DISTRICT COURT, CITY AND COUNTY OF DELTA, COLORADO Court Address: 501 Palmer Street, Room 338 Delta, CO 81416 **Plaintiffs:** SG INTERESTS I, LTD, a Texas limited partnership and SG INTERESTS VII, LTD., a Texas limited partnership v. **Defendant:** PETER K. KOLBENSCHLAG, a/k/a PETE KOLBENSCHLAG **Attorney for Defendant:** Steven D. Zansberg, #26634 Levine Sullivan Koch & Schulz, LLP 1888 Sherman Street, Suite 370 Denver, CO 80203 (303) 376-2400 szansberg@lskslaw.com	▲ ▲ COURT USE ONLY Case No.: 2017-cv-030026 Division: 1

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

SGI's Response makes unmistakably clear what this case is all about – not a genuine effort by a corporation to rectify any *actual injury* to its public reputation,[1] but a baseless assault on a vocal critic as retribution/punishment for his public advocacy against SGI's corporate interests in exploiting the mineral and petroleum resources of the North Fork region. As demonstrated in Defendant's Motion and accompanying exhibits, prior to Mr. Kolbenschlag's posting of his reader comment, multiple other organizations had published the same information: "**North Fork Gas Drillers Fined by Feds for Collusion."** The Crested Butte News, The National Law Review, the *Aspen Sojourner*, The Aspen Daily News, Baker & Botts LLP, McDermott Will & Emery, Citizens for a Healthy Community, and Borden Lardner Gervais ("GEC and SGI agreed to pay fines in the amount of USD $275,000 each."). All of these entities said so, and their websites *continue to say so*, to this day.[2]

But SGI has not sued any of these speakers, despite the far wider reach of their publications. Nor, apparently, has SGI asked *any* of these other publishers of *the exact same information it challenges herein*, to remove those publications from the internet. One need simply type into Google the search terms "SG Interests," "antitrust," "DOJ" and "fine" to discover what is that company's public reputation, and what it *was* when Kolbenschlag posted his reader comment last December.

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[1] *See Bolduc v. Bailey*, 586 F. Supp. 896, 900 (D. Colo. 1984) ("The gravamen of an action for defamation is the damage to one's reputation in the community caused by the defamatory statement(s).") (citation omitted).

[2] All of these websites were last visited on June 8, 2017.

No, SGI has no interest in any legitimate process of repairing its tarnished public reputation.[3] It seeks, instead, only one thing: to punish this defendant for his public advocacy.[4]

Notwithstanding SGI's own selective recitation of facts from the prior federal court lawsuit, it remains uncontroverted that Pete Kolbenschlag's reader comment was substantially true: SGI paid the U.S. Government substantial sums of money, in compliance with a court order, to resolve a proceeding in a court of record that alleged (and, SGI has *admitted*) that it colluded with another oil company to submit joint bids on BLM oil leases, without so notifying BLM of that collusive agreement. *See* Mot. at 2-5, 10.

Moreover, even if SGI could show it was "plausible" that Kolbenschlag's reader comment was not substantially true, SGI has fallen woefully short of showing it has pleaded a *plausible* factual basis for finding that Kolbenschlag either knew his comment was false or that he entertained actual "serious doubts" that what he wrote was true (i.e., that he had "a high degree of awareness" that his statement was probably false).

[3] SGI did not even bother to post a comment on the same webpage as defendant's challenged publication, *seeking* to "set the record straight." Comments on the newspaper's website remain open to this date. *See* http://www.postindependent.com/news/local/divide-lease-decision-likely-to-land-in-court/. The undersigned counsel posted a comment there on June 2, 2017.

[4] This is further evidenced by the fact that the only additional "factual averments" pleaded in SGI's First Amended Complaint, concerned Kolbenschlag's prior activities in publicly opposing SGI's plans to expand its operations in the North Fork Valley. *See* FAC ¶¶ 36 & 38 (noting that Kolbenschlag is an "outspoken critic" of SGI and was "part of a delegation" that traveled to Washington D.C. "to lobby for greater protection from oil and gas leasing on public lands.")

REPLY ARGUMENT

I. SGI Has Failed to Demonstrate A Plausible Basis to Find That Defendant's Challenged Publication Was Not Substantially True

SGI argues that Kolbenschlag's reader comment is materially false (not merely technically so), because it stated that SGI had paid a "fine" which, according to SGI, *necessarily* connotes that SGI was *punished* for its *proven* wrongdoing. Resp. at 6. SGI's argument does not hold water. It is well accepted that certain "fines" or "civil penalties" – monetary payments made to the government – are *not* deemed punitive, but are instead a means of compensating the government for lost revenues. *See, e.g., Thomas v. Comm'r.*, 62 F.3d 97, 102 (4th Cir. 1995) (holding that additional 50% tax imposed upon finding of tax fraud was compensatory, not punitive, and therefore did not implicate the "excessive fines" clause of the Constitution: "We find that the $44,068 sanction imposed on Thomas does no more than compensate the government for its damages and costs.").

