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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

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

Defendants *The Salt Lake Tribune*, Tom Baden, Tim Fitzpatrick, Ron Morris, Melissa Galbraith, Rhina Guidos, Glen Warchol and Tom Wharton (the "*Tribune* Defendants"), as well as *The Deseret Morning News*, John Hughes, Marjorie Cortez, Tiffany Erickson, Elaine Jarvik and Jennifer K. Nii (the "*Morning News*" Defendants) (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 Motion to Dismiss in the above-captioned matter.

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INTRODUCTION

Defendants' Opening Brief details six different legal defects in Plaintiffs' defamation claims against Defendants, two newspapers that have provided ongoing coverage of the contentious labor dispute at the Co-Op Mine. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss (hereafter "Plaintiffs' Memorandum") fails to rescue those claims or to demonstrate to this Court why they should not be dismissed as a matter of law.

First, Defendants' publications are protected by the neutral reportage privilege. Plaintiffs' attempts to cast Defendants as participants in the labor dispute simply because they reported the statements and positions of mine workers is belied by the actual content of Defendants' publications. Given the critical constitutional role of the news media in reporting on issues of social importance, this Court should recognize the neutral reportage privilege and apply it here.

Second, Defendants' publications are protected by Utah's public interest privilege. Plaintiffs' response – that Defendants made their publications with actual malice – is unsupported by any properly-alleged facts in the Amended Complaint and contrary to governing constitutional law.

Third, given the social context in which Defendants' statements were made, those statements do not convey defamatory meaning as a matter of law. This case is similar to other Utah cases involving spirited public debates, caustic rhetoric, and vituperative accusations, where Utah courts have found that words in that context are not likely to be taken at face value, and thus cannot be defamatory. Plaintiffs' Memorandum contains no coherent response to this argument.

Fourth, the statements which Defendants claim are defamatory are constitutionally protected statements of opinion. Aside from Defendants' editorial and op-ed pieces, which are clearly expressions of editorial opinion, the remaining allegedly defamatory statements are simply reports

of the opinions, claims, and positions of the participants in the Co-Op Mine labor dispute. Plaintiffs entirely ignore the factors under Utah law for determining whether a statement is fact or opinion (including, significantly, an examination of the context for such statements), simply asserting that Defendants' statements are statements of fact. Plaintiffs' *ipse dixit* is not a substitute for legal analysis.

Fifth, most, if not all, of Defendants' publications are protected by the official proceedings privilege because they are fair and true reports of proceedings before the NLRB. Plaintiffs' assertions that Defendants' statements do not accurately report on NLRB documents are unavailing in light of the actual content of those documents.

Sixth, and finally, the individual plaintiffs' attempt to recover for statements that are unquestionably directed solely at the corporate defendants is contrary to law. Plaintiffs' reliance in their Memorandum on two century-old cases is unavailing. The claims of the individual plaintiffs should, accordingly, be dismissed.

Resolution of this Motion is of critical importance to the news media. The dispute at the Co-Op Mine is ongoing, and the news media continues to play a constitutionally significant role in reporting on the legitimate issues of public concern involved in the dispute. This sweeping lawsuit, in which Plaintiffs claim they have been "defamed" by virtually everyone that has ever said anything critical about the Co-Op Mine, poses a dangerous risk of chilling that the news media's vigorous and constitutionally-protected reporting of this controversy. Plaintiffs should be held accountable for their attempt to use the coercive risk of litigation expense to impinge upon the news media's reporting of the Co-Op Mine dispute. Defendants should be awarded their reasonable attorneys fees and costs incurred in defending themselves against Plaintiffs' meritless claims.

REPLY ARGUMENT

I. THE ARTICLES IN QUESTION ARE PROTECTED BY THE CONSTITUTIONAL PRIVILEGE OF NEUTRAL REPORTAGE.

Notwithstanding the arguments in Plaintiffs' Memorandum to the contrary, Plaintiffs' defamation claims fail because the Articles are constitutionally privileged as neutral reports of an ongoing public controversy.

Plaintiffs' Memorandum, citing to *Dixson v. Newsweek*, 562 F.2d 626 (10th Cir. 1977), first argues that the neutral reporting privilege has been rejected by the Tenth Circuit Court of Appeals. This is not true. In *Dixson*, the court stated only that *"Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, is not in point." 562 F.2d at 631. However, the court did not reject the concept of the neutral reporting privilege nor refuse to recognize the existence of it. It merely said the privilege did not apply in the case before it because the involved plaintiff was not a public official or public figure. Plaintiffs here do not argue that they are private figures, nor could they successfully deny they are public figures.[1] Thus, the impediment to use of the privilege in the *Dixson* case is missing here.

Plaintiffs' Memorandum also argues that the privilege does not apply here for two other reasons: (1) the workers and union officials involved in this dispute allegedly are not responsible

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[1] Plaintiffs are, at the very least, limited purpose public figures, being involved and/or thrust into the center of this controversy, a major labor dispute resulting in proceedings before the National Labor Relations Board ("NLRB"). In *Madsen v. United Television, Inc.*, 797 P.2d 1083 (Utah 1990), the Utah Supreme Court stated:

> The law recognizes public figures for limited purposes who are sometimes referred to as "vortex public figures" because although they are not pervasive public figures, such as actors and other prominent persons, they have voluntarily or involuntarily been injected into a specific controversy of public interest.

