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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, C. W. MINING COMPANY, *et al.* Plaintiffs, vs. UNITED MINE WORKERS OF AMERICA *et al.*, Defendants.	**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF THE SALT LAKE TRIBUNE, THE DESERET MORNING NEWS, *et al.*** RESPONSE DUE BY PWBG&L MARCH 21, 2005 Civil No. 2:04CV00901 Judge Dee Benson

Plaintiffs International Association of United Workers Union (IAUWU), C. W. Mining Company (CWM) *et al.* respectfully submit this memorandum in opposition to the Motion to Dismiss filed by the Salt Lake Tribune, the Deseret Morning News, *et al.* (Defendants).

STATEMENT OF FACTS

Defendants have not offered any evidence to controvert the allegations of the Amended Complaint (the Complaint). Therefore, the following allegations, and all reasonable inferences from those allegations, must be taken as true for purposes of this motion. Plaintiffs set forth only those publications where Defendants made affirmative representations of their own.

DEFAMATIONS PUBLISHED BY THE *SALT LAKE TRIBUNE*

1. The *Salt Lake Tribune* published the following defamations [Complaint ¶ 83]:

e. In a December 20, 2003 article entitled "Striking Latino miners have little to celebrate this year," Wharton falsely described CWM as "part of an unfortunate American industry habit of exploiting immigrant workers."

f. In a May 5, 2004 article entitled "A show of support: Utah's Catholic leader speaks out, offers prayers for striking miners," Guidos said "For more than seven months, the workers have been locked out of their mining jobs at CW Mining Co." Guido also said the workers have been asking for their jobs back "with the right to organize a union," which amounted to a false assertion that CWM's workers not only had not exercised their right to form a union, but that CWM had tried to prevent its workers from organizing a union.

g. In a July 3, 2004 article entitled "Miners win back their jobs," Warchol and Guidos said that CWM workers "were fired and locked out" of their jobs at CWM, and that Estrada "was fired for union-organizing activity."

h. In a July 7, 2004 article entitled "Miners march back to work after settlement, armed with a settlement," Warchol said 49 coal miners "climbed the canyon to demand their jobs back under a federal settlement," falsely implying the workers (actually no more than 30 in number) were demanding their jobs, rather than merely accepting a unilateral offer of re-employment by CWM. Warhol said the workers "also won ... back pay."

I. In a July 10, 2004 article entitled "Victory for miners" the *Salt Lake Tribune* said, "The miners won the right to return to their jobs, [and] get back pay ..." The *Tribune* also said: "For the miners and UMWA, it was a glimpse into the past, where "Historically, immigrant workers were easier for employers to exploit. Today, companies can threaten to turn noncompliant workers over to immigration authorities. ... History, it seems, is repeating itself in Utah's coal country."

j. In a July 14, 2004 article entitled "Workers return to jobs at Huntington mine," Guidos said "the workers were allowed to return to work after being fired.

k. In a September 25, 2004 article entitled "Kingstons' mine sues over strike," Manson said CWM claims it fired one worker who was talking up the UMWA. [CWM actually gave Estrada a three day suspension with intent to fire for causes having nothing to do with UMWA.]

m. In a November 20, 2004 article entitled " Union vote to exclude Kingston relatives," Oberbeck said, "Late last year, several dozen coal miners, mostly Latinos, were fired and locked out of [CWM] after they protested poor working conditions, low salaries and the lack of benefits. ... [T]he NLRB in July determined the miners were entitled to reinstatement to their jobs ..."

n. In a November 24, 2004 article entitled "Union vote to exclude Kingston relatives," Oberbeck said, "Late last year, several dozen coal miners ... were fired and locked out of [CWM] after they protested poor working conditions, low salaries and the lack of benefits. ... [T]he NLRB in July determined the miners were entitled to reinstatement to their jobs."

o. In a November 29, 2004 article entitled "Miners allege union busting," Warchol said the NLRB determined miners (who had walked off their jobs in 2003) were entitled to reinstatement to their jobs and, possibly, back pay.