Thus, Kolbenschlag's statement that SGI paid a "fine," even if argubaly technically erroneous, is not *materially* false: a defendant paying monies to the government treasury is reasonably understood to connote compensation or retribution for revenues the government was improperly denied, and for the administrative costs of collecting that compensation.[5] *See, e.g.*, FAC Ex. 3 at 3 (Department of Justice's explanation that the $275,000 payment SGI had agreed to make to the U.S. Treasury would "compensate the United States for the damages it incurred as

[5] While SGI may continue to assert publicly, as it does here, that it chose to settle the government's antitrust case against it merely to avoid the higher cost it would have incurred to successfully defend that action, it has, in fact, pleaded (and thereby admitted) that "[a]fter conducting a two-year investigation, *the United States determined that* SGI's and GEC's agreement to bid jointly pursuant to the MOU constituted a *per se* violation of the Section 1 of the Sherman Act." FAC ¶ 18 (emphasis added).

a result" of SGI's alleged unlawful conduct). Moreover, the Department of Justice justified its revised proposed settlement of the antitrust case by telling U.S. District Court Judge Richard Matsch that SGI's monetary payment "would put others in the industry on notice that such anticompetitive conduct will not be tolerated." *Id.* Thus, for purposes of SGI's defamation claim, the claimed technical error in Defendant's reader comment (like the numerous other publishers who reported SGI was "fined" or had paid a "fine") is not a *material* falsehood. *See, e.g.*, *Fry v. Lee*, 2013 COA 100, ¶ 43 ("even if some readers in the legal field might have interpreted the word to mean a criminal charge, courts have held that technical errors in legal terminology are of no legal consequence in defamation actions . . ."); *see also* Mot. at 10 & n.7 (citing cases).

Indeed, it is a well-accepted practice of news outlets to report that a company has been "fined" when it enters into a settlement agreement or consent decree with the government in which the company expressly disavows any liability or unlawful conduct but agrees to an order to pay a sum to end the action. *See, e.g.*, *Offshore Platform Owner Fined for Oil Discharges*, The Maritime Exec. (Oct. 10, 2014), *available at* http://www.maritime-executive.com/article/Offshore-Platform-Owner-Fined-for-Oil-Discharges-2014-10-17 (reporting that oil company had been "fined" by three federal agencies when it expressly disavowed liability in the consent decree); NPR, *Hyundai, Kia Fined $100 Million Over Misleading Gas Mileage Figures*, (Nov. 3, 2014) *available at* http://www.npr.org/sections/thetwo-way/2014/11/03/361146128/hyundai-kia-fined-100-million-over-misleading-gas-mileage-figures (notwithstanding that the consent decree expressly disavowed any liability by those companies); Hannah Meisel, *Citgo To Pay $2M Fine For*

Refinery's CAA Violations, Law 360 (Jan. 9, 2017), *available at* https://www.law360.com/articles/878585/citgo-to-pay-2m-fine-for-refinery-s-caa-violations (reporting that under the proposed settlement, the EPA "would fine the oil company $1.95 million" even though the consent decree expressly states that "CITGO denies that it has violated and/or continues to violate . . . any statutory, regulatory, or permit requirements, and maintains that it has been and remains in compliance with the 2005 Consent Decree and all applicable statutes, regulations, and permits and is not liable . . . .")). Thus, ordinary readers reasonably understand a report that a company was "fined" to mean that it paid monies to the government to resolve a government charge of violation of law. Mr. Kolbenschlag's reader comment, like the numerous other publications that stated the same thing, was substantially true.

II. SGI Has Failed to Demonstrate It Pleaded A Plausible Basis to Find That Defendant Published Any False and Defamatory Statement Concerning SGI with Actual Malice

Nothing in SGI's First Amended Complaint, nor in its Response, comes even close to meeting SGI's burden of demonstrating it has pleaded facts from which it is "plausible" to conclude the Kolbenschlag either knew his challenged statement was false or that he "in fact entertained serious doubts as to the truth of [his] published statement." *DiLeo v. Koltnow*, 613 P.2d 318, 321 n.4 (Colo. 1980) (citations omitted) (alternatively describing the required showing as publishing with a "high degree of awareness" that his statement was *probably false*); *Fry*, 2013 COA 100 ¶ 21 ("Actual malice can be shown if the author entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity.").

