F. Mark Hansen, Utah Bar No. 5078
F. Mark Hansen, P.C.
431 North 1300 West
Salt Lake City, UT 84116
(801) 517-3530
Attorney for Plaintiffs International Association of United Workers Union and its Officers

Carl E. Kingston, Utah Bar No. 1826
3212 South State Street
Salt Lake City, UT 84115
Telephone: (801) 486-1458
Attorney for C. W. Mining Company and its Directors, Officers, and Management

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

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION, C. W. MINING COMPANY, *et al.* Plaintiffs, vs. UNITED MINE WORKERS OF AMERICA *et al.*, Defendants.	**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF *THE MILITANT* AND THE SOCIALIST WORKERS PARTY** Civil No. 2:04CV00901 Judge Dee Benson

Plaintiffs International Association of United Workers Union (IAUWU), C. W. Mining Company (CWM) *et al.* respectfully submit this memorandum in opposition to the Motion to Quash Service and Dismiss Complaint of *The Militant* and the Socialist Workers Party (Defendants).

STATEMENT OF FACTS

1. In September of 2003, UMWA and its agents, in violation of IAUWU's rights as the exclusive bargaining representative of CWM's workers, persuaded some of CWM's workers to leave their jobs and picket CWM in violation of the National Labor Relations Act and the collective bargaining agreement between CWM and IAUWU. IAUWU was certified as the workers' representative. Both the National Labor Relations Board and CWM had lawfully recognized IAUWU as the bargaining representative of CWM's workers. This was at a time when a question concerning IAUWU's representation of CWM's workers could not appropriately be raised under 29 U.S.C. §159. UMWA and its agents persuaded the workers to quit and picket with the unlawful objects of forcing IAUWU out and UMWA in as the workers' bargaining representative, and of

63

forcing CWM to recognize or bargain with UMWA as the representative of CWM's workers. IAUWU invited the workers to use the discharge and grievance procedures under the IAUWU/CWM collective bargaining agreement. UMWA and its agents persuaded or coerced the workers to ignore the discharge and grievance procedures in order to pursue UMWA's unlawful objective. [Amended Complaint (hereafter "Complaint" ¶ 63]

2. On or about September 22, 2004 CWM suspended Bill Estrada with intent to terminate for cause. Estrada did not seek IAUWU's help or otherwise challenge his termination through the procedures of the collective bargaining agreement. While management was meeting with Estrada, some of the workers gathered outside. When Estrada left the meeting he falsely told the waiting workers they had also been fired. This was a material misrepresentation of a presently existing fact, which Estrada made either intentionally or with reckless disregard of its falsity. Estrada intended that the workers would rely on his misrepresentation, which they did reasonably rely on to their detriment by, among other things, leaving their jobs, and engaging in a wildcat strike. At all pertinent times Estrada was UMWA's agent. [Complaint ¶¶ 64]

3. These acts of UMWA and its agents precipitated the matters complained of in the Complaint in this matter.

4. *The Militant* is a newspaper owned and/or controlled by the Socialist Workers Party, which is responsible for its content. Defendants Malapanis, Calero, Tremblay, Allen, Astorga, Bennett, Britton, Carroll, Ellis, Esquivel, Farley, Hoeppner, Italie, Koppel, Frank and Pat Miller, Moss, Parker, Picado, Ressler, Rivera, Rosenfeld, Senter, Trowe, Tyler, and Williams are agents of Defendants. [Complaint ¶¶ 33-37]

5. *The Militant* published many defamations of Plaintiffs, including defamations by its agents acting within the scope of their authority. [Complaint ¶ 81]

6. Defendants' statements as described in the Complaint were false. [Complaint ¶ 130]

7. Defendants' statements as described in the Complaint were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity. [Complaint ¶ 131]

8. Defendants' statements were made with malice. [Complaint ¶ 132]As a direct and proximate result of the foregoing, Plaintiffs have suffered damage to reputation, pecuniary losses and other injuries, which are continuing and ongoing. [Complaint ¶ 138]

