Michael Patrick O'Brien (USB #4894)
**JONES WALDO HOLBROOK & MCDONOUGH**
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

Attorneys for Defendants *The Salt Lake Tribune*, Tom Baden, Tim Fitzpatrick, Ron Morris, Melissa Galbraith, Rhina Guidos, Glen Warchol and Tom Wharton

Jeffrey J. Hunt (USB #5855)
David C. Reymann (USB #8495)
**PARR WADDOUPS BROWN GEE & LOVELESS**
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

Attorneys for Defendants *The Deseret Morning News*, John Hughes, Marjorie Cortez, Tiffany Erickson, Elaine Jarvik and Jennifer K. Nii

**IN THE UNITED STATES DISTRICT COURT**

**DISTRICT OF UTAH, CENTRAL DIVISION**

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

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 Memorandum in Support of their Motion to Dismiss in the above-captioned matter.

## TABLE OF CONTENTS

## INTRODUCTION

This case concerns a contentious and very public labor dispute between a coal mine owned by the Kingston family and a number of mine workers who have fought for union representation and better working conditions at the mine. For more than a year, the dispute has generated both local and national publicity, as well as widespread criticism of the Kingston family by mine workers, union leaders, and national advocacy groups. The dispute has been the subject of extensive proceedings before the National Labor Relations Board ("NLRB"), which continues today to investigate the mine and conduct proceedings relating to claims of unfair labor practices and union representation for mine workers.

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

Now, in an unfortunate attempt to punish their opponents in the labor dispute, and to chill any further negative publicity regarding the mine, the Kingstons have sued nearly 100 different defendants, all of whom allegedly "defamed" the Kingstons by reporting the claims of the mine workers during the dispute. Plaintiffs' sweeping 70-page Amended Complaint is a laundry-list of virtually every statement made about the Kingstons and their mine in the press, all of which

Plaintiffs claim are defamatory. Included among the Kingstons' targets are the *Salt Lake Tribune* and the *Deseret Morning News,* together with a number of their editors and reporters, who now bring this Motion to Dismiss.

Plaintiffs' claims against the *Tribune* Defendants and the *Morning News* Defendants are meritless, and they should be dismissed for at least six reasons: (1) Defendants' publications are protected by the neutral reportage privilege; (2) Defendants' publications are protected by the public interest privilege; (3) the alleged defamatory statements are not capable of sustaining defamatory meaning as a matter of law; (4) the alleged defamatory statements are statements of opinion, and not verifiable statements of fact; (5) many of the alleged defamatory statements are protected by the official proceedings privilege; and (6) none of the alleged defamatory statements are "of and concerning" the individual plaintiffs.

## RELEVANT ALLEGATIONS IN THE COMPLAINT

As is clear from the Plaintiffs' Amended Complaint (hereafter the "Complaint"), for more than a year there has been a very contentious and public labor dispute involving the Co-op Mine owned by C. W. Mining and located near Price, Utah (the "Co-op Mine"), current and former employees of the Co-op Mine, and officials of the United Mine Workers of America ("UMWA"). Plaintiffs here are: (1) the Co-op Mine; (2) some of the Co-op Mine's officers and employees; (3) the International Association of United Workers Union ("IAUWU") (the local and international union entities at the Co-op Mine); and (4) their officials.

The Defendants bringing this Motion are two Utah daily newspapers who regularly have reported on this ongoing labor dispute and the NLRB's actions related to the same. Plaintiffs now improperly seek to hold these Defendants liable for reporting and opining upon this dispute. Rather

than specifying which specific statements Plaintiffs believe to be defamatory, Plaintiffs' prolix Complaint contains a laundry-list of virtually every statement made by opponents of the Co-op Mine and reported in the *Tribune* or *Morning News*. No attempt is made to explain why these statements are false, why they have harmed Plaintiffs' reputation, or why they are actionable in tort. Instead, in violation of Fed. R. Civ. P. 8(a), Plaintiffs' strategy seems to be to include every statement ever made about the mine in the Complaint, hoping something will stick.

Given Plaintiffs' laxity, it is not the task of this Court or of Defendants to decipher the morass of allegations contained in the Complaint and try to construct a coherent defamation claim. Nevertheless, for purposes of this Motion, and in the interest of clarity, Defendants have attempted to categorize the numerous statements in the *Tribune* and *Morning News* that Plaintiffs claim are defamatory, and which appear in the various newspaper articles published in 2003 and 2004 referenced in the Complaint (hereafter the "Articles").[1] Those categories are as follows:

---

[1] Copies of the Articles are attached as Exhibit "A" (*Tribune* articles) and Exhibit "B" (*Morning News* articles), so the court can review them in their entirety. In addition, for context, attached hereto as Exhibit "C" and "D", respectively, are true and correct copies of the posted NLRB settlement documents and notice relating to the mine, which are publicly available from the Denver NLRB office; and a copy of the NLRB's rulings relating to the mine, available at: http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2004/27-RC-8326(11-18-04).pdf. These NLRB documents are referenced both in the Articles and in Plaintiffs' Complaint. [*See* Exhibit "A" hereto, 7/7/04, 7/14/04, 10/3/04, 11/20/04, 11/30/04; Exhibit "B" hereto, 7/4/04, 7/8/04, 11/20/04, 12/1/04; Complaint ¶¶ 81(tt)(iii)-81(vv), 81(xx)-81(eee), 81(ggg)-81(qqq), 83(h), 83(i), 83(l)-83(o), 85(h), 85(j).] Having been referenced and/or relied on in Plaintiffs' Complaint, these four exhibits are properly before the Court on a Rule 12 motion to dismiss. *See, e.g. GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) ("[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss. If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied.") (citations omitted); *Karacand v. Edwards*, 53 F. Supp.2d 1236, 1246 (D. Utah 1999) ("Courts have rejected as disingenuous the attempts of plaintiffs to exclude documents on which they rely in pleading their allegations."); *Oakwood Village LLC v. Albertson's, Inc.*, —P.3d—, 2004 WL 2756293, 2004 UT 101, ¶ 13 (Utah December 3, 2004) (attached hereto as Exhibit "E"); *see also Wright v. Associated Ins. Cos., Inc.*, 29 F.3d 1244, 1248 (documents are not "outside the pleadings" if they are "referred to in the plaintiff's complaint and are central to his claim").

