IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. MURRAY and MURRAY ENERGY CORPORATION,	)	Case No. 2:13-cv-1066
Plaintiffs,	)	Judge Gregory L. Frost
vs.	)	Magistrate Judge Terence P. Kemp
THE HUFFINGTONPOST.COM, INC., *et al*.	)	
Defendants.	)	

PLAINTIFFS ROBERT E. MURRAY AND MURRAY ENERGY CORPORATION'S MEMORANDUM IN OPPOSITION TO THE HUFFINGTON POST DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

I. INTRODUCTION

Defendants TheHuffingtonPost.com, Inc., its editors Arianna Huffington, Roy Sekoff, and Stuart Whatley, and its reporter Jason Cherkis (collectively the "Huffington Post Defendants") are certainly entitled to their own opinions, but they are not entitled to their own facts. The Huffington Post Defendants' unprovoked hatchet-job against Plaintiffs Robert E. Murray ("Murray") and Murray Energy Corporation ("Murray Energy") falls into the latter category as it contains actionable, false and defamatory assertions of fact regarding Plaintiffs. Although the Huffington Post Defendants may have believed that The Huffington Post article ("Article")[1] that is the subject of Plaintiffs' suit was merely an expression of a blogger's opinions, it is the average readers' perceptions – not the Huffington Post Defendants' (or their

[1] A printed copy of the Article is appended as Exhibit A to Plaintiffs' First Amended Complaint. It remains available online at the following URL address: http://www.huffingtonpost.com/mike-stark/meet-the-extremist-coal-baron_b_3948453.html.

blogger's) subjective beliefs – that differentiate defamatory assertions of fact from protected statements of opinion in the defamation context.

The Huffington Post Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint should be denied. The average reader of The Huffington Post – a Pulitzer-prize winning news outlet – would have perceived the Huffington Post Defendants' accusations that Murray is an "extremist" who "fires his workforce wholesale in fits of spite when electoral results disappoint him" and whose "firing" of 150 miners was the "fulfillment of a promise" in response to President Obama's reelection (the "Defamatory Statements") to be assertions of fact, not expressions of opinions. The Defamatory Statements carry clear factual connotations, are verifiable, and were made in the context of a serious news article (not labeled as an "editorial" or "commentary") containing many other factual assertions. The byline of Defendant Wilfred Michael Stark III ("Stark"),[2] appearing directly over the text of the online Article, describes Stark as a "Journalist," not a "columnist," and nowhere do the words "opinion," "commentary," "editorial," or similar terms appear that would caution the reader against interpreting the Defamatory Statements as being anything other than factual. Instead, the banner appearing directly over the text of the online Article promises "real time analysis" from The Huffington Post's "signature lineup of contributors" – hardly fair warning for readers to expect nothing but unvarnished *opinions* to follow.

For these reasons and those described more fully below, Plaintiffs respectfully ask this Court to deny the Huffington Post Defendants' Motion to Dismiss the First Amended Complaint.

[2] Defendant Stark has filed a separate Motion to Dismiss Plaintiffs' First Amended Complaint, to which Plaintiffs will respond separately. (Stark Mot. to Dismiss, Doc. # 19.) Because the Huffington Post Defendants, like Stark, address the fact/opinion test under the Ohio Constitution, there are close similarities between this response and the corresponding portion of Plaintiffs' response to Stark's motion. To the extent that the Huffington Post Defendants rely on additional authorities in their Motion, however, those distinctions are addressed herein.

At the very least, limited discovery concerning The Huffington Post's involvement in the Article, which may confirm and bolster the evidentiary bases for Plaintiffs' amended pleading, should be permitted to take place before any case-dispositive ruling is made. The Huffington Post Defendants themselves have expressly acknowledged that "limited, expedited discovery" may allow the parties to resolve critical issues in this case relating to the Huffington Post Defendants' claimed immunities under Section 230 of the Communications Decency Act. (Huff. Post Mot. to Dismiss, Doc. # 20, PAGEID #: 181, n.9.)

