is baseless because it fails to state a claim under either Sections 301 or 303.

C. Counts 3 and 4 - Defamation and Invasion of Privacy

Count 3 contains in excess of 113 paragraphs alleging hundreds of defamatory statements by the Union and employees. Count 4 incorporates those statements, and claims they placed defendants in a false light.³⁵ These

³³ Cf., e.g., UFCW v. Quality Plus Stores, Inc., 961 F.2d 904, 906 (10th Cir. 1992) (Section 301 does not establish subject-matter jurisdiction for federal common law claim of tortious interference against entity that is not party to contract; no contract between parties to lawsuit). The court distinguished Wooddell v. IBEW, Local 71, 502 U.S. 93 (1991) in which the Court held that an individual employee could sue under Section 301 for violations of an employer-union contract.

³⁴ UFCW v. Quality Plus Stores, Inc., 961 F.2d at 906.

³⁵ See, e.g., Stien v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 380 (Utah Ct. App. 1997) ("false light" claim

statements were made on picket lines, to local media, and at various community events. Most of the statements were made in support of the 2003 strike and described the Employer's treatment of employees and working conditions at the mine. Some statements were also made regarding the Employer's discharge of some 30 employees in December 2004 for failure to correct alleged immigration violations.

In Linn v. Plant Guard Workers,³⁶ the Supreme Court held that to be actionable, labor speech must be defamatory, false, and published with knowledge of its falsity, or with reckless disregard of whether the statement is true or false. In determining whether a defamation suit is reasonably based, the Board has recently taken an expansive view of the courts' role in making this determination and a restrictive view of the Board's role. Thus, in Beverly Health & Rehabilitation Services,³⁷ the employer's state court defamation lawsuit alleged that the union made certain defamatory statements in handbills and a radio spot accusing the employer of maintaining unsafe and unsanitary conditions in its nursing homes. While not explicitly contradicting this evidence, the employer proffered evidence that it had received fewer citations for health care deficiencies than most of its competitors.³⁸ Based on the employer's position, the Board held that although there were no actual credibility conflicts created by testimony, "a genuine issue of material fact exist[ed] by virtue, at the least, of the 'proper inferences to be drawn from undisputed facts' about the [u]nions' statements[.]"³⁹ The Board also found that where such issues of fact existed, the ALJ should not have even passed on the truth of the handbill and radio statements themselves, noting that "[s]uch a determination appears to exceed the permissible scope of inquiry allowed the Board under Bill Johnson's."⁴⁰ Thus, Beverly demonstrates that only a small quantum of evidence is necessary, particularly

closely tied with defamation action; same considerations apply to each claim).

³⁶ 383 U.S. 53, 61 (1966).

³⁷ 331 NLRB 960, 960 (2000), reconsideration denied 336 NLRB 332 (2001).

³⁸ Id. at 962.

³⁹ Ibid.

⁴⁰ Id. at 962 n.5.

in defamation cases, to demonstrate that a suit is reasonably based.

In light of the Board's low threshold for plaintiffs' bringing defamation actions, we conclude that the plaintiffs allege facts before the district court which may prove that several of the defendants' statements were false or were published with reckless disregard for their truth or falsity. In this regard, the alleged defamatory statements attributed to the defendants deal with a wide range of issues, including the 2003 strike, working conditions and harassment at the mine, and the IAUWU's relationship with the Employer. The truth of the defendants' statements, and/or whether they rose to the level of malice and resulted in injury to the plaintiffs, is a matter for the district court to resolve.⁴¹

Counts 3 and 4 may also be retaliatory if the Union and its members were engaged in protected labor speech. Thus, if the court finds that the statements attributed to the defendants were not defamatory, Counts 3 and 4 attack protected Section 7 activity and their prosecution may be unlawful if there is evidence uncovered in discovery that establishes that the plaintiffs would not have filed these counts but for a motive to impose litigation costs on the defendants.⁴² [FOIA Exemptions 2 and 5

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D. Counts 5-7 - Intentional Interference with Economic Relations, Negligence, and Civil Conspiracy - are baseless and preempted under *Loehmann's Plaza*

Counts 5-7, like the preceding counts, plead the defendants' entire course of conduct, and therefore incorporate the defendants' actions underlying the plaintiffs' Section 303, RICO, and defamation allegations, as well as conduct alleged in the plaintiffs' Declaratory Judgment and Section 301 claims. Thus, it is necessary to analyze these last three counts as they relate to our conclusions above regarding which allegations are baseless, and which are reasonably based.

⁴¹ Id. at 962 n.5, n.6.