Id. at 1084 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). Thus, despite Plaintiffs' attempts to characterize it as such, the underlying labor dispute here is hardly a private dispute.

persons or organizations, and (2) Defendants allegedly did not report statements of others but, rather, made their own statements. Each of these points is addressed below.

First, although the court in *Edwards* referred to the privilege as protecting "prominent" or "responsible" persons, 556 F.2d at 120, the neutral reportage privilege is not limited to reporting of statements made only by such people. Rather, it applies to all neutral reports of "serious charges made by one participant in an existing public controversy against another participant in that controversy," and the appropriate focus is on the neutrality of the report, not the prominence of those involved in the controversy. *In re United Press Int'l*, 106 B.R. 323, 329, 16 Med. L. Rptr. 2401, 2407 (D.D.C. 1989); *see also, Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122-1128 (N.D. Cal. 1981).

Second, given the context of this case, it is ludicrous for Plaintiffs to contend that the Defendants are the ones making statements here, rather than merely reporting on the statements of others involved in this ongoing labor dispute.[2] Plaintiffs are attempting to recast Defendants as participants in – rather than observers of – this dispute. Yet, this dispute originated with both sides making public charges and countercharges about each other, not with the Defendants making any such statements about these issues. It continued, and continues still, not because of any actions of Defendants, but because Plaintiffs and their opponents disagree over such issues as labor representation, wages, and working conditions at the Co-Op Mine.

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[2] As Defendants noted before, the only articles that may not fit within the neutral reportage privilege are certain editorials and op-ed opinion pieces published by the *Tribune* and the *Morning News*. [*See* Exhibit "A", 12/20/03 (op-ed), 7/10/04 (editorial); Exhibit "B", 12/3/03 (op-ed), 3/27/04 (editorial), 4/26/04 (op-ed), 12/8/04 (editorial).] It is the practice of many newspapers, including the *Tribune* and *Morning News*, to offer periodic editorial and op-ed opinion commentary on newsworthy matters of public concern. In every case, the articles listed above are clearly identified as opinion pieces on a matter of public interest, and thus, for reasons explained in Sections II, III, and IV, *infra*, are privileged statements of editorial opinion that do not convey defamatory meaning and cannot support a defamation claim regardless of whether they are neutral.

The public has a legitimate interest in understanding both sides of this dispute and the significant social issues involved. Thus, the Defendants have reported the many facets of the dispute, including the perspectives of Plaintiffs and the mine workers, in an ongoing fashion. Because this story is evolving, from time-to-time some aspects of it have been reported in a more shorthand manner.[3] But it is clear, looking at the Articles as a whole, that the Defendants are reporting and publishing as observers of the dispute, not participants in it.

This point is further demonstrated by the fact the Articles have neutrally and accurately reported both sides of the issues in the labor dispute, something which a participant or advocate would not do. Plaintiffs' Memorandum conveniently omits any reference in the Articles to comments made by mine officials or Kingston representatives, continuing to give the false impression that the Articles are merely one-sided reports of the mine controversy. As noted in Defendants' Opening Brief, even a cursory review of the actual Articles demonstrates that this is indeed a false impression.[4] Just as Defendants' reporting of the Kingstons' comments are not

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[3] "The contours of the press's right of neutral reportage are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made." *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (emphasis added).

[4] The Articles contain balanced reporting on the labor dispute, either quoting mine officials or noting that they were unavailable for comment. Specifically, the Articles report that: (1) Mine officials claimed that working conditions in the Mine are safe and are regularly inspected by the MSHA, and that Federal Mine Safety Records show that the Co-op Mine's injury incidence rate is lower than the national average for mine injuries. (*Tribune:* 10/12/03; *Morning News:* 10/30/03, 7/7/04, 7/8/04); (2) Mine officials and IAUWU representatives claimed that workers are paid fair and competitive wages, that wages are justified by miners' experience, and that miners have access to benefits and very generous incentives. (*Morning News:* 10/30/03, 7/7/04, 7/8/04): (3) The Co-op Mine denied it had locked out employees, said that the walkout was "illegal," and that any discipline imposed was legitimate. (*Tribune:* 11/30/04, 11/20/04, 9/25/04, 7/10/04, 7/7/04, 7/3/04, 10/12/03; *Morning News:* 5/2/04, 7/4/04); (4) Mine officials and IAUWU representatives said workers are already represented by a valid union, the IAUWU. (*Tribune:* 11/30/04, 10/3/04, 7/7/04, 10/12/03, 9/26/03; *Morning News:* 7/7/04); (5) The NLRB determined IAUWU is a valid labor organization. (*Tribune:* 11/20/04, 7/14/04, 7/3/04; *Morning News:* 11/20/04); (6) Mine officials stated that protests relating to the Mine were a "personal attack and nothing more" and that there was "no substance" to the workers' claims. (*Morning News:* 5/2/04);

(continued...)

Defendants' direct statements about the labor union officials and employees, Defendants' reporting of the comments of the Kingstons' opponents in this labor dispute are not direct statements about Plaintiffs or the Kingstons.

Defendants in this case reported on a public dispute, they did not become a part of it. Because the Articles fall within the ambit of the neutral reportage privilege, Plaintiffs' claims should be dismissed.

