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

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

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

INTRODUCTION

Plaintiffs' filed their Amended Complaint on December 9, 2004, asserting claims of defamation against *The Militant* and a number of other defendants, including *The Salt Lake Tribune* (the "*Tribune*") and *The Deseret Morning News* (the "*Morning News*"),[2] based on their coverage of the very public and contentious labor dispute that has been ongoing for almost two years between the Co-Op Mine owners in central Utah, and their current and former workers. The Media Defendants moved to dismiss all of the claims asserted against them in the first Amended Complaint for failure to assert claims upon which relief could be granted, and sought an award of attorneys fees and costs based on the frivolousness of the action and the Plaintiffs' apparent purpose to chill their First Amendment rights.

At a June 14, 2005, hearing on these prior motions to dismiss, this Court concluded that Plaintiffs' first Amended Complaint "[i]n its present form . . . [was] sufficiently vague and insufficiently precise to stand as a complaint upon which relief can be granted and from which litigation can proceed." Tr. of Motion Hearing ("Tr.") at 74, excerpts attached hereto as Exhibit A. Rather than dismissing the first Amended Complaint outright (as it noted it could have done), this Court ordered the Plaintiffs to simplify their confusing and unclear 70-page, 106-paragraph

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

[2] The *Tribune*, the *Morning News* and *The Militant* are collectively referred to herein as the "Media Defendants."

(excluding sub-paragraphs) first Amended Complaint, and to submit a second amended complaint that pulled out of the numerous and lengthy block quotes in the Amended Complaint those specific statements which Plaintiffs believe to be actionable, and to more plainly and simply identify (i) why each of those discrete statements are not only false, but defamatory under the law, and (ii) exactly which plaintiffs are claiming defamation against which defendants for which of those discrete statements. *See id.* at 68-74. The Court specifically advised Plaintiffs that it expected to see an amended complaint that would "parse this down to a manageable lawsuit" and avoid the "scatter gun approach" that plagued the Amended Complaint. *Id.* at 73.

Instead of complying with this Court's order (at least as to *The Militant*), Plaintiffs filed a 70-page, 224-paragraph (excluding sub-paragraphs) Second Amended Complaint, re-asserting the same claims of defamation against *The Militant*, adding eight new articles to its already extensive list of alleged defamations by *The Militant*, and alleging an entirely new cause of action for invasion of privacy by false light. Contrary to this Court's clear admonitions, the Second Amended Complaint further complicates, rather than simplifies this lawsuit. Using the same "scatter gun" approach previously rejected by this Court, the Second Amended Complaint quotes extensively from almost every article published by *The Militant* on the Co-Op Mine dispute since October 2003, providing no explanation as to what part of these extensive quotes contain false statements of fact, or why such purportedly false statements are defamatory under the law. Despite its cursory elements of reorganization, Plaintiffs' Second Amended Complaint against *The Militant* remains as "vague and insufficiently" pled as the first Amended Complaint (if not more so), fails to meet the most basic requirements of Rule 8(a) & (e) of the Federal Rules

of Civil Procedure, and violates this Court's order. For this reason alone, Plaintiffs' Second Amended Complaint against *The Militant* should be dismissed with prejudice.

Moreover, the Second Amended Complaint still fails to state claims against *The Militant* upon which relief can be granted. *The Militant* articles/editorials on which Plaintiffs' rest their claims of defamation focus primarily on (i) the Co-Op Mine workers' allegations regarding lack of genuine union representation, deplorable and unsafe working conditions, retaliatory and anti-union labor practices, and other egregious and unfair treatment by the Co-Op Mine, and (ii) proceedings before the National Labor Relations Board ("NLRB") regarding the labor dispute, and the actions of the Mine Safety and Health Administration ("MSHA") with respect to alleged safety violations at the Co-Op Mine.[3] As set forth below, and in the memoranda filed by the Media Defendants in support of their prior motions to dismiss, Plaintiffs' defamation claims against *The Militant* are meritless, fail to state a claim upon which relief can be granted, and should therefore be dismissed.[4]

This Court warned at the June 14 hearing that "the burden is on the [P]laintiffs to focus [the lawsuit] for the benefit of the people being sued, whose lives are disrupted by a lawsuit."

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[3] Copies of *The Militant*'s allegedly defamatory articles/editorials, including the eight new article/editorials cited for the first time in Plaintiffs' Second Amended Complaint, are attached hereto as Exhibit B so that this Court can review them in their full and proper context. Because these articles are specifically referred to in and relied upon by Plaintiffs to support the claims of defamation asserted in their Second Amended Complaint, *see* Sec. Am. Compl. at 12-29, ¶¶ 90-105; 34-36, ¶¶ 112-116, 118 & 122-23; 38-51, ¶¶ 135-158; 57-58, ¶ 183 & Addendum A, they may be properly considered by this Court on a Rule 12(b)(6) 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 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.").

[4] Plaintiffs' remaining claims for invasion of privacy by false light, intentional interference with economic relations, negligence and civil conspiracy to defame and injure the Plaintiffs arise entirely out of Plaintiffs' claims of defamation, and should likewise be dismissed.

Tr. at 73. The Plaintiffs have now had two bites at the apple and remain unable to plead any actionable claims against *The Militant*. By ignoring this Courts order (at least as to *The Militant*), the Plaintiffs' have revealed their true purpose for filing and continuing this lawsuit. They seek not to redress any actual legal harm, but to harass and burden *The Militant*, squelch *The Militant's* First Amendment rights, and deter *The Militant* from further reporting on the ongoing labor dispute at the Co-Op Mine. Plaintiffs' claims against *The Militant* should therefore be dismissed ***with prejudice***, and they should be ordered to reimburse *The Militant* all of the reasonable attorneys' fees and costs incurred in defending this ill conceived action.

PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

1. On December 9, 2004, Plaintiffs filed their Amended Complaint in this action, asserting broad and sweeping claims of defamation against *The Militant* and the other Media Defendants, based on almost every article published on the Co-Op Mine dispute since October 2003.

2. On February 17, 2005, the *Tribune* and *Morning News* filed a motion to dismiss Plaintiffs' claims against them, together with a supporting memorandum ("February 17 Memorandum"). Plaintiffs filed a memorandum in opposition to the *Tribune* and *Morning News'* motion on March 9, 2005, and the *Tribune* and *Morning News* filed a reply memorandum on March 21, 2005 ("March 21 Reply").