SGI cites to two cases in which the Colorado Supreme Court found sufficient evidence of actual malice because in both cases, the reporter failed to contact knowledgeable sources despite

having "obvious reasons to doubt" what he was about to publish. Resp. at 8-9, 13–14 (citing *Kuhn v. Tribune Republican Publishing Co.*, 637 P.2d 315 (Colo. 1981) and *Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351 (Colo. 1983). Neither of these cases has any application here. *See Spacecon Specialty Contractors, LLC v. Bensinger*, 713 P.2d 1028, 1047-48 (10th Cir. 2013) (distinguishing *Burns* and *Kuhn*).

While it is true that failure to investigate in the face of obvious reasons to doubt what a libel defendant is about to report may satisfy the plaintiff's evidentiary burden, none of the facts averred in the FAC fulfills that criterion. The U.S. Supreme Court's most recent analysis of the constitutional malice standard occurred in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). There, the Court made it abundantly clear that a publisher's failure to conduct *any* investigation into the truth of information obtained from third parties, even if such failure would constitute "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" does *not* establish actual malice, unless the publisher *already* had "obvious reasons to doubt" the truth of the information obtained and reported. *Id.*, 491 U.S. at 666, 688 (citations omitted). As the Ninth Circuit Court of Appeals has observed:

> [A] publisher's failure to conduct an investigation to verify the accuracy of reports it obtains from third parties cannot establish actual malice, 'even when a reasonably prudent person would have' conducted an investigation. . . . This is clearly the law; [*New York Times Co. v.*] *Sullivan*, [376 U.S. 254, 286-66 (1964)] itself reversed a libel verdict against a major newspaper that did nothing to investigate the accuracy of an advertisement that libeled the plaintiff. . . . What this means is that **a publisher who does not already have 'obvious reasons to doubt' the accuracy of a story is not required to initiate an investigation that might plant such doubt**.

Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 901 (9th Cir. 1992) (citations omitted) (emphasis added); *see also Price v. Viking Penguin, Inc*., 881 F.2d 1426, 1433 (8th Cir. 1989) ("a failure to investigate cannot sustain liability unless there was already good reason to doubt the truth of the information in hand").

None of the factual averments in the FAC give rise to a plausible and reasonable inference that, at the time he posted his reader comment, Kolbenschlag had *any* reason to doubt the truth of what numerous others had published previously, including the advocacy organization Citizens for a Healthy Community with whom SGI strives to associate Mr. Kolbenshchlag (Resp. at 10-11): "**Gunnison Energy and SGI Interests Fined for Colluding on Lease Bids**," *available at* http://www.chc4you.org/gunnison-energy-and-sg-interests-fined-for-colluding-on-lease-bids/ *and* "**SG Interests and Gunnison Energy Agree to $1 Million Fine**," *available at* http://www.chc4you.com/sg-interests-gunnison-energy-agree-to-1-million-fine/.

While SGI argues that the DOJ's press release, which Kolbenschlag's reader comment quoted from and linked to, should have apprised him of the purported falsity of his posting, Resp. at 10, SGI ignores the fact that the press release was headlined:

> **Justice Department Settlement *Requires* Gunnison Energy and SG Interests *to Pay the United States* a Total of $550,000 *for Antitrust and False Claims Act Violations***

Ex. 1 to FAC (emphasis added).

Similarly, SGI suggests that it is plausible to presume that Kolbenschlag read the entire federal court file in the Government's antitrust case, Resp. at 11, but SGI again ignores the fact the when he rejected the parties' original settlement figure, Judge Matsch stated that he was not convinced "these settlements would act as *a deterrence to these defendants and others in the*

industry. . .” and he therefore concluded that “the settlement of this civil action for nothing more than the nuisance value of this litigation is not in the public interest . . . .” Mot., Ex. E at 11 (emphasis added). Even if it were plausible to presume Kolbenschlag actually had reviewed the entire federal court file (which it is not), that provides no basis for concluding that he seriously doubted that all of the prior publications, which similarly stated that SGI was fined for colluding to rig bids, were correct. (Again, none of those prior publications has been the subject of any claim by SGI nor has any been retracted or corrected). And, he would have read Judge Matsch’s order refusing to accept the first proposed settlement for mere “nuisance value” because it did not provide “deterrence” against similar wrongdoing in the future.