II. THE ARTICLES IN QUESTION ARE PROTECTED BY UTAH'S "PUBLIC INTEREST" PRIVILEGE.

As demonstrated in Defendants' Opening Brief, Utah's public interest privilege protects publications concerning public health and safety, the functioning of governmental bodies, or the expenditure of public funds, so long as those publications were not made with malice. In this case, Defendants reported on a situation that continues to impact the health, safety, and rights of hundreds of workers in Utah, as well as ongoing proceedings before the NLRB. Despite Plaintiffs' attempts to characterize this dispute as a purely private matter, the accusations of the Co-Op Mine workers directly concern health and safety conditions at the Mine, the alleged exploitation and abuse of numerous workers, the use of child labor, unlawful working conditions and labor practices, possible human rights violations, and a large-scale strike. There is no question that Defendants' publications involve issues of "public health and safety," as well as issues "with respect to the functioning of

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[4] (...continued)
(7) The Co-op Mine appealed the NLRB ruling, calling it "discriminatory". (*Tribune:* 11/30/04, 11/20/04); (8) The Plaintiffs have filed lawsuits alleging statements made in the Articles are false. (*Tribune:* 10/3/04, 9/25/04); (9) The Co-op Mine was regularly approached for its side of the story but frequently declined comment or did not return phone calls seeking comment. (*Tribune:* 11/30/04, 7/14/04, 7/3/04, 10/31/03; *Morning News:* 1/18/04, 5/2/04, 7/4/04, 11/20/04).

governmental bodies," namely, the NLRB. *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 978 (Utah 1981). The privilege, therefore, applies.

Plaintiffs make three arguments in response to this privilege, none of which has merit. First, Plaintiffs argue that the privilege does not apply because Defendants' publications were not a "fair and true report" of official proceedings. (Plaintiffs' Memorandum at 7-8.) That argument confuses two different privileges contained in Section 45-2-3(5) – the official proceedings privilege (which is addressed in Section V, *infra*), and the public interest privilege. As noted in Defendants' Opening Brief, the legislature's use of the disjunctive "or" makes clear the statute is intended to protect both the reporting of statements made at a public meeting and the publication of matters for the "public benefit," and the statute has been so interpreted by the Utah Supreme Court. *See* Utah Code Ann. § 45-2-3(5); *Seegmiller,* 626 P.2d at 978; *Cox v. Hatch,* 761 P.2d 556, 559 n. 3 (Utah 1988) (recognizing public interest qualified privilege).

Second, Plaintiffs argue that this case does not involve an issue of public interest. As illustrated above, that argument is not credible. The Utah Supreme Court has defined the scope of the privilege to include issues concerning public health and safety, as well as the functioning of governmental agencies. The Co-Op Mine dispute directly implicates both issues. Plaintiffs' assertion that the privilege only applies to political disputes is clearly incorrect; the statute contains no such limiting language, nor has any Utah court restricted the privilege to such an artificially narrow context.

Plaintiffs further argue that their alleged exploitation and abuse of hundreds of Utah workers is analogous to animal cruelty, which was found insufficient to trigger the privilege in *Seegmiller. Id.* at 979. This is, to say the least, an offensive analogy. The workers at the Co-Op Mine are not

animals, and their abuse, exploitation, and workplace safety raise significantly greater public concerns. Moreover, Plaintiffs' argument is not supported by the actual holding of *Seegmiller,* which found that the animal cruelty allegations at issue there did not trigger the privilege because: (1) they did not implicate any governmental proceedings; and (2) there was no claim "that cruelty to animals was a problem having widespread dimensions beyond the single instance in this case." *Id.* In this case, in contrast, the Co-Op Mine dispute involves official proceedings before the NLRB and possible violations of the National Labor Relations Act. It also involves allegations of a widespread pattern of abuse and exploitation at the Mine – far from the "single instance" of animal cruelty at issue in *Seegmiller.*

Third, Plaintiffs argue that they have sufficiently alleged actual (or constitutional) malice in their Amended Complaint with regard to Defendants statements about the NLRB settlement. As a threshold matter, it is critical to note what Plaintiffs do *not* address, and thereby concede. Plaintiffs do *not* contend that Defendants' publications were made with common law malice (*i.e.,* ill will or spite). Indeed, the Amended Complaint contains no "facts which indicate actual malice in that the utterances were made from spite, ill will or hatred toward [Plaintiffs.]" *Combes v. Montgomery Ward & Co.,* 228 P.2d 272, 277 (Utah 1951). As a result, for common law malice, "there is no issue to be submitted to the jury." *Id.* Plaintiffs also do *not* contend that any of Defendants' statements concerning issues *other than* the content of the NLRB settlement were published with actual malice. Plaintiffs thereby concede that all of Defendants' statements published prior to July 1, 2004, when the settlement was issued, and all of their subsequent statements that did not report on the content of the settlement, are privileged.

What is left is a very narrow subset of statements, all reporting on the content of the NLRB settlement, that Plaintiffs contend were published with actual malice. And even with respect to those statements, Plaintiffs' allegations are insufficient to overcome the privilege.