II. BACKGROUND

This action for defamation and false light invasion of privacy arises from a September 20, 2013 Article titled "*Meet the Extremist Coal Baron Bankrolling Ken Cuccinelli's Campaign*," which was published on The Huffington Post under Stark's byline. (First Am. Compl., Ex. A, Doc. # 16-1.) The Article falsely defames Plaintiffs by asserting that Murray is an "extremist" who "announced he was firing more than 150 of his miners" in response to President Obama's reelection; that this "firing" was the "fulfillment of a promise;" and that Murray "fires his workforce wholesale in fits of spite when electoral results disappoint him." (*Id*.)

Plaintiffs allege on information and belief that, although Defendants published the Article under Stark's byline, some or all of the content for the Article was originally researched and/or drafted by Cherkis, a reporter for Defendant TheHuffingtonPost.com, Inc. (*Id.* at ¶13.) Plaintiffs allege that Cherkis has a history of fabricating stories and quotes and badgering or misquoting sources and that this history was either known or reasonably should have been known by Defendants. (*Id.* at ¶16.) Plaintiffs further allege on information and belief that, after Cherkis researched and/or drafted the Article, an unknown employee of TheHuffingtonPost.com, Inc. reviewed his work product and determined that it lacked sufficient verifiable information. (*Id.* at

¶14.) A request was then made to Stark for him to post the Article on The Huffington Post under his byline. (*Id.* at ¶17.) None of the Defendants or their representatives contacted any representative of the Plaintiffs before publication of the Article to verify its accuracy and, upon information and belief, Defendants made no other attempts to verify the accuracy of the Article "beyond a review of other information circulating on the Internet." (*Id*. at ¶22.)

III. LAW & ARGUMENT

A. The legal standard applicable to the Huffington Post Defendants' Motion to Dismiss.

As this Court noted in *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Edn.*, when assessing a motion to dismiss a defamation complaint, allegations in the complaint must be accepted as true and need only state a claim "plausible on its face." No. 2:09-cv-464, 2009 U.S. Dist. LEXIS 114346, *10 (S.D. Ohio Dec. 8, 2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcraft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is a "context-specific task" requiring the court "to draw on its judicial experience and common sense." *Freshwater*, *supra*, at *11. In *Freshwater*, this Court denied the motion to dismiss the plaintiff's defamation claim, and the same result should follow here.

It is important to note that, although a claim for defamation under Ohio law has five elements,[3] the Huffington Post Defendants' Motion to Dismiss attacks Plaintiffs' First Amended Complaint with respect to only one of these elements. That is, the Huffington Post Defendants make no argument that Plaintiffs have not adequately pleaded that the Defamatory Statements

[3] The elements of a claim for written defamation (also known as "libel") under Ohio law are: "(1) 'the assertion of a false statement of fact;' (2) 'the false statement was defamatory;' (3) 'the false defamatory statement was published by defendants;' (4) 'the publication was the proximate cause of the injury to the plaintiff;' and (5) 'the defendants acted with the requisite degree of fault.'" *Bentkowski v. Scene Magazine*, 637 F.3d 689, 693 (6th Cir. 2011), quoting *Celebrezze v. Dayton Newspapers, Inc.*, 41 Ohio App. 3d 343, 535 N.E. 2d 755, 759 (1988).

were "defamatory," that the Huffington Post Defendants published the Defamatory Statements, that the publication of the Defamatory Statements was the proximate cause of injury to Plaintiffs, and that the Huffington Post Defendants acted with the requisite degree of fault in publishing the Defamatory Statements – *i.e.*, negligence, if Plaintiffs are found to be private figures, and actual malice, if Plaintiffs are found to be public figures or limited-purpose public figures. (*See generally* Huff. Post Mot. to Dismiss, Doc. # 20.) Rather, the Huffington Post Defendants' Motion to Dismiss raises only a single issue for this Court to resolve at the pleading stage: whether the Defamatory Statements at issue are actionable statements of fact, or statements of opinion protected by Ohio's separate and independent constitutional guarantee. Because, as explained below (and in Plaintiffs' response to Stark's Motion to Dismiss), the Defamatory Statements fall squarely into the former category, the Huffington Post Defendants' Motion to Dismiss must be denied.