1. **Statements Regarding the Lockout:** Workers and union leaders say the Co-op Mine locked them out, fired them, and/or otherwise retaliated when the workers tried to organize or support a new union.[2]

2. **Statements Regarding the IAUWU:** Workers and union leaders say the IAUWU does not represent workers' interests, is a sham union controlled by the Kingstons, and does not have a "true" labor contract with workers; and that the Kingstons tried to stack the union vote with family members.[3]

3. **Statements Regarding Working Conditions at the Mine:** Workers and union leaders say that workings conditions at the Co-op Mine are poor; that the Co-op Mine exploits, intimidates, and abuses workers; that wages are meager and workers are forced to work with injuries, work overtime, and pay for equipment; that workers lack training and health-care benefits; that Kingston children work in the mine; and that mine conditions are analogous to human rights violations and slavery.[4]

4. **Statements Regarding NLRB Proceedings and Rulings:** Workers and union leaders say the NLRB ordered reinstatement and backpay, found the firing and intimidation of workers to be illegal, and excluded Kingston family members from the union vote.[5]

These statements are exactly the type of vigorous rhetoric and hyperbole one expects to hear in the course of a contentious labor dispute, and the fact that the local media reported these allegations is hardly surprising. Apparently, however, Plaintiffs believe that negative publicity equates to defamation, and that the *Tribune* and *Morning News* should therefore be held liable for

---

[2] *Tribune Articles:* 9/26/03, 10/12/03, 12/20/03, 5/5/04, 7/3/04, 7/7/04, 7/10/04, 7/14/04, 9/25/04, 10/3/04, 11/20/04, 11/30/04; *Morning News Articles:* 10/30/03, 12/3/03, 1/18/04, 3/23/04, 4/26/04, 5/2/04, 7/3/04, 7/4/04, 7/7/04, 7/8/04, 10/1/04, 11/20/04.

[3] *Tribune Articles:* 9/26/03, 10/12/03, 10/31/03, 5/5/04, 7/3/04, 7/7/04, 9/25/04, 10/3/04, 11/20/04, 11/30/04; *Morning News Articles:* 10/30/03, 12/3/03, 1/18/04, 3/23/04, 4/26/04, 7/4/04, 7/7/04, 11/20/04.

[4] *Tribune Articles:* 9/26/03, 10/12/03, 10/31/03, 11/20/04, 12/11/03, 12/20/03, 5/5/04, 7/10/04, 7/14/04, 11/30/04; *Morning News Articles:* 10/30/03, 1/18/04, 3/23/04, 4/26/04, 5/2/04, 7/7/04, 7/8/04, 11/20/04, 12/1/04.

[5] *Tribune Articles:* 7/7/04, 7/14/04, 10/3/04, 11/20/04, 11/30/04; *Morning News Articles:* 7/4/04, 7/8/04, 11/20/04, 12/1/04.

reporting both sides of this labor dispute. Plaintiffs are mistaken, and their claims should be dismissed as a matter of law.

## ARGUMENT

Plaintiffs' defamation claims against the *Tribune* Defendants and the *Morning News* Defendants suffer from at least six legal defects, any one of which is sufficient for dismissal: (1) the alleged defamatory statements are protected by the neutral reportage privilege; (2) the statements are protected by the public interest privilege; (3) the statements are not capable of sustaining defamatory meaning as a matter of law; (4) the statements are expressions of opinion, and not verifiable statements of fact; (5) many of the statements are protected by the official proceedings privilege; and (6) none of the statements are "of and concerning" the individual plaintiffs. These arguments will be considered in turn.[6]

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

First, Plaintiffs' defamation claims fail because the Articles are constitutionally privileged as neutral reports of an ongoing public controversy. The existence of a privilege in a defamation case is a question of law for the court. *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992).

The First Amendment to the United States Constitution protects accurate and disinterested reports of public controversies and charges made by participants in those controversies. *See*

---

[6] Plaintiffs' Complaint includes two other tort claims for intentional interference with economic relations and civil conspiracy. The Complaint does not specify whether these claims are directed at the *Tribune* and *Morning News* Defendants, although it appears they are not. However, to the extent that Plaintiffs do allege additional claims against those defendants, the claims fail for all of the reasons set forth herein because the only alleged wrongful conduct by the *Tribune* and *Morning News* is the publication of statements alleged to be defamatory.

*Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied* 434 U.S. 1002 (1977) (neutral reportage privilege protects newspaper article containing accusations by Audubon Society that prominent scientists were paid by pesticide industry to lie about effects of pesticide on birds);[7] *cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 649 (1989) (Blackmum, J., concurring) (petitioner's failure to assert neutral reportage privilege "unwise").

The purpose of the privilege is obvious – "The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." *Edwards*, 556 F.2d at 120. Said another way:

> A robust and unintimidated press is a necessary ingredient of self-government . . . Thus, the doctrine of neutral reportage gives bent to a privilege by the terms of which the press can publish items of information relating to public issues, personalities or programs which need not be literally accurate. If the journalist believes, reasonably and in good faith, that his story accurately conveys information asserted about a personality or program, and such assertion is made under circumstances wherein the mere assertion is, in fact, newsworthy, than he need inquire no further.

*Krauss v. Champaign News Gazette, Inc.,* 375 N.E.2d 1362, 1363 (Ill. Ct. App. 1978) (applying neutral report to newspaper article reporting state's investigation into use of drugs at youth group home).

---

[7] *See also Coliniatis v. Dimas,* 965 F. Supp. 511, 520 (S.D.N.Y. 1997) (privilege protects newspaper's publication of law firm letter alleging airline employee's involvement in kickback scheme); *In re United Press Int'l,* 106 B.R. 323, 16 Med. L. Rptr. 2401, 2406-08 (D.D.C. 1989) (neutral reportage privilege protects article about accusations made regarding politician's ties to organized crime); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122-1128 (N.D. Cal. 1981) (article outlining accusations against basketball coach protected by neutral reportage privilege); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1433-34 (8th Cir. 1989) (analyzing neutral reportage privilege in context of publication of book analyzing both sides of Wounded Knee occupation and shootout). Defendants have not discovered any Utah or Tenth Circuit cases addressing the neutral reportage privilege. Because it is based on the United States Constitution, however, this Court is best guided by the federal cases cited above when applying the privilege in this case.

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 the persons involved in the controversy. *In re United Press Int'l*, 106 B.R. at 329, 16 Med. L. Rptr. at 2407; *see also Barry*, 584 F. Supp. at 1122-28.

The presence of a labor dispute here presents especially compelling arguments for the application of the neutral reportage privilege for the press. Consider the nature of labor disputes:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

*Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966) (citing *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943)). The Tenth Circuit also has recognized these same principles. *See, e.g., Gen. Motors Corp. v. Mendicki*, 367 F.2d 66, 71 n. 3 (10th Cir. 1966). Thus, the federal courts have restricted libel claims in this context.

