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

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

International Association of United Workers Union (IAUWU), C. W. Mining Company (CWM) *et al.* respectfully submit this memorandum in opposition to *The Militant*'s Motion to Dismiss All Claims Asserted Against It In Plaintiffs' Second Amended Complaint (the Complaint).

STATEMENT OF FACTS

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

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

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

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

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

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

6. In reporting on UMWA's illegal activities, *The Militant* published numerous false and defamatory statements about Plaintiffs, as quoted in paragraphs 135 through 158 of the Complaint, which for brevity are not repeated but are incorporated here by reference.

7. *The Militant* has republished on its website at http://themilitant.com all the articles published in its print edition, where they remain available for viewing by the world*The Militant* has also posted on its website the original Complaint in this action, thereby republishing each and every defamation described therein. [Complaint ¶¶ 159, 160]

8. *The Militant* is an avowedly and unabashedly socialist publication. It did not engage in neutral reporting, but published articles intentionally biased and slanted from a socialist perspective, with the purpose and result of falsely portraying CWM and its agents as exploitative capitalists unconcerned about the welfare of its employees, IAUWU and its officers as CWM's lackeys, the employees who walked off the job as innocent victims, and UMWA as their hero and champion, and with the purpose and result of persuading readers that their publications about Plaintiffs were true. [Complaint ¶ 161]

9. Taken in context, *The Militant*'s statements were substantially and materially false, and were made with knowledge of their falsity, or with reckless disregard as to their truth or falsity, and were made with malice. [Complaint ¶¶ 186-188]

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

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

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

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

ARGUMENT

The Militant brings its motion "pursuant to Rules 8(a) & e(1) as 12(b)(6) of the Federal Rules of Civil Procedure." Rule 12 provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In opposition to this motion, Plaintiffs present matters outside of the pleadings. Therefore, this motion is treated as one for summary judgment and is disposed of as provided in Rule 56.

To the extent not set forth herein, Plaintiffs incorporate by reference the arguments in their previous memoranda in opposition to motions to dismiss the First Amended Complaint.

I. THE SECOND AMENDED COMPLAINT STATES CLAIMS FOR DEFAMATION.

I(A). THE SECOND AMENDED COMPLAINT COMPLIES WITH THE COURT'S ORDER AND WITH FED. R. CIV. PROC. 8.

The Militant, having made the effort to transcribe the June 14, 2005 hearing, saw fit to omit the vital portions explaining why the Court granted Plaintiffs leave to amend their pleading. The earlier Amended Complaint quoted publications by the news source rather than by each defendant. One had to parse the quoted articles to see what any particular defendant said. The newspapers' attorneys argued it was unclear whether the newspapers were sued for everything they reported or only for their own statements. *In that context*, [1] the Court ordered:

> The plaintiff's are to file a second amended complaint. I'll grant leave for that filing, which needs to clearly allege who is being sued for what and by whom.
> ...
> Mr. Hansen, I would like to ask you to do that within 30 days. That means you're going to have to sort out precisely which defendant is being accused of which defamatory statement, so they know what they are being charged with. The Deseret News and The Tribune may have relatively few after what I have heard here today. The Militant may have a bunch more, but then they can focus on it.
> I would also like you in this amended pleading to give them a better understanding of what you claim is defamatory. [*example omitted*] They need to know what part you think is untrue and why it, therefore, forms a basis for a defamation claim. [Tr. 69-71]

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[1] *The Militant* did not argue in that the First Amended Complaint was vague in alleging whether *The Militant*'s publications were defamatory, but that it was vague in alleging whose statements Plaintiff was holding *The Militant* responsible for.

The Complaint contains (a) simple, concise, and direct averments, (b) that sort out which defendant is accused of which defamatory statement, so each defendant would know what he is charged with. To quote*The Militant*'s authority Celli v. Shoell, 995 F. Supp. 1337, 1346 (D. Utah 1998), the purpose if pleading is simply to "give sufficient notice to allow the defendant to formulate a responsive pleading." The Complaint satisfies this standard.

The Court did not order Plaintiffs "to parse out the exact statements from each of the quoted articles which they believe to be objectively verifiable statements of fact, or explain why they believe those particular statements to be false and defamatory." [2] *The Militant*'s memorandum addresses those issues head on, showing it understands the allegations and can formulate a responsive pleading. *The Militant* wants Plaintiffs' Complaint to anticipate *The Militant*'s affirmative defenses. That is an impracticable task well beyond the pleading requirements of Rule 8 and the Court's order giving leave to amend. Nevertheless, the Complaint does identify *The Militant*'s false statements. The Complaint quotes specific language that defames. *The Militant* knows which publications are involved, as it has attached them to its memorandum. *The Militant* singles out its July 20, 2004 article, "Bosses are forced to rehire striking Utah coal miners." [Exhibit 1] Yes, the Complaint quotes more than one fact from the article. Plaintiffs' quote (except parts needed to put the rest in context), is all false statements of fact, impeaching Plaintiffs' honesty, integrity, virtue, and reputation - in other words, defamations.

The Militant's obligation in pleading is set forth in Fed. R. Civ. Proc. 8(b):

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when

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[2] Additional "parsing and explaining", which is beyond what the Court ordered, would triple the bulk of the defamation claim without affecting Defendants's ability to draft an Answer. [*See* Addendum 1.] By amending the Complaint Plaintiffs reduced the 26 pages alleging defamations published by *The Militant* by half. To "parse and explain" every defamatory quote in the Complaint would have added over 100 pages to Plaintiff's pleading, making it an unwieldy morass that would not materially aid the defendants in formulating a response to the pleading. The Court did not order that result and Rule 8 does not require it.