B. The Defamatory Statements do not constitute protected opinion speech.

Although the United States Supreme Court has declined to declare an express, separate constitutional privilege for "opinion," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), the Ohio Supreme Court held that "[t]he Ohio Constitution provides a separate and independent guarantee for protection of opinion ancillary to freedom of the press." *Vail v. Plain Dealer Pub. Co.*, 72 Ohio St.3d 279, 281, 649 N.E.2d 182 (1995). To determine whether statements are protected opinions, this Court assesses the totality of the circumstances, including the following (the "*Vail* factors"): (1) the specific language of the statements; (2) whether they are verifiable; (3) the immediate context in which they were made; and (4) the broader context in which they appeared. *Id.* at 282. These "can only be used as a compass to show general direction and not a map to set rigid boundaries." *Id.* Here, each *Vail* factor weighs in Plaintiffs' favor.

i. The specific language of the Defamatory Statements would be perceived by a reasonable reader as factual assertions.

The Court first assesses "'whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications.'" *Wampler v. Higgins*, 93 Ohio St.3d 111, 127-28, 752 N.E.2d 962 (2001), quoting *Ollman v. Evans*, 750 F.2d 970, 979-80 (D.C. Cir. 1984). In so doing, the Court assesses "'the common meaning ascribed to the words by an ordinary reader'" – not the "perception of the publisher." *McKimm v. Ohio Elections Comm'n*, 89 Ohio St. 3d 139, 144, 729 N.E. 2d 364 (2000), quoting *Vail*, 72 Ohio St. 3d at 282.

Two important principles must be borne in mind when applying the first *Vail* factor. First, to imply a factual assertion through innuendo is the same as to explicitly state it. For example, the Ohio Supreme Court has found the first *Vail* factor satisfied where, although an allegedly defamatory column contained no express statement that the plaintiff had committed perjury, the "'clear impact in some nine sentences and a caption'" was that the plaintiff had lied under oath at a hearing. *Wampler*, 93 Ohio St.3d at 128, quoting *Scott v. News-Herald*, 25 Ohio St. 3d 243, 251, 496 N.E. 2d 699 (1986); *see also Mehta v. Ohio Univ.*, 194 Ohio App. 3d 844, 2011-Ohio-3484, 958 N.E. 2d 598, ¶34 (holding that, although a report contained no direct statement that the plaintiff failed to perform his job duties, "the clear impact of the specific language imparts this assertion"). Indeed, the Ohio Supreme Court has found the first *Vail* factor satisfied even where *pictures* – instead of words – conveyed an unmistakable and false message. *McKimm*, 89 Ohio St. 3d at 145 (a political cartoon portraying a hand passing money under a table constituted a false statement of fact because "the average reader would view the cartoon as a false factual assertion that [the plaintiff] accepted cash in exchange for his vote").

A second principle is that pairing a defamatory statement with a qualifying phrase – *i.e.*, "supposedly," "I understand," or "it appears," – is not necessarily sufficient to transform defamatory factual assertions into protected opinion speech. *Rich v. Thompson Newspapers, Inc.*, 164 Ohio App. 3d 477, 2005-Ohio-6294, 842 N.E. 2d 1081, ¶30 (reversing dismissal of plaintiff's claim for defamation in part because defendant's use of such modifiers to temper his defamatory statements did not automatically transform the statements into protected opinion speech); *see also Scott*, 25 Ohio St. 3d at 252 ("[o]bjective cautionary terms, or 'language of apparency' . . . are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse"); *Mallory v. Ohio Univ.*, Ohio App. No. 01AP-278, 2001 Ohio App. LEXIS 5720, *13 (Dec. 20, 2001) ("simply couching [allegedly defamatory] statements in terms of opinion does not dispel the implication of knowledge of facts which may be either incorrect or based on an erroneous assessment"). With these principles in mind, it is apparent that the specific language of the Defamatory Statements satisfies the first *Vail* factor.

a. Statements regarding Murray's "firing" of his miners.