3. On February 28, 2005, *The Militant* filed its own motion to dismiss Plaintiffs' claims against it, together with a supporting memorandum which incorporated, by reference, almost all of the arguments set forth by the *Tribune* and *Morning News* in their February 17

Memorandum ("February 28 Memorandum").[5] Plaintiffs filed a memorandum in opposition to *The Militant*'s motion on April 15, 2005, and *The Militant* filed a reply memorandum on April 28, 2005 ("April 28 Reply"). *The Militant*'s April 28 Reply incorporated by reference almost all of the arguments set forth in the *Tribune* and *Morning News'* March 21 Reply.

4. The Media Defendants' collective motions to dismiss came before this Court for hearing on June 14, 2005 ("June 14 Hearing"). At the conclusion of that hearing, this Court ruled that the Amended Complaint was "sufficiently vague and insufficiently precise to stand as a complaint upon which relief can be granted and from which litigation can proceed," Tr. at 74, and ordered Plaintiffs to file a Second Amended Complaint within thirty days ("June 14 Order").

5. On July 13, 2005, Plaintiffs filed their Second Amended Complaint. While the Second Amended Complaint arguably attempts to comply with the Court's order with respect to the *Tribune* and *Morning News*, it reflects no such compliance with respect to *The Militant*. The Second Amended Complaint asserts essentially the same broad and imprecise claims of defamation against *The Militant,* based on all of *The Militant* articles originally referenced in the Amended Complaint ***plus*** eight new articles published on the Co-Op Mine dispute since the filing of the Amended Complaint. Plaintiffs also added an entirely new claim for invasion of privacy by false light, and amended its prior claims for intentional interference with economic relations, negligence and civil conspiracy, adding *The Militant* specifically as a defendant on those claims.

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[5] Plaintiffs' Amended Complaint named the Socialist Workers Party ("SWP") as a defendant, inaccurately claiming that the SWP owned and controlled *The Militant* and was therefore derivatively liable for *The Militant*'s allegedly defamatory publications. *See* Amended Complaint at 4, ¶ 33. SWP therefore joined in *The Militant*'s February 28 motion to dismiss. All of the allegations against the SWP have been dropped from the Second Amended Complaint, however, and the SWP is no longer named as a defendant. Accordingly, it is no longer a party to this lawsuit, and does not join in *The Militant*'s current motion.

6. Plaintiffs' defamation claims against *The Militant* are based on 75 different articles and/or editorials published by *The Militant* on the Co-Op Mine dispute since October 2003. As discussed in *The Militant*'s February 28 Memorandum, these allegedly defamatory statements can be grouped into one (or more) of the following four categories:

a. ***Statements Regarding the Lockout***: Workers and union leaders say the Co-Op Mine tried to lock them out, fired them, and/or otherwise retaliated when the workers tried to organize or support a new union in affiliation with the United Mine Workers of America ("UMWA");[6]

b. ***Statements Regarding the IAUWU***: Workers and union leaders say the IAUWU does not represent workers' interests, and is a sham union controlled by the Kingstons; and that the Kingstons tried to stack the union vote with family members;[7]

c. ***Statements Regarding Working Conditions at the Co-Op Mine***: Workers and union leaders say that working conditions at the Co-Op Mine are poor; that the Co-Op Mine intimidates and abuses workers; that wages are low and workers are forced to work with injuries, work extensive overtime, and pay for equipment and training; that workers lack adequate training and health-care benefits; and that the Co-Op Mine conditions are analogous to human rights violations and thus tantamount to slavery;[8] and

d. ***Statements Regarding NLRB/MSHA Proceedings and Rulings***: Workers' and union leaders' statements regarding proceedings before and investigations of the NLRB and/or MSHA relating to complaints by the Co-Op

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[6] *The Militant* Article: 10/06/03; 10/13/03; 10/27/03; 11/03/03; 11/10/03; 11/17/03; 11/24/03; 11/24/03; 12/1/03; 12/8/03; 12/15/03; 12/22/03; 12/29/03; 1/12/04; 1/19/04; 1/26/04; 2/2/04; 2/9/04; 2/16/04; 2/23/04; 3/8/04; 3/15/04; 3/22/04; 4/27/04; 5/04/04; 5/11/04; 5/25/04; 5/31/04; 6/14/04; 6/28/04; 7/6/04; 7/20/04; 8/3/04; 8/17/04; 8/31/04; 9/07/04; 9/14/04; 9/21/04; 9/28/04; 10/05/04; 10/12/04; 10/19/04; 10/26/04; 11/02/04; 11/09/04; 11/16/04; 11/23/04; 11/30/04; 12/7/04; 12/21/04; 12/28/04; 1/25/05; 1/31/05; 2/7/05; 2/14/05; and 4/4/05, true and correct copies of which are attached hereto as Exhibit B.

[7] *The Militant* Articles: 10/06/03; 10/27/03; 11/03/03; 11/10/03; 11/24/03; 12/1/03; 12/1/03; 12/29/03; 1/26/04; 2/2/04; 2/9/04; 4/13/04; 5/25/04; 6/7/04; 6/14/04; 6/28/04; 7/20/04; 8/3/04; 8/10/04; 8/17/04; 8/31/04; 9/07/04; 9/14/04; 9/21/04; 9/28/04; 10/05/04; 10/12/04; 10/19/04; 10/26/04; 11/02/04; 11/9/04; 11/23/04; 11/30/04; and 12/7/04, true and correct copies of which are attached hereto as Exhibit B.

[8] *The Militant* Articles: 10/13/03; 10/27/03; 11/03/03; 11/17/03; 11/24/03; 12/1/03; 12/8/03; 12/15/03; 12/22/03; 12/29/03; 1/12/04; 1/19/04; 1/26/04; 2/2/04; 2/16/04; 2/23/04; 3/1/04; 3/8/04; 3/15/04; 3/22/04; 4/20/04; 5/11/04; 5/18/04; 5/25/04; 6/07/04; 6/14/04; 6/28/04; 7/6/04; 7/20/04; 8/3/04; 8/17/04; 8/31/04; 9/14/04; 9/28/04; 10/19/04; 10/26/04; 11/02/04; 11/9/04; 11/16/04; 12/7/04; 12/14/04; 12/21/04; 1/25/05; 2/14/05; and 4/4/05, true and correct copies of which are attached hereto as Exhibit B.

