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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 THE SALT LAKE TRIBUNE'S AND THE DESERET MORNING NEWS' RENEWED MOTION TO DISMISS** Civil No. 2:04CV00901 Judge Dee Benson

International Association of United Workers Union (IAUWU), C. W. Mining Company (CWM) *et al.* respectfully submit this memorandum in opposition to the Renewed Motion to Dismiss of *The Salt Lake Tribune*, the *Deseret Morning News* and their reporters and editors (the Newspaper Defendants).

STATEMENT OF FACTS

On a motion to dismiss under Rule 12(b)(6) the court must accept as true all the factual allegations of a Complaint, and construe all reasonable inferences in the plaintiffs' favor. Timpanogos Tribe v. Conway, 286 F.3d 1195, 1204 (10th Cir. (Utah) 2002). Plaintiffs submit the facts in the Complaint as true for purposes of this motion, including the following:

1. IAUWU is and for over 20 years has continuously been the duly elected bargaining representative for the workers of C. W. Mining Company (CWM). Both the NLRB and the UMWA were directly involved in the initial election, and recognized IAUWU as the exclusive bargaining representative of CWM's workers. [Complaint ¶ 76]

2. On or about September 22, 2004 CWM suspended Bill Estrada with intent to terminate for cause. Estrada did not seek IAUWU's help or otherwise challenge his termination through the grievance process of IAUWU's collective bargaining agreement. While management was meeting with Estrada, some of the workers gathered outside. When Estrada left the meeting he falsely told the waiting workers they had also been fired. This was a material misrepresentation of a presently existing fact, which Estrada made either intentionally or with reckless disregard of its truth or falsity. Estrada intended that the workers would rely on his misrepresentation, which they did reasonably rely on to their detriment by, among other things, leaving their jobs, and engaging in a wildcat strike. At all pertinent times Estrada was UMWA's agent. [Complaint ¶ 78]

3. UMWA and its agents, in violation of IAUWU's rights as the exclusive bargaining representative of CWM's workers, persuaded approximately 75 of CWM's workers to leave their jobs and picket CWM in violation of the National Labor Relations Act [NLRA] and the collective bargaining agreement between CWM and IAUWU, with the object of forcing IAUWU out and UMWA in as the workers' bargaining representative, and with the object of forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers. This was at a time when IAUWU had been certified as the representative of CWM's workers, both the National Labor Relations Board (NLRB] and CWM had lawfully recognized IAUWU as the bargaining representative of CWM's workers, and a question concerning IAUWU's representation of CWM's workers could not appropriately be raised under the NLRA. [Complaint ¶ 77]

4. IAUWU invited the workers to use the discharge and grievance procedures under the IAUWU/CWM collective bargaining agreement, but UMWA and its agents persuaded or coerced the workers to ignore the discharge and grievance procedures in order to pursue UMWA's unlawful objective. [Complaint ¶ 77]

5. UMWA and its agents induced workers and former workers of CWM, in violation of the NLRA and the collective bargaining agreement between CWM and IAUWU, to engage in a refusal in the course of their employment to process, transport, or otherwise handle materials or to perform services; to engage in an unauthorized, unlawful "wildcat" strike; to picket CWM; and to engage in secondary picketing of businesses other than CWM, all with the unlawful object of forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers [Complaint ¶¶ 79, 80, 81]

6. In reporting on UMWA's illegal activities, *The Salt Lake Tribune* and its reporters and editors, and the *Deseret Morning News* and its reporters and editors (the Newspaper Defendants), published false and defamatory statements about Plaintiffs as quoted in paragraphs 162 through 174 of the Complaint, which for brevity are not repeated but are incorporated here by reference.

7. Taken in context, the Newspaper Defendants' statements were substantially and materially false, and were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity, and were made with malice. [Complaint ¶¶ 186-188]

8. The Newspaper Defendants' statements imputing wrongful conduct to Plaintiffs and otherwise impugning Plaintiffs reasonably related to, and were of and concerning CWM's directors, officers, and managers, and IAUWU's officers. [Complaint ¶¶ 189, 190]

9. The Newspaper Defendants gave publicity to these matters concerning Plaintiffs that placed Plaintiffs before the public in a false light that would be highly offensive to a reasonable person. The Newspaper Defendants acted with knowledge of, or in reckless disregard as to, the falsity of the publicized matters and the false light in which Plaintiffs would be placed. [Complaint ¶ 201]

10. As a direct and proximate result, Plaintiffs have suffered damage to reputation, pecuniary losses and other injuries. [Complaint ¶ 194]