ARGUMENT

I. RESPONSE TO ARGUMENTS INCORPORATED FROM OTHER MEMORANDA.

Defendants "rely upon and incorporate by express reference the following portions of the *Tribune/Morning News* Memorandum"

- 'Introduction,' paragraphs one thru three, *see Tribune/Morning News* Memorandum at iii-iv;
- 'Relevant Allegations of the Complaint,' particularly the argument that Plaintiffs failed to plead their defamation claims in accordance with the requirements of Federal Rule of Civil Procedure 8(a)m *see id.* at iv-vi & 1;
- 'Argument,' Sections II-VII, *see id.* at 7-28; and
- Exhibits C thru H."

In response to the "incorporated" argument, Plaintiffs incorporate by reference the corresponding portions of their Memorandum in Opposition to Motion to Dismiss of *The Salt Lake Tribune* and the *Deseret Morning News*.

II. PLAINTIFFS HAVE VALID DEFAMATION CLAIMS AGAINST DEFENDANTS.

Defendants' Motion to Dismiss at page 2 asserts five ostensible grounds for dismissal:

- A supposed "public interest" privilege.
- Defendants' publications do not have defamatory meaning.
- Defendants' statements are of opinion, not fact.
- A supposed "official proceedings" privilege.
- Defendants' publications are not "of and concerning" individual plaintiffs.

However, except for incorporating by reference arguments of *The Salt Lake Tribune* and the *Deseret Morning News*, Defendants' supporting memorandum contains no substantive argument in support of Defendants' contention.

A. Defendants' Publications Are Not Protected by a "Public Interest" Privilege.

The privilege afforded under Utah Code Ann. §45-2-3((5) applies only to "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 publication or broadcast of the matter complained of was for the public benefit." This statutory "public interest" privilege on its face

applies only to fair and true reports, made without malice. The statute does not apply because Plaintiffs are not suing Defendants for a fair and true report of anything, but rather their own publications of their own false affirmative statements of fact separate and apart from anything others have said. Since the defamations for which Plaintiffs sue Defendants are Defendants' own false statements, not the reports of others, the statutory privilege does not apply.

For a statutory "public benefit" privilege to apply requires something more than that a story is newsworthy. It requires more than that the public might find the story interesting. Even widespread news coverage of what is at heart a private dispute noes not make news coverage of a private dispute a publication the "public benefit." Otherwise, every newspaper article, because newsworthy, would for that reason alone be privileged. The privilege would be expanded so broadly as to effectively give the press an absolute rather than a qualified privilege.

Whatever the outcome of the dispute between Plaintiffs and the UMWA and its cohorts, the outcome is a private matter which legally cannot be affected by publicity or public debate. Arguably, the public might benefit from bringing allegations of animal cruelty to light. But in Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981), a news report of cruelty to animals, although certainly a matter of public interest, was held as a matter of law was not privileged under section 45-2-3. The publications of Defendants for which Plaintiffs have sued them were at most merely newsworthy, not for the "public benefit" as that statutory term must be construed.

Defendants' cases are not on point. Mast v. Overson, 971 P.2d 928 (Utah App. 1998) did not involve a suit against the press. It involved the qualified privilege under section 45-2-3(1) for comments made "in the proper discharge of an official duty." Defendants' Brown v. Wanlass is a state trial court decision with no precedential value that should not have been cited in the first place. The "public interest" at issue involved reports about the functioning a governmental body. The case was appealed, Brown v. Wanlass, 2001 UT App 30, 18 P.3d 1137, where the court held the plaintiff's claims were barred by the Governmental Immunity Act, which has nothing to do with this case. Defendants' Jacob v. Bezzant is also a state trial court decision with no precedential value that should not have been cited in the first place. The "public interest" at issue also involved reports about the functioning of a governmental body. The central basis for the court's ruling was not the application of a privilege, but that the defendants' comments were not defamatory.