DEFAMATIONS PUBLISHED BY THE *DESERET MORNING NEWS*:

The *Deseret Morning News* published the following defamations [Complaint ¶ 85]:

c. In a January 18, 2004 article entitled "Kingstons exploitative, protesters say," Jarvik said, "The miners [were] fired last September after they complained about what they said were unsafe conditions ...", and that Estrada "was among about 75 workers who staged a walkout at the Co-op Mine in Huntington and were later fired" because CWM "did not want the miners to unionize."

d. In a March 23, 2004 article entitled "Kingstons' treatment of miners is appalling " Cortez said the workers complaints about unsafe working conditions and a move to organize a union cost them their jobs. Cortez also said the workers "want a union to represent their interests," meaning IAUWU did not represent the interests of its bargaining unit. Cortez also said "The wages paid these men is an outrage. Some in the labor movement go so far to call it a human rights violation. At a minimum, these men have been horribly exploited."

h. In a July 4, 2004 article entitled "Miners plan to return to their jobs," Tiffany Erickson said, "Striking miners in central Utah are now making plans to return to their jobs after being fired and shut out of a polygamous clan-owned coal mine. ... On Thursday ... [NLRB] ordered that their jobs be reinstated ... [UMWA] received a draft settlement from the board that orders C. W. Mining Co. to reinstate all miners who were illegally fired. Last September, 75 coal miners were fired from their jobs at the Co-op mine owned by C. W. Mining in Emery County. ... "The labor board's decision also includes a back pay order."

I. In a July 7, 2004 article entitled "Co-op miners say battle has just begun," Nii said, "Ana Maria Sanchez had only worked at the mine for a month when she was fired for aligning with the pro-unionizers."

j. A July 8, 2004 editorial article entitled "Victory is first step for miners" said: "The miners ... were fired from their jobs last fall for attempting to organize a union to address poor pay and mine safety issues. The National Labor Relations Board has said the mine owners ... fired the miners illegally. The NLRB said the miners should be reinstated ... The NLRB validated the miners' contention that they were fired illegally ... "

The following allegations must also be taken as true for purposes of this motion.

3. Defendants' statements as described above were false. [Complaint ¶ 130]

4. Defendants' statements as described above were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity. [Complaint ¶ 131]

5. Defendants' statements as described above were made with malice. [Complaint ¶ 132]

6. Defendants' statements imputing wrongful conduct to CWM and otherwise impugning CWM, were directed against, reasonably related to, applied to, had a personal application to, and were of and concerning CWM's directors, officers, managers and supervisors named as Plaintiffs herein. [Complaint ¶ 133]

7. Defendants' statements imputing wrongful conduct to IAUWU, and impugning the legitimacy of IAUWU and the independence of its officers, referred to, were directed against, reasonably related to, applied to, had a personal application to, and were of and concerning IAUWU's officers named as Plaintiffs herein. [Complaint ¶ 134]

8. Defendants' statements were defamatory. To the extent they imputed criminal conduct on the part of Plaintiffs, and/or imputed to Plaintiffs conduct which is incongruous with

the exercise of a lawful business, trade, profession, or office, they were defamatory *per se*. [Complaint ¶ 135]

9. As a direct and proximate result of the foregoing, Plaintiffs have suffered damage to reputation, pecuniary losses and other injuries, which are continuing and ongoing. [Complaint ¶ 138]

ARGUMENT

Plaintiffs' Complaint can be dismissed under Rule 12(b)(6) only if Kingston can prove no set of facts in support of his claims that would entitle him to relief, accepting the allegations of the complaint as true and construing them in the light most favorable to Plaintiffs. Yoder v. Honeywell, Inc., 104 F.3d 1215, 1224 (10th Cir. 1997). *cert. den.* 522 U.S. 812. When the court applies this standard, the court must deny Defendants' motion.

Although the Amended Complaint (the Complaint) is very specific in its allegations of defamatory publications, Defendants's entire argument fails to focus on a single publication made by a single Defendant. That failure alone should justify denial of Defendants' motion. However, to clarify, Plaintiffs have redacted the specific defamatory comments attributable exclusively to Defendants as set forth in Facts 1 and 2 *supra*.

