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

INTERNATIONAL ASSOCIATION OF UNITED WORKER'S UNION, *et al.*, Plaintiffs, vs. UNITED MINE WORKERS OF AMERICA, *et al.*, Defendants.	Case No. 2:04CV00901 **REPLY MEMORANDUM IN SUPPORT OF *THE MILITANT*'S MOTION TO DISMISS ALL CLAIMS ASSERTED AGAINST IT IN PLAINTIFFS' SECOND AMENDED COMPLAINT** Judge Dee V. Benson

Defendant *The Militant*, by and through undersigned counsel, hereby submits this Reply Memorandum in Support of its Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint.[1]

[1] The plaintiffs in this case (collectively referred to herein as "Plaintiffs") are (i) C.W. Mining Company d/b/a the Co-Op Mine (the "Co-Op Mine"), (ii) some of the Co-Op Mine's officers and employees, (iii) the International Association of United Workers Union ("IAUWU") (an association currently operating at the Co-Op Mine), and (iv) a number of IAUWU officers.

INTRODUCTION

At the June 14, 2005, hearing ("June 14 Hearing") on the Media Defendants'[1] first motion to dismiss, this Court ordered Plaintiffs, in unambiguous terms, to file a Second Amended Complaint that not only clarified which defendants were being sued by which plaintiffs and for what, but simplified their claims to include only those discrete statements of actionable defamation, explaining why each alleged statement was not only false, but defamatory under the law ("June 14 Order"). *See id.* at 68-74. As discussed fully in *The Militant*'s August 15, 2005, memorandum in support ("August 15 Memorandum"), Plaintiff made ***no*** effort to comply with the latter portion of the June 14 Order, and filed a Second Amended Complaint that is more confusing and cumbersome than the first, adds entirely new claims of defamation against *The Militant* (instead of parsing down and simplifying the old ones), and provides neither the parties nor this Court with any basis to understand which of the alleged statements are defamatory or why. Plaintiffs have ignored the second part of this Court's June 14 Order (both in their Second Amended Complaint and their opposing memorandum), and for this reason alone, their claims against *The Militant* should be dismissed with prejudice.

The arguments in Plaintiffs' opposing memorandum also do nothing to save their claims from dismissal under the law. Plaintiffs' arguments about why the articles/editorials published by *The Militant* convey defamatory meaning and constitute actionable opinions, and the examples they cite, in most cases highlight the deficiencies of their claims. Similarly unsuccessful is their attempt to avoid application of Utah's fair report privilege, and to distort and misapply the "group libel" doctrine. Finally, Plaintiffs' efforts to explain and clarify their

[1] As used herein, "Media Defendants" refers collectively to The *Salt Lake Tribune, The Deseret Morning News* and *The Militant.*

claims for invasion of privacy by false light, intentional interference with economic relations, negligence and civil conspiracy merely highlight the total absence of any factual allegations (or evidence) sufficient to prove the required elements of these claims against *The Militant*.

By ignoring the mandate of the June 14 Order and by continuing to advance their legally deficient claims against *The Militant*, Plaintiffs further reveal that they have no good faith basis for pursuing this lawsuit. Plaintiffs' claims against *The Militant* should therefore be dismissed with prejudice, and *The Militant* should be awarded their reasonable attorneys' fees and costs incurred in defending this action.[2]

ARGUMENT

I. PLAINTIFFS' INTERPRETATION OF THIS COURT'S JUNE 14 ORDER CONFLICTS WITH THE LETTER AND SPIRIT OF THAT RULING.

In arguing that they complied with this Court's June 14 Order, Plaintiffs advance an interpretation of this Court's statements at the June 14 Hearing that ignores the express mandates of this Court, and contravenes the letter and spirit of its order. This Court made it clear that it expected Plaintiffs to do two things in their Second Amended Complaint: (1) clarify for the