> the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

Any competent third-year law student could easily draft an Answer that admits or denies each allegation of the Complaint, or state the client lacks knowledge or information sufficient to form a belief as to the truth of each allegation. Mr. Dryer, who has been practicing for 29 years, and whose qualifications are not in question here, has ample experience to do the same.

The Militant may dispute Plaintiffs' allegations, or claim a statement is an opinion, fact, or raise other affirmative defenses. But issues of how the publications should be construed are addressed by denying an allegation or alleging an affirmative defense. The twelve pages of argument in Point II of *The Militant*'s memorandum prove *The Militant* actually does understand Plaintiff's allegations, and is capable of responding to Plaintiffs' averments on the merits.

The Militant is entitled to notice of Plaintiffs' claim sufficient to frame a responsive pleading, nothing more. A defamation complaint may be dismissed for lack of particularity "only where it contains nothing more than general, conclusory allegations of defamation." Zoumadakis v. Uintah Basin Medical Center, Inc., 2005 UT App 325 ¶ 3. The Complaint goes well beyond that standard. It complies with Rule 8(a) and 8(e)(1) as well as the Court's order giving leave to amend. *The Militant*'s request to dismiss the Complaint for noncompliance with Rule 8 and the Court's order giving leave to amend is not well taken and should be denied.

I(B). *THE MILITANT*'S PUBLICATIONS CONVEY DEFAMATORY MEANING.

The Militant argues it was reporting on a "heated" labor dispute, and its readers would understand its articles were a continuation of a debate about the labor dispute." *The Militant* fallaciously contends that these two "facts," *which lack record evidentiary support*, [3] requires the Court to conclude any statement *The Militant* may have published, no matter how false and pernicious, cannot convey a defamatory meaning. The law does not support this contention.

In Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) the Court addressed whether the National Labor Relations Act (NLRA) pre-empted state defamation law. The Court held it did

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[3] There is no evidence, or any allegation in any pleading, that *The Militant*'s readers would form the understanding *The Militant* attributes to them. Plaintiffs object and move to strike those allegations as lacking in evidentiary or other record support.

not. The NLRA does not 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." Linn at 61. Although the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management, ... *it 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* ..." Id. at 62-63 (emphasis added).

While *The Militant* cites Linn for the proposition that language actionable in other contexts is more carefully scrutinized in the context of labor disputes, Linn actually says no such thing. Rather, the Court held that in an action between participants in a labor dispute, a party alleging defamations that under common law would be actionable *per se* (which does not require proof of damages) must prove damages:

> As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to labor controversies. However, even in those jurisdictions, the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law.

Id. 65. However, *The Militant* is not a participant in a labor dispute, merely an observer reporting from the sidelines. Therefore, Linn offers *The Militant* no succor.

"Under Utah law, a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule. At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation. Thus, in determining whether a particular statement fits within the rather broad definition of what may be considered defamatory, the guiding principle is the statement's tendency to injure a reputation in the eyes of its audience." West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994). *The Militant* even admits "the guiding principle is the statement's tendency to injure a reputation in the eyes of its audience." This principle applies here. It does not disappear simply because *The Militant* was reporting on a labor dispute.

The Militant argues what it said could not injure Plaintiffs' reputations, without examining what it actually said. [4] What *The Militant* actually said is critical to whether it exposed Plaintiffs to opprobrium. Paragraphs 134-156 of the Complaint allege these publications among others:

- *The Militant* falsely said CWM and its managers forced miners to labor under unsafe conditions including dangerous roof tops, inadequate roof supports and defective equipment, rules and in violation of federal MSHA regulations, forced miners to work while injured and to breathe increased levels of coal dust, refused to pay black lung benefits, and that those same unsafe rules and conditions caused three gratuitous deaths.

- *The Militant* falsely said CWM paid its miners between $5.15 and $7.00 an hour with no health benefits, paid incentives and bonuses arbitrarily, and told miners they would get a pay raise "when pigs fly."

- *The Militant* falsely said that CWM and its managers have kept the workers from organizing in a union, that IAUWU is a "company union," created and maintained by CWM to prevent its miners from organizing in a real union, that its officers are CWM managers, and that there are no "union" meetings or elections of "union" officers.

- *The Militant* falsely said CWM's "bosses" harassed and suspended miners for talking to UMWA organizers, describing what it meant by harassment – that the bosses cornered workers underground and questioned them about meetings with UMWA, tried to disrupt union meetings, and threatened to report miners to federal immigration authorities.

- *The Militant* falsely said on September 22, 2003, CWM and its managers fired 75 miners for protesting the "arbitrary" dismissal of Bill Estrada, for protesting unsafe job conditions, and for trying to organize a union, called the sheriff, ordered the miners off the property, and locked them out.

- *The Militant* falsely said the NLRB ruled against CWM on unfair labor practice charges, issued a decision holding CWM had fired the miners illegally for union activity, and ordered CWM to rehire the workers with back pay amounting to some $400,000.

- *The Militant* falsely said after CWM rehired some miners, CWM organized union meetings to keep up a facade that IAUWU is a labor organization, and when the NLRB ordered an election, CWM submitted a list of voters including management personnel.

The Militant's false statements that CWM and its managers forced miners to work in specifically described unsafe conditions impeach the managers' integrity and expose them to public contempt. *The Militant*'s false statements that the NLRB ruled CWM had fired the miners illegally and ordered CWM to rehire the workers and awarded them $400,000 in back pay, impeach CWM's integrity and exposes it to public contempt. *The Militant*'s false statements that IAUWU is a

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[4] *The Militant* also disregards that Plaintiffs' reputations have in fact been injured. Where a statement has defamation in fact, it is capable of defamatory meaning.

