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 DEFENDANT WILFRED M. STARK III'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Mark S. Stemm, Trial Attorney (0023146)
L. Bradfield Hughes (0070997)
Jared M. Klaus (0087780)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street, Suite 3200
Columbus, Ohio 43215
(614) 227-2092 (telephone)
(614) 227-2100 (facsimile)
mstemm@porterwright.com
bhughes@porterwright.com
jklaus@porterwright.com

Michael O. McKown (0013378)
Gary M. Broadbent (0083876)
46226 National Road
St. Clairsville, Ohio 43950
(740) 338-3100 (telephone)
(740) 338-3411 (facsimile)

Of counsel:
Kevin N. Anderson
FABIAN & CLENDENIN, PC
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
(801) 323-2225 (telephone)
(801) 596-2814 (facsimile)
kanderson@fabianlaw.com

Counsel for Plaintiffs

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I. INTRODUCTION

Defendant Wilfred Michael Stark III ("Stark") is certainly entitled to his own opinions, but he is not entitled to his own facts. Stark's 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 Stark may have believed that he was merely expressing his own opinions in The Huffington Post article ("Article")[1] that is the subject of Plaintiffs' suit, it is the average readers' perceptions – not Stark's subjective beliefs – that differentiate defamatory assertions of fact from constitutionally protected statements of opinion in the defamation context.

Stark's Motion to Dismiss Plaintiffs' First Amended Complaint should be denied, because the average reader of The Huffington Post would have perceived Stark's accusations that Murray is an "extremist" who "fires his workforce wholesale in fits of spite when electoral results disappoint him" and who fired 150 of his miners as the "fulfillment of a promise" in response to President Obama's reelection (the "Defamatory Statements") to be assertions of fact, not merely expressions of Stark's 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 a myriad of other factual assertions. Stark's byline, appearing directly over the text of the online Article, describes him 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

[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.

Article promises "real time analysis" from Huffington Post's "signature lineup of contributors" – hardly fair warning for readers to expect nothing but unvarnished *opinions* to follow.

Stark's argument that Plaintiffs have failed to adequately allege malice also fails. Plaintiffs (a Belmont County businessman and a privately-held company) are neither public figures nor limited-purpose public figures; therefore, they need not allege malice *at all* in order to survive a motion to dismiss. Even presuming that Plaintiffs *were* required to allege malice, Federal Rule of Civil Procedure 9(b) expressly permits malice to be "alleged generally." It does so for the obvious practical reason that before any discovery has been undertaken, Plaintiffs are hardly in a position to allege specific facts pertaining to Defendants' state of mind. And if the facts as alleged in the First Amended Complaint are not sufficient to allege malice, which requires only supporting an inference that Stark entertained serious doubts as to the truth of the Defamatory Statements, then the tort of defamation is truly a hollow remedy.

Plaintiffs have alleged, upon information and belief, that the original researcher and/or author of the Article was Defendant Jason Cherkis ("Cherkis"), a reporter for The Huffington Post, but that The Huffington Post deemed Cherkis's work product to be so lacking in verifiable factual support that it was unwilling to publish it under the byline of one of its reporters and thus asked blogger Stark to publish it under his byline instead – a request to which Stark willingly acceded. (First Am. Compl., Doc. # 16, ¶¶13-14, 17.) Plaintiffs have alleged that, at the time of the Article's publication, Cherkis was well-known among his peers for fabricating stories and misquoting sources. (*Id*., ¶¶15-16.) Thus, Stark would have this Court believe that a request from a Pulitzer Prize-winning news outlet to a third-party blogger to publish (under the blogger's byline) an article that was researched and/or written by one of the news outlet's own reporters – who presumably would have wished to enjoy the credit for his own work – was not enough to

trigger "serious doubts" as to the veracity of the Article. Accepting such a preposterous argument would completely unmoor journalists from any responsibility for their work and would transform the First Amendment into a tool for defeating the administration of justice.

For these reasons and those described more fully below, Plaintiffs respectfully ask this Court to deny Stark's Motion to Dismiss the First Amended Complaint.[2] 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' 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 the 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 and defamatorily asserts that Murray is an "extremist" who "announced he was firing more than 150 of his miners" in response to President

[2] Defendants TheHuffingtonPost.com, Inc., Arianna Huffington, Roy Sekoff, Stuart Whatley, and Jason Cherkis (the "Huffington Post Defendants") have filed a separate Motion to Dismiss Plaintiffs' First Amended Complaint, to which Plaintiffs will respond separately. (Huff. Post Mot. to Dismiss, Doc. # 20.) Like Stark, the Huffington Post Defendants focus primarily on Ohio's fact/opinion distinction in seeking dismissal of the First Amended Complaint. (*Id.*, PAGEID #: 174-180.) Unlike Stark, however, the Huffington Post Defendants do not challenge the sufficiency of Plaintiffs' allegations of malice. (*See generally id.*)

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 Stark's Motion to Dismiss.