Because the privilege does not apply, Plaintiffs do not have to prove malice. Defendants argue the Complaint makes "no allegations regarding any investigation or fact-checking" by Defendants. Defamation claims do not require the same pleading with specificity as fraud claims.

The Court should bear in mind that Plaintiffs have not had the opportunity to even begin discovery. What *The Militant* did by way of investigation is a fact in its exclusive control, for which Plaintiffs are entitled to conduct discovery.

Plaintiffs have alleged both actual and common-law malice. [Complaint ¶¶ 131-132] Malice, intent, knowledge, and other condition of mind may be averred generally. Fed. R. Civ. Proc. 9(b). "Because we must accept the allegations of the complaint as true and construe all inferences in [the plaintiff's] favor, we will not look beyond the pleadings to assess the viability of [the plaintiff's] cause of action ..." Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n., 90 F.3d 797, 806 (3rd Cir. 1996). The Complaint, its facts and reasonable inferences are specific enough on this element to require the Court to deny Defendants' motion to dismiss.

B. Defendants' Publications were False Statements of Fact, Not Opinion.

Defendants attach over 160 pages of news articles, and without any analysis whatever simply offer an unsupported contention that nowhere in those articles may be found a single defamatory statement made by Defendants. Apparently Defendants hope the Court, rather than wade through the news article, or actually look at the allegations of the Complaint, will simply through up its hands in agreement with Defendants. That is not a proper basis for a dispositive motion.

The following is an abbreviated summary of *The Militant's* defamations as quoted in paragraph 81 of the Complaint and as admitted by Defendants in their Exhibit 1. The statements of *The Militant* are not mere reporting of defamations by others, but are false affirmative statements of fact by *The Militant* itself by and through its reporters and editors.

The Militant said, as statements of fact, that on September 22, 2003, CWM illegally fired 75 miners for protesting unsafe working conditions and the suspension of Bill Estrada allegedly for union activity, and for their own union activity; that CWM locked the workers out, ordered them off the property, and called in the Sheriff to remove them from the property; and that the next day miners returning to work were stopped at the gate, with the police present, and were told by CWM managers that only 10 people on a list could return to work and the rest were fired.

The Militant said, as statements of fact, that several weeks earlier, the workers had begun protesting unsafe working conditions and a lack of benefits, and were involved with UMWA in a union organizing drive; that CWM's bosses, getting wind of this effort, began harassing the workers, cornered miners and questioned them about meetings with UMWA, and tried to disrupt a meeting the workers had organized outside the mine; and that to intimidate the workers, CWM began firing miners trying to bring in UMWA, and threatened to bring in the immigration police.

The Militant said, as statements of fact, that a Utah Department of Transportation decision to revoke a permit for the miners' picket trailer was an attack by CWM's bosses on a right of the miners to be at the mine's entrance; that UDOT and CWM were in collusion to remove the workers' picket trailer; that CWM started rumors it was going to tow away the trailer; and that CWM's owners told the working miners [1] that the picket line was about to come down.

The Militant said, as statements of fact, that the National Labor Relations Board upheld a charge that CWM had illegally fired workers who walked off the job, that NLRB ruled CWM had illegally fired the workers for union organization activity, and that the workers were eligible for back pay, and ordered CWM to reinstate them with back pay for lost wages and benefits amounting to some $400,000; and that CWM's management subjected the miners who returned to work to a 12 ½ hour rotating shift schedule, selective enforcement of safety rules, a rapidly accumulating series of verbal and written warnings on trumped-up charges against UMWA supporters, and blatant violations of the settlement agreement between CWM and UMWA, including threats to fire Alyson Kennedy and other workers for failure to meet arbitrary production standards.

The Militant said, as statements of fact, that CWM jacks up its profits by subjecting its workers to 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."