Mine workers and/or UMWA leaders, and reports on rulings, citations and/or settlement documents from the NLRB and/or MSHA ordering restatement and back pay, finding the firing and intimidation of workers to be illegal, finding safety violations at the Co-Op Mine and/or excluding Kingston family members form the union vote.[9]

ARGUMENT

I. PLAINTIFFS' SECOND AMENDED COMPLAINT AGAINST *THE MILITANT* FAILS TO COMPLY WITH THE BASIC REQUIREMENTS OF RULE 8 AND VIOLATES THIS COURT'S JUNE 14 ORDER AND SHOULD THEREFORE BE DISMISSED WITH PREJUDICE.

Rule 8 of the Federal Rules of Civil Procedure requires that all complaints contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and mandates that "[e]ach averment of a pleading shall be simple, concise and direct." Fed. R. Civ. P. 8(a) & (e)(1). As implicitly recognized by this Court at the June 14 Hearing, the purpose of these most basic pleading requirements is to ensure that defendants like *The Militant* will know exactly what they are "being accused of . . . , so they know what they are being charged with." Tr. at 71; *see also Celli v. Shoell*, 995 F. Supp. 1337, 1346 (D. Utah 1998) ("Although the complaint need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests . . . it must give sufficient notice to allow the defendant to formulate a responsive pleading.").

This Court concluded at the June 14 Hearing that Plaintiffs' first Amended Complaint did ***not*** meet these most basic pleading requirements and was "sufficiently vague and insufficiently precise to stand as a complaint upon which relief can be granted and from which this litigation may proceed." Tr. at 74. It therefore ordered Plaintiffs to submit a second amended complaint

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[9] *The Militant* Articles: 7/20/04; 8/10/04; 8/31/04; 9/14/04; 9/21/04; 9/28/04; 10/05/04; 10/12/04; 10/19/04; 10/26/04; 11/02/04; 11/9/04; 11/16/04; 11/23/04; 11/30/04; 12/7/04; 12/14/04; 12/21/04; 12/28/04; 1/25/04; 1/31/05; and 2/7/05, true and correct copies of which are attached hereto as Exhibit B.

(i) clearly alleging "who is being sued for what and by whom," and (ii) giving *The Militant* "a better understanding of what is claimed to be defamatory" by identifying "what part you think is untrue and why it, therefore, forms a basis for a defamation claim." *Id.* at 70-71. This Court specifically admonished Plaintiffs not to simply "lift a sentence out and say, oh, that is wrong, therefore, it is defamatory," but to identify exactly what part of the statement contains a false statement of verifiable fact, and how each particular statement rises to the level of a defamatory statement under the law. *Id.* at 72. It further cautioned Plaintiffs to avoid the "scatter gun approach" utilized in the Amended Complaint, and to file a second amended complaint that would "parse [their claims] down into a manageable lawsuit" where "[s]omebody is being sued in good faith for something that really did hold the [P]laintiffs up to being defamed in the community and of meeting the legal definition." *Id.* at 73.

As to *The Militant,* Plaintiffs failed entirely to comply with the June 14 Order, submitting a Second Amended Complaint that is every bit as "vague" and imprecise as their first Amended Complaint. Plaintiffs make no effort to put *The Militant* on meaningful notice of exactly what statements are defamatory, or why, and provide *The Militant* with no real way of knowing what it is being charged with.[10] The first Amended Complaint boldly alleged that almost every article ever published by *The Militant* on the Co-Op Mine labor dispute "defamed" the Plaintiffs, setting forth for each article, in block quote format, lengthy narratives of what the article said, without identifying what portion of the quoted statement was allegedly false, why it was defamatory, or

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[10] Plaintiffs made an apparent attempt at complying with the Courts June 14 Order with respect to the *Tribune* and *Morning News* by substantially reducing the number of alleged defamatory statements complained about. For example, the *Tribune* statements sued on were reduced from 60+ statements to 11 and the *Morning News* statements sued on were reduced from 45+ statements to 8. There is no legitimate excuse for Plaintiffs' failure to similarly parse down its claims and allegations against *The Militant.*

which of the named Plaintiffs were actually defamed. The Second Amended Complaint does exactly the same thing, and provides *The Militant* with no way to better understand the claims asserted against it.

The following example illustrates the point. The first Amended Complaint at page 24, paragraph 81(uu) contained the following allegation of defamation against *The Militant*:

> On September 22, 2003, 75 coal miners were fired from their jobs at the Co-Op mine, owned by C.W. Mining. They were fired because they had contacted the UMWA about getting a union organized at the mine. The miners were being paid between $5.15 and $7.00 an hour with no benefits. A company union has existed at the mine for many years. Workers have submitted evidence that the officers of this 'union' are bosses and are related to the Kingstons, the wealthy family that owns the mine. . . . Prior to that date [09/22/03], the miners had been talking to UMWA organizers about how to get real a union organized at the mine. Bosses began harassing and suspending the miners for this activity. They had cornered miners alone underground and questioned them about 'the meetings they were having with the UMWA.' The bosses also tried to disrupt a meeting the strikers had organized outside the mine, and had threatened workers, most of whom are immigrants from Mexico, with sending the immigration police after them. . . . On September 23, 2003, the UMWA filed charges with the NLRB stating that all 75 miners were fired illegally for union activity. The national labor board upheld the charge in its ruling. . . . The miners also reported that the draft settlement includes a back pay order.

The Second Amended Complaint contains the exact same allegation, in substantially the same form, albeit now found at page 42, paragraph 141(l)

> *The Militant* Reporter Anne Carroll said:
>
> . . . .
>
> On September 22, 2003, 75 coal miners were fired from their jobs at the Co-Op mine, owned by C.W. Mining. They were fired because they had contacted the UMWA about getting a union organized at the mine. The miners were being paid between $5.15

> and $7.00 an hour with no benefits. A company union has existed at the mine for many years. Workers have submitted evidence that the officers of this 'union' are bosses and are related to the Kingstons, the wealthy family that owns the mine. . . . Prior to that date [09/22/03], the miners had been talking to UMWA organizers about how to get a real union organized at the mine. Bosses began harassing and suspending the miners for this activity. They had cornered miners alone underground and questioned them about 'the meetings they were having with the UMWA.' The bosses also tried to disrupt a meeting the strikers had organized outside the mine, and had threatened workers, most of whom are immigrants from Mexico, with sending the immigration police after them. . . . On September 23, 2003, the UMWA filed charges with the NLRB stating that all 75 miners were fired illegally for union activity. The national labor board upheld the charge in its ruling. . . . The miners also reported that the draft settlement includes a back pay order.