Stark's claim that Plaintiffs' allegations are "utterly false" (Stark Mot. to Dismiss, Doc. # 19, PAGEID # 146) reveals his misunderstanding of the standard governing his Motion. As this Court noted in *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Edn.*, when assessing a motion to dismiss a defamation complaint, the 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 properly denied the motion to dismiss the plaintiff's defamation claim, and the same result should follow here.

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

Although the U.S. 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 has 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, the 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 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 examines "'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.

Stark's assertion that Murray fired 150 of his miners to make a political statement in response to the reelection of President Obama is false and defamatory. Indeed, Stark's Motion to Dismiss attempts to back away from his Defamatory Statements concerning Murray's "firing" of his miners by claiming that Stark did not explicitly state that Murray fired his miners "in response to" President Obama's reelection. (Stark Mot. to Dismiss, Doc. # 19, PAGEID # 154.) And to the extent Plaintiffs claim that Stark *implied* that Murray fired his miners in response to President Obama's reelection, Stark argues, that would merely be Plaintiffs' "conjecture." (*Id.*)

Stark's argument misses the mark. As well-established Ohio law makes clear, Stark's implication that Murray fired his workers in response to President Obama's reelection is the same, for purposes of assessing defamation liability, as if Stark had made the assertion explicit. *See Wampler*, 93 Ohio St.3d at 128. To borrow the words of the Ohio Supreme Court, although Stark did not expressly state that Murray fired his workers in response to President Obama's reelection, the "clear impact" on the average reader is that Murray did just that. Such an impression 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 Stark

suggests, 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. 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 heavily 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 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 the Article's Defamatory Statements regarding Murray's "firing" of his miners. It is clear that Stark used 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 "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 demonstrated 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 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.

Stark tries to undercut the verifiability of his own work-product by asserting that "Stark cannot purport to know what precisely motivated Murray to fire his workers. No one, not a historian evaluating corporate documents, nor a psychiatrist examining Murray, nor even Murray himself, would be able to identify precisely why Murray made the decision that he made. Stark could at most, only offer his opinion." (Stark Mot. to Dismiss, Doc. # 19, PAGEID # 154.) This is simply wrong. Plaintiffs know exactly why they laid off the employees at issue; indeed,

Plaintiffs publically announced the reasons in statements to the press that were intentionally ignored by Defendants before publication. Stark's suggestion that the reasons behind such employment decisions must always remain obscure – and that assertions about them may thus only be expressed in the form of "opinions" – makes no sense and disregards settled law.[3] 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 Stark relies 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, 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

[3] The argument makes no sense because courts for decades have objectively assessed employers' *motivations* in terminating employment in cases brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 2000e et seq. *See*, *e.g.*, *International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ("[p]roof of discriminatory motive is critical…"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 Sup.Ct. 1817, 36 L.Ed.2d 668 (1973) (burden on employer to "articulate some legitimate, nondiscriminatory reason" for a challenged employment decision).

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, 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 assertions of fact. The Defamatory Statements' immediate context thus weighs in favor of actionability.

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 Stark 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 *Christiansen v. Pricer*, the radio broadcast at issue carried the express disclaimer: "this is an editorial from WCLT." Ohio App. No. 09-CA-126, 2010-Ohio-2718, ¶¶17-18. And in *Condit*, the allegedly defamatory statements were authored by the publisher of the defendant newspaper and were clearly presented as editorials. 110 Ohio App. 3d at 756, 761.

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).

Stark asks the Court to "take judicial notice that the Huffington Post blog is a well-known forum for people to write opinion articles – the online equivalent of a newspaper editorial page." (Stark Mot. to Dismiss, Doc. # 19, PAGEID # 153.) This is not an appropriate subject for the taking of judicial notice, as it is subject to reasonable dispute, not generally known, nor readily determinable from "sources whose accuracy cannot reasonably be questioned." Fed. Evid. R. 201; *see Pearce v. Faurecia Exhaust Sys., Inc.*, No. 12-3983, 2013 U.S. App. LEXIS 12841, *11-12 (6th Cir. June 19, 2013) (affirming court's refusal to take judicial notice when plaintiff failed to present a "reliable source of verification" such as a dictionary, public record, or newspaper article); *Tedrow v. Cowles*, No. 2:06-cv-637, 2007 U.S. Dist. LEXIS 67391, *8 (S.D. Ohio Sept. 12, 2007) (refusing judicial notice of a fact "subject to reasonable dispute").