Specifically, in *Linn*, the United States Supreme Court held that defamation claims made by labor dispute participants are preempted and governed by the National Labor Relations Act ("NLRA") and not actionable in tort. The only exception the Court allowed is when a libel plaintiff proves the statements at issue were published with known falsity or reckless disregard of the truth. *See Linn,* 383 U.S. at 65-66 (relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This

restriction was established to prevent "unwarranted intrusion upon free discussion envisioned by the Act [NLRA]" and because the national labor laws favor "uninhibited, robust and wide-open debates in labor disputes . . . ." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974). The press needs similar breathing space to report on the uninhibited, robust and wide-open debates that occur in labor disputes.

The neutral reportage privilege clearly applies to this case. 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. 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)). Plainly, both sides of this labor dispute have made charges and countercharges during the course of the dispute. The public has a great interest in understanding both sides of the dispute and the significant social issues involved. The Articles, in neutrally and accurately reporting both sides of the issues, served to inform the public of this controversy, and thus are privileged.[8]

---

[8] 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.

In their Complaint, Plaintiffs conveniently omit any reference in the Articles to comments made by mine officials or Kingston representatives, giving the false impression that the Articles are merely one-sided reports of the mine controversy. Even a cursory review of the actual Articles demonstrates that these allegations are misleadingly incomplete. To take just one example, in Paragraphs 85(i)(i-iv), Plaintiffs quote a series of statements from a July 7, 2004 *Morning News* article in which workers and union leaders state their positions in the ongoing labor dispute. Plaintiffs omit, however, an extensive section of the article – which appears in the middle of the alleged defamatory statements – that fully reports the Kingstons' side of the controversy. In language *immediately following* statements made by a mine worker, the article states as follows:

> The [NLRB] settlement stipulates that the mine does not admit to any unfair labor practice. On Tuesday, C.W. officials continued to assert that their miners are paid fairly and that the mine stands up to safety requirements.
>
> "They have made several allegations, all of which have been investigated by MSHA (the Mine Safety and Health Administration), which concluded that there were no safety violations," said Charles Reynolds, C.W. Mine's personnel manager. "We have an excellent record with MSHA, which can be verified."
>
> In addition, Reynolds said, "Some of the employees who did have complaints brought their complaints to us. The majority did not."
>
> When asked about the miners' wages, Reynolds said workers are paid on a scale, based on skill level and experience. While the scale allows for wages as high as $18 per hour, Reynolds said that many of the affected workers were closer to the $5.75 per-hour minimum – which he attributed to workers' lack of experience.
>
> "A lot of these guys, they come in from Mexico totally inexperienced, like I was totally inexperienced," said Chris Grundvig, a C.W. Mine mechanic and International Association of United Workers Union miners' representative. "I don't think any mine in the country would have paid me, or them, $20 an hour. . . . They make higher wages once they've been here a while."
>
> C.W. asserts it already has an exclusive collective bargaining agreement with its workers through the IAUWU, and that workers should seek representation there, instead of from the United Mine Workers.
>
> "I offered them representation," said Grundvig. "They don't want it."
>
> Grundvig said C.W.'s IAUWU membership currently includes up to 100 active miners, and he maintained under heavy criticism from the striking miners that the union is a legitimate, legally established association acting on behalf of workers.

[*See* Exhibit "B" hereto, 7/7/04.]

The remaining non-editorial articles contain similar balanced reporting on the labor dispute, either quoting mine officials or noting that they were unavailable for comment. Specifically, the Articles report that:

- 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).

- 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).

- 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).

- 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).

- The NLRB determined IAUWU is a valid labor organization. (*Tribune:* 11/20/04, 7/14/04, 7/3/04; *Morning News:* 11/20/04).

- 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)

- The Co-op Mine appealed the NLRB ruling, calling it "discriminatory". (*Tribune:* 11/30/04, 11/20/04).

- The Plaintiffs have filed lawsuits alleging statements made in the Articles are false. (*Tribune:* 10/3/04, 9/25/04).

- 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).

These balanced accounts of the public labor dispute between the Mine and its workers are precisely the type of newsworthy reporting encouraged by the neutral reportage privilege.[9] Plaintiffs are not entitled to bar any news coverage of their labor dispute by refusing to offer public comment, nor are they entitled to sue for defamation when an article reports both sides of a public controversy. 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.

Plaintiffs' defamation claims also fail because the Articles are privileged under the "public benefit" or "public interest" privilege recognized under Utah law. The privilege applies if "the publication . . . of the matter complained of was for the public benefit." Utah Code Ann. § 45-2-3(5).[10] While the statute does not define which publications are for the "public benefit," Utah courts have made clear that publications concerning public health and safety, the functioning of

---

[9] The neutrality of the Articles is also obvious in the words used, which indicate that the Articles are reporting on disputed claims. For example: "complained" or "complaints" (*Tribune:* 11/30/04; *Morning News:* 3/27/04); "perceive" (*Tribune:* 10/12/04); "alleges/alleged" (*Tribune:* 11/30/04; *Morning News:* 10/30/03, 7/7/04, 11/20/04, 12/1/04); "disagreement" (*Tribune:* 10/12/03); "claims/claimed" (*Tribune:* 11/30/04, 9/25/04; *Morning News:* 4/26/04, 7/3/04, 7/7/04, 12/1/04); "contended" (*Tribune:* 11/20/04; *Morning News:* 7/8/04); "dispute" (*Tribune:* 9/25/04, 7/10/04, 7/7/04, 9/26/03; *Morning News:* 7/8/04); "argued" (*Morning News:* 10/30/03); "charges" (10/30/03); "believe" (*Morning News:* 3/27/04); "opinion" (*Morning News:* 5/2/04); "assert" (*Morning News:* 7/7/04); and "maintains" (*Tribune:* 10/12/03).

[10] The statute provides as follows:

> A privileged publication or broadcast which shall not be considered as libelous or slanderous per se, is one made:
>
> ***
>
> (5) By 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 broadcast of the matter complained of was for the public benefit.

Utah Code Ann. § 45-2-3(5) (emphasis added). 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 interpreted that way by the Utah Supreme Court.

governmental bodies, or the expenditure of public funds fall within the ambit of the privilege. As the Utah Supreme Court has explained:

> The "public interest" privilege is applicable, at least, when the public health and safety are involved and when there is a legitimate issue with respect to the functioning of governmental bodies, officials, or public institutions, or with respect to matters involving the expenditure of public funds.