The Militant said, as statements of fact, that CWM forced its miners to work with defective equipment, and to work while injured; and that unsafe working conditions imposed by the bosses at CWM were responsible for three deaths in the last half of the 1990s.

---

[1] *The Militant* called the solid majority of the workers who honored their collective bargaining agreement "scabs" although their union had never called a strike, and although the workers who had quit were engaged not in a legal strike, but in illegal picketing.

The Militant said, as statements of fact, that CWM's bosses maintain a complicated system of pay grades, supplemental wages, and bonuses to keep pay low and workers in line; that supplementary pay and bonuses tied to production and attendance are arbitrary tools in CWM's hand; that if a worker refuses to carry out an unsafe work practice he is likely to lose his bonuses and supplementary pay; that most of the workers earn only $5.25 to $7 an hour and have no health insurance benefits; that they are forced to work under unsafe conditions in violation of federal mine regulations; and that CWM's bosses told workers they would get a raise "when pigs fly."

The Militant said, as statements of fact, that one of CWM's directors was convicted for savagely beating his daughter. (This is a good example of the defamatory nature of *The Militant*'s publications. (CWM's directors are Earl Stoddard, Dorothy Sanders, and Charles Reynolds [Complaint ¶ 7], none of whom have been convicted of any crime, yet alone the one *The Militant* accused them of. A false accusation of criminal conduct is by definition defamatory *per se*.)

The Militant said, as statements of fact, that CWM was holding off the formation of a union; and that the request of a large majority of CWM's workers to vote in a union election was an attempt by CWM to stack the elections against UMWA.

The Militant said, as statements of fact, that IAUWU is not a real union, but a "company union," a "company outfit," a "boss outfit," and a "company-run union" that CWM's bosses had set up to prevent the workers from organizing; that CWM pretends IAUWU is a legitimate representative of the workers in order to keep miners from bringing in the UMWA; that all of IAUWU's officers are mine bosses; that IAUWU held no union meetings and had no elections of union officers; that after CWM rehired workers who had walked off, CWM (not IAUWU) organized monthly union meeting to keep up a facade that IAUWU is a labor organization; and that this lawsuit is proof IAUWU "is an outfit run by the bosses, not a workers' union.

The Militant said, as statements of fact, that Chris Grundvig, Dana Jenkins, and Warren Pratt, IAUWU Local 1-02's officers, and IAUWU international officers including Nevin Pratt and Vickie Mattingly, were all either bosses or directly connected to the "Kingston family"; *i.e.*, CWM's alleged owners; that IAUWU's officers did nothing to represent the workers and were supervisors at the mine; and that Nevin Pratt told workers that the company was too poor to give them a raise, that UMWA was jeopardizing their jobs by insisting on back pay for them, and that

since they might not have all their documents in order they would not be eligible for back pay and could jeopardize themselves by insisting on back wages.

The Militant said, as statements of fact, that during a NLRB hearing, Mark Hansen, attorney for IAUWA, quit pretending there was a distinction between IAUWU and CWM, and that Hansen, while IAUWU's attorney, represented CWM's position at the hearing.

The Militant said, as statements of fact, said that this lawsuit is an attack on workers' rights to organize a union, an attack on freedom of the press and free speech, and an attempt by "the Kingstons" to prevent *The Militant* from telling the truth; and that "the Kingstons" have a record of filing outlandish suits against their adversaries.

On or about September 30, 2004, *The Militant* posted on its website the original Complaint in this action, thereby republishing each and every defamation described therein.

Defendants' statements were not mere rhetoric. They were not mere statements of opinion. Even statements of opinion, if they are regarding facts, are subject to claims for defamation. *See* West v. Thomson Newspapers, 872 P.2d 999, 1015 (Utah 1994) (opinions are not protected if they imply facts that are false and defamatory); Jenkins v. Weis, 868 P.2d 1374, 1381 *fn* 2 (Utah App. 1994) ("Opinions regarding facts are not unconditionally privileged. ... [I]f the substance of a statement couched in opinion language is capable of being proven true or false, it is subject to suit."). Defendants' statements are capable of being proven false. For purposes of this motion, the Court must take them as false. Taken in context, they amount to affirmative false claims of specific acts done by CWM and its management, and IAUWU and its officers, constituting tortious conduct, breach of the IAUWU/CWM collective bargaining agreement, and systematic violations of federal and state labor law.