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[2] Plaintiffs contend that because they "present matters outside of the pleadings," *The Militant*'s Motion to Dismiss should "be treated as one for summary judgment and disposed of as provided in Rule 56." Mem. Opp'n at 4. Even the most cursory review of Plaintiffs' memorandum reveals, however, that Plaintiffs do not actually cite to or rely on ***any*** relevant evidence or matter outside that raised in their Second Amended Complaint. Their first attachment (Addendum 1) is a document prepared by Plaintiffs' counsel, and constitutes an attempt to clarify and restate their prior allegations regarding one of the 75 articles and editorials published by *The Militant* about the Co-Op Mine dispute between October 6, 2003, and April 4, 2005, and generally alleged to be defamatory by the Second Amended Complaint. This attempt at re-pleading does not constitute the type of external "evidence" that would justify treating *The Militant*'s Motion to Dismiss as a motion for summary judgment. Their second and third attachments (Exhibits 1 and 2) are copies of two of the 75 articles/editorials upon which Plaintiffs' base their claims of defamation against *The Militant*. As noted in all of *The Militant*'s prior memoranda, because all of the articles and editorials cited in the Second Amended Complaint are relied upon by Plaintiffs to support their claims of defamation, true and correct copies of those articles/editorials are properly considered under Rule 12(b)(6). *See, e.g., GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). Their fourth attachment (Exhibit 3) is a copy of an article from *The Militant* that has nothing to do with the labor dispute at the Co-Op Mine, does not in anyway reference or discuss Plaintiffs, and is therefore irrelevant to the issues raised by *The Militant*'s Motion to Dismiss.

Media Defendants "***who is being sued for what and by whom,***" Tr. at 70-71 (emphasis added), and (ii) give the Media Defendants "a better understanding of ***what is claimed to be defamatory***" by identifying "***what part you think is untrue and why it, therefore, forms a basis for a defamation claim.***"[3] *Id.* (emphasis added). While Plaintiffs may have attempted to meet the first mandate, the Second Amended Complaint and opposing memorandum did nothing to comply with the second.

This Court concluded at the June 14 Hearing that Plaintiffs' First Amended Complaint was "sufficiently vague and insufficiently precise to stand as a complaint upon which relief can be granted and from which this litigation may proceed." Tr. at 74. As discussed fully in *The Militant*'s August 15 Memorandum, Plaintiffs submitted a Second Amended Complaint that is every bit as "vague" and imprecise as their first Amended Complaint. Far from simplifying their claims, and clearly identifying those discrete statements Plaintiffs believe to be defamatory and why, Plaintiffs continue to allege that almost ***every*** article (in their entirety) ***ever*** published by *The Militant* on the Co-Op Mine labor dispute "defamed" the Plaintiffs. The Second Amended Complaint sets forth for each article, in block quote format, lengthy narratives of what the article said, without identifying what portion of the quoted statement is allegedly false (or why), why it is defamatory, or which of the named Plaintiffs are actually defamed. In this regard, Plaintiffs' claims of defamation continue to rest entirely on overbroad, conclusory and generalized

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[3] By suggesting that this Court was unconcerned with the second half of its own order, Plaintiffs ignore this Courts specific admonishment that Plaintiffs not simply "lift a sentence out and say, oh, that is wrong, therefore, it is defamatory," but identify exactly what part of the statement contains a false statement of verifiable fact, and how each particular statement rises to the level of a defamatory statement under the law. *Tr.* at 72. They likewise ignore this Court's caution to avoid the "scatter gun approach" utilized in the first Amended Complaint, and to file a second amended complaint that would "parse [their claims] down into a manageable lawsuit" where "[s]omebody is being sued in good faith for something that ***really did hold the [P]laintiffs up to being defamed in the community and of meeting the legal definition.***" *Id.* at 73 (emphasis added).

allegations which meet neither the requirements of Rule 8, nor the mandates of the June 14 Order.

Plaintiffs' attempt to excuse their failure to conform their pleading to the June 14 Order by the argument that "[a]dditional 'parsing and explaining' . . . would triple the bulk of defamation claim without affecting Defendants' ability to draft an Answer," and "would have added over 100 pages to Plaintiff's pleading, making it an unwieldy morass that would not materially aid the defendants in formulating a response to the pleading." Mem. Opp'n at 5, n. 2. The obvious implication of this Court's June 14 Order was that *The Militant* could not possibly be liable to every plaintiff for every statement it ever published about the Co-Op Mine dispute, and that Plaintiffs must therefore reconsider the breadth and scope of their pleading to assert claims against *The Militant* ***only*** on those discrete factual statements that might be actionable under the law. Rather than undertake a critical self-evaluation of their claims, Plaintiffs re-asserted all of their prior claims of defamation along with entirely new claims against *The Militant* based on articles/editorials published about the Co-Op Mine dispute (and this litigation) ***after*** the filing of the first Amended Complaint. This disregard for the Court's order further demonstrates the bad faith by which Plaintiffs have proceeded against *The Militant*. *See infra* Section V.