The Huffington Post Defendants argue that the phrase "fits of spite" lacks an "objectively ascertainable meaning." (Huff. Post Mot. to Dismiss, Doc. # 20, PAGEID #: 176.) Yet such an argument misses the point. It is not the term in isolation, but rather the "clear impact," "general tenor," and "impression" created by the Defamatory Statements as a whole that must be analyzed under the first *Vail* factor. *McKimm*, 89 Ohio St. 3d at 144. And, viewing the Defamatory Statements together, the clear impact, general tenor, and impression that they convey is that Murray fired 150 of his miners in order to make a political statement following the reelection of President Obama; an objective – and false – assertion of fact. Such an assertion is clearly conveyed by the Article's statement that "[f]iring so many employees may well have been the

fulfillment of a promise," a statement that is followed by a purported quotation from a September 2010 internal letter sent by Murray to his employees, warning of the potential loss of coal industry jobs from negative mid-term election results. (First Am. Compl., Ex. A, Doc. # 16-1.) The use of the qualifying phrase "may well have been" does not, as the Huffington Post Defendants suggest, automatically transform this Defamatory Statement into an expression of opinion. *See Scott*, 25 Ohio St. 3d at 252. Even if it did, the Article's statement that Murray "fires his workforce wholesale in fits of spite when electoral results disappoint him" surely brings home the message that, as a matter of fact, Murray's "firing" of 150 of his miners was done in response to the reelection of President Obama (and not for any legitimate business reasons, such as the lack of adequate markets for the coal they mined). Because the specific language of these Defamatory Statements carries a precise meaning and gives rise to a clear factual implication, the first *Vail* factor weighs in favor of a finding that these Defamatory Statements are actionable.

b. Statement that Murray is an "extremist."

The dictionary definition of an "extremist" is "[a] person who advocates or resorts to extreme measures, especially in politics; a radical." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 466 (1973); *see also* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 686 (2d ed. 2001) (defining "extremist" as "1. a person who goes to extremes, esp. in political matters. 2. a supporter or advocate of extreme doctrines or practices"). Although labeling someone as an "extremist" could, in some contexts, be viewed as mere hyperbole, the Article at issue here uses the term to convey an assertion of fact. Notably, the Article's labeling of Murray as an "extremist" appears not only in the title, but also immediately after its attack on Murray for allegedly "firing" his miners in response to the reelection of President Obama. The

accusation that Murray is an "extremist" is thus intended to, and does, reinforce to the reader the Article's false and defamatory assertions regarding Murray's "firing" of his miners. It is clear that the Article uses the term "extremist" to portray Murray as an unhinged, even dangerous, zealot who cares so little about his employees that he would give not a second thought to firing them *en masse* just to make a political point. In this context, the term "extremist" thus carries a precise meaning and gives rise to a clear factual implication. Again, the first *Vail* factor tilts toward a finding that this Defamatory Statement is actionable.

ii. The Defamatory Statements are verifiable.

The second *Vail* factor requires the Court to assess whether alleged defamatory statements are verifiable because "'a reader cannot rationally view an unverifiable statement as conveying actual facts.'" *Wampler*, 93 Ohio St.3d at 129, quoting *Ollman*, 750 F.2d at 981. In *Scott*, the Ohio Supreme Court deemed an accusation of perjury to be "an articulation of an objectively verifiable event" that could be proven "with evidence adduced from the transcripts and witnesses present at the hearing." 25 Ohio St. 3d at 252. Verifiability may also be shown where "the author implies that he has first-hand knowledge that substantiates the opinions he asserts." *Mehta*, 2011-Ohio-3484 at ¶35, quoting *Vail*, 72 Ohio St. 3d at 283. If such an implication is made, "the expression of opinion becomes as damaging as an assertion of fact." *Id*., quoting *Scott*, 25 Ohio St. 3d at 251.