These statements were not mere reporting of others' statements, and were not mere rhetoric or opinion, but were false affirmative statements of fact made by*The Militant* itself by and through its reporters and editors. *The Militant* did not just report that workers and union leaders said those things. *The Militant* affirmatively stated those things in its own capacity. *The Militant*'s statements are false publications of facts alleging conduct by Plaintiffs incongruent with the exercise of a lawful business. They are not only defamatory, they are defamatory *per se*.

C. Defendants' Publications Are Not Privileged Reports of Government Proceedings.

The statements for which Plaintiffs have sued Defendants on this point are *The Militant*'s publications that the NLRB upheld a charge that CWM had illegally fired workers who walked off the job, that NLRB ruled CWM had illegally fired the workers for union organization activity and that the workers were eligible for back pay; and that NLRB ordered CWM to reinstate the workers with back pay for lost wages and benefits amounting to some $400,000. The privilege Defendants seek to invoke applies only if Defendants made a fair and true report of those proceedings.

The trouble with Defendants' argument is that the publications in question were not true. The NLRB did not find that CWM illegally fired workers, or that CWM fired workers for union organization activity, or order CWM to reinstate the workers, or to pay any back pay.

Defendants' statements, if true, would amount to statements that CWM had been found liable for violating the National Labor Relations Act, and had been ordered to do specific things to remedy its illegal conduct. Defendants' statements were false. They were made with known falsity, or with reckless disregard for their falsity. If the NLRB had entered any such order it would have been a matter of public record that Defendants would have checked before publishing. Exhibit C to *The Salt Lake Tribune*'s motion to dismiss contains two documents, neither of which includes or incorporates any NLRB order or decision evidencing *The Militant*'s publications. In fact, the only order NLRB has issued on the point is an order *dismissing* unfair labor practices charges against CWM.

Utah Code Ann. §45-2-3(2) does not apply because *The Militant*'s publications were not of any statement made in any official proceeding. Section 45-2-3(2) does not apply because *The Militant*'s statements of NLRB action were not a fair and true report of any official proceeding, or of 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.

Because Defendants' publications do not accurately report the NLRB proceedings, but rather falsely state the NLRB entered an order or orders finding that CWM had fired workers illegally, and ordering CWM to reinstate those workers with back pay, *The Militant*'s publications of NLRB proceedings are not privileged.

D. Defendants' Publications Conveyed Defamatory Meaning.

That *The Militant*'s statements had defamatory meaning is evidenced by the plethora of comments publicly made by others, after reading *The Militant*'s statements or substantially the same statements made by others, showing that Plaintiffs' reputations have been damaged in the eyes of those others. For example, If*The Militant*'s statements had no defamatory meaning, Father Donald E. Hope of the Catholic Church, after hearing such statements, would not have concluded, "What is needed here ... is the development of a conscience on the part of the C.W. Mining Co. They need to take the necessary steps to give their workers basic human rights." Catholic Bishop Niedermeyer would not have concluded CWM was denying its workers fair wages, safe working conditions, and the right to associate as workers. Mel Logan would not have accused CWM of "regressing to the dark age of business morality." The demonstrable injury to Plaintiffs' reputations from statements such as those of *The Militant* shows those statements are not only capable of defamatory meaning, they have resulted in actual injury to Plaintiffs' reputations.