As noted in Defendants' Opening Brief, whether the facts as pled support a showing of actual malice is a question of law for the Court. *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992). "The standard of actual malice is a daunting one." *Howard v. Antilla,* 294 F.3d 244, 252 (1st Cir. 2002) (citation omitted). Plaintiffs must show, by "clear and convincing" evidence, that the defendant (1) published the statement with a "high degree of awareness of . . . probable falsity," or (2) "in fact entertained serious doubts as to the truth of his publication." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). "Mere negligence does not suffice." *Masson v. The New Yorker Magazine,* 501 U.S. 496, 510 (1991). Plaintiffs' proof must be "strong, positive and free from doubt . . ., full, clear and decisive." *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 175 (Mass. 1975).

The Amended Complaint contains no factual allegations that, if proven true, would meet this test. Indeed, the only mention of actual malice is in paragraph 131, which simply parrots the legal standard. That type of conclusory legal assertion is insufficient to withstand dismissal. *See Combes,* 228 P.2d at 277; *Karacand v. Edwards,* 53 F. Supp. 2d 1236, 1241 (D. Utah 1999) (on a motion to dismiss, although well-pleaded facts are taken as true, legal conclusions and unsupported assertions are insufficient to preclude dismissal); *Caprin v. Simon Transp. Servs.*, 112 F. Supp. 2d 1251, 1255 (D. Utah 2000) (same).

In their Opposition Memorandum, Plaintiffs' only assertion of actual malice is their speculation that Defendants might have seen a copy of the NLRB settlement, and therefore should have known that their statements about that settlement were inaccurate. There are no allegations in the Amended Complaint that support this assertion, but it is legally irrelevant in any event. Contrary to Plaintiffs' assumptions, the actual malice standard is not an objective test as to whether Defendants "should have known" that their interpretation of the NLRB settlement was inaccurate. Rather, actual malice "rests *entirely* on an evaluation of [the author's] state of mind when he wrote his initial report." *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 494 (1984) (emphasis added). "This inquiry is 'a *subjective* one – there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity.'" *Revell v. Hoffman,* 309 F.3d 1228, 1233 (10th Cir. 2002) (citations omitted; emphasis in original). "[T]he Supreme Court has made clear that "the mere failure to investigate cannot establish reckless disregard for the truth." *Id.* (quoting *Gertz v. Welch*, 418 U.S. 323, 332 (1974)).

As the Supreme Court has unequivocally held, "[our] cases are clear that reckless conduct is not measured by what a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication." *St Amant,* 390 U.S. at 731 (emphasis added); *see also Revell,* 309 F.3d at 1233 (rejecting claim that publisher should have known falsity, since "actual malice is a subjective inquiry"). If a plaintiff fails to allege any facts "concerning defendant's subjective state of mind," there can be no "concrete evidence from which a reasonable juror could return a verdict in his favor." *Revell,* 309 F.3d at 1233 (affirming summary judgment on actual malice issue) (citation omitted).

Plaintiffs' assertion that Defendants should have known that their statements were inaccurate based on the content of the NLRB settlement, even if true, does not establish any facts regarding Defendants' actual, subjective state of mind. The assertion is therefore insufficient to support a finding of actual malice.

Moreover, the NLRB settlement is a complex legal document subject to varying interpretations. "[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." *Moldea v. New York Times, Co.,* 22 F.3d 310, 315 (D.C. Cir. 1991). As the Supreme Court has explained, where an event or document lends itself to "a number of possible rational interpretations," an author's "deliberate choice of [one] . . . such interpretation, though arguably reflecting a misconception, [is] not enough to create a jury issue of 'malice' under *New York Times.*" *Time, Inc. v. Pape,* 401 U.S. 279, 289-90 (1971).[5]

Plaintiffs also concede that Defendants made multiple attempts to interview them for the published articles, often quoting Plaintiffs' side of the story. Such actions by Defendants directly refute an inference of actual malice. *See Newton v. Nat'l Broad. Co., Inc.,* 930 F.2d 662, 686 (9th Cir. 1990) (repeated attempts to interview plaintiff dispel accusation of actual malice and purposeful avoidance of the truth).

Applying the legal requirements for actual malice, it is clear that there are no facts in the Amended Complaint that could, even if proven true, meet that standard. Plaintiffs' conclusory

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[5] As Defendants similarly illustrated in their Opening Brief, a defamation claim cannot be predicated on statements of legal interpretation by laypersons, because those statements "are opinion statements, and not statements of fact[.]" *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.,* 173 F.3d 725, 731-32 (9th Cir. 1999). Plaintiff fail to respond in any way to this argument. As non-verifiable statements of legal interpretation, there can be no falsity, and thus no knowledge of falsity, and, thus, no actual malice. *See also Rodriguez v. Panayiotou,* 314 F.3d 979, 986 (9th Cir. 2002); *Dial-A-Car, Inc. v. Trans., Inc.,* 884 F. Supp. 584, 592 (D.D.C. 1995).

assertions aside, they have failed to create a triable issue of actual malice, and thus failed to overcome application of the public interest privilege. Their claims should accordingly be dismissed.

III. IN THE CONTEXT OF THE CO-OP MINE LABOR DISPUTE, THE ALLEGED DEFAMATORY STATEMENTS DO NOT CONVEY DEFAMATORY MEANING AS A MATTER OF LAW.

