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DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, *et al.*	:	**REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS**
Plaintiffs,	:	**(Oral Argument Requested)**
vs.	:	
UNITED MINE WORKERS OF AMERICA, *et al.*,	:	Case No. 2:04CV00901
	:	Judge Dee V. Benson
Defendants.	:	

Defendants *The Salt Lake Tribune* and its employees as well as *The Deseret Morning News* and its employees (all hereafter collectively referred to as "Defendants"), by and through their undersigned counsel of record, hereby jointly file this Reply Memorandum in Support of their Renewed Motion to Dismiss in the above-captioned matter.

REPLY ARGUMENTS

Defendants' renewed Motion to Dismiss, like their initial Motion to Dismiss, identifies six independent legal defects in Plaintiffs' claims: (1) defamatory meaning; (2) protected opinion; (3) neutral reportage privilege; (4) public interest privilege; (5) official proceedings privilege; and (6) the "of and concerning" requirement in libel cases. In their memorandum opposing Defendant's renewed motion (hereafter "Plaintiffs' Memorandum"), however, Plaintiffs really only specifically address the issues of opinion and neutral reporting. Thus, Defendants will limit their reply arguments to these two specific issues and a few additional points also explaining why Plaintiffs cannot show defamatory meaning in the statements at issue.

Moreover, Plaintiffs' Memorandum does not dispute Defendants' observation that Plaintiffs' Second Amended Complaint (hereafter the "Complaint") has whittled their claims down to four basic statements: (1) the miners were fired or locked out; (2) the National Labor Relations Board ("NLRB") found that the miners were fired and ordered reinstatement and/or backpay; (3) the current union (IAUWU) does not represent the miners' interests; and (4) the miners are exploited or abused.[1] Therefore, Defendants will focus their arguments on these four basic types of statements.

Opinion/Defamatory Meaning

Despite Plaintiffs' arguments to the contrary, it is clear that the four statements at issue are opinion and/or not capable of a defamatory meaning.

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[1] For the convenience of the court, the articles containing the statements still at issue after the amendments are attached as Exhibit "A" (*The Salt Lake Tribune* articles) and Exhibit "B" (*The Deseret Morning News* articles) (hereafter the "Articles"). The Articles are also labeled to cross-reference the numbers assigned to them by Plaintiffs: T-1 through T-16 for *The Salt Lake Tribune* articles and D-1 through D-13 for *The Deseret Morning News* articles.

The common meaning of the words at issue suggests they are nothing more than the spirited rhetoric and/or hyperbole common in public debates such as a labor dispute. The statements, published in the context of a broader public debate on the treatment of the miners, are not capable of objective verification as true or false. Many of the statements are essentially legal opinions offered by laymen. Courts consistently hold such statements are not verifiable as true or false, particularly where no court has yet ruled on the issue, and thus cannot support a claim for defamation. Each statement is addressed specifically below.

The first statement, that the miners were fired (as opposed to walking off the job), cannot convey defamatory meaning. It might possibly be defamatory to falsely say, about an employee, that he or she was fired. But Plaintiffs' Memorandum never explains how it defames an employer to say that it fired someone. It is actually very common for an employer to fire someone. In the context of a heated labor dispute, the question of whether the workers here were "fired" for protesting unsafe conditions or whether they "quit" to protest unsafe conditions is so semantic, so typical of a labor dispute, and so irrelevant to the core of that dispute that it cannot convey defamatory meaning as a matter of law. It is obvious in this dispute, as in nearly every labor dispute, that the miners and their employer *disagree* as to whether the miners were fired or walked out. The numerous articles published by the Defendants in which miners and mine managers are quoted on this point, make this abundantly clear. The mere reporting of the workers' allegation that they were fired cannot, in the context of this labor dispute, support a claim for defamation.