*Seegmiller v. KSL, Inc.*, 626 P.2d 968, 978 (Utah 1981); *see also Cox v. Hatch,* 761 P.2d 556, 559 n. 3 (Utah 1988) (recognizing public interest qualified privilege). To overcome the privilege, Plaintiffs must prove that Defendants acted with ill will or spite ("common law malice"), that the Articles were excessively published, or that Defendants did not reasonably believe the statements in the Articles were true ("actual malice"). *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-905 (Utah 1992); *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, 225 (Utah 1976); *Williams v. Standard-Examiner Publ'g Co.*, 27 P.2d 1, 17 (Utah 1933).

In this case, it is clear that the Articles concern a matter of significant public interest and were published for the public benefit. The allegations surrounding the Co-op Mine concern health and safety conditions at the mine, the alleged exploitation and abuse of numerous workers, the use of child labor, allegedly unlawful working conditions and labor practices, accusations of human rights violations, a large-scale strike by miners, and, eventually, multiple proceedings before the NLRB. Close to a hundred workers were involved in the initial strike and subsequent lockout by the Co-op Mine, and numerous other miners continue to work at the mine. A myriad of government and advocacy groups have been involved in the dispute in connection with the workers' health and safety claims, including the United Mine Workers, Utah Jobs with Justice, the Disabled Rights Action

Committee, the Mine Safety and Health Administration, the National Organization for Women, and Code Pink.

The Co-op Mine dispute has generated substantial coverage in both local and national press, as the voluminous allegations of Plaintiffs' own Complaint make clear. The news media plays a significant constitutional role in providing the public with newsworthy information on a matters of public interest and thereby facilitating legitimate public debate. In fulfilling this role by publishing the Articles, the *Tribune* and *Morning News* helped keep the public informed of a situation that implicated the health, safety, and rights of hundreds of workers in Utah, as well as ongoing proceedings before governmental agencies. Because the statements in the Articles deal not only with public health and safety, but also issues before the NLRB, they fall within the scope of the public interest privilege. *See Seegmiller,* 626 P.2d at 978; *Mast v. Overson,* 971 P.2d 928, 931 (Utah Ct. App. 1998) (political dispute over local development project was "issue of public interest"); *Brown v. Wanlass,* No. 980404712 (4th Dist. Ct. August 11, 1999) (Stott, J.) (granting newspaper defendant's motion for summary judgment on defamation claim based on public interest privilege); *Jacob v. Bezzant,* No. 000403530 (4th Dist. Ct. April 2, 2004) (Davis, J.) (dismissing defamation claims against newspaper on the pleadings based on public interest privilege).[11]

To overcome the public interest privilege applicable to the Articles, it is Plaintiffs' burden to demonstrate that Defendants published the Articles with common law malice, that the articles were excessively published, or that Defendants did not reasonably believe that the statements in the Articles were true. Plaintiffs have failed to plead facts supporting any of these three exceptions.

---

[11] Copies of the rulings in *Brown* and *Jacob* are attached hereto as Exhibits "F" and "G", respectively.

First, Plaintiffs must plead facts demonstrating common law malice by Defendants (*i.e.*, ill will or spite) in order to overcome the public interest privilege. *See Russell,* 842 P.2d at 905 and n. 28; *Combes v. Montgomery Ward & Co.,* 278 P.2d 272, 277 (Utah 1951). "Whether the evidence in a defamation case is sufficient to support a finding of malice is a question of law." *Russell,* 842 P.2d at 905.

Plaintiffs' Complaint is entirely devoid of any facts supporting a finding of common law malice by Defendants. The only allegation in the Complaint that relates to malice is Paragraph 132, which states, in full, as follows: "Defendants' statements as described above were made with malice." [Complaint ¶ 132.] Notably, this conclusory allegation is not specific to the *Tribune* Defendants, or the *Morning News* Defendants, but is rather applied to all of the nearly 100 defendants in this case. The Complaint contains no specific facts explaining why the *Tribune* or *Morning News* would have any spite or ill will towards the Co-op Mine, or why the Articles would be the product of such common law malice.[12]

Under Utah law, a plaintiff must do more than simply include the word "malice" in his complaint to overcome a conditional privilege. "[U]nless plaintiff pleads and proves facts which indicate actual malice in that the utterances were made from spite, ill will or hatred toward him and, unless the plaintiff produces such evidence, there is no issue to be submitted to the jury." *Combes v. Montgomery Ward & Co.,* 228 P. 2d 272, 277 (Utah 1951) (emphasis added). *Cf. Karacand v. Edwards,* 53 F. Supp. 2d 1236, 1241 (D. Utah 1999) (on a motion to dismiss, although well-pleaded

---

[12] Indeed, the only facts before the Court are directly contrary to a finding of common law malice. As noted in Section I, *supra*, the Articles regularly provide a balanced account of the labor dispute, including extensive recitations of the Co-op Mine's position. The Articles also indicate repeated attempts to contact and interview mine officials to provide their side of the story.

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) ("Legal conclusions, deductions, and opinions couched as facts are, however, not given such a presumption.").

Because it is Plaintiffs that "[have] the burden of presenting evidence to overcome the privilege," *Russell,* 842 P.2d at 905 n. 28, and because the Complaint fails to plead facts sufficient to carry that burden, the common law malice exception does not apply.

The second exception to the privilege – excessive publication – is irrelevant here. The Complaint contains no allegations or supporting facts contending that the Articles were excessively published. Under Utah law, excessive publication requires that "publication of the defamatory material extended beyond those who had a legally justified reason for receiving it." *DeBry v. Godbe,* 1999 UT 111, ¶ 21, 992 P.2d 979 (quoting *Brehany v. Nordstrom, Inc.,* 812 P.2d 49, 58 (Utah 1991)). Here, the Articles were published to those who subscribed to the *Tribune* or the *Morning News* – precisely those with a legally justified reason for receiving those papers.[13]

Finally, the "actual malice" exception to the public interest privilege does not apply here. In alleging actual malice, Plaintiffs face a heightened burden of proving their claim by "clear and convincing" evidence. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254 (1986). To prove that a false statement was made with "reckless disregard" for its truth, the plaintiff must show that

---

[13] Plaintiffs allege that the Articles were published on the internet websites of the *Tribune* and the *Morning News,* Amended Complaint ¶¶ 84, 86, but that fact does not establish excessive publication. *See Firth v. New York,* 747 N.Y.S.2d 69, 30 Media L. Rep. 2085 (N.Y. 2002) (publication on internet website constitutes "single publication" for defamation purposes); *Cf. DeBry,* 1999 UT 111, ¶ 23 ("publication" requires that the receiving party "read and understand" the defamatory material; without allegation that recipient of publication read material, publication cannot be excessive). This rule makes practical sense. Virtually every newspaper now publishes some or all of its articles online. If internet publication alone were enough to vitiate a conditional privilege, then the privilege would be meaningless.