I. DEFENDANTS' PUBLICATIONS ARE NOT PROTECTED BY A "NEUTRAL REPORTAGE" PRIVILEGE.

Defendants invoke a so-called "neutral reportage privilege" without, however, clearly identifying the scope and limitations of the privilege. The Second Circuit articulated the privilege in Edwards v. National Audubon Society, 556 F.2d 113, 120 (2d Cir.). Tucked away in a footnote in six pages of argument, Defendants admit they "have not discovered any Utah or Tenth Circuit cases addressing the neutral reportage privilege." That is because there are no such cases. The State of Utah has not recognized any such privilege. The United States Supreme Court has not recognized any such privilege. The Tenth Circuit has not recognized any such privilege. Neither the District of Utah nor any other district court in the Tenth Circuit has recognized any such

privilege. In fact, the Tenth Circuit appears to have rejected the privilege, at least so far as it might be applied to private persons such as Plaintiffs:

> [T]he republication of false defamatory statements is as much a tort as the original publication. *See Restatement, Second, Torts* §581, p. 231, and *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 9 Cir., 328 F.2d 869, 871. *Edwards v. National Audubon Society, Inc.*, 2 Cir., 556 F.2d 113, is not in point. The plaintiff there was a public figure. The protections afforded the press when it reports on public officials and public figures do not shield it from liability when it publishes defamatory statements concerning private individuals.

Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977). Plaintiffs respectfully submit that there is no "neutral reportage" privilege under the laws of either the State of Utah or the Tenth Circuit.

The privilege, if it even did exist (it does not), is limited to those instances where the defendant publishes a defamatory statement in the context of (1) an accurate and disinterested report; (2) against a public figure; (3) in which the defamatory statement was made by a responsible, prominent organization; and (4) the statement is not endorsed by the publisher. Edwards, *supra.* Even if this Circuit recognized such a privilege (it does not), not a single one of the elements of the privilege apply. Construing the facts and reasonable inferences in favor of Plaintiff as the Court must on this motion, Defendants' reports were not accurate and disinterested. Plaintiffs are not public figures. [1] Plaintiffs have sued Defendants not for republications of statements originally made by a responsible organization, but for Defendants' own false and defamatory statements, endorsed by the publishers. The original sources from which Defendants obtained the information upon which Defendants based their own defamations was not a responsible organization, but was a rabid labor union and its cohorts. Defendants did not merely report what others said. Defendants published their own affirmative falsehoods, including the following:

The Salt Lake Tribune and its agents adopted as their own false statements that CWM was "part of an unfortunate American industry habit of exploiting immigrant workers," and that "Kingstons' treatment of miners is appalling." The Tribune and its agents not merely reported that others claimed, but themselves falsely claimed, CWM had locked its workers out of their jobs after

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[1] Nor was there a public controversy. The controversy was and is a private one between Plaintiff, the UMWA and the mine workers who supported UMWA. That the latter group fomented publicity did not alter the essential character of the matter as a purely private dispute.

they protested poor working conditions, low salaries and the lack of benefits. The Tribune and its agents not merely reported that others claimed, but themselves falsely claimed, CWM's workers not only had not exercised their right to form a union, but that CWM had tried to prevent its workers from organizing a union. The Tribune and its agents not merely reported that others claimed, but themselves falsely claimed, CWM fired and locked out workers for union organizing activity. The Tribune and its agents not merely reported that others claimed, but themselves falsely claimed, that the NLRB held the miners were entitled to reinstatement, that 49 workers demanded their jobs back, and that the "fired" miners [who had actually quit] had "won the right to return to their jobs and get back pay." The Tribune, in its own description of CWM, falsely said, "Historically, immigrant workers were easier for employers to exploit. Today, companies can threaten to turn noncompliant workers over to immigration authorities. ... History, it seems, is repeating itself in Utah's coal country."

The Deseret Morning News and its agents adopted as their own false statements that CWM's miners were fired after they complained about what they said were unsafe conditions. The Deseret Morning News not merely reported that others claimed, but themselves falsely claimed, not as opinions but as facts, that CWM's treatment of miners was "appalling," that wages were an "outrage" and a "human rights violation, and that "these men have been horribly exploited." The Deseret Morning News and its agents not merely reported that others claimed, but themselves falsely claimed, that Estrada with about 75 other workers staged a walkout and were fired and shut out for attempting to organize a union to address poor pay and mine safety issues, and because CWM did not want the miners to unionize, and that the workers' complaints about unsafe working conditions and a move to organize a union cost them their jobs. The Deseret News and its agents not merely reported that others claimed, but themselves falsely claimed, one worker in particular "was fired for aligning with the pro-unionizers." The Deseret Morning News and its agents falsely implied IAUWU did not represent the interests of its bargaining unit. The Deseret Morning News and its agents not merely reported that others claimed, but themselves falsely claimed, the NLRB found CWM fired the miners illegally and validated the miners' contention that they were fired illegally, that the NLRB had ordered CWM to reinstate all miners who were illegally fired and that the NLRB issued a back pay order.