E. Defendants' Statements Were of and Concerning The Individual Plaintiffs.

The Militant's argument that it made statements only about CWM and IAUWU is demonstrably false and asserted in bad faith. Besides CWM and IAUWU, *The Militant* made specific references by name to the individuals Chris Grundvig, Dana Jenkins, and Warren Pratt (IAUWU Local 1-02's officers), to Nevin Pratt and Vickie Mattingly (two of IAUWU's three international officers), and to Mark Hansen (IAUWU's attorney). *The Militant*'s own publications calling these individuals by name were certainly of and concerning these individuals.

The Militant also made references to specific small discrete classes or groups of persons including CWM's "managers", "bosses", "the Kingstons", and "one of the directors of the Co-op mine." *The Militant* also referred to a group consisting of IAUWU's "officers."

An entity such as CWM or IAUWU cannot act directly, but can only act through its agents. *In re* Ewles' Estate, 143 P.2d 903, 905 (Utah 1943) (an intangible entity can act only through its agents.) Therefore, when *The Militant* published statements that CWM or IAUWU did or failed to do a thing, those statements require the reasonable inference that the directors, officers, and management of CWM or IAUWU did or failed to do that thing. More to the point, *The Militant* has also stated not just that CWM or IAUWU did or failed to do certain things, but that CWM's

"managers", "management", "bosses", "the Kingstons", and "one of the directors of the Co-op mine" and IAUWU's officers did or failed to do certain specific things.

Defendants are really invoking the so-called "group defamation" rule. In this action Plaintiffs' defamation claim is governed by the substantive law of the forum state. Lynch v. Standard Pub. Co., 170 P. 770, 773 (Utah 1918) is Utah's most recent commentary the rule:

> [W]here words defamatory in their character seem to apply to a particular class of individuals, and are not specifically defamatory of any particular member of the class, an action can be maintained by any individual of the class who may be able to show the words referred to himself.

Under the Lynch rule, each of the individual Plaintiffs "may be able to show the words referred to himself." The general rule espoused in Lynch was earlier adopted in Fenstermaker v. Tribune Pub. Co., 43 P. 112 (Utah Terr. 1895) (Fenstermaker I):

> Where the words used seem to apply only to a class of individuals, and not to be specially defamatory of any particular member of that class, still the action can be maintained by any individual of that class who can satisfy ***the jury*** that the words referred especially to himself . ... [W]here the words, by any reasonable application, impute a charge to several individuals, under some general description or general name, either one coming within such description may successfully maintain an action, if ***the jury*** determine that the words have a personal application to the person bringing suit.

Fenstermaker I says that whether a "group defamation" refers especially to an individual, or has personal application to an individual, is a question of fact for the jury. The court cannot resolve such a question on summary judgment, yet alone on a Rule 12(b)(6) motion to dismiss.

Utah was admitted as a state, and its Constitution came into force, on January 4, 1896, immediately following Fenstermaker I. That document is part of the substantive law of the forum state. Article 1 Section 11 of the Utah Constitution states: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial ..." Shortly after Utah obtained statehood, the newly formed Utah Supreme Court decided Fenstermaker v. Tribune Pub. Co., 45 P. 1097, 13 Utah 532 (Utah 1896) (hereinafter Fenstermaker II), which held:

> One who publishes matter about a [group] in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and would permit indiscriminating reference to the deeds of a single member of the [group] as the deeds of all collectively, while the odium should rest legally and morally only upon the member of the [group] who is guilty.

The Fenstermaker cases should be read in harmony with the contemporaneously adopted Utah Constitution. One who publishes matter about a group in its collective capacity assumes the risk

of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and so would violate Utah's unique "open courts" state constitutional requirement that every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law.

CWM had three officers: Earl Stoddard, Dorothy Sanders, and Charles Reynolds. [Complaint ¶ 7] When *The Militant* published as its own statement that "one of the directors of the Co-op mine ... was convicted for savagely beating his daughter" [Complaint ¶ 81(k)], that statement relates to and concerns, and had personal application to, at least Stoddard and Reynolds.