see also id. at 44-45, ¶ 143(g) (making the exact same charge against Ms. Carroll's co-author, Guillermo Esquivel).[11]

There are at least thirteen (13) discrete factual statements contained in the paragraph quoted above, yet Plaintiffs make no effort to identify which of these numerous "facts" it contends is false, or why the false "fact" is defamatory or exposes Plaintiffs to public hatred and ridicule. Although Plaintiffs allege generally that ***all*** of the quoted statements from all of the named defendants (allegations spanning some 48 pages) "were substantially and materially false" and "defamatory," *Id.* at 58, ¶¶ 186 & 191, Plaintiffs still have not undertaken the effort (expressly required by this Court) to parse out the exact statements from each of the quoted articles which they believe to be objectively verifiable statements of fact, or explain to *The Militant* or this Court why they believe those particular statements to be false and defamatory.

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[11] All that Plaintiffs have really done is reorganize their allegations by coal miners, UMWA representatives, other union supporters, newspapers, correspondents, or other alleged speakers, rather than by date. They have done nothing to clarify their claims or simplify these proceedings.

Plaintiffs' vague, conclusory and wholly unsupported allegations meet neither the requirements of Rule 8, nor the mandates of the June 14 Order. Accordingly, Plaintiffs' Second Amended Complaint against *The Militant* remains "sufficiently vague and insufficiently precise to stand as a complaint upon which relief can be granted and from which this litigation may proceed," *id.* at 74, and, for this reason alone, should be dismissed with prejudice.[12]

II. PLAINTIFFS' SECOND AMENDED COMPLAINT FAILS TO STATE CLAIMS AGAINST *THE MILITANT* UPON WHICH RELIEF CAN BE GRANTED AND SHOULD THEREFORE BE DISMISSED.

Plaintiffs' Second Amended Complaint is not substantively different from their first Amended Complaint, and their claims of defamation fail, as a matter of law, for the same reasons set forth in the memoranda filed in support of the Media Defendants' prior motions to dismiss. The legal authority and arguments set forth in those prior memoranda apply with equal force to the claims asserted in the Second Amended Complaint. In the interest of judicial economy, *The Militant* will not repeat all of those arguments here, but incorporates by reference its February 28 Memorandum and April 28 Reply (together with those portions of the February 17 Memorandum and March 21 Reply incorporated therein).

A. Plaintiffs' Defamation Claims Against *The Militant* Fail As A Matter of Law and Should Therefore Be Dismissed.

As set forth in *The Militant*'s prior memoranda, each of the statements published by *The Militant* regarding the Co-Op Mine dispute either: (1) do not convey any defamatory meaning;

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[12] *See Cox v. Transunion, Inc.*, No. 03-4160-JAR, 2003 WL 22245323, *2 (D. Kan. Sep. 26, 2003) ("When a complaint . . . fails to plead all elements of the cause of action, fails to plead any facts supporting the cause of action, and states the claim in a vague or ambiguous manner, the court may dismiss the complaint."); *Celli*, 995 F. Supp. at 1346 ("In the case of a defamation claim, the allegations in the complaint must afford the defendant sufficient notice of the allegedly defamatory communications to allow him to defend himself. . . . Since plaintiffs have failed to identify any defamatory statements, the defamation claim is subject to dismissal for failure to state a claim upon which relief can be granted.").

(2) constitute statements of opinion which are not capable of being objectively verified as true or false; (3) constitute reports of official government proceedings privileged under Utah law; and/or (4) with few exceptions, are not "of and concerning" the individually named plaintiffs.[13]

1. Many of The Statements Published by *The Militant* Do Not Convey Any Defamatory Meaning.

To sustain a claim for defamation under Utah law, a plaintiff must establish that the published statements convey some defamatory meaning. *West v. Thompson*, 872 P.2d 999, 1007-08 (Utah 1994). "Whether a statement is capable of sustaining a defamatory meaning is a question of law" for the court, and is properly addressed on a motion to dismiss. *Id.* at 1008. *See also* Feb. 17 Mem. at 12-16 (setting forth a detailed analysis of the law on defamatory meaning as it applies in this case); Mar. 21 Reply at 10-11; Apr. 28 Reply at 5-6.

Context is essential in determining whether the statements convey defamatory meaning. *See West*, 872 P.2d at 1008. As discussed more fully in the prior memoranda, the articles/editorials at issue in this case were published in the context of a very public, heated, well-publicized, and bitter labor dispute of the kind in which polemic and hyperbole abound. The courts have long recognized that labor disputes are "ordinarily heated affairs," and "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Linn v. United Plant*

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[13] In its prior motion to dismiss, *The Militant* (and the other Media Defendants) asserted that its reports on the Co-Op Mine dispute constituted reports on a matter of "public interest," privileged under Utah Code Ann. § 42-2-3(5). *See* Feb. 17 Memorandum at 7-12; Feb. 28 Memorandum at 6-7, ¶ 1; Mar. 21 Reply Memorandum at 4-10; Apr. 28 Reply Memorandum at 3-5. In light of this Court's statements at the June 14 Hearing that "the public interest privilege . . . strikes [the court] as the weakest of all of your arguments," Tr. at 69, *The Militant* has chosen not to rely on this defense to support its current motion to dismiss. *The Militant* does not waive the defense, however, and expressly reserves the right to reassert the privilege, as necessary and appropriate, in the future. *The Militant* also expressly incorporates herein, by reference, footnote 12 of its February 28 Memorandum regarding the "neutral reporting" privilege, and reserves the right to assert that privilege, as appropriate, in the future. *See* Feb. 28 Mem. at 6.