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." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). Whether the facts as pled support such a showing is a question of law for the Court. *See Russell,* 842 P.2d at 905.

The Complaint contains no facts supporting such a showing. The sole allegation in the Complaint relating to actual malice is the sweeping assertion that *all* of the defendants' statements "were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity." [Complaint ¶ 131]. There are no facts in the Complaint supporting this legal conclusion, no allegations regarding any investigation or fact-checking performed by the *Tribune* or *Morning News,* and no assertions of any background knowledge those defendants had regarding the underlying facts of the Co-op Mine dispute. Again, under Utah law, a plaintiff must do more than simply parrot the legal standard for actual malice. He must allege specific facts that, if proven true, would carry his burden at trial. *Combes,* 228 P.2d at 277. Plaintiffs have not done so here.

Because the Articles in question clearly fall within the scope of Utah's public interest privilege, and because Plaintiffs have not alleged any specific facts establishing an exception to the privilege, Plaintiffs' claims should 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.

Plaintiffs' defamation claims also fail because the Articles, published in the context of a heated labor dispute, do not convey defamatory meaning as a matter of law.

"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) (ordering dismissal of politician's

libel claim because newspaper article was not capable of conveying a defamatory meaning as a matter of law). If the Court determines that, given the context of the Co-op Mine labor dispute, the alleged falsehoods in the Articles are not capable of conveying a defamatory meaning to "reasonable" members of its audience, then Plaintiffs' defamation claims fail as a matter of law. *Cox,* 761 P.2d at 561 (affirming dismissal of defamation claim because publication not defamatory as a matter of law). Consequently, it is not enough that Plaintiffs may believe the Articles damaged their reputations or were otherwise upsetting:

> A publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff. Thus, **an embarrassing, even though false, statement that does not damage one's reputation is not actionable as libel or slander.** If no defamatory meaning can reasonably be inferred by reasonable persons from the communication, the action must be dismissed for failure to state a claim.

*Cox,* 761 P.2d at 561 (emphasis added); *see also West,* 872 P.2d at 1009.

Moreover, political invective, exaggerated commentary or rhetorical hyperbole, such as saying a politician manipulated a situation, is not actionable as libel, *i.e.,* "such criticism is not defamatory." *West*, 872 P.2d at 1010. For example, the Utah Supreme Court has noted that it is not necessarily defamatory to use comments or phrases such as "coarse," "vile," "obscene," "abusive," "insensitive," "malicious," "hypocritical," "hatchet man," "scalawag," "scab," "rake," "scoundrel," and/or "traitor." *Id.; see also Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1994) (use of word "blackmail" in context was nonactionable rhetorical hyperbole); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1983) (references to alleged sexual acts by Miss Wyoming were nonactionable rhetorical hyperbole).

In determining whether a statement can convey defamatory meaning, the overall context in which the statements were made is critically important. Rather than looking at the Articles in isolation, the Court "must carefully examine the context in which the statement was made, giving the words their most common and accepted meaning," to determine if the statement is capable of being defamatory in the manner Plaintiffs allege. *West,* 872 P.2d at 1009.

When statements are made in the context of a heated political debate, or contentious labor dispute, courts properly give wide berth to participants in those debates to encourage vigorous public dialogue. As noted in Section I, *supra,* labor disputes are "ordinarily heated affairs" involving language that, in some other context, "might well be deemed actionable per se[.]" *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58 (1966). Such disputes "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* Given the need to prevent chilling of participants in such disputes, the U.S. Supreme Court has held that defamation claims against labor participants are only actionable if the plaintiff can demonstrate actual malice. *Id.* at 65-66.

In reporting on such disputes and the statements made by participants, the news media fulfills an important constitutional function of facilitating these debates, and consequently merits the same latitude afforded the participants themselves. Otherwise, the goals of encouraging "uninhibited, robust and wide-open debates in labor disputes" would be frustrated, resulting in an "unwarranted intrusion upon free discussion envisioned by the Act [NLRA]." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974).

The Utah Court of Appeals addressed an analogous situation in *Mast v. Overson,* 971 P.2d 928 (Utah Ct. App. 1998), *cert. denied,* 982 P.2d 88, in which the court dismissed a claim for

defamation because the statements at issue were not defamatory as a matter of law. That case involved a heated local debate over the Salt Lake County Commission's plan to build a golf course in Draper, Utah. The plaintiff, David Mast, claimed that statements made by Commissioner Brent Overson were defamatory, including claims that Mast's campaign was "politically motivated, mean spirited and a sham"; that Mast's activist group was "deceptive," and merely a "ruse" and a "front"; that Mast had engaged in "character assassination"; and that Mast had made claims that were "rife with misstatements and bare-faced lies." *Id.* at 930.

In dismissing the plaintiff's claims and finding that the statements at issue could not convey defamatory meaning, the Utah Court of Appeals focused extensively on the context of the statements, noting that "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.'" *Id.* at 931 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964)). This context was significant to the court, since "Mast and Overson were merely continuing the tradition of open exchange necessary to a free society." *Id.* at 932. Even assuming that "Overson's statements were completely false," the court found that, "[i]n this context, Overson's statements would not impugn Mast's honesty, integrity, virtue, or reputation in the eyes of the statements' audience." *Id.* The court continued, "the context of Overson's statements informed the reader or listener they were merely a continuation of a heated political debate, and the statements did not present a likelihood the audience would form a personal animus towards Mast." *Id.* at 932.

Simply put, "because these statements were published in the context of a political debate on a public issue and the audience was thus not apt to take them at face value, there was no likelihood

of damage to Mast's reputation and the statements, therefore, were not defamatory." *Id.* at 933. The court's conclusion eloquently underscores the need to encourage unfettered dialogue on issues of social importance, and the consequent protection given to statements made in such debates:

> Overson's statements were not defamatory as a matter of law. The discourse between Mast and Overson is commendable for demonstrating why "debate on public issues should be uninhibited, robust, and wide-open," and statements made in the course of such debate do not become compensable merely because they "include vehement, caustic, and sometimes unpleasantly sharp attacks."