In their effort to avoid their obligations of fair pleading, Plaintiffs argue that "[t]he twelve pages of argument in Point II of *The Militant*'s memorandum prove *The Militant* actually does understand Plaintiffs' allegations, and is capable of responding to Plaintiffs' averments on the merits." Mem. Opp'n at 6. However, the fact that *The Militant* has been able to ascertain some of the most obvious legal impediments to Plaintiffs' claims, and has been able to explain why

these claims, as pled, do not state claims upon which relief can be granted under controlling law, does not excuse Plaintiffs' failure to comply with the requirements of Rule 8 or of the June 14 Order.

In sum, Plaintiffs' Second Amended Complaint against *The Militant* remains "sufficiently vague and insufficiently precise to stand as a complaint upon which relief can be granted and from which this litigation may proceed." Tr. at 74. Having had two chances to properly plead their claim, and having failed both times, Plaintiff's claims against *The Militant* should be dismissed with prejudice.[4]

II. PLAINTIFFS' "AMENDED" DEFAMATION CLAIMS AGAINST *THE MILITANT* FAIL AS A MATTER OF LAW AND SHOULD THEREFORE BE DISMISSED.

A. The Majority of Statements Published by *The Militant* Do Not Convey Any Defamatory Meaning.

Despite four pages of argument, Plaintiffs still do not provide this Court with any basis to conclude that the cited articles and/or editorials published by *The Militant* convey the type of defamatory meaning required for actionable defamation under Utah law. As discussed more fully in *The Militant*'s August 15 Memorandum, the majority of *The Militant*'s articles/editorials report and/or opine on issues surrounding a very public, heated, well-publicized, and bitter labor dispute of the kind in which polemic and hyperbole abound. *See* Aug. 15 Mem. at 12-14. Because the readers of *The Militant* are particularly used to the type of polemicizing commonly spoken and expected in the context of long, heated labor disputes, and would understand the statements published by *The Militant* as a continuation of the heated debate surrounding the on-

[4] Plaintiffs do not dispute the authority of this Court to dismiss their claims with prejudice if it determines, as it should, that they failed to adhere to the mandates of its June 14 Order. *See* Aug. 15 Mem. at 11, n. 12.

going labor dispute at the Co-Op Mine, *The Militant*'s articles/editorials convey no defamatory meaning as a matter of law.[5] *See id.*

Plaintiffs attempt to distinguish *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) on the basis that *The Militant* is merely an observer, rather than a participant, in the labor dispute at the Co-Op Mine. *See* Mem. Opp'n at 5-6. *Linn* is important not for its specific holding, but for its recognition of the fact that labor disputes are heated affairs, that the public expects people to say and do things in the context of those disputes that they might not do or say in the context of everyday life, and that the type of "bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions" (383 U.S. at 58) said (or, in this case, reported) in the course of such disputes do not typically give rise to claims of defamation.[6]

Equally unavailing is Plaintiffs' attempt to distort the ***independent*** statements of the actual mine workers and the numerous critics of the Co-Op Mine ownership or management (*see* Mem. Opp'n at 9) into support for its claims that the statements published by *The Militant* themselves have a "tendency to injure [Plaintiffs'] reputation in the eyes of [*The Militant's*] audience." Mem. Opp'n at 7. The fact that prominent members of the local community such as Catholic Bishop George Niederauer and Father Donald E. Hope have made what are perceived to be derogatory statements about the Co-Op Mine and its dispute with its workers, without any

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[5] These facts are reasonably inferred both from the context of the articles/editorials themselves, and from Plaintiffs' own allegation that *The Militant* "is an avowedly and unabashedly socialist publication." Second Amended Complaint at ¶ 161.