11. Besides being defamatory *per se*, actual injury in fact to Plaintiffs' reputations is evidenced by published comments of other persons who made conclusions as to Plaintiffs based on the defamatory publications by, or similar to those published by, the Newspaper Defendants. [Complaint ¶ 195]

ARGUMENT

The Newspaper Defendants begin by reference to their legal arguments "in the memoranda Defendants have already filed in support of their initial motion to dismiss, all of which are incorporated herein by reference." In response, Plaintiffs adopt the arguments in their March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, and other memoranda Plaintiffs have filed in responses to motions to dismiss this action. More particularly, in response to the specific points the Newspaper Defendants

summarize, Plaintiffs adopt the following arguments from other memoranda filed with the court, as applicable to the Newspaper Defendants' publications, incorporated here by reference:

Newspaper Defendants' Argument:	Plaintiffs' Legal Argument, Adopted From:
Defamatory Meaning	March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, Point III pages 9-10. September 30, 2005 Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint, Point I(B) pages 6-10.
Opinion	March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, Point IV page 10. September 30, 2005 Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint, Point I(C) pages 10-12.
Neutral Reportage Privilege	March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, Point I pages 4-7. September 30, 2005 Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint, Point I(D) pages 12-14.
Public Interest Privilege	March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, Point II pages 7-9.
Official Proceedings Privilege	March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, Point V pages 11-12. September 30, 2005 Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint, Point I(D)(2) pages 13-14.
Of and Concerning Individuals	March 9, 2005 Memorandum in Opposition to Motion to Dismiss of the Salt Lake Tribune, the Deseret Morning News, *et al.*, Point VII pages 12-14. September 30, 2005 Memorandum in Opposition to *the Militant*'s Motion to Dismiss All Claims Asserted Against it in Plaintiffs' Second Amended Complaint, Point I(E) pages 14-15.

As a preliminary matter, Plaintiffs would like to make clear that the only claims alleged against the Newspaper Defendants are their Third Claim for Relief for defamation, and the Fourth Claim for Relief for "false light" invasion of privacy based on the same operative facts as the defamation claim. Plaintiffs also make clear that they do not seek to hold the Newspaper Defendants liable for truthful reporting of statements made by others.

Plaintiffs summarize, expound on, and expand the above arguments as follows:

NEWSPAPER DEFENDANTS' PRIVILEGE ARGUMENTS.

The Newspaper Defendants are not entitled to invoke a defense of privilege in a Rule 12(b)(6) motion to dismiss. *See* Zoumadakis v. Uintah Basin Medical Center, Inc., 2005 UT App 325, holding the trial court erred in considering the defense of privilege in the context of a Rule 12(b)(6) motion: [1]

> A qualified or conditional privilege is an affirmative defense to defamation that a defendant must raise in its answer. ... Thus, the burden of pleading the inapplicability of a qualified privilege is not initially on the plaintiff as a prerequisite to stating a claim for defamation; instead, the defendant must first raise privilege as an affirmative defense in a responsive pleading in order to shift the burden to the plaintiff to show the inapplicability of a qualified privilege.

Id. at ¶7. The Court further stated at ¶ 10 *fn* 6 (citation omitted):

> Raising an affirmative defense, like a qualified privilege, for the first time in a 12(b)(6) motion is not generally appropriate since "dismissal under rule 12(b)(6) is 'justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim.'" Thus, "affirmative defenses, which often raise issues outside of the complaint, are not generally appropriately raised in a motion to dismiss under rule 12(b)(6)." Consequently, in the context of Uintah's 12(b)(6) motion, the burden of proving the abuse of any qualified privilege was not yet on Zoumadakis. The trial court should only have considered whether her complaint stated a claim upon which relief could be granted based on the allegations of the complaint itself, and not based on any possible affirmative defenses.

This action is in the same procedural posture as was Zoumadakis. Under Utah law, a "fair reporting" privilege is an affirmative defense that Plaintiffs do not have to anticipate in their Complaint. It is not appropriate to raise the defense in a 12(b)(6) motion.

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[1] Although the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised, this Court looks to state law for definition of the nature of those defenses. LaFont v. Decker-Angel, 182 F.3d 932 (Table - Unpublished Decision) (10th Cir. 1999) (applying Utah law).

NEWSPAPER DEFENDANTS' "NEUTRAL REPORTING" ARGUMENT.

The Newspaper Defendants argue they "have neutrally and accurately reported both sides of the issues." But this matter is before the Court on their Rule 12(b)(6) motion to dismiss. Plaintiffs' Complaint can be dismissed under Rule 12(b)(6) only if Plaintiffs can prove no set of facts in support of their claims that would entitle them 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.