Perhaps the clearest basis on which Plaintiffs' claims should be dismissed is the failure to allege statements that, *taken in context*, convey defamatory meaning. "Whether a statement is capable of sustaining a defamatory meaning is a question of law[.]" *West v. Thomson Newspapers,* 872 P.2d 999, 1008 (Utah 1994).

In their Opening Brief, Defendants explained at length how the defamatory meaning inquiry is a *context-based* determination, requiring an evaluation of the circumstances in which the publications were made. Words that would be defamatory in one context may convey no defamatory meaning in another, where the reader is "not apt to take them at face value." *Mast v. Overson,* 971 P.2d 928, 933 (Utah Ct. App. 1998), *cert. denied,* 982 P.2d 88 (Utah 1999). In this case, where statements were made in the course of a contentious labor dispute – a context that is "frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions" – the statements did not convey defamatory meaning as a matter of law. *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58 (1966).

Plaintiffs' Memorandum contains no coherent response to this argument. Indeed, Plaintiffs' only attempt to respond is the assertion that this Court should look at the words that were used in the articles, and that those words, *ipse dixit,* "are certainly capable of a defamatory meaning." (Plaintiffs' Memorandum at 10.) Plaintiffs' reasoning on this point is exactly backwards. It is not

the words that are used, but rather the context in which they are uttered, that primarily determines defamatory meaning. *See, e.g., West,* 872 P.2d at 1009; *Mast,* 971 P.2d at 931-32.

Labor disputes are characterized by statements that, in some other context,"might well be deemed actionable per se[.]" *Linn,* 383 U.S. at 58. Just like in *Mast,* which involved a heated debate over the development of a golf course, "this dispute grows out of spirited public debate on an issue of public interest. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Mast,* 971 P.2d at 931 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964)). "[S]tatements made in the course of such debate do not become compensable merely because they "include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.*

Plaintiffs' one-sentence attempt to distinguish *Mast* because it involved a "political debate" makes no sense. The question is not whether the "spirited public debate" involves politics; it is whether the context of that debate informs the reader that statements made therein are likely to be hyperbolic, exaggerated, and contentious. In that context, which unquestionably describes a labor dispute just as aptly as a political debate, the audience is "not apt to take [the statements] at face value," and, therefore, they cannot be defamatory. *Mast,* 971 P.2d at 932.

Plaintiffs' sole defense on defamatory meaning is, therefore, legally erroneous. Their failure to address the overall context in which Defendants' statements were made is fatal to their claims.

IV. THE STATEMENTS COMPLAINED OF BY PLAINTIFFS ARE CONSTITUTIONALLY PROTECTED STATEMENTS OF OPINION.

As demonstrated in the Defendants' Opening Brief, many of the news articles, opinion columns, and editorials upon which Plaintiffs base their defamation claim are protected expressions

of opinion, not statements of fact. As such, these publications are not actionable as a matter of common law and state constitutional law. *See Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, 224 (Utah 1976) (expression of editorial opinion not actionable under common law); *West v. Thomson Newspapers*, 872 P.2d 999, 1015 (expressions of opinion are protected under Article 1 sections 1 and 15 of Utah Constitution). Although Plaintiffs concede that expressions of opinion are not actionable, they assert that the more limited number of allegedly defamatory statements upon which they now rely are statements of fact, not opinion. In making this argument, however, Plaintiffs ignore both the actual language of the news articles, opinion columns, and editorials they claim are defamatory, the context in which the allegedly defamatory statements appear, and the factors to be considered under Utah law for determining whether a statement is fact or opinion.

Illustrative of these defects is Plaintiffs' assertion that they were defamed by statements published in two opinion columns – one written by *Tribune* feature columnist Tom Wharton and the other by *Morning News* editorial writer Marjorie Cortez. In Wharton's column, published a few days before Christmas 2003, Wharton infuses his own observations and commentary on the labor dispute at the Co-Op Mine with comments from union organizer Bill Estrada and quotations from legendary American folk singer and labor supporter Woody Guthrie. *See* "Striking Latino miners have little to celebrate this year," *Salt Lake Tribune* (Dec. 20, 2003) at B1. In Cortez's opinion column, published on March 27, 2004, Cortez expresses her opinion that the wages paid to the Co-Op miners ($5.75 an hour for one miner) "is an outrage," that the miners were "horribly exploited," and that "[s]ome in the labor movement go so far as to call it a human rights violation." *See* "Kingstons' treatment of miners is appalling," *Deseret Morning News* (March 27, 2004) at A15.

Plaintiffs claim that the Wharton column "falsely describes CWM as 'part of an unfortunate American industry habit of exploiting immigrant workers'" and that Cortez' statements concerning exploitation of miners and "outrage" at their wages constitutes defamation. (Plaintiffs' Memorandum at 1, 3.) Plaintiffs' reliance on these statements (and multiple similar statements appearing in other *Tribune* and *Morning News* opinion columns, editorials, and articles) to support their defamation claim is untenable as a matter of law for at least two basic reasons.[6]

First, Plaintiffs wholly ignore the general and specific context in which these statements appear. Viewed in context, as they must, the statements clearly signal that they are expressions of opinion. In the general context of a newspaper feature column such as Wharton's, readers expect opinion, commentary and a viewpoint from Wharton. Similarly, Cortez' column appeared, as it regularly does, on the "op-ed" (opposite editorial) page of the *Morning News*, which is clearly labeled as commentary and where readers expect to find vigorous opinion on issues of public concern.[7] Moreover, in light of the specific factual context in which the statements appear – opinion columns about the contentious labor dispute at the Co-Op Mine – Wharton's opinion that the Latino miners are "part of the unfortunate American industry habit of exploiting immigrant workers" and Cortez' opinion that miners are being "horribly exploited" and their wages an "outrage" are understood by readers to be subjective expressions of opinion, not objective statements of fact.