[6] This argument is further undermined by Plaintiff's own allegations that *The Militant* somehow conspired with and worked together with the United Mine Workers of America ("UMWA") to facilitate and advance the union organizing effort. Plaintiffs cannot have it both ways. Either *The Militant* is an independent newspaper, having no liability for UMWA's actions, or they are connected with the UMWA in a manner which makes them effective participants in the dispute.

evidence (or even allegation) that these individuals formed their beliefs based on the materials published by *The Militant* (or any of the other Media Defendants), simply demonstrates the already poor reputation the Co-Op Mine and its managers hold in the eyes of the general public, further undermining Plaintiffs' claim that the statements of *The Militant* (or any other Media Defendants) convey any defamatory meaning.

B. Many of The Statements Published by *The Militant* Constitute Statements of Opinion Which Are Not Capable of Being Objectively Verified As True or False.

The Militant explained in its August 15 Memorandum why the vast majority of its published statements, particularly those in its editorials, constitute statements of opinion, rather than statements of actionable fact. *See* Aug. 15 Mem. at 14-18. The arguments in Plaintiffs' opposing memorandum effectively prove the point. The observations of the Co-op Mine workers, for example, that the mine is "dangerous," and that its roof supports are "inadequate" are not, as Plaintiffs allege, statements of fact, but are subjective, personal observations that cannot be objectively verified as true or false. Similarly subjective is the reported opinion of Co-Op Mine workers that the IAUWU is a "company union" operated with the intent and motive of preventing the miners from organizing a "real" union. *See, e.g., Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir. 1989) (internal quotations omitted). ("Assertions whose elements are unverifiable, including statements regarding motive are intrinsically unsuited to serve as a basis for libel.").[7] Also incapable of objective verification is the perception of Co-Op Mine workers that they have been "harassed," "cornered," "threatened" and "locked out," and their

[7] Plaintiffs' efforts to avoid *Price* simply because it arises in a different jurisdiction are unavailing. Its pronouncements are entirely consistent with the core principles in controlling Utah cases such as *West v. Thompson*, 872 P.2d 999, 1014.19 (Utah, 1994), and can be relied upon by this Court as persuasive authority in applying Utah law.

subjective opinion that the firing of a number of mine workers has been motivated by their protests and efforts to organize a union at the mine. If these statements are actionable nearly ever labor dispute involving competing unions would become a morass of libel litigation. Taken in context, these statements constitute protected statements of opinion. *See Price*, 881 F.2d at 1433 (internal quotations omitted) ("Even when a statement is subject to verification . . . it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it.").

C. Many of The Statements Published by *The Militant* Constitute Fair and Accurate Reports of Official Government Proceedings Privileged Under Utah Law.

The Media Defendants have explained in their prior memoranda why their published statements on the NLRB proceedings are supported by the NLRB documents previously submitted to this Court, and why *The Militant*'s coverage of the NLRB proceedings, along with its coverage of MSHA investigations and citations at the Co-Op Mine, constitute "fair and accurate" reports privileged under Utah law. Because nothing in Plaintiffs' opposing memorandum changes these arguments, they will not be repeated here, and are merely incorporated by reference.[8] *See* Feb. 17 Mem. at 20-23; Mar. 21 Reply at 17-17; Apr. 28 Reply at 10.

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[8] The recent decision of *Zoumadakis v. Uintah Basin Med. Ctr. Inc.*, 2005 UT App 325, --- P.3d ---, 2005 WL 1692503 (July 21, 2005) does not render *The Militant*'s reliance on Utah's fair report privilege premature or improper. *Zoumadakis* dealt with a qualified common law privilege protecting statements made to protect the legitimate interest of the publisher, the recipient or a third person as it applies in the context of employment to "protect an employer's communication to employees and to other interested parties concerning the reasons for an employee's dismissal." *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). Recognizing that the contours and application of such a privilege are not clearly defined in the law, and that a plaintiff may not be able to effectively anticipate the applicability of such a privilege at the time of the initial pleading, the *Zoumadakis* court concluded that the privilege was an affirmative defense that was not properly raised in a Rule 12(b)(6) motion to dismiss. *See Zoumadakis*, 2005 UT App 325 at ¶2, n 4 (noting that it would be difficult for the "plaintiff, in the

D. With Few Exceptions, The Statements Published by *The Militant* Are Not "Of and Concerning" The Individually Named Defendants.