Thus, Plaintiffs are forced to focus on causation and claim that the Articles say the firings occurred as a result of the miners' union organizing or other protected activity. Most of the

Articles, however, do not make this kind of statement. When such a charge is reported, it is clear both in the individual articles and in the overall context of all the Articles, that such statements are reports of what the participants in the labor dispute are claiming. Such statements are not the statements of Defendants. Plaintiffs have already conceded that they do not seek to impose liability here for the statements Defendants attributed to others. Therefore, all Plaintiffs' claims based on statements that the miners were fired must fail.

The statement that the miners do not like or want the IAUWU– or that they want a union they feel truly represents their interests– is incapable of verification as a statement of fact. Some of the workers obviously feel that way about the IAUWU, given that they have said so as alleged in the Complaint.[2] How can Plaintiffs possibly prove Defendants made false statements here? The Plaintiffs cannot, and do not, claim that the miners actually love and adore the IAUWU and as a result the statements in the Articles about their dislike for the IAUWU are false. The real motivation for this lawsuit is that Plaintiffs are unhappy that the miners have an unfavorable opinion of the IAUWU. Plaintiffs do not agree with that opinion and want to punish anyone who expresses it or reports about it. Their claims based on this type of statement are not actionable.

The statement that the NLRB ordered reinstatement and backpay is not actionable as defamation because it does not convey defamatory meaning and it is not false. It is clear that the parties to the labor dispute agreed to such an order and it was entered. In the context of a labor dispute, whether Plaintiffs "voluntarily" reinstated the miners after the NLRB brokered a

[2] *See, e.g.*, Complaint at ¶¶ 90(a), 91(b), 91(d), 91(n), 91(o), 91(w), 91(x), 91(ag), 91(aj), 93, 95(a), 95(n), 95(q), 95(r), 100(a), 100(c), 101(f), 101(g), 101(h), 101(l), 102(a), 102(m), 103(b), 105(a), 105(I), 105(l), 105(m), 105(q), 105(r), 105(s), 105(t), 105(u), 105(y), 105(ab), 105(ad), 105(aj), 105(ak), 105(aq), 105(az), 105(bb), 105(bd), 105(bi), 105(bl), 111, 118(f), 122(c), 124 and 128.

settlement or whether they were ordered to do so would make no real difference to Plaintiffs' reputation in the mind of a reasonable reader. The result is the same either way– the miners got their jobs back after the NLRB got involved. Plaintiff's Complaint also takes this statement out-of-context. The Articles, in full context, clearly identify the NLRB action as a settlement during which Plaintiffs made no admission of liability or wrongdoing. Moreover, lay interpretations of the NLRB's actions, even if slightly inaccurate, are not actionable as a matter of law, as extensively explained in Defendants' prior memoranda.[3]

Finally, the statements regarding the abuse or exploitation of workers are hyperbole and/or protected opinion. As noted, these statements appear on editorial pages or in columns, where readers expect to find opinions, and are written in the common language of opinion. "Newspaper readers expect that statements in editorials will be more exaggerated and polemicized than 'hard news.' Readers are therefore less likely to form personal animus towards an individual based on statements made in an editorial." *West v. Thomsen Newspapers*, 872 P. 2d 999, 1009 (Utah 1994). Moreover, in *West*, the Utah Supreme Court noted that statements that one person engaged in "manipulation" or acted in an "abusive manner"– both statements similar to those at issue in this case– were not actionable as defamation. *Id* at. 1010.

Defendants suggest the opinion statements are actionable because they imply the existence of undisclosed defamatory facts (which Plaintiffs do not even identify themselves). Given the extensive news coverage of this labor dispute by Defendants and many others, it is

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[3] *See, e.g., Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731-32 (9th Cir. 1999) (no defamation claim for lay interpretations of legal rulings); *Moldea v. New York Times, Co.*, 22 F.3d 310, 315 (D.C. Cir. 1991) ("[W]hen a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation.").

astounding that Plaintiffs can conclude, with a straight face, that anything about it remains undisclosed. Defendants' reporters have objectively, neutrally, accurately and thoroughly reported both sides of this dispute. The bases for the editorial opinions is outlined in the Articles. No reasonable reader of the same can miss them. Moreover, nothing in the editorials suggests they rely on undisclosed defamatory facts, something which the court can verify by its own review of the actual words used (the editorials are attached as parts of Exhibits "A" and "B").