The above statements were not reports about what "workers and union leaders say." In making the above statements, Defendants were not reporting what others said. Defendants made those statements as their own affirmative statements of fact.

The truth, known or available to Defendants at the times of their publications, was that the workers quit after one worker, Bill Estrada, who had been suspended for cause with intent to terminate, falsely told the others they had all been fired. The truth was the workers involved did not stage a walkout, but quit because Estrada had lied to them. The truth was that CWM has an above-average safety record, and its workers had not been complaining about unsafe working conditions. The truth was CWM's workers had organized a union two decades before, and were represented by a union ever since. The truth was there had been no mention of wages, working conditions, or organizing under UMWA at the time the workers quit. The truth was that CWM unilaterally offered to re-hire workers who had quit, that only about 30 accepted, and that there was no offer of back pay, and no NLRB orders of any kind whatever, yet alone orders of reinstatement or an award of back pay. The Salt Lake Tribune and its agents, and the Deseret Morning News and its agents, knew or had notice of the truth, and published their false and defamatory statements to the contrary in the face of that knowledge.

Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966) is not on point. It applies only to defamation claims between parties to labor disputes. Defendants are not and never were parties to any labor dispute relating to this action.

The defamations with which Plaintiffs charge Defendants were neither neutral nor accurate. They were not mere republications of statements by others, but were Defendants' own statements, made with known falsity or reckless disregard for their falsity. Construing the facts and reasonable inferences in Plaintiff's favor, and applying the law of the State of Utah and the Tenth Circuit, Defendants' publications are not protected by a "neutral reportage" privilege.

I. DEFENDANTS' PUBLICATIONS ARE NOT PROTECTED BY UTAH'S "PUBLIC INTEREST" PRIVILEGE.

As Defendants themselves point out, the privilege afforded under Utah Code Ann. §45-2-3((5) applies only to "a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or the

publication or broadcast of the matter complained of was for the public benefit." The statute does not apply because Plaintiffs are not suing Defendants for "a fair and true report" of anything, but rather their own publications of their own false affirmative statements of fact separate and apart from anything others have said.

Since the defamations for which Plaintiffs sue Defendants are Defendants' own statements, not the reports of others, the statutory privilege does not apply, and the statutory requirement of malice does not apply.

Defendants' cases are not on point. Mast v. Overson, 971 P.2d 928 (Utah App. 1998) did not involve a suit against the press. It involved the qualified privilege under section 45-2-3(1) for comments made "in the proper discharge of an official duty." Defendants' Brown v. Wanlass is a state trial court decision with no precedential value that should not have been cited in the first place. The "public interest" at issue involved reports about the functioning a governmental body. The case was appealed, Brown v. Wanlass, 2001 UT App 30, 18 P.3d 1137, where the court held the plaintiff's claims were barred by the Governmental Immunity Act, which has nothing to do with this case. Defendants' Jacob v. Bezzant is also a state trial court decision with no precedential value that should not have been cited in the first place. The "public interest" at issue also involved reports about the functioning a governmental body. The central basis for the court's ruling was that the defendants' comments were not defamatory.

For a statutory "public benefit" privilege to apply requires something more than that a story is newsworthy. It requires more than that the public might find the story interesting. Even widespread news coverage of what is at heart a private dispute noes not make coverage of the dispute, for purposes of the statutory privilege, for the "public benefit." Otherwise, every newspaper article, because newsworthy, would for that reason alone be privileged. Whatever the outcome of the dispute between Plaintiffs and the UMWA and its cohorts, the outcome is a private rather than a public benefit resulting from NLRB and ultimately the courts litigating the rights of private litigants, which legally cannot be affected by any amount of publicity or public debate. Arguably, the public might benefit from bringing to allegations of animal cruelty to light. But in Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981), a news report of cruelty to animals, although certainly a matter of public interest, was held as a matter of law was not privileged under section

45-2-3. The publications of Defendants for which Plaintiffs have sued them were at most merely newsworthy, not for the "public benefit" as that statutory term must be construed.