*Id.* at 934 (quoting *New York Times,* 376 U.S. at 270).

Like *Mast v. Overson,* the Articles in this case were published in the course of a heated debate on public issues addressing matters of significant social importance. The "spirited public debate" between the Co-op Mine workers and its management is not only typical of labor disputes, but is also a crucial part of the public resolution of such issues. As in *Mast,* the context of the statements contained in the Articles immediately inform the reader that the statements are made in the course of a contentious labor dispute, and thus, even if the statements were false, the audience is "not apt to take them at face value." *Id.* at 933. The statements in the Articles, therefore, are not capable of conveying defamatory meaning as a matter of law, and Plaintiffs' defamation claims should accordingly be dismissed.

## IV. THE ALLEGED DEFAMATORY STATEMENTS ARE NON-ACTIONABLE STATEMENTS OF OPINION.

A related, but distinct, element of Plaintiffs' defamation claims is that the alleged defamatory statements must be statements of verifiable fact, rather than simply expressions of opinion. To state a claim for defamation, a plaintiff must allege defamatory statements of fact that are "capable of being objectively verified as true or false." *West v. Thomson Newspapers,* 872 P.2d 999, 1018 (Utah

1994). This requirement is derived both from the common law elements of defamation and from the constitutional importance of a free and unrestrained press. The Utah Supreme Court has emphasized the importance of allowing the press latitude to express opinions on public issues:

> [E]xpressions of opinion are the mainstay of vigorous public debate. Without opinion, such debate is virtually nonexistent. Thus, if expressions of opinion could serve as the basis for defamation actions, the press would be forced to choose between publishing opinions knowing that no amount of editorial oversight could protect it from exposure to civil liability or ceasing altogether to publish expressions of opinion. Given the importance of opinion in the marketplace of ideas, either alternative would constitute significant abridgement or restraint of the press.

*Id.* at 1014-15 (citation omitted).

The Utah Supreme Court has identified four factors to consider in determining whether a statement is fact or opinion in the defamation context: (1) the common usage or meaning of the words used; (2) whether the statement is capable of being objectively verified as true or false; (3) the full context of the statement, *i.e.,* the entire article in which the statement is made; and (4) the broader setting in which the statement appears. *West,* 872 P.2d at 1018. All four of these factors weigh in favor of finding the alleged defamatory statements here to be non-actionable opinions.

First, the common meaning of the allegedly defamatory words in the Articles suggests the words are nothing more than spirited rhetoric common in public debates. As noted above, the Articles frequently introduce statements made by participants with indications that the statements are "contentions," "arguments," or "claims." [*See* Section I, *supra.*] Moreover, the context of the Articles as reporting on a labor dispute further indicates that the allegations are expressions of the opinions of workers and union activists. *See, e.g., Ogden Bus Lines v. KSL, Inc.,* 551 P.2d 222, 224 (Utah 1976) (finding editorial statement to be opinion where statement was preceded by phrase "KSL believes . . .").

Second, few, if any, of the allegedly defamatory statements identified by Plaintiffs are capable of objective verification as true or false. The first two categories of statements identified above (claims that workers were illegally locked out and terminated, and claims that the IAUWU was not a proper legal union and did not fairly represent worker interests), as well as the fourth category of statements (interpreting the rulings of the NLRB), are essentially legal opinions offered by laymen. Courts have consistently held that statements of legal opinion are not verifiable as true or false, particularly where no court has yet ruled on the issue, and thus cannot support a claim for defamation. As the court stated in the leading case of *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, "[a]bsent a clear and unambiguous ruling from a court or agency of competent jurisdiction, statements by laypersons that purport to interpret the meaning of a statute or regulation are opinion statements, and not statements of fact. . . . As a matter of law, the statement . . . [therefore] did not constitute defamation." 173 F.3d 725, 731-32 (9th Cir. 1999). *See also Rodriguez v. Panayiotou,* 314 F.3d 979, 986 (9th Cir. 2002) (rejecting defamation claim based on statement of legal opinion); *Dial-A-Car, Inc. v. Trans., Inc.,* 884 F. Supp. 584, 592 (D.D.C. 1995) ("At this point, all that can be said is that defendants were expressing an opinion on an inconclusive question of law and were not making representations of verifiable or 'hard definable facts.'").[14]

The remaining category of statements (involving claims of exploitation and abuse of workers) also includes very few statements that are capable of objective verification. Exaggerated rhetoric and hyperbole, such as claims that the Co-op Mine is akin to "slavery" and guilty of "abuse, intimidation, and exploitation" are immediately obvious as statements of subjective intent, often

[14] This rule makes perfect sense. Legal differences of opinion are common in public discourse, particularly in the context of labor disputes. It would be paralytic to free and unfettered dialogue if every such discussion resulted in one party getting sued for defamation.

made by clearly partisan activists in the dispute. *See West,* 872 P.2d at 1019 (statement of subjective intent is mere opinion). The remaining statements dealing with more specific claims, such as forced overtime, lack of health care, charges for equipment, and the use of child labor, are closer to factual claims, but, because they are made in the context of a contentious labor dispute, are likely to be seen by a reasonable reader as expressions of opinion in an ongoing debate, rather than authoritative statements of fact. *See Ogden Bus Lines,* 551 P.2d at 224.

The third factor in the fact/opinion test considers the verbal context of the Articles, *i.e.,* whether other words used in the Articles convey to the reader that the statements contained therein are expressions of opinion. As noted in detail above, the Articles consistently use such words and relate background facts explaining to readers that the Co-op Mine and its workers are involved in a heated labor dispute. In this context, readers are made aware that the Articles are not conveying statements from the workers or mine officials as statements of verified fact, but rather reporting those statements as the assertions and claims of the parties to that dispute. As a result, the statements are not defamatory. *See Ogden Bus Lines,* 551 P.2d at 224. Moreover, several of the Articles alleged by Plaintiffs as defamatory are clearly identified as editorials or "op-ed" opinion pieces, explicitly informing the reader that the statements contained therein are protected expressions of editorial opinion.[15]

Fourth, and perhaps most compelling, the Articles were published in the broader context of a spirited public debate. Under Utah law, statements made in such contexts are much more likely to be construed as statements of opinion, rather than fact. *See West,* 872 P.2d at 1019 (statements

---

[15] *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).

made in course of political campaign). This presumption that such statements are opinion is even stronger when the statements are published in an editorial context by a newspaper. *Id.* at 1020 ("It is well understood that editorial writers and commentators frequently resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction.") (quotation omitted).