Neutral Reporting

Plaintiffs' Memorandum makes only two arguments on the neutral reporting issue. First, Plaintiffs cite a Utah case and argue that this Court cannot decide a privilege issue on a Rule 12(b)(6) motion to dismiss because privilege is supposedly an affirmative defense that Plaintiffs need not anticipate nor address in their pleadings. Second, Plaintiffs argue that the court cannot grant the renewed motion to dismiss because Defendants have not presented any record evidence (i.e. affidavits) showing that the statements in the Articles are accurate reports of what was said by those involved in this labor dispute. Each argument is addressed below.

First, the neutral reporting protection from defamation claims is unlike the state law privileges at issue in *Zoumadakis v. Uintah Basin Medical Center, Inc.*, 530 Utah Adv. Rep. 28, 2005 UT App. 325 (Utah Ct. App. 2005), the case cited in Plaintiffs' Memorandum. Rather, it is a federal constitutional protection for the press, based on the First Amendment. *See Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120, 122 (2d Cir. 1977), *cert. denied* 434 U.S. 1002 (1977) ("We believe The New York Times cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations . . ."). Other federal district courts have considered and enforced the neutral reporting privilege when it was

raised in a motion to dismiss like the one now before this Court. *See, e.g., Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122-1128 (N.D. Cal. 1981).

The neutral reporting protection is akin to the constitutional requirement that defamation claims against public officials or figures cannot proceed absent pleading and proof of actual malice (i.e. that a statement was published as a known falsity or with reckless disregard of the truth). Heightened rules of pleading apply in such situations and a defamation plaintiff must show that his/her claim does not unconstitutionally impose on First Amendment rights.

Thus, where a plaintiff "challenges conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights required more specific allegations that would otherwise be required." *Barry v. Time, Inc., supra*, 584 F. Supp. at 1121, quoting *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1154 (N.D. Ca. 1983), aff'd on other grounds 732 F. 2d 163 (9th Cir. 1984), and also quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.3d 1076, 1082-83 (9th Cir. 1976), cert. denied 430 U.S. 940 (1977). Accordingly, Plaintiffs' argument that the neutral reporting privilege cannot be considered on a motion to dismiss is without merit.[4]

Finally, Plaintiffs argue that there is no record evidence that the Articles accurately report the charges made in this labor dispute. This argument is not just wrong, it is silly. This lawsuit results from Plaintiffs' contention that statements made about them are not true in substance and

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[4] Plaintiffs' similar argument asking the court not to address the state law privilege issues on a motion to dismiss is not practical, especially when First Amendment rights are at stake. The Defendants plainly have raised the privilege issues and Plaintiffs knew this before amending their Complaint. Those issues can and should be addressed now.

not from any claim that these statements were said one way and then reported inaccurately. The Complaint does not allege that the Articles inaccurately reported either the nature of the dispute or what the participants charged. Nor does Plaintiff present any such evidence of inaccurate reporting in opposing Defendants' renewed motion to dismiss.

More importantly, Plaintiffs have sued just about every participant in this labor dispute. Plaintiffs' Complaint alleges that these various participants (the miners, the unions groups, the union organizers, the labor activists, etc.) have made defamatory statements about them. The Complaint outlines these statements in great detail. Thus, unless Plaintiffs' own allegations are wrong, the "record" for this Court's determination that Defendants have accurately reported on this dispute is the Complaint itself. The court can review the allegations in the Complaint outlining what Plaintiffs claim was said about them (e.g. Complaint at ¶¶ 88-133, 175-182) and compare them to the charges and countercharges reported by Defendants in the Articles.[5] Even a cursory review of the same will show that the Articles have accurately reported the claims made in this labor dispute.