⁴² See BE & K, 536 U.S. at 536-37.

⁴³ [FOIA Exemptions 2 and 5

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In this regard, Counts 5-7 are baseless because they allege that conduct relating to the 2003 strike violated Utah state law. Thus, the Supreme Court has held that claims relating to alleged secondary conduct that are based on substantive state law must yield to the federal limitations set forth by Section 303.⁴⁴ As such, because the plaintiffs' remaining three claims relate to alleged Section 8(b)(4) conduct, they are baseless as actually preempted by Section 303. Moreover, as these claims are also based on alleged Section 301 contract violations, they are baseless for the reason detailed above in discussing Count 2, namely, that the defendants will not be found to have committed a breach of contract when they were not parties to the plaintiffs' collective-bargaining agreement.⁴⁵

We also conclude that Counts 5-7 are preempted by the issuance of the General Counsel's complaint in Cases 27-CA-19399-1, et al. because they seek damages for employees' Section 7 activity, including their support for the Union and/or 2003 strike. Thus, since the plaintiffs' remaining three counts attack arguable Section 7 activity, and are unrelated to Section 8(b)(4) conduct and/or the defamatory statements alleged in the lawsuit, they are preempted by the General Counsel's issuance of complaint in Cases 27-CA-19399-1, et al., pursuant to Loehmann's Plaza.⁴⁶

On the other hand, these claims also relate to alleged defamatory statements made by the defendants, or alleged RICO violations. [FOIA Exemptions 2 and 5

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II. The plaintiffs' lawsuit is retaliatory as it includes baseless allegations attacking protected activity

We conclude that the plaintiffs' maintenance of the baseless claims described above violates Section 8(a)(1) because those claims are also retaliatory. Primarily, the lawsuit is retaliatory because it includes baseless allegations that attack Section 7 activity.⁴⁷ Retaliatory

⁴⁴ See Teamsters v. Morton, 377 U.S. at 259-61.

⁴⁵ See note 33, above.

⁴⁶ Loehmann's Plaza, 305 NLRB at 671.

⁴⁷ See Bill Johnson's Restaurants, 461 U.S. at 747; Phoenix Newspapers, 294 NLRB 47, 49 (1989); Diamond Walnut Growers, 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995).

motive is further established by the fact that several allegations in the lawsuit, including the IRCA allegations in Count 1, Paragraph 78 of Count 2, and Counts 5-7 as they attack the employees' arguable Section 7 activity, are merely a restatement of the Employer's rejected defense before the General Counsel in Cases 27-CA-19399-1, et al., and contrary to the General Counsel's decision to issue complaint in that case alleging that the Employer discharged employees because of their support for the Union and the protected 2003 strike.⁴⁸ Finally, the plaintiffs' attempts to hold individual Union members personally liable,⁴⁹ and secure damages in excess of mere compensatory damages,⁵⁰ is further evidence that the lawsuit is retaliatory.

III. Conclusion

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and the IAWUW violated Section 8(b)(1)(A) by filing and maintaining a lawsuit that includes baseless and retaliatory allegations and/or preempted allegations that attack Section 7 activity. [FOIA Exemptions 2 and 5

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Count 1: Paragraphs 60-66 and 73-74, alleging violations of IRCA, are baseless. [FOIA Exemptions 2 and 5

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Count 2: Paragraphs 78 and 79, alleging Section 301 violations, are baseless. [FOIA Exemptions 2 and 5 .] Paragraphs 84-85 are baseless because they seek punitive damages for Section 303 conduct.

Counts 3-4: [FOIA Exemptions 2 and 5

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⁴⁸ See generally C.W. Mining, d/b/a Co-Op Mine, Cases 27-CA-19399-1, et al., Advice Memorandum dated July 8, 2005.

⁴⁹ See Phoenix Newspapers, 294 NLRB at 49-50 (lawsuit retaliatory in part because it sought large punitive damages from union and individual employee-members because they engaged in Section 7 activity).

⁵⁰ See ibid; H.W. Barss Co., 296 NLRB 1286, 1287-88 (1989).

Counts 5-7: These counts are baseless because they allege misconduct under Sections 301 or 303. They are also preempted by Loehmann's Plaza because they attack employees' arguable Section 7 conduct. [FOIA Exemptions 2 and 5

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Although we have concluded that certain aspects of this lawsuit violate the Act, the district court is scheduled to hear the defendants' Motions to Dismiss the plaintiffs' Amended Complaint on February 17, 2006. [FOIA Exemptions 2 and 5.

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B.J.K.