Because the privilege does not apply, Plaintiffs do not have to prove malice. Defendants argue the Complaint makes "no allegations regarding any investigation or fact-checking" by Defendants. Defamation claims do not require the same pleading with specificity required of fraud claims. The Court should bear in mind that Plaintiffs have not had the opportunity to even begin discovery. Unlike Defendants' publications themselves, what Defendants did by way of investigation is a fact in their exclusive control. However, Defendants admit receiving information from Plaintiffs that gave Defendants notice that all their statements were false. It is clear, or at least can reasonably be inferred, from Defendants' publications that they had access to the NLRB record, which would have shown them the NLRB never made any order such as Defendants claimed. The Complaint, its facts and reasonable inferences are specific enough on this element to require the Court to deny Defendants' motion to dismiss.

III. DEFENDANTS' PUBLICATIONS CONVEYED DEFAMATORY MEANING.

The statements of Salt Lake Tribune and its agents, not reporting statements by others, but their own false statements, that CWM was exploiting immigrant workers, that its "treatment of miners is appalling," that CWM had fired and locked its workers out for protesting poor working conditions, low salaries, the lack of benefits and union activities, that CWM's workers not only had not exercised their right to form a union, but that CWM had tried to prevent its workers from organizing a union, that the NLRB had ordered the miners were entitled to reinstatement with back pay, are all affirmative claims by the Tribune and its agents that CWM had repeatedly violated the National Labor Relations Act. The statements of the Deseret Morning News and its agents, not reporting statements by others, but their own false statements, that CWM's treatment of its workers was appalling and a horrible exploitation, that their wages were an outrage and a human rights violation, that CWM fired workers for complaining about unsafe conditions and attempting to organize a union to address poor pay and mine safety issues because CWM did not want the miners to unionize [even though Defendants knew full well the workers were already unionized], that IAUWU did not represent its bargaining unit members, and that the NLRB found CWM had fired the miners illegally and ordered CWM to reinstate them with back pay, are also all affirmative

claims by the Tribune and its agents that CWM had repeatedly violated the National Labor Relations Act. [2] Defendants' false statements are certainly capable of a defamatory meaning. Defendants' argument to the contrary ignores what Defendants actually said, it is so lacking in merit as to be frivolous.

IV. DEFENDANTS MADE FALSE STATEMENTS OF FACT, NOT OPINION.

A statement that CWM fired workers for complaining about unsafe conditions is a statement of fact, not opinion.

A statement that CWM fired workers for attempting to organize a union to address poor pay and mine safety issues is a statement of fact, not opinion.

A statement that CWM fired workers because CWM did not want the miners to unionize is a statement of fact, not opinion.

A statement that CWM had fired and locked its workers out for protesting poor working conditions, low salaries, the lack of benefits and union activities is a statement of fact, not opinion.

A statement that CWM's workers had not exercised their right to form a union, and that CWM had tried to prevent its workers from organizing a union, is a statement of fact, not opinion.

A statement that IAUWU did not represent its bargaining unit members is a statement of fact, not opinion.

A statement that the NLRB found CWM had fired the miners illegally and ordered CWM to reinstate them with back pay is a statement of fact, not opinion.

Taken in the overall context as Defendants argue the Court should do, Plaintiffs respectfully submit that affirmative statements, not prefaced by "so-and-so said," or "so-and-so believes," even statements characterizing specific conduct of CWM as "appalling," "exploitation," and a "human rights violation" could be found by a jury to be defamatory statements not protected as mere opinion.

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[2] Defendants again invoke Linn, supra for the proposition that a judgment against a participant in a labor dispute for defamation requires actual malice. That requirement has never been extended to affirmative false statements made by news media and adopted by the media as their own statements. Defendants were not participants in a labor dispute, so the point is, well, pointless.

Again, this case is nothing like Mast, *supra*. It does not involve a political debate over actions by governmental officials pursuing their official duties.