Guard Workers of Am., 383 U.S. 53, 58 (1966). As such, they carefully scrutinize claims of defamation arising out of such debates, and refuse to impose liability for language and allegations that are common in such disputes, even though such language, in some other context, "might well be deemed actionable per se[.]" *Id.*

The Plaintiffs allege in their Second Amended Complaint that *The Militant* "is an avowedly . . . socialist publication" well known for publishing pro-labor articles "from a socialist perspective." Sec. Am. Compl. at 51, ¶ 161. It is a news weekly distributed to those who have a particular interest in labor issues and issues of workers' rights, and who expect that its articles/editorials will be written with a pro-labor slant.[14] The readers of *The Militant* are particularly used to the type of polemicizing commonly spoken and expected in the context of long, heated labor disputes, and would understand the statements published by *The Militant* as a continuation of the heated debate surrounding the on-going labor dispute at the Co-Op Mine. *Cf. Mast v. Overson*, 971 P.2d 928, 932 (Utah Ct. App. 1998) (allegedly defamatory statements were merely the continuation of a heated political debate and thus conveyed no defamatory meaning). Accordingly, *The Militant*'s articles/editorials convey no defamatory meaning as a matter of law. *See, e.g., West*, 872 P.2d at 1008-09 (emphasis added) ("[I]n determining whether a particular statement fits within the rather broad definition of what may be considered defamatory, the guiding principle is the statement's tendency to injure a reputation ***in the eyes of its audience***. . . . 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. . . . He must establish that it

[14] *The Militant* expressly states on its front page masthead that it is a paper "published in the interests of working people."

damaged his reputation . . . ***in the eyes of at least a substantial and respectable minority of [the publication's] audience."***).

Indeed, Plaintiffs have been unable, at any stage of this proceeding, to articulate for this Court or the parties how the statements in question convey the required defamatory meaning. The best they have been able to come up with are bold and unsupported allegations about negative and derogatory statements allegedly made by "other persons,"[15] implying that because these "other persons" have made negative statements about the Co-Op Mine and its unfair labor practices, the adverse statements published by the "Defendants" must have harmed the Co-Op Mine's reputation, and must therefore be defamatory. Plaintiffs fail to plead any facts to support the inference that these "other persons" actually read *The Militant* or any of the articles/editorials published therein about the Co-Op Mine dispute, however, and in the absence of such a critical link their argument fails as a matter of law.[16]

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

As set forth in the prior memoranda, a claim for defamation will not lie where the published statements merely convey the opinion of the speaker, rather than any objectively verifiable statements of fact. *See Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, 224 (Utah 1976);

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[15] Plaintiffs allege generally that "actual injury in fact to Plaintiffs' reputations is evidenced by published comments from other persons who came to conclusions about Plaintiffs' based on the defamatory publications by Defendants." See Am. Compl. at 59, ¶ 195. They do not even attempt to link such "comments" to anything specifically published by *The Militant*.

[16] It is important to note that *The Militant*, a socialist news weekly, has a limited circulation (average weekly distribution nationwide was 2,616 in 2003 and 2,793 in 2004), figures for which are published every year, and were included in the issues published November 10, 2003, and October 19, 2004 (issues relied upon in the Second Amended Complaint). Many of the statements published in *The Militant* have also been published in large circulation daily publications such as *The Tribune* and *The Morning News*. There is nothing in the Second Amended Complaint which, if proven, would allow a reasonable jury to infer that any of these "other persons" based any of their allegedly derogatory "comments" on *The Militant*'s publications.

see also Feb. 17 Mem. at 16-20 (setting forth a detailed analysis of the law of opinion as it applies in this case); Mar. 21 Reply at 11-15; Apr. 28 Reply at 6-9. The distinction between actionable fact and protected opinion "is a question of law" for the court, *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir. 1989), and context is once again critical in making the assessment. *Id.* at 1432-33; *West*, 872 P.2d at 1018-19.

When read in context the vast majority of the statements set forth in *The Militant*'s articles constitute protected statements of opinions, not actionable statements of objectively verifiable fact. Many of the statements in question were contained within clearly identified editorials which convey to the reader that the statements are the opinions and impressions of the editorialist about the ongoing labor dispute, the poor working conditions at the Co-Op Mine, and other related issues. The editorials in *The Militant* express the opinions of the author and/or quoted Co-Op Mine workers regarding the "abuse" and "extreme level[s] of exploitation" suffered by the workers at the Co-Op Mine, and the writer's subjective belief that the Co-Op Mine engages in "wage slavery" and "brutality against workers." *See, e.g.*, November 24, 2003, editorial entitled "Support the Co-Op miner!" (quoting the UMWA and a mine worker). Other editorials contain subjective opinions regarding the motivation for this lawsuit. *See, e.g.*, October 24, 2004, editorial entitled "Defend Freedom of Speech!" ("This lawsuit . . . is not only an attack on workers' elementary right to organize a union. It's an attack on freedom of the press. It's an attack on free speech. The mine bosses in Utah who filed the suit . . . are trying to silence those who have backed the Co-Op workers' struggle for living wages, safe working conditions, and human dignity."). Plaintiffs cannot seriously contend that these types of editorial statements are anything but protected statements of opinion.

The vast majority of the challenged news articles likewise convey the statements and opinions of those workers who have been involved in the labor dispute at the Co-Op Mine, and depict their individual beliefs and subjective observations about the treatment they have personally received at the mine. Plaintiffs have carefully edited the statements from the articles/editorials to give the mistaken impression that they come solely from the imagination of the reporters. The most frequent tactic employed by Plaintiffs is to edit out from the beginning or end of the quoted statement the fact that the information reported came directly from a mine worker and/or UMWA representative.[17] Taken in this context, and read as part of a larger report of the ongoing labor dispute, these statements constitute protected statements of opinion. *See Price*, 881 F.2d at 1433 (internal quotations omitted) ("Even when a statement is subject to