In *Mehta*, for example, the court found that statements appearing in a report were verifiable where the authors of the report "g[ave] every indication that they conducted a thorough investigation before reaching their conclusions" and thus "implied that they had first-hand knowledge of facts supporting their conclusions." *Id*. at ¶38. Similarly, in *Mallory*, the court held that an accusation of sexual misconduct was verifiable because it was coupled with the

phrase "from the information that was gathered," which "implies 'undisclosed facts that would allow the statements to be verified.'" 2001 Ohio App. LEXIS 5720 at *16, quoting *Condit v. Clermont Cty. Review*, 110 Ohio App. 3d 755, 761, 675 N.E. 2d 475 (1996).

As in *Mehta* and *Mallory*, the Defamatory Statements at issue here were packaged by Defendants to suggest they are the product of a thorough investigation, and that undisclosed facts would substantiate them. They were presented in the context of other facts. The Article contains numerous electronic links to supporting materials, giving the impression of thorough research. The Article goes on to support its accusations that Murray fired 150 of his miners in response to the reelection of President Obama and that Murray is an "extremist" by quoting at length and providing an electronic link to an article from the New Republic titled "Coal Miner's Donor" (the "New Republic Excerpt") (First Am. Compl., Ex. A, Doc. # 16-1.) The New Republic Excerpt, which accuses Murray of, among other things, threatening to fire his workers based on the outcome of the 2010 mid-term elections, states that it is supported in part by "a review of letters and memos to Murray employees," unidentified "[i]nternal documents," and anonymous sources "who requested anonymity for fear of retribution." (*Id*.) Such statements imply that the Defamatory Statements are supported by the New Republic reporter's investigation. Yet, with the exception of the New Republic Excerpt's selective citation to a single letter and two anonymous sources, nowhere in the Article does there appear any disclosure of information gleaned from the New Republic's purported investigation that would support the Defamatory Statements. Rather, the Article relies largely on the mere suggestion that an investigation was conducted to lend a false sense of credibility to the Defamatory Statements and imply to the reader that they are verifiable by reference to undisclosed facts. The second *Vail* factor thus weighs in favor of actionability.

iii. The immediate context of the Defamatory Statements indicates to a reasonable reader that the Defamatory Statements are factual assertions.

Under the third *Vail* factor, the Court considers the "immediate context" of the Defamatory Statements. *Wampler*, 93 Ohio St. 3d at 130. "[C]ourts should assess 'the entire article or column' because 'unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content.'" *Wampler*, 93 Ohio St.3d at 130, quoting *Ollman*, 750 F.2d at 979. In *Bentkowski v. Scene Magazine*, which the Huffington Post Defendants rely heavily upon, the court found that allegedly defamatory statements were opinions based on their immediate context – a column "ridden with humor and sarcasm" containing such hyperbolic phrases as "super-duper cool" and "political IQ of Quiznos' lettuce." 637 F.3d 689, 695 (6th Cir. 2011). On the other hand, when a defamatory statement appears amidst other verifiable statements of fact (as the Defamatory Statements did here), the immediate context may indicate to the average reader that the defamatory statement is also one of fact. *See Comm. to Elect Straus Prosecutor v. Ohio Elections Comm'n*, Ohio App. No. 07AP-12, 2007-Ohio-5447, ¶11 (defamatory statements were factual in part because they were made in a political ad containing several factual statements regarding the defendant's opponent); *Cooke v. United Dairy Farmers, Inc.*, Ohio App. No. 04AP-817, 2005-Ohio-1539, ¶28 (statement at press conference was factual in part because it "appeared amid factual, verifiable information," and, "[t]hus, the listener would have inferred that the [alleged defamatory] statement about [the plaintiff] was also factual").