V. DEFENDANTS' PUBLICATIONS ARE NOT PRIVILEGED REPORTS OF GOVERNMENTAL PROCEEDINGS.

The statements for which Plaintiffs have sued Defendants on this point are Defendants' publications that the NLRB entered an order or orders finding that CWM had fired workers illegally, and ordering CWM to reinstate those workers with back pay. The privilege Defendants seek to invoke applies only if Defendants made a fair and true report of those proceedings. The trouble with Defendants' argument is that Defendants's publications were not true.

The NLRB did not find CWM fired workers, either legally or legally.

The NLRB did not order CWM to reinstate the workers.

The NLRB did not order CWM to pay any worker any back pay.

Defendants' statements, if true, amount to statements that CWM had been found liable for violating the National Labor Relations Act, and had been ordered to do specific things to remedy its illegal conduct. Defendants' statements were false and therefore defamatory. They were made with known falsity, or with reckless disregard for their falsity, because if the NLRB had entered any such order or decision it would have been a matter of public record that Defendants would have checked and verified before publishing. Defendants' Exhibit C proves the falsity of their publications. Exhibit C contains two documents, neither of which includes or incorporates any NLRB order or decision. The first is a "Settlement Agreement", a voluntary agreement between CWM and UMWA, which contains a Non-Admission Clause stating, "Entry into this agreement does not constitute the admission of any unfair labor practice conduct." It does not even include an agreement that CWM will pay any back pay, only that "the amount of backpay, if any, due will be determined" at a future date. The second is a "Settlement Stipulation," also a voluntary agreement, which states that CWM "does not admit the commission of any unfair labor practices," and that CWM reserves the right to a hearing to determine backpay due, if any. It is clear from Exhibit C that when Defendants published statements of their own, affirmatively stating that NLRB held CWM had fired workers illegally and ordered CWM to reinstate those workers with back pay, Defendants knew or should have known those statements were not true.

Defendants argue Exhibit C indicates unfair labor practice charges were filed; NLRB was involved in negotiating a settlement in lieu of litigation; the settlement provides for reinstatement; the NLRB would review and enforce the settlement; the NLRB would determine the amount of

backpay; and CWM would post notices informing employees of their rights. Defendants' argument might have some merit if that is what they said in their publications. But what Defendants published is very different from what even Defendants admit Exhibit C actually says.

Utah Code Ann. §45-2-3(2) does not apply because Defendants's publications were not of any statement made in any official proceeding. Section 45-2-3(2) does not apply because Defendants' statements of NLRB action were not a fair and true report of any official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

Because Defendants' publications do not accurately report the NLRB proceedings, but rather state the NLRB entered an order or orders finding that CWM had fired workers illegally, and ordering CWM to reinstate those workers with back pay, when Defendants knew full well the NLRB had done no such thing, Defendants' publications of NLRB proceedings are not privileged.

VII. DEFENDANTS STATEMENTS WERE OF AND CONCERNING CWM'S AND IAUWU'S MANAGEMENT PERSONNEL.

An entity such as CWM or IAUWU cannot act directly, but can only act through its agents. *In re* Ewles' Estate, 143 P.2d 903, 905 (Utah 1943) (an intangible entity can act only through its agents.) Therefore, when Defendants publish statements that CWM did or failed to do a thing, or that IAUWU did or failed to do a thing, those statements require the reasonable inference that the directors, officers, and management of CWM or IAUWU did or failed to do that thing. Defendants are really invoking the so-called "group defamation" rule. In this action Plaintiffs' defamation claim is governed by the substantive law of the forum state. Lynch v. Standard Pub. Co., 170 P. 770, 773 (Utah 1918) is Utah's most recent commentary the rule: [3]

> [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 of the class who may be able to show the words referred to himself.

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[3] Defendants ask this court to apply the law of Alabama, or Florida, or New York, or California, or Massachusetts. With all due respect to opposing counsel, this Court is bound to apply Utah law.

Under Lynch, the individual Plaintiffs can maintain a defamation action as long as they may be able to show Defendants' words referred to themselves. This court must deny Defendants' motion unless no jury could find Defendants referred to the individual Plaintiffs.

The rationale for the rule adopted in Lynch was expounded in Fenstermaker v. Tribune Pub. Co., 43 P. 112, 114 (Utah Terr. 1895) (Fenstermaker I):

> Where the words used seem to apply only to a class of individuals, and not to be specially defamatory of any particular member of that class, still the action can be maintained by any individual of that class who can satisfy the jury that the words referred especially to himself. ... [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.