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[17] For example, *Compare* December 29, 2003, article entitled "UMWA: 'Support Co-Op Miners Strike'" (emphasis added) ("The mine, owned by the Kingston family, had suspended UMWA supporter William Estrada for refusing to sign a disciplinary warning the week before. At the time, it was the company's third attempt to victimize workers, ***according to the Co-Op miners***.") *with* Sec. Am. Compl. at 39, ¶ 135(c) ("The mine . . . had suspended UMWA supporter William Estrada for refusing to sign a disciplinary warning the week before. At the time, it was the company's third attempt to victimize a UMWA supporter."); *Compare* April 27, 2004, article entitled "Utah miners fight attempt to revoke picket trailer permit" (emphasis added) ("***Other miners say*** this is a serious attack instigated by the Co-Op bosses on their right to be at the mine's entrance. ***They say*** some of the strikebreakers had spread rumors from the company that it was going to tow away the trailer before the strikers knew about it.") *with* Sec. Am. Compl. at 44, ¶ 143(d) ("A UDOT decision to revoke a merit for the miners picket trailer was 'a serious attack instigated by Co-Op bosses on their [the miners'] right to be at the mine's entrance,' and that 'strikebreakers had spread rumors from the company that it was going to tow away the trailer before the strikers knew about it.'"); *Compare* September 21, 2004, article entitled "Utah miners affirm support for UMWA representation at meeting of bosses 'union'" (emphasis added) ("After a 10-month strike for UMWA representation that ended in July, the company has felt obliged to organize these monthly 'union' meetings to keep up the façade that the IAUWU is a labor organization, ***the miners said***. . . . The other IAUWU officers present were Dana Jenkins and Warren Pratt, vice-president and treasurer of the local, respectively, and Nevin Pratt and Vicky Mattingly, the vice president and treasurer of the 'international.' All six of these 'officers' are relatives of the mine owners, the Kingstons, ***the miners pointed out***.") *with* Sec. Am. Compl. at 43, ¶139(n) ("After a 10-month strike for UMWA representation that ended in July, the company has felt obliged to organize these monthly 'union' meetings to keep up the façade that the IAUWU is a labor organization. . . . [Besides Chris Grundvig], the other IAUWU officers present were Dana Jenkins and Warren Pratt, vice-president and treasurer of the local, respectively, and Nevin Pratt and Vicky Mattingly, the vice president and treasurer of the 'international.' All six of these 'officers' are relatives of the mine owners, the Kingstons. . . .").

verification . . . it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it.").

Plaintiffs appear to take particular issue with statements peppered throughout the articles/editorials in *The Militant* implying that mine workers were "fired" for union activity and/or their association with UMWA. Plaintiffs' apparent claim is either (1) that these workers were, in fact, fired for some other reason or (2) they weren't "fired," but walked off the job. Whichever "false fact" is being complained about, both are clearly expressions of opinion and, indeed, are at the core of the dispute before the NLRB.

Plaintiffs likewise complain about statements in *The Militant* reporting on claims by the mine workers that the Co-Op Mine has, among other things, "locked" the workers out of the mine, "harassed," "threatened," "intimidated" or "abused" the workers, tried to "disrupt" meetings and otherwise impede the ability of the workers to seek true union representation, imposed "unfair" and "unsafe" working conditions, supplied workers with "defective" equipment, "jack[ed] up its profits" by abusing the workers, and tried to "stack" the union election.[18] Taken in the context not only of the articles/editorials themselves, but of the ongoing and contentious labor dispute that is being reported, these statements are not statements of objectively verifiable fact (as Plaintiffs strain to assert), but subjective statements of opinion based on what has been seen and experienced by the workers at the Co-Op Mine. Readers of *The Militant* would recognize these statements for what they are: polemics and other expressions

[18] Plaintiffs claim that insofar as these later statements imply that the Co-Op Mine and/or its officers and managers violated the law, they are defamatory per se. *See* Sec. Am. Compl. at 58, ¶ 191 ("To the extent [the statements] imputed criminal conduct on the part of Plaintiffs, and/or imputed to Plaintiffs' conduct that is incongruous with the exercise of a lawful business, trade, profession, or office, they were defamatory *per se*."). "Absent a clear and unambiguous ruling from a court or agency of competent jurisdiction," however, "statements by laypersons that purport to interpret the meaning of a statute [or other legal authority] . . . are opinion statements, and not statements of fact." *Rodriguez v. Panayiotou*, 314 F.3d 979, 986 (9th Cir. 2002) (internal quotations omitted).

of the opinions or strongly held views of the speaker. Such statements are protected by the law, and cannot support Plaintiffs' defamation claims.

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

As set forth in the prior memoranda, Utah law recognizes a qualified privilege for fair and accurate reports of official government or judicial proceedings. The Media Defendants have already explained in their prior memoranda why their published statements on the NLRB proceedings are supported by the NLRB documents previously submitted to this Court (and re-attached hereto as Exhibits C & D), and why *The Militant*'s coverage of the NLRB proceedings, along with its coverage of MSHA investigations and citations at the Co-Op Mine, constitute "fair and accurate" reports which are qualifiedly privileged under Utah law. Because nothing in the Second Amended Complaint changes these arguments, they will not be repeated here, and are merely incorporated by reference. *See* Feb. 17 Mem. at 20-23; Mar. 21 Reply at 17-17; Apr. 28 Reply at 10.

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

To state a claim for defamation the allegedly defamatory statements must have been made "of and concerning" the named plaintiff. *West*, 872 P.2d at 1007-08; *Lynch v. Standard Pub. Co.*, 170 P. 770 (Utah 1918). *The Militant* has already explained in its prior memoranda (particularly its April 28 Reply) why the vast majority of the allegedly defamatory statements are not "of and concerning" the individually named plaintiffs, and why these individually named

plaintiffs are not entitled to invoke any exception to the "group libel" doctrine.[19] *See* Apr. 28 Reply at 10-13; *see also* Feb. 17 Mem. at 23-25; Mar. 21 Reply at 17-19. Because nothing in the Second Amended Complaint changes these arguments, they will not be repeated here, and are merely incorporated by reference.[20]

B. Plaintiffs' Remaining Claims Against *The Militant* Are Deficient As A Matter of Law and Should Therefore Be Dismissed.

1. Plaintiffs' Claims Against *The Militant* for Invasion of Privacy By False Light Arise Entirely From Their Claims of Defamation and Likewise Fail As a Matter of Law.

To prevail on a claim for false light invasion of privacy, Plaintiffs must be able to establish (1) that *The Militant* gave publicity to a matter concerning Plaintiffs, (2) that placed Plaintiffs before the public in a false light, (3) that the false light "would be highly offensive to a

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[19] Indeed, some of the allegedly defamatory statements are not even "of and concerning" the corporate plaintiffs (i.e., the Co-Op Mine and/or IAUWU). *See, e.g.,* December 1, 2003, editorial entitled "Solidarity with Utah miners!" (emphasis added) ("The Co-Op miners, most of whom were born in Mexico, are standing up for their rights in response to the brutal drive that the ***coal barons are waging nationwide*** to jack up their profits. On top of their regular exploitation through the system of wage slavery, these profits result from longer work hours, increased levels of coal dust miners breathe, refusal to pay black lung benefits, speed-up and other work rules that result in gratuitous deaths in the mines, disregard for the environment, and efforts to weaken or keep out the union. ***Miners around the country*** have engaged in struggles such as opposing efforts to loosen coal-dust rules, demanding federal black lung benefits for retired and disabled miners and their widows, and exposing the bosses' cover-up of last year's near-fatal mine disaster in ***Pennsylvania***.").