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[6] In addition to the Wharton and Cortez opinion columns, Plaintiffs also allege they were defamed by a *Tribune* editorial entitled "Victory for miners" published July 10, 2004 (incorrectly identified by Plaintiffs as a news article) and a *Morning News* editorial entitled "Victory is first step for miners" published July 8, 2004 (also incorrectly identified by Plaintiffs as a news article). As with the others, these publications are non-actionable expressions of opinion and cannot sustain a claim for defamation.

[7] The presumption that such statements are opinion is even stronger when they are published in an editorial context by a newspaper. *See West,* 872 P.2d at 1020 ("It is well understood that editorial writers and commentators frequently resort to the type of caustic and bombast traditionally used in editorial writing to stimulate public reaction.") (quotation omitted).

Similarly, with respect to the non-editorial news articles complained of by Plaintiffs, the allegedly defamatory statements contained in those articles are expressions of opinion by participants in the labor dispute. The articles clearly convey to the reader that the statements are made in the course of a labor *dispute*, with arguments on both sides. Indeed, as noted above, the Kingstons' position is quoted in various articles, and the articles frequently indicate attempts to contact the Kingstons for comment. Any reasonable reader of the articles would immediately know that such statements – made by self-interested participants in a contentious debate – were statements of opinion, not fact.

Second, Plaintiffs' do not even attempt to apply the factors set forth by the Utah Supreme Court in *West* to determine whether these or the other allegedly defamatory statements upon which they rely are fact or opinion. *See West*, 872 P.2d at 1018. Three of those factors – whether the statement is capable of objective verification, the full context of the statement, and the broader setting in which the statement appears – are dispositive with respect to the statements claimed by Plaintiffs to be defamatory. Statements that the Co-Op miners are being exploited, that their treatment is appalling, and that their wages are an "outrage" are not susceptible to being objectively verified as true or false. Conduct that is exploitative and outrageous to some may be shrewd and merely aggressive to others. Those are inherently subjective terms, incapable of being proven true or false. Furthermore, as noted above, the specific context and broader setting in which these statements appear – in opinion columns and news articles regarding a contentious labor dispute – clearly signal that the statements are spirited expressions of opinion on an issue of public concern, not objectively verifiable statements of fact.

Plaintiffs have every right to disagree with the opinions expressed by the mine workers, labor organizers, social activists, *Tribune* and *Morning News* columnists, and others who have voiced strong opinions concerning this labor dispute. In this country, Plaintiffs may give voice to that disagreement by exercising their own First Amendment right to speak, to comment, and to publish. What Plaintiffs may not do, however, is maintain a claim for defamation because they believe the opinions expressed by others are wrong-headed, unfair, or false. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Plaintiffs' claims based upon the newspapers' constitutionally protected expressions of opinion must be dismissed.

V. SOME OF THE STATEMENTS AT ISSUE ARE PRIVILEGED REPORTS OF OFFICIAL GOVERNMENTAL PROCEEDINGS.

Some of the statements at issue in the Articles are independently privileged as reports of governmental proceedings and thus not actionable as defamation. law. The Articles accurately reflect the NLRB settlement and rulings, as well as the statements and allegations made in the course of those proceedings.

The Articles need not be exactly and precisely true to gain the protection of the official reports privilege, they need merely be substantially accurate.[8] Such is the case here.

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[8] In defamation claims, "The defense of truth is sufficiently established if the defamatory charge is true in substance. Insignificant inaccuracies of expression do not defeat the defense of truth." *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57-58 (Utah 1991); *Auto West, Inc. v. Boggs*, 678 P.2d 286, 290-91 (Utah 1984) (same); *Crellin v. Thomas*, 247 P.2d 264, 266 (Utah 1952) (same); *Mark v. Seattle Times*, 635 P.2d 1081, 1092 (Wash. 1981), *cert. denied* 457 U.S. 1124 (1982) (Defamation defendant need only show that gist or sting of story is true); *Read v. Phoenix Newspapers, Inc.*, 819 P.2d 939, 941 (Ariz. 1991) ("Slight inaccuracies will not prevent a statement from being true in substance, as long as the 'gist' or 'sting' of the publication is justified."); Prosser & Keeton, Torts, § 116 at 842 (5th ed. 1984) (same); Restatement (Second) of Torts, § 581A, comment f, 1977 ("Slight inaccuracies of expression are immaterial provided

(continued...)

Plaintiffs continue to claim that certain statements regarding forced reinstatement, backpay, and illegal firings do not accurately reflect the NLRB proceedings. Plaintiffs claim they voluntarily gave unilateral offers of reemployment, rather than being ordered to reinstate workers. Plaintiffs appear to suggest their actions all were done without any pressure or involvement from the NLRB. However, as already noted, the NLRB settlement documents tell an entirely different story.

