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

Robert E. Murray, et al.,

Plaintiffs,

v.

The Huffington Post.com, Inc., et al.,

Defendants.

Civil Action No. 2:13-cv-1066

Judge Gregory L. Frost

Magistrate Judge Terence Kemp

DEFENDANT STARK'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
(Oral Hearing Requested)

Defendant Wilfred Michael Stark III hereby moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted. For the reasons set forth in the accompanying Memorandum in Support of Defendant Stark's Motion to Dismiss, the Court should grant the motion. Defendant Stark respectfully requests oral argument on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2013, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

/s/ James L. Hardiman_____

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MEMORANDUM IN SUPPORT OF DEFENDANT STARK'S MOTION TO DISMISS

INTRODUCTION

Defendant Wilfred Michael Stark III ("Stark"), a citizen of Virginia, published an article ("the Article") on the Huffington Post website blog ("Huffington Post blog") making arguments about public policy issues relating to Virginia gubernatorial candidate Ken Cuccinelli and to plaintiff Robert Murray ("Murray"), the president, chief executive officer, and chairman of plaintiff Murray Energy Corporation ("Murray Energy").

Murray and Murray Energy sued Stark, along with the Huffington Post and its officials, for defamation and false light invasion of privacy, in the Court of Common Pleas, Belmont County, St. Clairsville. Defendants removed this action to this Court based on diversity jurisdiction.

On November 1, 2013, Stark filed a motion to dismiss the Complaint. (The other defendants stipulated with plaintiffs for an extension of time to respond.)

On November 11, 2013, plaintiffs filed a First Amended Complaint.

The First Amended Complaint distinguishes itself from the original Complaint mostly by asserting the claim that someone other than Stark actually prepared the Article. That claim is utterly false, and we are at loss to understand how responsible individuals could be party to asserting it. But if the goal of this approach is to create a factual issue in hopes of prolonging the litigation, it misses the mark, because that issue is irrelevant to Stark's motion to dismiss. The First Amended Complaint does nothing to remedy the original Complaint's failure to state a claim upon which relief can be granted.

Stark's article contains no false statements of fact, nor is it misleading, nor does it place Murray in a false light. More importantly, for purposes of this Motion to Dismiss, the statements

in the Article about which Plaintiffs complain are not assertions of fact. Rather, the Complaint takes issue only with opinions offered by Stark in the Article. Under Ohio law, such statements are not actionable as either defamation or false light invasion of privacy. These types of statements are clearly protected by the Ohio and United States constitutions.

Even if the Complaint were interpreted to allege false statements of fact, this Court should dismiss for the additional reason that the First Amended Complaint does not allege any facts to support the assertion that Stark acted with actual malice, that is, with knowledge that a statement was false or with reckless disregard for whether a statement was false – the legal threshold for a defamation claim brought by a public figure, or for a false light claim. Rather, the First Amended Complaint seeks to avoid this issue by making the incredible legal claim that Murray is not a public figure, with no specific factual assertions included to back up that claim. However, the First Amended Complaint itself, with its attached and referenced documents, makes plain that Murray is a public figure, and one who has actively sought the spotlight.

The foregoing two paragraphs have been lifted almost verbatim from Stark's original Motion to Dismiss, because they remain entirely valid. Plaintiffs had ample opportunity to refashion their amended complaint to address the deficiencies in the original Complaint, as Stark described them in his original Motion to Dismiss. Plaintiffs did not do so. Nor could they do so, in this or any subsequent amended complaint, because they have no valid claim.

The First Amended Complaint fails to state a claim upon which relief can be granted, and Stark respectfully requests that the Court dismiss this action with prejudice.

BACKGROUND

The Complaint alleges that, on or about September 20, 2013, Defendants published an article on the Huffington Post blog, under Stark's byline, titled "Meet the Extremist Coal Baron Bankrolling Ken Cuccinelli's Campaign."

The First Amended Complaint specifies four alleged assertions in the article that Plaintiffs contend are false and defamatory:

- "(i) Murray 'announced he was firing more than 150 of his miners' following and in response to President Obama's reelection in 2012;"
- "(ii) Murray's firing of 150 of his miners was the 'fulfillment of a promise' – i.e. a promise to fire his miners if Obama won reelection;"
- "(iii) Murray is an 'extremist';"
- "(iv) Murray 'fires his workforce wholesale in fits of spite when electoral results disappoint him';"

The *actual* statements made by Stark in the article are:

(1) "Murray announced he was firing more than 150 of his miners."
(2) "Firing so many employees may well have been the fulfillment of a promise."
(3) Murray is "an extremist billionaire…."
(4) Murray "fires his workforce wholesale in fits of spite when electoral results disappoint him."

LAW AND ARGUMENT

I. The alleged false and defamatory statements, to the extent they were actually asserted, are expressions of opinion on public policy matters and not actionable as defamation or false light invasion of privacy

(a) Defamation

There are "constitutional limits on the type of speech which may be the subject of state defamation actions." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990). Under Ohio law, statements of opinion may not be the subject of such a suit, for either defamation or false light invasion of privacy. All of the statements alleged by the Plaintiffs to be defamatory are statements of opinion. Therefore, this Court should dismiss the First Amended Complaint.