CWM has about fifteen managers, including Owen, Kenny and Randy Defa, Anderson, Brown, Jackson, Jared and Elden Stephens, Freddy, Jim and Shain Stoddard, Tucker, and Peterson. [Complaint ¶¶ 8 - 13] [2] When *The Militant* published as its own statements that, for example, "The conditions imposed by the Co-Op bosses were responsible for three deaths on the job," and "Bosses at Co-op ... said the workers would get a raise 'when pigs fly,'" and "The workforce ... was fired to the person by the bosses," and " Many miners have injured themselves working on machinery that the bosses refuse to fix" [Complaint ¶ 81(m), (v), (x), (ee)], those statements relate to and concern, and have personal application to, the individual Plaintiffs who are CWM's "bosses."

IAUWU has three local officers, Chris Grundvig, Dana Jenkins, and Warren Pratt, and three international officers, Ronald Elden Mattingly, Nevin Pratt, and Vickie Mattingly. [Complaint ¶¶ 2 - 4] When *The Militant* published as its own statements that, for example, "There are no "union" meetings or elections of "union" officers," and "The officers of this outfit did nothing to represent the workers" [Complaint ¶¶ 81(e), (zz)], those statements relate to and concern, and have personal application to, the individual Plaintiffs who are IAUWU's "officers."

When *The Militant* published as its own statement that, for example, that "the union officers are the mine bosses," and that IAUWU is "run by the Co-op bosses" [Complaint ¶¶ 81(x), (ccc), such statements have direct application to, and are defamatory of, both IAUWU's officers and CWM's managers.

Fenstermaker I says each individual Plaintiff has an action if he or she "can satisfy the jury that the words referred especially to himself." Fenstermaker II says *The Militant* assumes the risk

---

[2] A few of CWM's managers are not parties to this action.

of group defamations being defamatory as to any member of a group. AndLynch says *The Militant* is liable for "group defamation" to any member of a group "who may be able to show the words referred to himself." *The Militant* in its own statements, not reporting on statements of others, identified by name Chris Grundvig, Dana Jenkins, Warren Pratt, Nevin Pratt, Vickie Mattingly, and Mark Hansen; they are outside the "group defamation" rule entirely. Each of the individual Plaintiffs, consisting of CWM's directors and managers, and IAUWU's officers, can show that one or more of *The Militant*'s statements about company directors, mine bosses and managers, and union officers, referred to him or her. Because *The Militant* made statements that were "of and concerning" the individual Plaintiffs, the Court should deny *The Militant*'s motion on this point.

III. DEFENDANTS ARE LIABLE FOR CIVIL CONSPIRACY.

Plaintiff's defamation claim is not preempted. *See* Memorandum in Opposition to Motion to Dismiss of Utah State AFL-CIO. To summarize: This is an action under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185. It is not preempted by the National Labor Relations Act (NLRA). Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903 (1967); Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers of Am. v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1356 (8th Cir.1995).

Plaintiff's defamation claim is not preempted. Linn v. Plant Guard Workers, 383 U.S. 53, 61, 86 S.Ct. 657 (1966), stating the NLRA does nog give "either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. In such case the one issuing such material forfeits his protection under the Act." Id. at 61. Further,

> [I]t must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned. ... Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. ... The injury that the statement might cause to an individual's reputation – whether he be an employer or union official – has no relevance to the Board's function. ...
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.

Id. at 63-64. *See* Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n., 90 F.3d 797, 806 (3rd Cir. 1996), holding actions for defamation are not preempted by the NLRA. Plaintiffs have

met their burden of pleading that the responsible parties made defamatory statements with malice and knowledge of falsity. Therefore, Plaintiffs' defamation claim is not preempted.