Fenstermaker I says that where words seem only to apply to a class, an action can be maintained by anyone who can convince a jury that the words referred to him. In other words, it is a question of fact for the jury. The court cannot resolve the question on summary judgment.

The Salt Lake Tribune's statement that CWM locked its workers out of their jobs after they protested poor working conditions, low salaries and the lack of benefits is a statement that CWM's on-site management personnel did the act.

The Tribune's statement that CWM had tried to prevent its workers from organizing a union is a statement that CWM's managers did the act.

The Tribune's statement that CWM's workers had not exercised their right to form a union is a statement defamatory of IAUWU's officers.

The Tribune's statement that CWM fired and locked out workers for union organizing activity is a statement that CWM's on-site management personnel did the act.

The Tribune's statement that the NLRB held the miners were entitled to reinstatement, that 49 workers demanded their jobs back, and that the "fired" miners [who had actually quit] had "won the right to return to their jobs and get back pay" is a statement that CWM's managers violated the National Labor Relations Act.

The Deseret Morning News' statement that CWM's miners were fired after they complained about what they said were unsafe conditions is a statement that CWM's on-site management personnel did the act.

The Deseret Morning News' statement that Estrada and 75 others were fired and shut out for attempting to organize a union to address poor pay and mine safety issues, and because CWM did not want the miners to unionize, is a statement that CWM's managers did the act.

The Deseret Morning News' statement that one worker in particular "was fired for aligning with the pro-unionizers" is a statement that CWM's on-site management personnel did the act.

The Deseret Morning News's implied statement that IAUWU did not represent the interests of its bargaining unit members directly concerns IAUWU's six officers.

The Deseret Morning News' statement that the NLRB found CWM fired the miners illegally and validated the miners' contention that they were fired illegally, that the NLRB had ordered CWM to reinstate all miners who were illegally fired and that the NLRB issued a back pay order, is a statement that CWM's managers had violated the National Labor Relations Act.

Utah law is that where a defamation seems to apply to a class of individuals but is not specifically defamatory of any particular member, an action can be maintained by any individual of the class who may be able to show the words referred to himself. Where the words, by any reasonable application, impute a charge to several individuals, under some general description or general name, ANYONE 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. Utah law says IT is a question for the jury. CWM's management personal is a small and discrete group. IAUWU's officers are a small and discrete group. It is for a jury to determine that, when Defendants stated CWM did a thing, the statement referred to CWM's managers. It is for a jury to determine that, when Defendants defamed IAUWU, Defendants defamed IAUWU's officers.

VIII. DEFENDANTS ARE NOT ENTITLED TO ATTORNEY FEES ON THIS MOTION.

Defendants are not entitled to an award of attorney fees. For the reasons stated above, Defendants' motion to dismiss is lacking in merit and should be denied.

Even if the Court was to grant Defendant's motion, an award of attorney fees is not justified. Fees can be awarded under Utah Code Ann. §78-27-56(1) only if this action is without merit and not brought or asserted in good faith. For the reasons stated above, Plaintiffs brought this action in good faith.

Fees cannot be awarded under 78-58-105. The Utah Citizen Participation in Government Act applies only in certain limited circumstances not found here. First, there must be an action involving public participation in the process of government. "Process of government" means the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution. U.C.A. §78-58-102(5). Defendants were not exercising their right to influence decisions by the legislative or executive branch of government. The NLRB is an independent agency. The rights of litigants before the NLRB are controlled by statute and government regulations. No citizen has a First Amendment right to influence the rights of private litigants under the National Labor Relations Act. And Defendants' publications were not for the purpose of trying to influence the NLRB in any event. Therefore, Defendants' publications do not constitute public participation in the process of government. In addition, based on points I-VII above, this action was commenced with a substantial basis in fact and law.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion to dismiss.

DATED March 9, 2005.

Attorney for IAUWU and its Officers

and for C.E. Kingston,
Attorney for C. W. Mining Company
and its Directors, Officers, and Management

CERTIFICATE OF SERVICE

I certify on March 9, 2005 copies of the above were served by first class mail to:

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2712-p.002 oppose Trib mot to dismiss