As demonstrated at length above, Defendants' participation in the process of public debate is a constitutionally important role that should not be abridged by retaliatory defamation claims by one side to a dispute. For the same reasons that the broader context of the Co-op Mine dispute renders the statements in the Articles incapable of sustaining defamatory meaning, that context also informs the reader that the assertions made by participants in the dispute are likely to be expressions of opinion, not fact. As a result, those statements cannot support a defamation claim.[16]

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

Even if the foregoing arguments did not apply, some of the statements at issue in the Articles are independently privileged as reports of governmental proceedings and thus not actionable as defamation.

This issue is governed directly by common law privileges, a Utah statute (Utah Code Ann. § 45-2-3(2), (4)), and a Utah Supreme Court decision, *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992). Each provide that a fair and true report of judicial records and/or proceedings is privileged. The statute states, in relevant part:

> A privileged publication or broadcast which shall not be considered as libelous or slanderous per se, is one made:

---

[16] The fact that the Articles do not contain false statements of verifiable facts also undermines any claim by Plaintiffs that Defendants acted with constitutional (or "actual") malice – *i.e.*, with knowledge of falsity. If the statements in the Articles are non-actionable opinion, then there can be no showing of actual malice.

(2) In any publication or broadcast of any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.

. . .

(4) By a fair and true report, without malice, of a judicial, legislative or other public official proceeding, or 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.

In *Russell*, a Cedar City nurse sued in tort after a newspaper reported on disciplinary proceedings initiated against her and a doctor named David Brown. The trial court granted the newspaper's summary judgment motion, concluding the statements at issue were non-actionable privileged reports of official proceedings under the statutes discussed above and under the common law. The Utah Supreme Court agreed that the fair report privileges were valid and applied to all but one of the statements at issue in the case. *Russell,* 842 P.2d at 902.

Whether a privilege exists is a question of law for the court. *Id.* at 900. Under *Russell* a statement will "qualify for privilege under the statute" if it meets three criteria:

- It must be a report of a judicial, legislative, or other public official proceeding or anything said in the course thereof or of a charge or complaint upon which a warrant shall have been issued or an arrest made;
- It must be a fair and true report of the proceeding or charge (i.e. "the report must accurately reflect the proceedings and the statements or allegations made therein"); and
- It must be made without malice.

*Id.* at 900, 902. The court held, "If the report correctly and accurately reflects the proceedings it covers, then it will maintain the privilege, absent malice, regardless of the falsity of the statements or allegations made in the proceedings themselves." *Id.* at 902.

All three of these elements are satisfied here. First, the Articles were all published in the context of a labor dispute that is still subject to official NLRB proceedings. The statements made by participants in the dispute mirror the allegations made by those parties to the NLRB. More directly, many of the Articles specifically report on proceedings before the NLRB and convey the content of various NLRB rulings.[17]

Second, the Articles accurately reflect the NLRB settlement and rulings, as well as the statements and allegations made in the course of those proceedings. Plaintiffs imply that certain statements regarding forced reinstatement, backpay, and illegal firings are not an accurate reflection of the NLRB settlement. According to Plaintiffs, the Co-op Mine voluntarily gave unilateral offers of reemployment, rather than being ordered to reinstate workers. Plaintiffs appear to suggest this was all done without any pressure or involvement from the NLRB. However, the NLRB settlement documents tell a 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 of the parties cannot agree on an amount; and (6) the Co-op Mine had to

---

[17] These articles are contained in Category 4 above; specifically: Exhibit "A", 7/7/04, 7/14/04, 10/3/04, 11/20/04, 11/30/04; Exhibit "B", 7/4/04, 7/8/04, 11/20/04, 12/1/04.

post notices restating its recognition of the employees' federal rights to engage in concerted activity and union organizing activities. [*See* Exhibits "C" and "D" hereto.]

Third, as discussed in detail above, Plaintiffs have not alleged any facts in their Complaint supporting a showing of malice – either common law or actual – by Defendants. Such a showing is Plaintiffs' burden, and they have failed to carry it here.

As a result, because the Articles accurately report the assertions made in connection with the NLRB proceedings, as well as the resulting NLRB settlement and rulings, 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.

Even if the Court were to assume that the statements contained in the Articles were defamatory, and were not privileged, the defamation claims of the individual plaintiffs (as opposed to the Co-op Mine and the IAUWU) should be dismissed because the allegedly defamatory statements in the Articles are not "of and concerning" those persons (hereafter, the "Individual Plaintiffs.")[18]

The Utah Supreme Court has defined libel as "words specifically directed at the person claiming injury." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977 (Utah 1981) (emphasis added); *see also West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) (libel plaintiff must show statement was published "concerning" him or her). Thus, as part of their defamation claims here, the Individual Plaintiffs must prove that the statements at issue are "of and concerning" them. *See also*

---

[18] The Individual Plaintiffs are 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.

*New York Times Co. v. Sullivan*, 376 U.S. 254, 288, 292 (1964); RESTATEMENT (SECOND) OF TORTS § 613 (1977).

In *Rosenblatt v. Baer*, 383 U.S. 75, 79 (1966), an article implied that Baer, a county administrator, along 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. "To the extent the trial judge authorized the jury to award respondent a recovery without regard to evidence that the asserted implication of the column was made specifically of and concerning him, we hold the instruction was erroneous." *Id.* at 81-82 (emphasis added).

In the case at hand, all the statements alleged to be actionable in the Amended Complaint refer to the Corporate Plaintiffs (which are IAUWU and/or the Co-op Mine) and are not specifically directed at the Individual Plaintiffs. [*See* Complaint ¶¶ 83-86.] The vast majority of the Individual Plaintiffs are not even identified by name, or in any other way, in the Articles. [*See* Exhibits "A" and "B" hereto.] When one or two of them are identified by name, it is to allow them to give Plaintiffs' side of the circumstances relevant to the ongoing labor dispute. Because the Complaint does not plead any circumstances where allegedly libelous words were directed at any of the Individual Plaintiffs, it fails as a matter of law regarding all such Individual Plaintiffs.

Moreover, it has long been established that an individual plaintiff cannot typically recover for an alleged defamation about a corporation or business with which that individual is involved. *See, e.g., 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)[19]; *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).[20]

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.

This is not the first "defamation" action filed by the Kingston family, nor, unfortunately, is it likely to be the last. In recent months, Defendants are informed that various members of the Kingston family have filed multiple lawsuits against news media organizations, political opponents, lawyers, and any other person who dares to make public statements critical of the Kingstons or their business enterprises. This lawsuit, with its sweeping allegations of a nationwide conspiracy

---

[19] A copy of the *Page* opinion is attached hereto as Exhibit "H".