"company union" CWM created to prevent miners from organizing and its officers are CWM managers, impeach IAUWU's officers' integrity and exposes them to public contempt.

The Militant's own publications prove statements that CWM illegally fired miners conveyed a defamatory meaning. Its October 13, 2003 article "Locked-out coal miners in Utah fight for union" reports that after hearing such statements, supporters joined the miners shouting, "Down with the bosses!" - a response they would not have made if the reputations of CWM's "bosses" were unsullied by those statements. It is reasonable to infer *The Militant*'s readers had a similar response from reading a similar statement.

The Complaint sets out dozens of instances showing Plaintiffs' reputations have suffered injury in actual fact as a direct result of the sort of false statements *The Militant* made. Such statements so injured Plaintiffs' reputation in the eyes of the president of Utah NOW as to lead her to say, "They break labor laws, they don't pay their workers a decent wage. ... It is some of the worst exploitation in the U.S." [¶ 195(e)] Such statements induced Catholic Bishop George Niederauer to form an opinion of CWM's reputation to the effect that the right to fair wages, for safe working conditions, and for the right to associate as workers were all being denied to the workers at CWM, and for Father Donald E. Hope to remark, "What is needed here ... is the development of a conscience on the part of the C.W. Mining Co." [¶ 195(i), (k)] Such statements led Susan Vogel of Salt Lake City CodePINK to say "They treat women, children and workers like garbage, and the way they've treated these miners is an example of that." [¶ 195(x)] These are only a few examples showing Plaintiffs in fact suffered injury to their reputations as a direct result of publications of the sort *The Militant* published.

The argument that there is no evidence these people read *The Militant* is not well taken. If A falsely tells B that C did an illegal act, and C's reputation is injured in B's eye as a result, that proves the false statement is capable of a defamatory meaning. If anyone else publishes the same statement, the statement is still capable of defamatory meaning, which is the issue here.

The Militant says, without evidentiary support, that it is "published in the interests of working people," and is "distributed to those who have a particular interest in labor issues and issues of workers' rights, wand who expect that its articles/editorials will be written with a pro-labor slant." In other words, its readers are pre-disposed to unquestioning acceptance of statements injuring the reputations of management.

It is reasonable to infer from the preceding facts that *The Militant*'s publications injured Plaintiffs' reputations in the eyes of its subscribers. But the Court need not rely on reasonable inferences alone. The March 1, 2004 edition of *The Militant* published a letter from 20 of its readers who, upon reading *The Militant*'s publications against Plaintiffs, wrote [Exhibit 2]:

> ... The treatment handed out to the miners seems to us abusive, as they were suspended from their jobs and thrown out into the streets to swell the numbers of the unemployed; in our eyes, these actions by the Co-Op owners are undemocratic and antiquated. These exploiters are holding off the formation of a union ... This backward attitude shows that they want to go on exploiting and abusing the workers, and violating their rights. ... the bosses are still living in the epoch of the cave-dwellers, and we are obliged to wake them up to reality.... To be able to defend this right it is necessary to organize against this feudalistic company.

It is clear from this letter that *The Militant*'s false publications about Plaintiffs impeached Plaintiffs' honesty, integrity, and virtue in the eyes of its audience. This Court cannot say *The Militant*''s publications are incapable of injuring Plaintiffs' reputations as a matter of law, when it is a demonstrated, undisputed fact that Plaintiffs reputations have been damaged in the eyes of *The Militant*'s readers.

The Court must construe each fact as alleged in the Complaint, and every reasonable inference from those facts, in favor of Plaintiffs. *The Militant* carries the burden of proof on its motion to dismiss for each and every statement it claims is not defamatory. It does not meet this burden by referring only generally to its statements with no analysis of any particular statement. *The Militant*'s false publications are not merely capable of conveying a defamatory meaning. Its publications as a demonstrable fact have injured Plaintiffs' reputations. Under West, *supra*, *The Militant*'s motion to dismiss is not well taken and should be denied.

I(C). *THE MILITANT* PUBLISHED STATEMENTS OF FACT, NOT MERE OPINION.

The publications summarized in Point I(B) are statements of fact. The West opinion explained how a person can be liable for stating an opinion:

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

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

> Whether a given statement constitutes an assertion of fact or an opinion is a question of law to be determined by the court. "The distinction frequently is a difficult one,

> and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole." Even if a statement is an opinion and hence generally not actionable ..., the opinion nevertheless may give rise to a cause of action if it "implies the allegation of undisclosed defamatory facts as the basis of the opinion."

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

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

The statements summarized in Point I(B) are capable of being objectively verified as true or false. They are false, and malign Plaintiffs' reputations. [5] Perhaps a statement of "unsafe" working conditions *standing alone* could be considered an opinion. But when expounded on by false assertions that "unsafe" means dangerous roof tops, inadequate roof supports, breathing increased coal dust, defective equipment, and being forced to work while injured, the implication is capable of being objectively verified as true or false, and under West is actionable.

The Militant's statements that CWM and its managers have kept the workers from organizing in a union, that IAUWU is a "company union" created and maintained by CWM to prevent its miners from organizing in a real union, that its officers are CWM managers, and that there are no "union" meetings or elections of "union" officers, are statements of fact, not opinion.