They indicate that: (1) unfair labor practice charges were filed with the NLRB; (2) a negotiated settlement was reached in the face of, and in lieu of litigating, such charges and the NLRB was actively involved in the process; (3) the settlement provides for reinstatement and backpay for the Co-op Mine employees, as well as the removal from employee files of certain disciplinary documents the Co-op Mine had issued; (4) the NLRB is reviewing, approving and monitoring enforcement of the settlement; (5) the NLRB will be determining the amount of backpay due to the Co-op Mines employees If the parties cannot agree on an amount; and (6) the Co-op Mine had to post notices restating its recognition of the employees' federal rights to engage in concerted activity and union organizing activities.

Plaintiffs would have this court believe that out of the goodness of their corporate hearts, and with no pressure at all from government regulators breathing down their necks, Plaintiffs voluntarily and generously gave reinstatement offers to former employees they would have nothing to do with prior to the time of the NLRB's involvement. Such an argument strains credibility.

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[8] (...continued)
that the charge is true in substance."). Courts use the same concept in determining if a published report is accurate for purposes of the official reports privilege. *See, e.g., Williams v. WCAU-TV*, 555 F. Supp. 198, 202-03 (E.D. Pa. 1983); *Green Acres Trust v. London*, 688 P.2d 617, 626-27 (Ariz. 1984); *Steer v. Lexleon, Inc.*, 472 A.2d 1021, 1025-26 (Md. App. 1984); *Pearce v. Courier Journal*, 683 S.W. 2d 633, 635 (Kent. Ct. App. 1986).

The Articles are substantially accurate and accurately report the assertions made in connection with the NLRB proceedings, as well as the resulting NLRB settlement and rulings. Thus, the Articles are privileged.

VI. THE CLAIMS OF THE INDIVIDUAL PLAINTIFFS SHOULD BE DISMISSED BECAUSE THE ARTICLES ARE NOT "OF AND CONCERNING" THE INDIVIDUAL PLAINTIFFS.

Plaintiffs' Memorandum, relying on two century-old cases, fails to demonstrate that the alleged defamatory statements are of and concerning the Individual Plaintiffs [9] as opposed to the Corporate Plaintiffs.[10] Therefore, all such claims by the Individual Plaintiffs should be dismissed.

Plaintiffs' Memorandum first quotes *Lynch v. Standard Pub. Co.*, 170 P. 770, 773 (Utah 1918) as follows:

> [w]here words defamatory in their character seem to apply to a particular class of individuals, and are not specifically defamatory of any particular member of the class, an action can be maintained by any individual member who may be able to show the words referred to himself.

By its own terms, *Lynch* does not apply here.

First, the words at issue here do not apply to a "particular class of individuals." There is no "class" of individuals discussed at all in the Articles. Plaintiffs do not point to any language in the Articles that can be construed as referring to a class of persons. Instead, the Articles refer only to two specific corporate entities (i.e., corporate "persons") – the Co-op Mine and IAUWU. Second, the *Lynch* court says its rule applies only when the words at issue are not defamatory of "particular"

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[9] The phrase "Individual Plaintiffs" means the officials of IAUWU: Ronald Mattingly, Vicki Mattingly, Nevin Pratt, Dana Jenkins, Warren Pratt and F. Mark Hansen, as well as officials of the Co-op Mine: Earl Stoddard, Charles Reynolds, Dorothy Sanders, Wendell Owen, Ken Defa, Rodney Anderson, Robert Brown, Cyril Jackson, Jared Stephens, Freddy Stoddard, Jim Stoddard, Shain Stoddard, Ethan Tucker, Randy Defa, Kevin Peterson, Elden Stephens and Jose Ortega.

[10] The phrase "Corporate Plaintiffs" means IAUWU and/or the Co-op Mine.

persons. In this case, however, the words do refer (and allegedly defame) particular persons-- the Corporate Plaintiffs both of whom are corporate "persons." Finally, because the allegedly defamatory statements do not refer to a class or group but rather refer specifically and only to the Corporate Plaintiffs by name, none of the Individual Plaintiffs can possibly show that there is a reference to them as individuals, which also is required for the *Lynch* language quoted above to apply. Thus, *Lynch* does not apply here.

Nor does any so-called rule from the equally ancient case of *Fenstermaker v. Tribune Pub. Co.*, 43 P. 112 (Utah Terr. 1895), apply here. Plaintiffs' claim *Fenstermaker* establishes this rule:

> [w]here the words, by any reasonable application, impute a charge to several individuals, under some general description or general name, either one coming within such description may successfully maintain an action, if the jury determine that the words have a personal application to the person bringing suit.

Id. at 114. Like *Lynch*, however, the language from *Fenstermaker* simply does not apply to this case. The Articles do not impute any charges to "several individuals, under some general description or general name." Instead, the Articles refer only and specifically to the Corporate Plaintiffs – the Co-op Mine and IAUWU.

In short, the cases relied on by Plaintiffs really say only that defamatory words that refer to a class of people can potentially be the basis of a lawsuit by a member of that class. This case, however, does not involve words directed at a class of people. Moreover, Plaintiffs provide no authority to indicate Utah courts would reject the holdings of the (more current) cases cited by Defendants, one involving the United States Supreme Court, that an alleged defamation of a business corporation does not refer to or concern an officer or employee of that corporation.[11]

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[11] *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 79-82 (1966) (article implied that Baer, a county administrator, along (continued...)