Stark's argument that the Defamatory Statements are protected opinion speech simply because they appeared on the "Huffington Post blog" also 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 Stark may truly believe that the Huffington Post blog is nothing but a platform for people such as himself 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 Stark contends, there would be no need for this reference to "other statements" (*besides opinions*) in the Terms and Conditions.

v. The totality of the circumstances supports denial of Stark's 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. *Id*. at 186. This is not a bright line test, but is highly fact dependent. *Id.* at 185. Each of the *Vail* factors 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 Stark's argument that the Defamatory Statements are non-actionable opinion speech simply because they appeared on the "Huffington Post blog." (Stark Mot. to Dismiss, Doc. # 19, PAGEID # 153.) 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 a "blogger" (*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 Stark's 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 Stark 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 are private figures not required to plead actual malice.

Murray is neither a public figure nor a limited-purpose public figure in that he has neither achieved pervasive fame or notoriety nor voluntarily injected himself into a public controversy. *See Gilbert v. WNIR 100 FM*, 142 Ohio App. 3d 725, 736, 756 N.E. 2d 1263 (2001). Nor is Murray Energy, a privately held Ohio corporation with its principal place of business in Belmont County, Ohio, a public figure or limited-purpose public figure. *See Park W. Galleries, Inc. v. Global Fine Art Registry, LLC*, Nos. 08-12247, 08-12274, 2010 U.S. Dist. LEXIS 17323, *26, 38 (E.D. Mich. Feb. 26, 2010) (a corporation was neither a public figure nor a limited-purpose public figure where no evidence was presented showing that the corporation had "achieved an elevated level of notoriety or role of special prominence in the community when the alleged

defamatory statements were made" or thrust itself to the forefront of a public controversy); *United States Medical Corp. v. M.D. Buyline, Inc.*, 753 F. Supp. 676, 680 (S.D. Ohio 1990) (expressing doubt that a closely-held corporation was a public figure in a defamation action). Indeed, Stark's Motion says nothing regarding Murray Energy's status as a private or public figure. As such, Plaintiffs are not required to plead or prove actual malice in order to adequately state a claim for defamation. *See Fuchs v. Scripps Howard Broad. Co.*, 170 Ohio App. 3d 679, 2006-Ohio-5349, 868 N.E. 2d 1024, ¶30 ("[p]rivate person defamation plaintiffs must show by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication").

D. Even if Plaintiffs were public figures or limited-purpose public figures, Plaintiffs have adequately alleged actual malice.

Even should the Court find that Plaintiffs are public figures or limited-purpose public figures, Plaintiffs have alleged sufficient facts to satisfy the actual malice standard, which requires facts sufficient to infer that a defendant "in fact entertained serious doubts as to the truth of his publication." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) (internal quotation omitted). As this Court held in *Freshwater*, Plaintiffs need only allege enough facts to make their defamation claim "plausible on its face." 2009 U.S. Dist. LEXIS 114346 at *10 (quotation omitted). Based on the allegations in the First Amended Complaint, which must be taken as true, it is beyond peradventure that Plaintiffs have alleged sufficient facts to support a plausible inference that Stark "entertained serious doubts" as to the truth of the Defamatory Statements.

Indeed, before Stark published the Defamatory Statements, he was presented with numerous red flags as to their veracity. Here, the assumed fact is that The Huffington Post, a Pulitzer-Prize winning news outlet, was asking Stark, an independent blogger, to publish a news

story under his byline rather than under the byline of Cherkis, the Article's original researcher/author. (First Am. Compl., ¶17.) Given that journalists typically prefer to be credited for their own work – which Stark, as a self-described journalist, would know as well as anyone – such a request should have immediately set off alarm bells. And the bells should have been deafening in this case given the identity of the Article's original researcher/author, Cherkis, who has a known history of fabricating stories and quotes, and badgering or misquoting sources. (*Id*., ¶¶ 13-16.)

Paragraph 16 of the First Amended Complaint notes at least seven instances in which Cherkis had been "accused of fabricating quotes and making serious and misleading misquotes." These complaints against Cherkis had been well-publicized in the close-knit journalistic community, giving Stark all the more reason to entertain serious doubts as to the Article's veracity. The fact that, despite entertaining such serious doubts, Stark still published the Defamatory Statements without even attempting to contact Plaintiffs to verify their veracity provides more than adequate grounds for finding that Plaintiffs have adequately alleged malice. *See Young v. Gannett Satellite Info. Network, Inc.*, No. 12-3999, 2013 U.S. App. LEXIS 22161, *10 (6th Cir. Oct. 31, 2013) (upholding jury's finding of actual malice in defamation action arising from newspaper article accusing plaintiff of sexual misconduct because the reporter failed to seek out plaintiff for comment despite being faced with "obvious reasons to doubt the veracity" of the allegations against him); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (finding actual malice where the investigation was "grossly inadequate" and the neutrality of the source was dubious); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012), quoting *Levesque v. Doocy*, 560 F.3d 82, 90 (1st Cir. 2009) ("'[r]ecklessness amounting to actual malice may be found' where the defendant 'relies on a source' when 'there

is an obvious reason to doubt its veracity . . . or deliberately ignores evidence that calls into question his published statements'").