The Militant explained in its prior briefing (particularly its April 28 Reply) why the vast majority of the allegedly defamatory statements are not "of and concerning" the individually named plaintiffs, why the individually named plaintiffs are not entitled to invoke any exception to the "group libel" doctrine, and why this case is distinguishable from *Fensetermaker* and *Lynch*. *See* Apr. 28 Reply at 10-13; *see also* Feb. 17 Mem. at 23-25; Mar. 21 Reply at 17-19; Aug. 15 Mem. Because nothing in Plaintiffs' opposing memorandum changes these arguments, they will not be repeated here, and are merely incorporated by reference.[9]

III. PLAINTIFFS' REMAINING CLAIMS AGAINST *THE MILITANT* ARE DEFICIENT AS A MATTER OF LAW AND SHOULD THEREFORE BE DISMISSED.

The Militant explained in its August 15 Memorandum all of the reasons why Plaintiffs' claims for invasion of privacy by false light, civil conspiracy, intentional infliction of emotional distress, and negligence fail as a matter of law.[10] *See* Aug. 15 Mem. at 19-23. Plaintiffs' opposing memorandum does nothing to actually refute or undermine these arguments, and in fact

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initial complaint, to anticipate and plead the applicability of any possible privilege"). Here, by contrast, *The Militant* rests on a statutory privilege, the contours of which are more clearly defined and easily anticipated. Moreover, because *The Militant* raised the defense in their prior motion to dismiss, Plaintiffs knew of *The Militant*'s intent to assert the defense and was on notice of the need to plead those facts necessary to overcome it in the Second Amended Complaint. The holding of *Zoumadakis* should be limited to its context (i.e., a common law privilege not clearly defined by the law or easily anticipated by the plaintiff), and should not apply in this factually and procedurally distinguishable case.

[9] *The Militant* has previously acknowledged that a ***small handful*** of the disputed articles and editorials referred specifically to a ***few*** of the individual plaintiffs. *See* Feb 28 Mem at 7, n. 13; Apr. 15 Reply at 10, n. 12. The published statements about these individual plaintiffs are not actionable, however, because they do not convey any defamatory meaning, constitute non-actionable statements of opinion, and/or are protected by Utah's fair reports privilege.

[10] To summarize, it is not enough for Plaintiffs to merely allege, as they have done in their Second Amended Complaint, that *The Militant* defamed Plaintiffs and that through this defamation they committed other torts against Plaintiffs. They must allege some actual facts to support the elements of each of their other tort claims. Plaintiffs have failed to do so, resting exclusively on generalized, conclusory statements that are insufficient to state a claim even under the most liberal pleading standards.

highlights the absence of any independent factual allegations (as opposed to overbroad, unsupported, conclusory statements) sufficient to prove the required elements of such claims. Accordingly, *The Militant* simply relies on its prior arguments, which are incorporated herein by reference.

IV. THIS COURT SHOULD DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AGAINST *THE MILITANT* WITH PREJUDICE AND AWARD *THE MILITANT* THOSE REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN DEFENDING THIS FRIVOLOUS ACTION.

Plaintiffs lack of any real effort to comply with the mandates of this Court's June 14 Order (at least as to *The* Militant) underscores the conclusion that they have filed this lawsuit simply to harass and unduly burden *The Militant* and prevent further publicity of the Co-Op Mine dispute. If Plaintiffs are allowed to proceed and pursue discovery on their virtually unlimited Second Amended Complaint, they will have achieved their primary objective of making the threat of protracted and expensive litigation a reality in the hopes of chilling *The Militant*'s future exercise of its rights to free speech and expression. Plaintiffs should not be allowed to proceed on such an improper course. Rather, their claims should be dismissed with prejudice, and they should be ordered to reimburse *The Militant* their reasonable attorneys' fees and costs.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Media Defendants' prior memoranda, this Court should grant *The Militant*'s motion and enter an order (1) dismissing all of the Plaintiffs' claims against *The Militant* with prejudice, and (2) awarding *The Militant* all of the reasonable attorneys' fees and costs incurred in defending this frivolous and retaliatory lawsuit.

DATED this 14th day of October, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2005, I caused to be delivered, via the U.S. Mail, postage prepaid, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF *THE MILITANT*'S MOTION TO DISMISS ALL CLAIMS ASSERTED AGAINST IT IN PLAINTIFFS' SECOND AMENDED COMPLAINT**, to the following:

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