Here, the Defamatory Statements appeared in a serious news article published by a Pulitzer-prize winning news outlet, not a sarcasm-dripping humor column such as the one at issue in *Bentkowski*. And the Defamatory Statements are found amidst other factual assertions concerning Murray and former Virginia gubernatorial candidate Ken Cuccinelli. The Article

begins by detailing Cuccinelli's acceptance of gifts from the CEO of Star Scientific, trades made by Cuccinelli in the stock of Star Scientific, Cuccinelli's failure to report various transactions as required by law, Cuccinelli's efforts to help Consol Energy avoid paying royalties to landowners, and the dramatic increase in campaign contributions from Consol Energy to Cuccinelli – all undeniable assertions of fact. (First Am. Compl., Ex. A, Doc. # 16-1.) The Article then turns to a discussion of Murray and Murray Energy, prefacing the Defamatory Statements with factual assertions concerning Murray Energy's contributions to Cuccinelli, based upon the "most recent campaign finance filing," Murray's speech at the Bluefield Coal Show, and his presence at a September 2012 Mitt Romney campaign speech. (*Id.*) And, as noted above, the Article supports the Defamatory Statements with the New Republic Excerpt, which itself contains a number of factual allegations regarding Murray's political activities. To the average reader of The Huffington Post, the Defamatory Statements, just like the numerous factual statements surrounding them, appear to be verifiable assertions of fact. The Defamatory Statements' immediate context thus weighs in favor of actionability under the third *Vail* factor.

iv. The broader social context of the Defamatory Statements signals to a reasonable reader that they are statements of fact.

Under the fourth *Vail* factor, the Court examines "the broader social context into which the statement fits," as "[s]ome types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Wampler*, 93 Ohio St. 3d at 131, quoting *Ollman*, 750 F.2d at 983. Thus, the Ohio Supreme Court has recognized that certain "genres" of writing associated with newspapers – including the sports pages and editorial pages – are traditionally linked to opinions. *Scott*, 25 Ohio St. 3d at 253; *Vail*, 72 Ohio St. 3d at 282. Not surprisingly, many of the cases relied upon by the Huffington Post Defendants involved allegedly defamatory statements appearing in such opinion-charged

contexts. In *Bentkowski*, the article at issue was in a section of Scene Magazine labeled "First Punch" – well-known for featuring humor, comments, and criticism. 637 F.3d at 695. Similarly, in *Ferreri v. Plain Dealer Publishing Co.*, the bulk of the alleged defamatory statements appeared on a newspaper's editorial page, "where people know that they are reading opinions and not news stories." 142 Ohio App. 3d 629, 640, 756 N.E. 2d 712 (2001). And in *Stepien v. Franklin*, the allegedly defamatory statements were made by the bombastic host of a sports talk show, which the court noted was "a traditional haven for cajoling, invective, and hyperbole . . . ." 39 Ohio App. 3d 47, 51, 528 N.E. 2d 1324 (1988), quoting *Scott*, 25 Ohio St. 3d at 253-54.

The Defamatory Statements at issue here, on the other hand, did not appear on the sports page of The Huffington Post, nor on any "editorial," "forum," or "commentary" page. Instead, the Defamatory Statements appeared under the byline of Stark, identified as a "Journalist," under a banner promising readers "real time analysis." As noted in Exhibit B to the First Amended Complaint, The Huffington Post recently won a Pulitzer Prize for *news reporting*, leading readers to view it is a source of reliable and factual news reporting – not a "traditional haven for cajoling, invective, and hyperbole." *Scott*, 25 Ohio St. 3d at 253. As the Ohio Supreme Court has noted, serious news articles such as the Article at issue here indicate to the reader that what is being read is factual in nature. *See Vail*, 72 Ohio St. 3d at 282 ("a column is distinguished from a news story which should contain only statements of fact or quotes of others, but not the opinion of the writer of the story"); *see also Mallory*, 2001 Ohio App. LEXIS 5720 at *6 (where alleged defamatory statements appeared in a newspaper article rather than an editorial, the broader context supported finding the statements to be assertions of fact rather than opinion).