Stark's argument that Plaintiffs have not adequately alleged malice also flies in the face of Federal Rule of Civil Procedure 9(b), which provides that "[m]alice, intent, knowledge, and other conditions of a person's mind *may be alleged generally*." (Emphasis added). Under Rule 9(b), even conclusory allegations of malice – allegations far less detailed and specific than those that Plaintiffs have made here – are enough to withstand a motion to dismiss in a public-figure defamation case. *See Ultimate Creations, Inc. v. McMahon*, 515 F. Supp. 2d 1060, 1066 (D. Ariz. 2007) (denying motion to dismiss where plaintiff's complaint merely "allege[d] that [the] statement[s] were made with actual malice" because "[d]uring the pleading stage, plaintiffs may generally aver a defendant's state of mind simply by stating that it existed"); *Pacquiao v. Mayweather*, 803 F. Supp. 2d 1208, 1214-15 (D. Nev. 2011) (denying motion to dismiss where plaintiff alleged only that defendants made statements "out of malice" and "with actual knowledge that such statements were false and in reckless disregard for their falsity" because a "plaintiff need only 'aver the required state of mind generally, without any corroborating evidence' to survive a motion to dismiss on the issue of malice") (internal quotations omitted).

To impose the insurmountable pleading threshold advocated by Stark would render the tort of defamation an illusory remedy for public-figure plaintiffs. Evidence of malice is, by nature, generally obtainable only through discovery. Requiring defamation plaintiffs to come forward with it at the pleading stage, absent the availability of pre-suit discovery (permitted only under the rarely-used Fed. R. Civ. P. 27 to perpetuate testimony of an individual who may not be available to testify, or to preserve evidence which may not be available at trial), would place justice out of reach for those in the public eye. *See Herbert v. Lando*, 441 U.S. 153, 172, 99 S.

Ct. 1635, 60 L. Ed. 2d 115 (1979) ("our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood").

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

Even if this Court should grant Stark's 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).

Contrary to Stark's argument that a published statement cannot constitute false light invasion of privacy unless it also constitutes defamation, 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 Stark's defenses is that the Defamatory Statements are not actionable because they concern Murray's beliefs. (Stark Mot. to Dismiss, Doc. # 19, PAGEID # 154-56.) In the context of Plaintiffs' false-light claims, *Welling* shows

that Stark's defense is no defense at all. By publishing false statements concerning Plaintiffs to millions of readers, Stark 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 explained above, Plaintiffs have pleaded sufficient facts to allege that Stark had knowledge of or acted in reckless disregard as to the falsity of his assertions. The Court must permit Plaintiffs' false-light claims to proceed.

IV. CONCLUSION

Despite hanging his hat on the Ohio Constitution's separate and independent guarantee of protection for opinions, Defendant Stark never addresses 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). Stark has abused the right conferred on him by the Ohio Constitution, and must be held responsible. Plaintiffs Robert E. Murray and Murray Energy Corporation respectfully ask the Court to deny Defendant Stark's Motion to Dismiss so that this case can proceed beyond the pleading stage for discovery and a determination on the merits.

Respectfully submitted,

/s/ Jared M. Klaus
Mark S. Stemm, Trial Attorney (0023146)
L. Bradfield Hughes (0070997)
Jared M. Klaus (0087780)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street, Suite 3200
Columbus, Ohio 43215
(614) 227-2092 (telephone)
(614) 227-2100 (facsimile)
mstemm@porterwright.com
bhughes@porterwright.com
jklaus@porterwright.com

Michael O. McKown (0013378)
Gary M. Broadbent (0083876)
46226 National Road
St. Clairsville, Ohio 43950
(740) 338-3100 (telephone)
(740) 338-3411 (facsimile)

Counsel for Plaintiffs

Of counsel:
Kevin N. Anderson
FABIAN & CLENDENIN, PC
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
(801) 323-2225 (telephone)
(801) 596-2814 (facsimile)
kanderson@fabianlaw.com

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:

John J. Kulewicz
Daniel E. Shuey
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

Jared Freedman
JENNER & BLOCK LLP
1099 New York Ave. NW, Ste 900
Washington, DC 20001

Attorneys for Defendants TheHuffingtonPost.com, Inc., Arianna Huffington, Roy Sekoff, Stuart Whatley, and Jason Cherkis

James L. Hardiman
Jennifer Martinez Atzberger
Drew S. Dennis
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, OH 44103

David E. Halperin
1530 P Street NW
Washington, DC 20005

Attorneys for Defendant Wilfred Michael Stark III

/s/ Jared M. Klaus
Jared M. Klaus