The Militant's statements of "harassment," that CWM's cornered workers underground, questioned them about meetings with UMWA, tried to disrupt union meetings, and threatened to report miners to federal immigration authorities, fired 75 miners for protesting the dismissal of Bill Estrada, for protesting unsafe job conditions, and for trying to organize a union, called the sheriff, ordered the miners off the property, and locked them out, are statements of fact, not opinion.

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[5] It is interesting that *The Militant* would use its November 24, 2003 editorial to buttress its argument, since the Complaint does not allege a claim against *The Militant* base on that article! And its October 12 (not 24), 2004 editorial included statements that the NLRB "found in June that the Co-Op miners had been fired illegally and ordered the company to take back the workers, and "the Kingston" are trying "to prevent us from telling the truth." If *The Militant* had only been telling the truth, it wouldn't have published false statements such as its canard that the NLRB ruled against CWM, and it wouldn't be a party to this action.

The Militant 's statements that the NLRB ruled against CWM on unfair labor practice charges, issued a decision holding CWM had fired the miners illegally for union activity, ordered CWM to rehire the workers with back pay amounting to some $400,000, and that after CWM rehired some miners, CWM organized IAUWU's union meetings, and that CWM submitted a list of voters including management personnel, are statements of fact, not opinion.

The Militant's reliance on Price v. Viking Penguin, Inc., 881 F.2d 1426 (8th Cir. 1989) is misplaced. Plaintiff's defamation action is governed by the law of the State of Utah, not Minnesota. The rule in Utah is as stated in West, *supra*.

With the burden on *The Militant* to prove grounds for dismissal, the Court should limit its review to the minuscule handful of specific statements *The Militant* cited in its memorandum. Even if a few of *The Militant*'s statements are of opinions, most are statements of fact that Plaintiffs can prove are false. Plaintiff's Complaint alleges defamatory statements of fact *The Militant*'s motion to dismiss on the grounds the statements are of opinion only is without merit and should be denied.

I(D). *THE MILITANT* IS NOT PROTECTED BY A FAIR REPORTING PRIVILEGE.

I(D)(1). *The Militant*'s Argument Is Premature and Therefore Procedurally Defective.

The Militant is not entitled to invoke a defense of privilege in a Rule 12(b)(6) motion to dismiss. In Zoumadakis v. Uintah Basin Medical Center, Inc., 2005 UT App 325, an employee sued her employer for defamation. The Utah Court of Appeals reversed a trial court judgment for the employer, holding the trial court erred in considering the defense of privilege in the context of a Rule 12(b)(6) motion: [6]

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

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

> Raising an affirmative defense, like a qualified privilege, for the first time in a 12(b)(6) motion is not generally appropriate since "dismissal under rule 12(b)(6)

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

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

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

I(D)(2). The Fair Reporting Privilege Does Not Apply to *The Militant*'s False Reporting.

Apart from the procedural defect in *The Militant*'s motion, Utah has no common-law "fair reporting" privilege, only a limited statutory privilege. Utah Code Ann. §45-2-3 provides:

> A privileged publication or broadcast which shall not be considered as libelous or slanderous per se, is one made: (4) By a fair and true report, without malice, of a judicial, legislative, or other public 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.

The privilege would apply only to *The Militant*'s reporting of NLRB decisions, and not to any other of its publications. The privilege would protect *The Militant* in making "a fair and true report, without malice," of the NLRB's decisions. *The Militant* said the NLRB ruled against CWM on unfair labor practice charges, issued a decision holding CWM had fired the miners illegally for union activity, and ordered CWM to rehire the workers with back pay amounting to some $400,000. None of those things are true. *The Militant* did not make a fair and true report of any official proceeding. [7] Also, for purposes of this motion the Court accepts as true Plaintiff's allegations that *The Militant* published with malice, and with knowledge its statements were false or with reckless disregard of their falsity. Rule 9(b) says fraud must be pleaded with particularity,

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[7] This is a Rule 12(b)(6) motion, where the allegations of the Complaint, and all reasonable inferences, are construed in favor of Plaintiffs. Because the Complaint alleges *The Militant*'s statements are false, that allegation must be taken as true without the need for Plaintiffs to prove it with evidence. However, the evidence will show: The NLRB has never ruled against CWM on any unfair labor practice charge. The NLRB has never issued any decision holding CWM fired anyone illegally, whether for union activity or any other reason. The NLRB has never ordered CWM to rehire any workers, or to pay workers back pay of $400,000 or any other amount. In fact, the only decisions the NLRB has made in unfair labor practices in the present matter have *dismissed such charges with no finding that anyone committed any unfair labor practices.*

but "malice, intent, knowledge, and other condition of mind of a person may be averred generally." Because *The Militant*'s reporting of NLRB decisions is neither fair nor true, and not without malice, its publications are not privileged.

I(E). *THE MILITANT*'S PUBLICATIONS ARE CONCERNING THE INDIVIDUAL PLAINTIFFS UNDER THE GROUP DEFAMATION RULE.

Plaintiffs incorporate by reference the argument on pages 10-13 of their April 15, 2005 Memorandum in Opposition to Motion to Dismiss of *The Militant*. To summarize:

Besides CWM and IAUWU, *The Militant* referred by name to Chris Grundvig, Dana Jenkins, and Warren Pratt (IAUWU Local 1-02's officers), Nevin Pratt and Vickie Mattingly (two of IAUWU's three international officers), and to Mark Hansen (IAUWU's attorney). *The Militant*'s statements calling these people by name were of and concerning them.