The Huffington Post Defendants attempt to create a false distinction between "The Huffington Post's traditional news section" and "The Huffington Post Blog," the latter of which

they claim is "an open forum for posts by individual users" and the equivalent of a newspaper editorial page. (Huff. Post Mot. to Dismiss, Doc. # 20, PAGEID #: 179.) Because the Article appeared on The Huffington Post Blog, they argue, it must be protected opinion speech. (*Id*.) Such an argument indicates a fundamental misunderstanding of Plaintiffs' burden. The Ohio Supreme Court has rejected the proposition that "a bright-line rule of labeling a piece of writing 'opinion' can be a dispositive method of avoiding judicial scrutiny." *Scott*, 25 Ohio St. 3d at 252. Although the Huffington Post Defendants may truly believe that The Huffington Post Blog is nothing but a platform for unpaid bloggers to spout off their opinions, it is the impression created in the mind of *a reasonable reader* that separates fact from opinion. *See McKimm*, 89 Ohio St. 3d at 144. And nowhere on The Huffington Post Blog is there language placing readers on notice that they are being exposed only to opinions rather than factual assertions. To the contrary, The Huffington Post's Terms and Conditions provide that The Huffington Post does not endorse or guarantee the opinions or "*other statements* expressed by users and third parties (e.g. bloggers)." (First Am. Compl., Doc. # 16, ¶18 (emphasis added).) If all that bloggers did was express their opinions, as the Huffington Post Defendants contend, there would be no need for this reference to "other statements" (*besides opinions*) in their own Terms and Conditions.

The serious news-oriented appearance and focus of The Huffington Post Blog also serves to set it apart from the blogs at issue in the cases cited by the Huffington Post Defendants, making these cases readily distinguishable. In *Farah v. Esquire Magazine*, for example, the allegedly defamatory blog post appeared on an patently satirical political blog that had featured such recent topics as Osama Bin Laden's television-watching habits and "Sex Tips from Donald Rumsfeld." No. 12-7055, 2013 U.S. App. LEXIS 23719, *22 (D.C. Cir. Nov. 26, 2013). And in *Obsidian Fin. Group, LLC v. Cox*, the alleged defamatory blog posts were made on the

obviously critical websites "obsidianfinancesucks.com" and "bankruptcycorruption.com" – titles that would cause "the reader of the statements [to be] predisposed to view them with a certain amount of skepticism and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts." 812 F. Supp. 2d 1220, 1232 (D. Or. 2011). In neither of these cases was the mere fact that the alleged defamatory statements appeared on an Internet blog dispositive on the issue of the author's liability for defamation. Indeed, in *Obsidian*, the court refused to grant summary judgment to the defendant blogger for one of her blog posts, noting that, "while the setting and format of a blog tend to reduce a reader's expectation that provable assertions of fact will be found there, *the use of a blog does not . . . automatically insulate the poster from liability*." *Id*. at 1238 (Emphasis added). Here, too, the posting of the Defamatory Statements on a blog (particularly a serious and news-oriented blog such as The Huffington Post Blog) should not automatically insulate the Huffington Post Defendants from liability, and the fourth *Vail* factor weighs in favor of actionability.

v. The totality of the circumstances supports denial of the Huffington Post Defendants' Motion.

The Court makes the fact-opinion determination based on the totality of the circumstances. *Vail*, 72 Ohio St.3d at 185. Essentially, the court determines whether a reasonable reader would view the language as a statement of fact or opinion. *See McKimm*, 89 Ohio St.3d at 144. This is not a bright-line test, but is highly fact dependent. *Id.* at 185. Each of the *Vail* factors thus seeks to answer the same question: would a reasonable reader perceive the alleged defamatory statements to be assertions of fact or opinion? *See McKimm*, 89 Ohio St. 3d at 144. From the vantage point of the average reader, the specific language of the Defamatory Statements, viewed in light of their immediate and broader context, gives rise to precise and verifiable factual implications: that Murray is an "extremist" who *fired* 150 miners in order to

make a political statement in response to the reelection of President Obama. This is a false and defamatory factual assertion, not protected opinion speech.