Plaintiffs also have claims against *The Militant* for civil conspiracy. Where an underlying tort is not preempted, a civil conspiracy to commit the tort also is not preempted. Alongi v. Ford Motor Co., 386 F.3d 716, 729 (6th Cir. 2004) ("It follows that original Count 3 (conspiracy) also is not preempted, since it merely asserts that the conduct alleged in original Count 1 (which is not preempted) was a tortious conspiracy."). 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." Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah App 1987). It is not necessary that the parties actually came together and entered into a formal agreement to do the acts complained of. Conspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators. Id.

The Defendants collectively comprise a combination of two or more persons, which operated with a meeting of minds to accomplish the unlawful object of defamation, one or more of whom committed overt acts directed against Plaintiffs in furtherance of the combination and conspiracy, resulting in injury to Plaintiffs. [Complaint ¶¶ 163-165] Civil conspiracy need not be pleaded with particularity. "Because we must accept the allegations of the complaint as true and construe all inferences in [the plaintiff's] favor, we will not look beyond the pleadings to assess the viability of [the plaintiff's] cause of action ..." Pennsylvania Nurses Ass'n. *supra*. Malice, intent, knowledge and other conditions of mind may be averred generally. F.R.C.P 9(b). Defendants are liable with their co-conspirators for the injuries to Plaintiffs caused by Defendants defamations.

IV. DEFENDANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES.

The Militant is not entitled to an award of attorney fees. For the reasons stated above, *The Militant*'s motion to dismiss is lacking in merit and should be denied.

Even if the Court was to grant *The Militant*'s motion, an award of attorney fees is not justified. Fees can be awarded under Utah Code Ann. §78-27-56(1), or any inherent court power, only if this action is without merit and not brought or asserted in good faith. For the reasons stated above, Plaintiffs brought this action in good faith.

Fees cannot be awarded under Utah Code Ann. § 78-58-105. The Utah Citizen Participation in Government Act applies only in certain limited circumstances not found here. First, there must be an action involving public participation in the process of government. "Process of government" means the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution. U.C.A. §78-58-102(5). *The Militant* was not exercising any right to influence decisions by the legislative or executive branch of government. The NLRB is an independent agency. The rights of litigants before the NLRB are controlled by statute and government regulations. No citizen has a First Amendment right to influence the rights of private litigants under the National Labor Relations Act. And *The Militant*'s publications were not for the purpose of trying to influence the NLRB in any event. There is no evidence*The Militant* ever directed any publication to the NLRB or that the NLRB was even aware of any publication by *The Militant*. Perhaps more importantly, nothing in any provision of the United States Code, or in the Code of Federal Regulations, empowers the NLRB, in resolving charges under the National Labor Relations Act, to take into consideration anything *The Militant* might say about the charges. Therefore, Defendants' publications do not constitute public participation in the process of government. In addition, based on the previous points of this memorandum, this action was commenced with a substantial basis in fact and law.

CONCLUSION

For the reasons set forth above, the Court should deny the motion to dismiss of *The Militant* and the Socialist Workers Party.

DATED April 15, 2005.

Attorney for IAUWU and its Officers

Attorney for C. W. Mining Company
and its Directors, Officers, and Management

CERTIFICATE OF SERVICE

I certify on April 15, 2005 copies of the above were served by first class mail to:

Judith E. Rivlin
8315 Lee Highway
Fairfax, VA 22031

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

Richard Rosenblatt
8085 E. Prentice Ave.
Greenwood Village, CO 80111

Randy L. Dryer
Michael P. Petrogeorge
Parsons Behle & Latimer
201 South Main, Suite 1800
Salt Lake City, UT 84145-0898

Steven K. Walkenhorst
Utah Assistant Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114-0856

Michael Patrick O-Brien
Jones Waldo Holbrook & McDonough
170 South Main Street, Suite 1500
Salt Lake City, UT 84101

Jeffrey Hunt
David C. Reymann
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, UT 84111

Joseph E. Hatch
5295 South Commerce Drive, Ste 200
Murray, UT 84107

2712-p.002 oppose Militant mot to dismiss