The Militant also made references to specific small discrete groups of persons including CWM's managers, bosses, etc., and to IAUWU's officers. Those statements evoke the rule in Lynch v. Standard Pub. Co., 170 P. 770, 773 (Utah 1918):

> [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. 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.

Utah law is clear. Fenstermaker I says each Plaintiff has an action if he "can satisfy the jury that the words referred especially to himself." Fenstermaker II says *The Militant* assumes the risk of group defamations being defamatory as to any member of a group. Lynch 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." Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and would violate Utah's "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 about fifteen managers or "bosses." When *The Militant* maligned the "bosses," its statements related to, concerned, and had personal application to, the individuals who were CWM's bosses. IAUWU had three local and three international officers. When *The Militant* maligned IAUWU and its "officers," its statements related to, concerned, and had personal application to, the individuals who were IAUWU's officers. Each of the individual Plaintiffs 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.

II. THE COMPLAINT STATES A CLAIM AGAINST *THE MILITANT* FOR INVASION OF PRIVACY.

The Militant argues Plaintiffs' "invasion of privacy claims are inextricably intertwined with their claims for defamation, and must be dismissed for the same reasons." In other words, *The Militant* only argues Plaintiffs' invasion of privacy claims should be dismissed under the Rule 12(b)(6) standard because (a) *The Militant*'s statements cannot convey a defamatory meaning; (b) it made only statements of opinion and not fact; (c) a "fair reporting" privilege applies to its reporting of NLRB decisions; and (d) its statements were not "of and concerning" the individual defendants.

Besides the arguments set forth in Point I above, to portray a plaintiff in a false light a statement does not have to convey a defamatory meaning, indeed it could even be true (which would be a complete defense to a defamation claim). *The Militant* published articles intentionally

biased and slanted from a socialist perspective, with the purpose and result of falsely portraying CWM and its agents as exploitative capitalists unconcerned about the welfare of its employees, IAUWU and its officers as CWM's lackeys, the employees who walked off the job as innocent victims, and UMWA as their hero and champion, and with the purpose and result of persuading readers that their publications about Plaintiffs were true. [Complaint ¶ 161] *The Militant* has not argued its statements are not capable of placing Plaintiffs before the public in a false light.

Under West and *Rinsely*, *supra*, even "opinions" of *The Militant* can be actionable because they imply "the allegation of undisclosed defamatory facts as the basis of the opinion."

The "fair reporting privilege" affects only *The Militant*'s statements about NLRB decisions and is not a defense to other statements. It is procedurally improper to consider affirmative defenses on a motion to dismiss. The privilege applies only to "a fair and true report, without malice" of official proceedings. *The Militant*'s reports of official proceedings were not fair, were not true, and were not without malice, so they were not privileged.

The Militant's "of and concerning" argument applies only to claims of individual defendants, and is not a defense to the claims of the entities CWM and IAUWU. Whether Under Lynch, Fenstermaker I and Fenstermaker II, *supra*, the individual Plaintiffs are entitled to present to a jury their evidence *The Militant*'s statements were "of and concerning" them.

The Militant presents no other arguments for dismissing Plaintiff's invasion of privacy claims. Its arguments for dismissal are legally insufficient; its motion should be denied.

III. THE COMPLAINT STATES CLAIMS AGAINST *THE MILITANT* FOR CIVIL CONSPIRACY, AND UNDERLYING TORTS IN FURTHERANCE OF THE CONSPIRACY.

The Court accepts as true for purposes of this motion that "Defendants Aguilar [and other former CWM workers] ..., UMWA and its officers and other agents, *The Militant* [and others] collectively comprise a combination of two or more persons, which operated with a meeting of minds to accomplish the unlawful objects described herein." [Complaint ¶ 220] That adequately alleges a combination of two or more persons, the first element of a civil conspiracy claim.

The Militant argues the Complaint does not allege "how" the conspirators combined. Plaintiffs do not have to allege, or even prove at trial, exactly how the conspirators combined. "It is not necessary in a civil conspiracy action to prove that the parties actually came together and

entered into a formal agreement to do the acts complained of by direct evidence. Instead, 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." Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah App 1987). Given the requirements of notice pleading, Plaintiffs allege the nature of the acts done with sufficient particularity. Although the relation of the parties is largely a matter for discovery, there is evidence that Estrada, the UMWA agent responsible for instigating the workers's walkout and setting in motion all the resulting torts, was a reporter for and agent of *The Militant*. [Exhibit 3 - May 19, 2003 article, "Nevada gold miners strike for pay, seniority published under the byline of Bill Estrada, a coal miner in Utah] *The Militant*'s interest as an avowedly socialistic newspaper was to portray CWM and its agents as exploitative capitalists unconcerned about the welfare of its employees, IAUWU and its officers as CWM's lackeys, the employees who walked off the job as innocent victims, and UMWA as their hero and champion. [Complaint ¶ 161]

The Militant argues the Complaint does not allege "what the object was they allegedly intended to accomplish." That is simply not true. The Complaint alleges the object was "the unlawful objects described herein." In other words, the objects of the conspiracy were to defame Plaintiffs, to invade their privacy, to falsely portray CWM and its agents as exploitative capitalists unconcerned about the welfare of its employees, IAUWU and its officers as CWM's lackeys, the employees who walked off the job as innocent victims, and UMWA as their hero and champion, and to interfere with CWM's and IAUWU's economic relations with others.