Nor is it “plausible,” as SGI claims, that Kolbenschlag was personally involved in, or even aware of, the multiple public comments posted on the DOJ’s website in response to the first proposed antitrust settlement. Resp. at 10-11. But even if Kolbenschlag *had* reviewed those comments, or had played any role in their authorship, such knowledge or participation would only serve to *defeat* any plausible claim that he had serious doubts about to the truth of his reader comment. *See, e.g.*, Ex. 6 at 1 (letter from Mike Arnold of Paonia objecting to the proposed settlement in which the two oil companies would “pay fines of $275,000 . . . It is not fair that the two gas companies should violate the law and keep the leases.”); *id.* at 2 (Rosemary Bilchak letter of Apr. 18, 2012, stating that “GEC and SGI colluded to fix the bids on gas development leases,” and urging a larger “fine” and “jail time for the perpetrators” in order to punish them for “the severity of the crime”); *id.* at 5 (letter from Lazaros Bountour of Paonia, stating that “in this case, corrupt unethical executives intentionally violated the law” and urging “a judgment that fits the crime” to send “a strong message to those [who] are willing to intentionally break the law

and cheat the public"); *id.* at pt. 2 p.1 (letter from Hal Brill of Paonia objecting to "inadequacy of the penalty. A fine of $275,000 amounts to a slap on the wrist for a corporation of this size"); *id.* at pt. 2 p.8 (letter of Lynn E. Carroll of Paonia objecting to "fines of $275,000": "This is a slap on the wrist to companies breaking the law for profit" and urging DOJ to impose "prison time for the CEOs and other responsible officers of these two firms"). Indeed, practically all of the letters from area residents included in SGI's Exhibit 6 echo these same sentiments: the proposed settlement did not impose sufficiently severe penalties or fines on SGI to adequately punish it for colluding to rig bids and to deter others from similarly violating the law. *See* Mot. at 4.

The fact that Kolbenschlag has been outspoken in his public criticism of SGI, FAC ¶ 36, and has engaged in constitutionally-protected advocacy, including petitioning the government, in opposition to SGI's extraction practices in the North Fork Valley, *id.* ¶ 38, is no proof, whatsoever, of actual malice with respect to the single challenged publication. *See, e.g.*, *Egiazaryan v. Zalmayev*, No. 11 Civ. 2670 (PKC), 2011 WL 6097136, at *8 (S.D.N.Y. Dec. 7, 2011) (dismissing defamation claim for failure to plausibly plead actual malice where plaintiff alleged "hostility" to the Plaintiff but no facts indicating an "attempt to inflict harm through *falsehood*").

SGI asserts that it has only the most minimal burden of averring it is plausible that Kolbenschlag published with knowledge of falsity or with "a high degree of awareness of probable falsity," Resp. at 7-8 (arguing it need only plead facts "suggestive" of actual malice). However, as demonstrated by the numerous authorities cited in the Motion (at 11-12), courts across the nation applying the federal *Twombly/Iqbal* "plausibility" standard to actual malice in defamation cases have held otherwise, and for good reason:

> [T]he actual malice standard was designed to allow publishers the "breathing space" needed to ensure robust reporting on public figures and events. *Sullivan*, 376 U.S. at 271–72, 84 S.Ct. 710. **Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent**. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.

Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016) (emphasis added).

Here, in response to Defendant's Motion to Dismiss the original Complaint on these same grounds, SGI filed an Amended Complaint in which it attempted to set forth all factual averments that would create a reasonable inference that Kolbenschlag published with actual malice. Thus, there is no basis for the Court to provide SGI with "another bite at the apple," by dismissing without prejudice, and leave to amend. The Amended Complaint should be dismissed with prejudice.

CONCLUSION

Retaliatory, baseless lawsuits like this one – intended *only* to punish a vocal critic[6] and to deter others from expressing concerns with this plaintiff's business practices that affect the land and water of Colorado residents– have no place in the courts of this State.

For the reasons stated above, and in the Motion, the Court should grant the Defendant's motion to dismiss, with prejudice.

[6] Tellingly, Plaintiff has acknowledged that any "damages" it seeks herein, *combined with* "attorney's fees, penalties, and punitive damages," does not exceed $100,000. *See* District Court Civil (CV) Cover Sheet, filed Feb. 21, 2017.

Respectfully submitted this 8th day of June, 2017.

By *s/ Steven D. Zansberg*

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THIS MOTION WAS FILED WITH THE COURT THROUGH THE LEXIS/NEXIS FILE-AND-SERVE ELECTRONIC FILING PROCEDURES, UNDER C.R.C.P. 121(C), § 1-26.

AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS ON FILE WITH LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2017, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS** was served on the following counsel through the Lexis/Nexis CourtLink electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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