[20] "An 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).

involving nearly 100 defendants, is simply the latest attempt by the Kingstons to silence their critics through the threat of costly and protracted litigation.

Even if Plaintiffs' claims here are dismissed with prejudice, the lawsuit will have served its purpose. Defendants have been forced to incur substantial legal fees responding to claims which are so riddled with legal defects that their only apparent purpose is to harass the Defendants. There will be an inevitable chilling of the news media's willingness to publish statements critical of the Kingston family and their business enterprises if every such publication results in a meritless, but nonetheless costly, lawsuit. There must be some accountability for Plaintiffs' pattern of conduct.

The only way to deter Plaintiffs from filing repeated meritless suits, and to avoid the patently unfair result of making Defendants pay the cost of defending against Plaintiffs' meritless claims, is to require Plaintiffs to compensate Defendants for their attorneys fees and costs. This Court, of course, has the inherent power 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). However, there is a particular reason why, in this specific case, such a sanction would be uniquely appropriate.

In 2001, the Utah Legislature enacted the Citizen Participation in Government Act, Utah Code Ann. § 78-58-101, *et seq.* (the "Anti-SLAPP Statute"), joining a growing number of states that have recognized the potential for strategic abuse of the legal system to interfere with a party's right to public commentary and participation. The purpose of this Statute is, in part, to prevent the chilling of the valid exercise of constitutional rights, such as freedom of speech and the press under

the First Amendment.[21] The Anti-SLAPP Statute applies when a lawsuit is instituted in response to a defendant's participation in the process of government, which includes "the exercise by a citizen of the right to influence [governmental] decisions under the First Amendment to the U.S. Constitution." *See* Utah Code Ann. §§ 78-58-102(5), -103, and -105. As discussed above, 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. This case therefore falls within the ambit of the Anti-SLAPP Statute.

The Statute provides a variety of procedural mechanisms to quickly end SLAPP suits and to minimize expense on SLAPP defendants. Of primary importance here, however, are the substantive remedies for defendants involved in SLAPP suits. In particular, Section 105 of the Anti-SLAPP Statute provides that SLAPP defendants may maintain an action or claim to recover their attorneys fees and costs upon a showing that the claims at issue are legally meritless. *See* Utah Code Ann. § 78-58-105(1)(a).[22] Utah's Anti-SLAPP Statute thereby codifies the strong public policy in this state that defendants should not be forced to incur the costs of litigation for meritless claims brought in connection with the valid exercise of free speech rights.

---

[21] Indicative of this sentiment are the findings of the California Legislature in enacting its version of anti-SLAPP legislation:

> [T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. Cal. Code Civ. Proc. § 425.16(a).

[22] Additional compensatory damages are available upon an additional showing that the lawsuit was commenced or continued to harass, intimidate, or chill the free speech of the defendants. *See* Utah Code Ann. § 78-58-105(1)(b). The Court need not reach that issue here, since Defendants' only request is for their attorneys fees and costs.

This public policy applies with full force to the facts of this case. By reporting on the significant social justice and public health issues in the Co-op Mine dispute, Defendants were performing an important constitutional function that should not be impeded by the unjustified threat of costly and retaliatory litigation. In line with this public policy, as evidenced by the Anti-SLAPP Statute, this Court should exercise its inherent power to impose sanctions and require Plaintiffs to compensate Defendants for their attorneys fees and costs incurred in this matter.[23]

In addition to the Anti-SLAPP Statute, Utah law also provides for recovery of attorneys fees and costs where "the court determines that the action or defense to the action was without merit and not brought or asserted in good faith[.]" Utah Code Ann. § 78-27-56(1). This statute provides a substantive remedy under Utah law which may be employed by this Court as well. *See Cascade Energy & Metals Corp. v. Banks,* 896 F. 2d 1557, 1579 (10th Cir. 1990). In light of the context in which this lawsuit has been brought, and given the litany of legal defects in Plaintiffs' claims, Plaintiffs should be held to account for the attorneys fees and costs Defendants have incurred in this matter. *See Valcarce v. Fitzgerald,* 961 P. 2d 305 (Utah 1998); *Warner v. DMG Color, Inc.,* 20 P. 3d 868, 874 (Utah 2000).

## 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.

---

[23] Because Defendants have filed a Motion to Dismiss, they have not filed a counterclaim under the Anti-SLAPP Statute in this case. Such fees would be recoverable in a subsequent action against Plaintiffs under Section 105. By awarding Defendants their fees and costs now, this Court will avoid the necessity of Defendants filing a subsequent action, which would involve additional needless expense and waste of judicial resources.

RESPECTFULLY SUBMITTED this 17 day of February 2005.

PARR WADDOUPS BROWN GEE & LOVELESS

By: _____
Jeffrey J. Hunt
David C. Reymann
Attorneys for Defendants *The Deseret Morning News*, John Hughes, Marjorie Cortez, Tiffany Erickson, Elaine Jarvik and Jennifer K. Nii

JONES WALDO HOLBROOK & MCDONOUGH PC

By: _____
Michael Patrick O'Brien
Attorneys for Defendants *The Salt Lake Tribune*, Tom Baden, Tim Fitzpatrick, Ron Morris, Melissa Galbraith, Rhina Guidos, Glen Warchol and Tom Wharton

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of February 2005, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was served, via U.S. Mail, postage prepaid (unless otherwise noted), on the following:

F. Mark Hansen
F. MARK HANSEN, P.C.
431 North 1300 West
Salt Lake City, Utah 84116
***(via hand-delivery)***

Steven K. Walkenhorst
UTAH ATTORNEY GENERAL'S OFFICE
160 East 300 South, 6th Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856

Carl E. Kingston
3212 South State Street
Salt Lake City, UT 84115
***(via hand-delivery)***

Randy L. Dryer
PARSONS BEHLE & LATIMER
201 South Main, Suite 1800
Salt Lake City, Utah 84111

Arthur F. Sandack
8 East Broadway, Suite 510
Salt Lake City, Utah 84111

Joseph E. Hatch
5295 South Commerce Drive, Suite 200
Murray, Utah 84107

Richard Rosenblatt
RICHARD ROSENBLATT AND ASSOCIATES
8085 E. Prentice
Greenwood, Colorado 80111

Judith Rivlin
UNITED MINE WORKERS OF AMERICA
8315 Lee Highway
Fairfax, Virginia 22031-2215