The Militant argues the Complaint does not allege "when the supposed meeting of the minds occurred." There is no pleading requirement that Plaintiffs allege with particularity when the conspiracy arose. That is a matter within the exclusive knowledge of the Defendants, which Plaintiffs should not be expected to know before conducting discovery. However, the defendant miners walked off the job on September 22, 2003. [Complaint ¶ 78] *The Militant*'s first publication in furtherance of the conspiracy was dated October 6, 2003. [Addendum A, publication M-01] For present purposes, that adequately brackets the time frame during which *The Militant* would likely have joined in the conspiracy, and is certainly sufficient to state a claim for relief and give *The Militant* sufficient notice for it to formulate a responsive pleading.

Those are the only points of the Complaint *The Militant* specifically argues as being inadequate. *The Militant* admits Plaintiffs allege the unlawful, overt acts in furtherance of the conspiracy in considerable detail, and admits Plaintiffs also adequately allege damages as a proximate result.

The Militant fallaciously argues that if the conspiracy claim fails, then CWM's and IAUWU's claims for intentional interference with economic relations must also fail. *The Militant* does not dispute for present purposes that the intentional interference claims state valid claims against UMWA *et al.* *The Militant*, as an alleged co-conspirator, puts the cart before the horse. If the intentional interference claims fail as a matter of law, then a claim for conspiracy to commit intentional interference would also fail, not the other way around as *The Militant* argues.

"All persons who advise, instigate, aid, encourage or direct a wrongful act are as liable as if they had performed the act themselves." Oman v. U.S., 179 F.2d 738, 741 (10th Cir. 1950), *citing* Roe v. Lundstrom, 57 P.2d 1128 (UT 1936). Plaintiffs' civil conspiracy claim makes *The Militant* liable not only for its own defamations of Plaintiffs, but for all damages proximately caused by all the acts of its fellow conspirators. That includes all damages resulting from all of the other Defendants' defamations of Plaintiffs, invasions of Plaintiff's privacy, and interference with CWM's and IAUWU's economic relations with others. *The Militant*'s motion to dismiss those claims is without merit and should be denied.

IV. THE COMPLAINT STATES A CLAIM AGAINST *THE MILITANT* FOR NEGLIGENCE.

The Militant does not deny for purposes of this motion that it owed Plaintiffs a duty of care to refrain from interfering with CWM's contractual relations with its employees, including a duty to refrain from counseling, advising, assisting, abetting, encouraging, supporting, or aiding CWM's workers in walking off the job.

The Militant only argues the allegation "One or more of Defendants breached their duty of care" does not state a claim against *The Militant*. The underlying facts presently in Plaintiffs' possession are evidenced by *The Militant*'s publications, identified in the Complaint, excerpts of which are quoted in the Complaint. The full text of those articles is in *The Militant*'s possession. Any other facts evidencing the precise manner in which *The Militant* would have counseled, advised, assisted, abetted, encouraged, supported, or aided CWM's workers in walking of the job

would be in the exclusive possession of the parties involved. Plaintiffs should not be expected to know those facts before conducting discovery and so cannot reasonably be expected to have pleaded them before discovery. Given the liberal notice pleading allowed under the rules, the pleading of facts from *The Militant*'s publications evidencing that it encouraged the workers in walking off the job, and the lack of opportunity for discovery, the Complaint adequately alleges *The Militant* breached its duty.

For purposes of this motion *The Militant* does not deny CWM's allegations it was injured and suffered damages as a proximate result of *The Militant*'s negligence. Therefore, *The Militant*'s motion to dismiss CWM's negligence claim should be denied.

V. *THE MILITANT* IS NOT ENTITLED TO DISMISSAL WITH PREJUDICE OR TO AN AWARD OF ATTORNEY FEES.

Whether Plaintiffs' action against *The Militant* should be dismissed for failing to state a claim is addressed above and requires no further argument.

The Militant's arguments for an award of attorney fees are based on faulty premises. The Second Amended Complaint complies with the Court's order granting leave to amend Plaintiffs' pleading, so arguments based on a supposed failure to comply are not well taken.

The Militant offers no evidence that Plaintiffs are motivated by any purpose other than a legitimate interest in having their rights vindicated and their injuries compensated. Plaintiffs did not file this action to harass or unduly burden *The Militant*. Plaintiffs have never sought to prevent *The Militant* from exercising its First Amendment rights, but it has no right to hide behind the Constitution to commit torts. *See* Linn, *supra*, 383 U.S. at 62: "[It must be emphasized that malicious libel enjoys no constitutional protection in any context." Even if the Court should find against Plaintiffs on the merits of their claims against *The Militant*, Plaintiffs nevertheless brought this action in good faith and not for any improper purpose. *The Militant* offers no evidence to the contrary and so fails to meet even the most minimal burden of proof for relief under U.C.A. §78-27-56(1). *The Militant* invokes Fed. R. Civ. Proc. 11(c) but failed to comply with the mandatory "safe harbor" requirement of Rule 11(c)(1)(A) that any Rule 11 motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion ... the challenged paper ... is not withdrawn or appropriately corrected." Therefore, *the Militant* would not be entitled to relief on its motion under Rule 11 in any event.

CONCLUSION

For the reasons set forth above, the Court should deny *The Militant*'s Motion to Dismiss.

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

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2712-p.004 oppose Militant mot to dismiss

ADDENDUM 1

From the Complaint:

The Militant article said, "On Sept. 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 Sept. 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 NLRB ordered CWM to reinstate 75 miners who were illegally fired last September. ... The miners also reported that the draft settlement includes a back pay order.

Taken in context, Defendants' statements as described above were substantially and materially false.

Defendants' statements were defamatory. To the extent they imputed criminal conduct on the part of Plaintiffs, and/or imputed to Plaintiffs conduct which is incongruous with the exercise of a lawful business, trade, profession, or office, they were defamatory per se.