[20] Plaintiffs' conclusory statements that "Defendants' statements imputing wrongful conduct to [the Co-Op Mine and/or IAUWU] and otherwise impugning [the Co-Op Mine and/or IAUWU], were directed against, reasonably related to, applied to, had a personal application to, and were of and concerning [the Co-Op Mine's and/or IAUWU's] directors, officers, managers and supervisors named as Plaintiffs' herein," Sec. Am. Compl. at 58, ¶¶ 189-90, are not supported by any factual averment in the Second Amended Complaint, and are therefore insufficient to overcome the arguments of *The Militant* (and the other Media Defendants) on this issue. The law is clear that an individually named plaintiff must come forward with something by which a jury could reasonably conclude that the allegedly defamatory statements "referred especially to [the named plaintiff]." *Fenstermaker v. Tribune Pub. Co.*, 43 P.2d 112, 114 (Utah 1985). This standard is met only where there is some evidence or allegation to establish "either (1) that the defendant intended the words to refer to the plaintiff and that they were so understood or (2) that persons could reasonably interpret them in such a way that they could be so understood." *Elm Med. Lab., Inc. v. RKO Gen., Inc.*, 532 N.E. 2d 675, 679 (Mass. 1989) (abrogated on other grounds). "The officer of a corporation [or organization] who is not personally defamed has no right to recover damages for defamation published about the corporation [or organization]." *Id.*; *see also McMillen v. Arthritis Found.*, 432 F. Supp. 430, 432 (S.D.N.Y. 1977); *Page v. Los Angeles Times*, No. B162176, 2004 WL 847527, *6 (Cal. Ct. App. 2004).

reasonable person," and (4) that *The Militant* had "knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [Plaintiffs] would be placed." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 907 (Utah 1992). Although a claim of invasion of privacy by false light is separate and distinct from a claim for defamation, *Russell*, 842 P.2d at 907, "[a] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Moldea v. New York Times Co.*, 22 F.3d 310, 319 (D.C. Cir. 1994).

Plaintiffs' new claims of invasion of privacy by false light rest entirely on the previously asserted claims of defamation, and Plaintiffs allege no separate or independent facts to support their conclusory allegation that "Defendants gave publicity to matters concerning Plaintiffs that placed Plaintiffs before the public in a false light that would be highly offensive to a reasonable person."[21] Sec. Am. Compl. at 67, ¶ 201. Their invasion of privacy claims are thus inextricably intertwined with their claims for defamation, and must be dismissed for the same reasons.

2. Plaintiffs' Claims Against *The Militant* for Civil Conspiracy Fail as a Matter of Law and Should Be Dismissed.

A claim for civil conspiracy has five elements: "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof."

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[21] Where a statement has no defamatory meaning, it is likewise not "highly offensive to a reasonable person," and will not sustain a claim for invasion of privacy by false light. *See Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988). For the reasons set forth above, *see supra* Section II(A)(1), most of the statements published by *The Militant* do not convey any defamatory meaning, and thus they are not "highly offensive to a reasonable person" as a matter of law. Invasion of privacy by false light also requires proof that *The Militant* acted with "knowledge" or "reckless disregard as to the falsity of the publicized matter and the false light in which the [Plaintiffs] would be placed," a standard akin to the constitutional standard of "actual malice" set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964). For the reasons set forth in the Media Defendants' prior memoranda, *see* Feb. 17 Mem. at 9-12; Mar. 221 Reply at 6-10, Plaintiffs have not alleged facts by which any reasonable jury could reasonably conclude or infer that *The Militant* acted with the requisite level of fault.

Israel Pagan Estate v. Cannon, 746 P. 2d 785, 790 (Utah App. 1987). Although the Second Amended Complaint recites these elements in a conclusory fashion, *see* Sec. Am. Compl. at 69, ¶¶ 220-221, Plaintiffs do not allege how *The Militant* (or any of the other "Defendants") actually combined, what the object was they allegedly intended to accomplish, or when the supposed meeting of the minds occurred, or otherwise provide any of the underlying factual details necessary to meet even the most liberal notice pleading requirements. *See Utah Steel & Iron Co. v. Bosch*, 475 P.2d 1019, 1020 (Utah 1970) (complaint alleging simply that defendants conspired together to harass, annoy, threaten and intimidate the plaintiff in order to cause him to go out of business, without more, "does not comport with the requirements of Rule 8(a) . . . . and failed to state a claim upon which relief can be granted."); *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962) ("It is to be noted that the terms 'fraud,' 'conspiracy,' and 'negligence' are but general accusations in the nature of conclusions of the pleader. They will not stand up against a motion to dismiss on that ground. The basic facts must be set forth with sufficient particularity to show what facts are claimed to constitute such charges."). Plaintiffs cannot rest on such conclusory allegations, and have not, therefore, pled an actionable claim for civil conspiracy against *The Militant*.[22]

3. Plaintiffs' Claims Against *The Militant* for Negligence Fail as a Matter of Law and Should Be Dismissed.

"To prevail on a negligence claim, a plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the

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[22] The most that could even be inferred from Plaintiffs' Second Amended Complaint is that there was a conspiracy to defame Plaintiffs. Insofar as that is what Plaintiffs actually seek to allege, however, the civil conspiracy claim rises and falls with their claims of defamation. *See Coroles v. Sabey*, 79 P.3d 974, 983-84 (Utah Ct. App. 2003) (civil conspiracy is a "secondary" claim premised on an actionable "underlying tort," and must be dismissed where a plaintiff fails to "adequately plead the existence of such a tort.").

breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, ¶ 12, 83 P.3d 391, 394-95. The only duty even potentially alleged against *The Militant* in this case is the duty to "refrain from counseling, advising, assisting, abetting, encouraging, supporting, or aiding [the Co-Op Mine] worker in walking off the job." Although Plaintiffs assert generally that "[o]ne or more Defendants breached their duty of care," they allege no facts to support this conclusory allegation *vis-à-vis The Militant* (or any other Media Defendant), and do not explain anywhere in the Second Amended Complaint how *The Militant* actually breached this alleged duty of care.[23] As such, the Second Amended Complaint fails to state a claim for negligence against *The Militant* upon which relief can be granted.

4. Plaintiffs' Claims Against *The Militant* for Intentional Interference with Economic Relations Is Deficient as a Matter of Law and Should Therefore Be Dismissed.