In assessing the totality of the circumstances, this Court must remain keenly aware of the implications of a holding accepting the Huffington Post Defendants' argument that the Defamatory Statements are non-actionable opinion speech simply because they appeared on The Huffington Post Blog. (Huff. Post Mot. to Dismiss, Doc. # 20, PAGEID #: 179.) Plaintiffs have alleged, upon information and belief, that TheHuffingtonPost.com, Inc. had originally planned to publish the Article under the byline of one of its staff reporters, Cherkis, and that it only decided to have the Article published under the byline of one of its unpaid "bloggers" (*i.e.*, Stark) after concluding that the Article was lacking in sufficient verification. (First Am. Compl., ¶¶13-14, 17.) These allegations must be taken as true at this stage. To accept the Huffington Post Defendants' contention that The Huffington Post Blog is an anything-goes free-for-all where individuals such as Murray may have their reputations maligned with impunity would be to hold that any online newspaper may in essence completely insulate itself from defamation liability simply by publishing questionable articles on the other side of an artificially created virtual wall that is imperceptible to the average reader. Such a holding would all but eviscerate the tort of defamation. While the Huffington Post Defendants would surely praise such a ruling as a victory for the First Amendment, "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Mehta v. Ohio Univ.*, 194 Ohio App. 3d 844, 2011-Ohio-3484, 958 N.E. 2d 598, ¶27, quoting *Feldman v. Bahn*, 12 F.3d 730, 733 (7th Cir. 1993), in turn quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).

C. Plaintiffs have adequately pleaded a claim for false light invasion of privacy.

Even if this Court should grant the Huffington Post Defendants' Motion to Dismiss Plaintiffs' defamation claim, it must allow Plaintiffs' false light invasion of privacy claim to proceed. The false-light tort was recognized by the Ohio Supreme Court in *Welling v. Weinfeld*, and is defined as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E. 2d 1051, *syllabus*, citing RESTATEMENT OF THE LAW 2D, TORTS, Section 652E (1977).

Although the Huffington Post Defendants' Motion to Dismiss simply lumps Plaintiffs' claims for defamation and false light invasion of privacy together as if they were one tort, the Ohio Supreme Court has held that the false-light tort covers a broader range of false statements than defamation. *Welling*, 2007-Ohio-2451 at ¶49 ("[w]ithout false light, the right to privacy is not whole, as it is not fully protected by defamation laws"). The Court described situations "in which persons have had attributed to them certain qualities, characteristics, or beliefs that, while not injurious to their reputation, place those persons in an undesirable false light." *Id*. at ¶50 (internal quotation omitted). *Welling*'s recognition that false statements about a person's "beliefs" can constitute false light invasion of privacy is notable because one of the Huffington Post Defendants' defenses is that the Defamatory Statements are not actionable because they concern Murray's beliefs. (Huff. Post Mot. to Dismiss, Doc. # 20, PAGEID # 177.) In the context of Plaintiffs' false-light claims, *Welling* shows that the Huffington Post Defendants'

defense is truly no defense at all. By publishing false statements concerning Plaintiffs to millions of readers, the Huffington Post Defendants placed Plaintiffs in a false light before the public. There is no doubt that being labeled an "extremist" who callously fires employees "in fits of spite" to make a political statement would be "highly offensive to a reasonable person." And, as noted above, the Huffington Post Defendants have not argued that Plaintiffs failed to adequately plead that the Huffington Post Defendants acted with actual malice in publishing the statements at issue. The Court thus must permit Plaintiffs' false-light claims to proceed.

IV. CONCLUSION

Despite hanging their hat on the Ohio Constitution's separate and independent guarantee of protection for opinions, the Huffington Post Defendants never fully address what the Ohio Constitution actually says. Section 11, Article I of the Ohio Constitution states that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right* . . . ." (Emphasis added). The Huffington Post Defendants have abused the right conferred on them by the Ohio Constitution, and must be held responsible. Plaintiffs Robert E. Murray and Murray Energy Corporation respectfully ask the Court to deny the Huffington Post Defendants' Motion to Dismiss so that this case can proceed beyond the pleading stage for discovery and a determination on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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