In addition to Plaintiffs' prior legal arguments incorporated by reference, the Newspaper Defendants have not offered any affidavits in support of their argument that their reporting was either accurate or neutral, and the allegations of the Second Amended Complaint (the Complaint), construed in the light most favorable to Plaintiffs, do not allege the Newspaper Defendants' publications were accurate and neutral. Given the procedural posture of the case, the Newspaper Defendants' "neutral reporting" argument is premature, and unsupported by the record.

NEWSPAPER DEFENDANTS' "OPINION" ARGUMENT.

A statement is not privileged simply because it is made in a newspaper editorial.

A statement is not privileged simply because it is uttered in the form of an opinion.

"Under Utah law, a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule. At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation. Thus, in determining whether a particular statement fits within the rather broad definition of what may be considered defamatory, the guiding principle is the statement's tendency to injure a reputation in the eyes of its audience." West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994). West explained how a person can be liable for stating an opinion:

> [O]pinions rarely stand alone, isolated from any factual moorings. To convince readers of the legitimacy of an opinion, authors typically describe the perceived factual bases for opinions, seeking to demonstrate that the author's opinions are grounded in common sense. Assertions of fact, being objectively verifiable and much more capable of harming reputation, are not entitled to the same degree of protection afforded expressions of opinion.

Id. at 1015. *See* Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983) (citations omitted):

> Whether a given statement constitutes an assertion of fact or an opinion is a question of law to be determined by the court. "The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole." Even if a statement is an opinion and hence generally not actionable ..., the opinion nevertheless may give rise to a cause of action if it "implies the allegation of undisclosed defamatory facts as the basis of the opinion."

The West Court at page 1019 applied a method to determine if an opinion is defamatory. The question is whether the published statement, if couched in the form of an opinion, gives rise to an implication that is capable of being proven true or false:

> First, could a reasonable fact finder conclude that the underlying statement conveys the allegedly defamatory implication? Second, if so, is that implication sufficiently factual to be susceptible of being proven true or false? In other words, is that implication capable of being objectively verified as true or false?

The Newspaper Defendants said CWM and its managers fired workers for protected union activity. Whether CWM fired a worker can be objectively verified as true or false. If the workers were not fired at all but quit, they weren't fired for union activity, and a statement that CWM did fire them for protected union activity is not only defamatory, it is defamatory *per se*. The Newspaper Defendants' argument that it would make no difference to reasonable readers whether CWM offered workers their jobs back after they quit, or the NLRB ruled CWM had illegally fired the workers for protected activity and ordered CWM to reinstate the workers with back pay, is based on evidence not in the record, would require the Court to construe facts alleged in the Complaint against Plaintiffs contrary to law, and is not a matter on which the Court can rule against Plaintiffs as a matter of law based on the present record. Juries find such facts from evidence presented to them with universal regularity. Plaintiffs are entitled to have a jury find the facts here.

Even if accusations that CWM and its managers "abused" or "exploited" workers are opinions standing alone, those words imply the allegation of undisclosed defamatory facts as the basis of the opinions, else the speaker would not have spoken the word in the first place. Construing all reasonable inferences in favor of Plaintiffs as the Court must do on a Rule 12(b)(6) motion, the specific factual statements the newspaper articles attributed to the disgruntled UMWA supporters, *see* Complaint ¶¶ 89-105, are underlying statements implied by the Newspaper Defendants' use of words such as exploit and abuse. Construing the facts and reasonable inferences in Plaintiffs favor, that makes those statements defamatory under controlling Utah law.

CONCLUSION

The Newspaper Defendants ask the Court to make rulings as a matter of law on factual issues that either have no evidentiary support, or that are based on allegations which, construed in Plaintiffs' favor, preclude dismissal of Plaintiffs' claims. Plaintiffs are entitled to present the news articles in their entirety to a jury, together with their evidence of the underlying facts. It is for those triers of fact to determine, from the evidence as a whole, whether Plaintiffs have been defamed, or if they have been held up on a false light. For the reasons set forth above, the Court should deny the Newspaper Defendants' Motion to Dismiss, and for the reasons set forth in Plaintiffs' prior memoranda, adopted here, should deny The Newspaper Defendants' request for an award of attorney fees.

DATED September 30, 2005.

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CERTIFICATE OF SERVICE

I certify on September 30, 2005 copies of the above were served by first class mail to:

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2712-p.004 oppose newspapers mot to dismiss