CONCLUSIONS

Defendants will end the extensive briefing of this renewed motion with a few thoughts they started with when filing the original motion to dismiss several months ago.

This case concerns a contentious and very public labor dispute between a coal mine owned by the Kingston family and a number of mine workers who have fought for union representation and better working conditions at the mine. The dispute has generated both local

[5] Moreover, as Plaintiffs' Memorandum notes, on a motion to dismiss the court must accept as true the allegations in the Complaint. The court needs no further record to verify that the Defendants accurately reported the charges and countercharges made in this labor dispute.

and national publicity, as well as widespread criticism of the Kingston family by mine workers, union leaders, and national advocacy groups and criticism of the miners by the mine owners. The dispute has been the subject of extensive proceedings before the NLRB, which has investigated the mine and conducted proceedings relating to claims of unfair labor practices and union representation for mine workers.

The issues raised by this labor dispute are of significant public interest. As verified by the Complaint here, dozens of workers claimed to be illegally fired from the mine, citing widespread exploitation, physical and verbal abuse, unsafe work conditions, violation of child-labor laws, and other unfair labor practices by mine officials. Throughout this bitter dispute, the local news media has provided ongoing coverage of both sides of the debate, attempting to properly inform the citizenry of the significant issues at stake. Often, mine officials and other members of the Kingston family have used this media coverage to articulate their positions and to refute the allegations of the workers. Those statements have been reported along with the public allegations of the mine workers.

The presence of a labor dispute here presents especially compelling arguments for granting this Motion to Dismiss:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, 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.

Linn v. United Plant Guard Workers of Am., 383 U.S. 53, 58 (1966) (citing *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943)).[6] Thus, the federal courts have restricted libel claims in this context.

Specifically, in *Linn*, the United States Supreme Court held that defamation claims made by labor dispute participants are preempted and governed by the National Labor Relations Act ("NLRA") and not actionable in tort. The only exception the Court allowed is when a libel plaintiff proves the statements at issue were published with known falsity or reckless disregard of the truth. *See Linn,* 383 U.S. at 65-66 (relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This restriction was established to prevent "unwarranted intrusion upon free discussion envisioned by the Act [NLRA]" and because the national labor laws favor "uninhibited, robust and wide-open debates in labor disputes . . . ." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974). The press needs similar breathing space to report on the uninhibited, robust and wide-open debates that occur in labor disputes. The court's acceptance of the arguments Defendants have made in favor of dismissal here will give the press that breathing space so important to our constitutional system.

For all these reasons, Defendants respectfully request that the court grant their renewed motion to dismiss.

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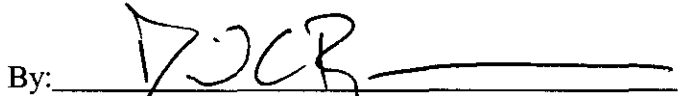
[6] The Tenth Circuit also has recognized these same principles. *See, e.g., Gen. Motors Corp. v. Mendicki*, 367 F.2d 66, 71 n. 3 (10th Cir. 1966).

RESPECTFULLY SUBMITTED this 14 day of October 2005.

PARR WADDOUPS BROWN GEE & LOVELESS

By: 

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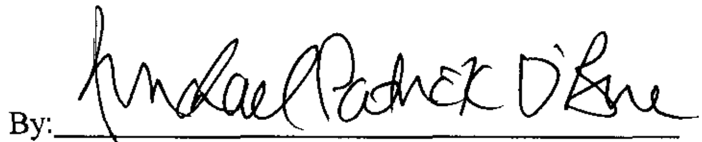
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of October 2005, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS** was served, via first class mail, postage prepaid (unless otherwise noted), on the following:

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