"Parsing and Explaining" the Same Quote:

The Militant article said, "On Sept. 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." This was false because it is not true that 75 or any other number of coal miners were fired from their jobs at the Co-op mine because they had contacted the UMWA about getting a union organized at the mine. It is false because CWM and its managers did not fire any worker for union activity, on September 22, 2003 or any other day. It is also false because, as stated in paragraphs 77-81 of the Complaint, CWM did not fire the workers. It is defamatory because it falsely claims CWM's on-site managers fired workers for protected union activity, an unfair labor practice under the National Labor Relations Act. It is defamatory per se, because it imputes to CWM and its managers conduct which is incongruous with the exercise of a lawful business.

The article's authors said, "The miners were being paid between $5.15 and $7.00 an hour with no benefits." This was false because it is not true that the miners were being paid between $5.15 and $7.00 an hour with no benefits. It is defamatory because it implies the workers are being unfairly underpaid for the work they do. It is defamatory per se, because it imputes to CWM and its managers conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, "A company union has existed at the mine for many years." This was false because it is not true that a company union has existed at the mine, either for many years or for any other period of time. It is false because IAUWU, the union referred to, is not a company union. It is defamatory because it falsely states the operation of IAUWU is conducted in a way that violates the National Labor Relations Act. It is defamatory per se, because it imputes to CWM and its managers, and to IAUWU and its officers, conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, "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." It is false because workers could not have submitted evidence that the officers of IAUWU are bosses, because because IAUWU's officers are not and never were

bosses, therefore no such evidence could exist. It was false because workers could not have submitted evidence that the officers of UMWA are related to the mine owners, because IAUWU's officers are not related to the owners of the mine, therefore no such evidence could exist. It was false because CWM is not owned solely by a "Kingston family." It is false because it falsely accuses IAUWU's officers of collusion with an alleged wealthy Kingston family controlling both the mine and the union. It is defamatory because it falsely accuses IAUWU and its officers of conduct constituting unfair labor practices in violation of the National Labor Relations Act. It is defamatory per se, because it imputes to CWM and its managers, and to IAUWU and its officers, conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, "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." This is false because it is not true that bosses began harassing and suspending the miners for talking to UMWA organizers about how to get a real union organized at the mine. It is false because CWM's "bosses" did not harass or suspend miners for protected union activity. It is false because CWM's "bosses" did not harass miners at all. It is false because any miners who were suspended were suspended for cause. It is defamatory because it falsely states CWM and its managers committed acts constituting unfair labor practices. It is defamatory per se, because it imputes to CWM and its managers, and to IAUWU and its officers, conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, "They [CWM's managers] had cornered miners alone underground and questioned them about "the meetings they were having with the UMWA." This was false because it is not true that CWM's managers had cornered miners alone underground and questioned them about "the meetings they were having with the UMWA. It is false because CWM's "bosses" did not corner miners alone underground and question them about meetings they were having with UMWA. It is false because CWM's "bosses" did not corner miners alone, underground or elsewhere, and question them about anything. It is defamatory because it falsely states CWM and its managers committed acts that constitute unfair labor practices. It is defamatory per se, because it imputes to CWM and its managers, and to IAUWU and its officers,

conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, "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." This was false because it is not true that CWM's "bosses" tried to disrupt a meeting the strikers had organized outside the mine. It was false because it is not true that CWM's "bosses" threatened workers with sending the immigration police after them. It was false because "the bosses" did not try to disrupt a meeting strikers organized outside the mine, and did not threaten workers with sending the immigration police after them. It is defamatory because it falsely states CWM and its managers committed conduct constituting unfair labor practices. It is defamatory per se, because it imputes to CWM and its managers conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, " On Sept. 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 NLRB ordered CWM to reinstate 75 miners who were illegally fired last September." This was false because it is not true that NLRB upheld a charge by UMWA against CWM that all 75 miners, or any other number of miners, were fired illegally, for protected union activity or for any other illegal reason. It was false because NLRB did not hold any worker was illegally fired in September 2003. It is false because it is not true that the NLRB ordered CWM to reinstate any miners. It is defamatory because it falsely states CWM and its managers committed acts constituting unfair labor practices. It is defamatory per se, because it imputes to CWM and its managers conduct which is incongruous with the exercise of a lawful business.

The article's authors also said, "The miners also reported that the draft settlement includes a back pay order." The Militant had a copy of the NLRB decision or had ready access to it when The Militant published this statement, and knew or should have known there was no settlement containing a backpay order, making this a knowingly or recklessly false statement. Since a backpay order would issue only for unfair labor practices, the statement is defamatory per se.

THE MILITANT

Vol. 68/No. 26 July 20, 2004

Bosses are forced to rehire striking Utah coal miners

UMWA announces breakthrough in union-organizing battle

lead articles

'On toward victory in union election in August,' Utah miners say

Co-Op miners describe advance at Colorado event on Ludlow massacre

BY ANNE CARROLL
AND GUILLERMO ESQUIVEL

HUNTINGTON, Utah—In a major breakthrough for the United Mine Workers of America (UMWA) organizing battle at the Co-Op mine here, the union received a draft settlement from the National Labor Relations Board (NLRB) that orders C.W. Mining Co. to reinstate all of the 75 miners who were illegally fired last September. With most of the Co-Op strikers back to work before mid-July, the chances increase that the UMWA will win the NLRB-mandated union election that will be held sometime in August, workers report.