To recover on a claim for "intentional interference with economic relations" a plaintiff must establish (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. *Leigh Furniture & Carpet v. Isom*, 657 P.2d 293, 304 (Utah 1982). Plaintiffs do not allege anywhere in the Second Amended Complaint that *The Militant* itself acted with any improper purpose or improper means to interfere with their economic relations. These claims are leveled exclusively against the UMWA and its officers. Plaintiffs apparently

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[23] The most that can be inferred from the allegations in the Second Amended Complaint is that *The Militant* "counsel[ed], advis[ed], assist[ed], abett[ed], encourag[ed], support[ed] or aid[ed] [the Co-Op Mine] worker in walking off the job" by publishing the allegedly defamatory statements and/or somehow conspiring with UMWA and its officers in their efforts to assist and represent the workers. Because Plaintiffs' claims for both defamation and civil conspiracy fail as a matter of law, *see supra* Sections II(B)(1) & (2), so too must any secondary claims for negligence.

seek to hold *The Militant* responsible for the alleged actions of UMWA and its officers based solely on the alleged civil conspiracy. *See* Sec. Am. Compl. At 68, ¶ 210 (alleging generally that *The Militant* and other defendants "conspired, planned, directed, instigated, advised, aided, abetted, encouraged, supported, participated in, mutually agreed to, and/or ratified the acts of one another as described herein, and are liable as though they had performed the acts themselves."). Because Plaintiffs' claim of civil conspiracy against *The Militant* fails as a matter of law, *see supra* Section II(B)(2), so too must any secondary claim of intentional interference with economic relations.

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

The Plaintiffs' failure to comply with this Court's June 14 Order provides clear evidence in support of *The Militant*'s contention that Plaintiffs lack any good faith basis for this lawsuit, or their claims against *The Militant*, and that Plaintiffs have filed this lawsuit to harass and unduly burden *The Militant* in a transparent effort to chill their First Amendment rights and prevent further negative publicity of the Co-Op Mine dispute. Plaintiffs should not be allowed to proceed on such pretenses, and should be appropriately sanctioned for pursuing their frivolous claims.

As set forth more fully in all of the incorporated memoranda, this Court has the power and authority, under both federal procedural law and Utah substantive law, to require Plaintiffs and/or their attorneys to reimburse *The Militant* the reasonable attorneys' fees and costs incurred in defending this case. *See* Fed. R. Civ. P. 11(c)(1) & (c)(2) (allowing Court, upon motion or on its own initiative, to award "monetary sanctions" where it determines that a lawsuit has been

filed for "any improper purpose, such as to harass," or lacks a good faith basis in the law); U.C.A. § 78-27-56(1) (requiring the court to "award reasonable attorney's fees to a prevailing party if the court determines that the action . . . was without merit and not brought or asserted in good faith"); *see also* Feb. 17 Mem. at 25-28; Feb. 28 Mem. at 8-9; Mar. 21 Reply at 19-21; Apr. 28 Reply at 16.

Given Plaintiffs total disregard for this Court's June 14 Order, and its continued failure (and inability) to file an amended complaint that actually asserts actionable claims or puts *The Militant* on notice of the claims against them, this Court should also exercise its discretionary authority to dismiss this action ***with prejudice***. *See* Fed. R. Civ. P. 41(b) ("For failure of the plaintiff . . . to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as adjudication upon the merits."); *Gripe v. City of Enid*, 312 F.3d 1184, 1187-88 (10th Cir. 2002) (affirming dismissal of case with prejudice where plaintiff violated court orders and rules on at least two occasions); *Schroeder v. Southwest Airlines*, 129 Fed. Appx. 481, 483-85 (10th Cir. Apr. 28, 2005) (recognizing that district court has the discretion to use dismissal with prejudice as sanction in appropriate case).[24]

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[24] The Tenth Circuit recognizes "that dismissal represents an extreme sanction appropriate only in cases of willful misconduct," and should be used only as a sanction of last resort. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992). "Before choosing dismissal as a just sanction, a court should ordinarily consider a number of factors, including: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process ; . . . (3) the culpability of the litigant . . . ; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance . . . ; and (5) the efficiency of lesser sanctions." *Id.* at 920 (internal quotations omitted). "These factors do not constitute a rigid test," but merely "represent criteria for the court to consider. . . ." *Id.* at 921. Plaintiffs total disregard for this Court's June 14 Order is inexcusable, exposes Plaintiffs' lack of good faith in bringing this action, and has required *The Militant* to expend additional resources preparing yet another motion to dismiss. Only the sanction of dismissal with prejudice will adequately prevent

CONCLUSION

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

DATED this 16th day of August, 2005.

RANDY L. DRYER
MICHAEL P. PETROGEORGE
PARSONS BEHLE & LATIMER
Attorneys for defendants The Militant

Plaintiffs from continuing to harass *The Militant* and the other Media Defendants, and effectively stop Plaintiffs from using the judicial process as a means of squelching *The Militant's* Constitutional right to freedom of speech and press.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2005, I caused to be delivered, via the method indicated below, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF *THE MILITANT*'S MOTION TO DISMISS ALL CLAIMS ASSERTED AGAINST IT IN PLAINTIFFS' SECOND AMENDED COMPLAINT**, to the following:

F. Mark Hansen **F. Mark Hansen, P.C.** 431 North 1300 West Salt Lake City, Utah 84116	Via Hand Delivery
Carl E. Kingston 3212 South State Street Salt Lake City, Utah 84115	Via Hand Delivery
Arthur F. Sandack 8 East Broadway, Suite 510 Salt Lake City, Utah 84111	Via U.S. Mail
Richard Rosenblatt **Richard Rosenblatt & Associates** 8085 E. Prentice Greenwood, Colorado 80111	Via U.S. Mail
Michael Patrick O'Brien **Jones Waldo Holbrook & McDonough** 170 South Main Street, Suite 1500 Salt Lake City, Utah 84101	Via U.S. Mail
Jeffrey J. Hunt **Parr Waddoups Brown Gee & Loveless** 185 South State Street, Suite 1300 Salt Lake City, Utah 84111	Via U.S. Mail
Joseph E. Hatch 5295 South Commerce Drive, Suite 200 Murray, Utah 84107	Via U.S. Mail
Judith Rivlin **United Mine Workers of America** 8315 Lee Highway Fairfax, Virginia 22031-2215	Via U.S. Mail