Accordingly, because the allegedly defamatory statements outlined in the Amended Complaint concern only the Corporate Plaintiffs, all the claims of the Individual Plaintiffs fail and should be dismissed.

VII. THE COURT SHOULD AWARD DEFENDANTS THEIR COSTS AND ATTORNEYS FEES INCURRED IN THIS ACTION.

Finally, Plaintiffs argue that this Court should not award Defendants their attorneys fees and costs because Plaintiffs' claims are meritorious and asserted in good faith. The Court is entitled to make its own determination in that regard. Defendants submit that this lawsuit is only part of a pattern of harassment and intimidation by the Kingstons against the news media in an attempt to use the coercive expense of litigation to chill commentary critical of the Kingstons and their business enterprises – a risk that is particularly acute given that the Co-Op Mine controversy is ongoing and continues to generate news coverage. The breathtaking scope of this case alone, and the myriad legal defects in Plaintiffs' claims, leave little doubt about Plaintiffs' transparent purposes. If the right to free and unfettered dialogue under the First Amendment is to have any meaning, Plaintiffs must be

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[11] (...continued)
with the county supervisors, had mismanaged a public facility. The Court found the article implied only a collective management failure, not an individual failure by Baer. Because Baer was not individually implicated, the court held that dismissal of his claims was constitutionally mandated); *United States Steel Corp. v. Darby*, 516 F.2d 961, 964 n.4 (5th Cir. 1975) (applying Alabama law) (controlling shareholder cannot state claim for defamatory statements about controlled corporation); *McBride v. Crowell-Collier Publ'g Co.*, 196 F.2d 187, 189 (5th Cir. 1952) (applying Florida law) (stockholder cannot sue for libel of corporation); *McMillen v. Arthritis Found.*, 432 F. Supp. 430, 432 (S.D.N.Y. 1977) (chair of board and principal shareholder cannot sue for article critical of his corporation); *Page v. Los Angeles Times*, No. B162176, 2004 WL 847527 at *6, 32 Media L. Rep. 1783 (Cal Ct. App. 2nd Dist. April 21, 2004), *reh'g denied* (May 18, 2004), *review denied* (August 11, 2004) (plaintiff "has not cited nor have we found a case in any jurisdiction which allowed a corporate officer to maintain a defamation action based on a defamatory statement about a corporation or its management.") (emphasis added); *Elm Med. Lab., Inc. v. RKO Gen., Inc.* 532 N.E.2d 675, 679-80 (Mass. 1989) (corporate officer who is not personally defamed has no right to recover damages for defamation published about corporation). Moreover, "[a]n organization is not defamed by words directed at its officers, stockholders, or employees, nor are they defamed by words directed at it, unless the words are such, in the light of the connection between them, as to defame both." PROSSER AND KEETON ON TORTS, pp. 779-80 (5th ed. 1984).

held accountable for the substantial expense they have inflicted on Defendants for doing nothing more than reporting on and engaging in an important public debate.

In their Opening Brief, Defendants referred the Court to Utah's Anti-SLAPP Statute, Utah Code Ann. §§ 78-58-101, *et seq.*, as an example of Utah's public policy against retaliatory lawsuits based on First Amendment rights, and the critical need to deter such lawsuits by shifting the costs to the plaintiffs who bring meritless suits. By facilitating public debate about an ongoing labor dispute and NLRB proceedings, Defendants were exercising their First Amendment rights to affect those decisions through a more informed citizenry. In doing so, Defendants were fulfilling an important constitutional function specifically recognized by the Utah Legislature in Utah's Anti-SLAPP Statute.

Plaintiffs argue that the Anti-SLAPP Statute does not apply here because the NLRB is an "independent agency," not part of the legislative or executive branches of government. As a threshold matter, Plaintiffs' assertion is incorrect. The NLRB was created by an act of Congress to administer the National Labor Relations Act, and its powers are directly delegated from the Legislature. *See* 29 U.S.C. § 153. It is, in all relevant respects, an extension of the legislative branch, and the same policy considerations under the Anti-SLAPP Statute apply to its proceedings.

Ultimately, however, the technical language of the Anti-SLAPP Statute is not relevant here. Plaintiffs concede that this Court has inherent powers to impose whatever sanctions is deems appropriate to deter meritless litigation and abuse of the judicial process, including attorneys fees and costs. *See, e.g., Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991); *Agee v. Paramount Communications, Inc.,* 114 F.3d 395, 398 (2d Cir. 1997); *Exhibitors Poster Exch., Inc. v. Nat'l*

Screen Serv. Corp., 78 F.R.D. 192, 194 (E.D. La. 1978). The Anti-SLAPP Statute merely emphasizes that such an award would be line with Utah's public policy.

"[I]t is in the public interest to encourage continued participation in matters of public significance, and [this] participation should not be chilled through abuse of the judicial process." Cal. Code Civ. Proc. § 425.16(a). Upon the dismissal of their meritless claims, Plaintiffs should be held accountable for the needless expense they have imposed on Defendants in this case.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that their Motion to Dismiss be granted, and that Plaintiffs' claims against them be dismissed with prejudice and on the merits.

RESPECTFULLY SUBMITTED this 21st day of March 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of March 2005, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was served, via U.S. Mail, postage prepaid, on the following:

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