On June 21, two bosses from the Co-Op mine hand delivered letters to the striking miners giving them an unconditional offer to return to work. The letter stated that workers must let the company know by

Exhibit 1

THE MILITANT

Vol. 67/No. 17 May 19, 2003

Nevada gold miners strike for pay, seniority

BY BILL ESTRADA
AND ROLLANDE GIRARD

ELKO, Nevada--Several hundred gold miners walked off the job March 27–28 at Newmont Mining Corp. to press their fight against company concession demands. Members of International Union of Operating Engineers Local Union no. 3 have worked without a contract since Sept. 30, 2002, at Newmont, one of the world's largest gold producers.

The 960 union miners, out of a workforce of some 1,500, work at the company's underground and surface mining operations in Carlin Trend, a 250-square-mile area in northern Nevada where one-third of all gold is mined in the United States.

Workers carried out the two-day strike in response to company efforts to gut seniority rights. Newmont bosses are demanding a "skills-based" seniority system, which they claim would provide greater "opportunities" for employees while allowing the company more "flexibility" in moving workers from job to job. Union chief negotiator Frank Herrera told the Las Vegas Sun that "Newmont could demote workers if they don't meet certain company criteria, including being able to handle up to eight different pieces of equipment."

The miners work rotating 12-hour shifts. Many pay for charter-bus rides to get to the Carlin mining operation, which is about 30 miles away from Elko.

The company wants "to be able to hire people off the street for less money to do the jobs of those with more seniority," said a miner, "and then put the older people in harder jobs to make them quit and lose

Exhibit 3

their pension."

Another miner also spoke about the harsh conditions in the underground mine. "The company assigns you to work for two hours in a place more hot than hot," he said, "and some people have passed out [including me.] They don't care."

Whether miners are members of the union or not, most say that they supported the walkout. "The union sets the wage scale," explained a worker coming back from work. "If the company wins against the union or if they get rid of it, the wages would go down in all the mines." Miners say that Newmont is the only union-organized gold mine in northern Nevada.

Miners say that Newmont has penalized workers for union activity, and imposed unilateral changes such as an increase in co-payments for health-care benefits, and cuts in bonuses.

Miners also confront a dangerous level of naturally occurring arsenic, a very dangerous carcinogenic chemical element, in the hot underground mine. The workers are demanding an arsenic-free place to eat their lunch.

After the walkout, the company agreed to restart negotiations.

Bonanza for mine bosses

Elko township is situated in northern Nevada at an elevation of 5,060 feet. With only a 90-day growing season placing severe limits on agriculture, the state's economy is based mainly on the mining industry and casinos. The state of Nevada is the third-largest producer of gold in the world after South Africa and Australia.

Denver-based Newmont Corp. also has mining operations in Indonesia, Africa, Australia, Bolivia, Ecuador, New Zealand, Turkey, and Uzbekistan. The company hires close to 25,000 workers worldwide, including 2,875 in the United States. Newmont's underground and pit mines at the Carlin Trend started production in 1965, and by April 2002 this mining operation had produced 36 million ounces of gold.

Higher gold sales and prices nearly quadrupled the company's net income in the last quarter of 2002. Newmont's chairman and chief executive officer, Wayne Murphy, told the March 28 Elko Press that "a dollar change in the gold price results in a one-cent impact per share and $5.3 million in cash flow for the company."

The average price of gold was nearly $310 per ounce in 2002, compared to a low of $271 per ounce in 2001. The price rose to $380 earlier this year and now stands near $330 per ounce.

Due to the weak U.S. economy and the decline of the U.S. dollar, some businessmen, middle-class layers, and governments in several countries have started to increase their holdings in gold in place of U.S. currency. Unlike paper money or shares in stocks, precious metals are commodities possessing an intrinsic exchange value, derived from the labor power involved in mining and processing them. Gold is a traditional haven in times of economic and political crisis. This is behind the recent rise in the price of gold--it constitutes a real asset, while the U.S. dollar is just a promise.

State laws aid mine owners

Nevada is a so-called right-to-work state, which means the "closed shop"--a gain of the labor movement which makes union membership mandatory in union-organized work places--is outlawed. The wealthy in Nevada also don't pay estate, personal property, or inventory taxes.

The General Mining Law of 1872, still in effect, allows corporations to take over land where there is a deposit of minerals and buy it for no more than $5 an acre--the price set in 1872. Newmont owns or controls around 3,000 square miles of land in Nevada. Under the same 1872 law, no royalties are paid to the federal government by hard-rock mineral mines. In comparison, royalties from coal, oil, and gas on public lands are between 8 and 16 percent.

Nevada tops all 50 states in pollution with 1.3 billion pounds of toxins, mostly from hard-rock mining, released into the air, water, and soil--the equivalent of 750 pounds of pollutants for every person living in the state. The toxic elements include lead, arsenic,

cyanide, and mercury. Under the Mining law 557,000 hard-rock mine sites have been left unreclaimed.

Newmont spilled 24,000 gallons of cyanide solution at its Pinion mill facility, in Winnemuca, in May of last year. The Nevada Department of Environmental Protection claimed that this did not affect the aquifers or the Humboldt River, and that therefore there were no public health risks.

Barrick Goldstrike Mines, Inc., a Toronto-based company with a mining operation in Carlin, is one of the largest polluters in the country. It won a victory in April when Judge Thomas Jackson ruled in Washington, D.C., that the Environmental Protection Agency was wrong in requiring mining companies to include "the natural movement of rock" as part of their annual toxic release inventory report. Barrick produces about 400 million pounds of pollutants every year. Nevada currently is 10th in the nation in cancer mortality.

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