The U.S. Supreme Court has repeatedly protected speech that a reasonable reader would recognize as spirited argument or opinion, rather than assertions of fact. Referring to a real estate developer's negotiating position as "blackmail" was not a legitimate basis for a defamation action, because it could not reasonably imply that the developer engaged in the actual crime of blackmail, as "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970). Using the word "traitor" in the definition of a labor "scab" was not a legitimate basis for a defamation action, because it was used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." *Letter Carriers v. Austin*, 418 U.S. 264, 284-286 (1974).

In *Milkovich v. Lorain Journal Co*., 497 U.S. at 19-20, the U.S. Supreme Court ruled that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations … where a media defendant is involved." Statements also are protected if they "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Id*., at 20, quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id*.

The Court in *Milkovich*, a case that arose in Ohio, while reaffirming the aforementioned federal constitutional protections relevant to state defamation claims, declined to declare an express "separate constitutional privilege for 'opinion.'" 497 U.S. at 21. However, the Ohio Supreme Court subsequently ruled that "regardless of the outcome in *Milkovich* … [t]he Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to

freedom of the press." *Vail v. Plain Dealer Publishing Co*., 72 Ohio St. 3d 279, 281, 649 N.E.2d 182, 185 (1995). Thus, under Ohio law, statements of opinion are non-actionable per se. In *Wampler v. Higgins*, 93 Ohio St. 3d 111, 752 N.E.2d 962 (2001), the Ohio Supreme Court held that this guarantee of protection for opinion applies to media defendants and non-media defendants alike.

In *Vail*, the court reaffirmed that Ohio would continue to apply the four-factor "totality of the circumstances" test adopted in its pre-*Milkovich* decision *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), to determine whether a statement is actionable fact or non-actionable opinion: The court should consider: (1) the immediate context of the statement; (2) the broader context in which the statement appeared; (3) the specific language used; and (4) whether the statement is verifiable. *Vail*, 72 Ohio St.3d at 282. The determination as to whether an allegedly defamatory statement is one of fact or of opinion is a question of law to be decided by the court. *Scott*, 25 Ohio St.3d at 250. Thus, it is a determination appropriate for resolution on a motion to dismiss for failure to state a claim.

Two of the four factors in the *Scott / Vail* test relate to Stark's Article as a whole, so we address them first, and then evaluate the other two factors with respect to each statement that Plaintiffs contend is false and defamatory.

In analyzing the immediate context of the statement, Ohio courts assess "the entire article or column," *Wampler*, 93 Ohio St. 3d at 130, quoting *Ollman v. Evans*, 750 F.2d 970, 979 (1984), cert. denied, 471 U.S. 1127 (1985). The court in *Vail* framed the question this way: "Is the column characterized as statements of objective facts or subjective hyperbole?" 72 Ohio St.3d at 186.

In this case, as in *Wampler*, "the gist" of the subject article "as a whole" is an expression of opinion. 93 Ohio St.3d at 130. The title of the Article – "Meet the Extremist Coal Baron Bankrolling Ken Cuccinelli's Campaign" -- makes plain that the writer is offering an opinion essay. The entire Article is written in an aggressive tone, questioning the conduct and ethics of Virginia Republican gubernatorial candidate Ken Cuccinelli, criticizing the behavior of Robert Murray, and concluding by raising questions about whether Murray's campaign contributions to Cuccinelli may be a bid for improper influence over the candidate:

> So that's Cuccinelli's largest individual donor from the last cycle. $30,000 from an extremist billionaire that is funding an Obama impeachment effort, that allegedly extorts money from his low-wage employees, and fires his workforce wholesale in fits of spite when electoral results disappoint him. In light of the Consol and Star Scientific scandals, Murray's status as the largest individual donor to Cuccinelli's campaign should raise questions in Virginia: What does Bob Murray expect in return for his investment? (It's worth noting that Murray Energy has no mining presence in Virginia.) What promises has Cuccinelli made to Murray Energy and Bob Murray? Does Murray Energy have any pending business before the state of Virginia? Does Bob Murray have any business before the Office of the Attorney General?

As in *Vail*, "The general tenor of the column is sarcastic, more typical of persuasive speech than factual reporting." 72 Ohio St.3d at 280. As with *Scott* and *Wampler*, the writer's "mind is certainly made up" and "the average reader viewing the words in their internal context would be hard pressed to accept [his] statements as … impartial reporting." *Wampler*, 93 Ohio St.3d at 130, quoting *Scott*, 25 Ohio St.3d at 253.

The court in *Vail* further stated that in considering this first factor, "The author's reputation as an opinionated columnist must be considered." 72 Ohio St.3d at 282. Stark has a

reputation as an opinionated columnist. His own description of himself on the Huffington Post blog reads: "Mike Stark is a University of Virginia law student, a marine, extreme political activist and a citizen journalist."[1] On his blog, Fossil Agenda, Stark strongly criticizes fossil fuel energy industries, with a particular emphasis on coal.[2] Another website Stark has maintained, Stark Reports, criticizes and documents Stark's efforts to confront conservatives including radio host Rush Limbaugh and television host Sean Hannity.[3] There is also a Wikipedia page devoted to Stark, and it describes his activism and criticism directed at conservative television host Bill O'Reilly and Virginia Republican Senator George Allen.[4] Stark is a persistent, aggressive critic of the coal industry, political conservatives, and others, and an advocate for policy reforms. Thus, the immediate context factor strongly favors viewing Stark's statements in the article as opinion, not fact.

The same is true of the second *Scott* / *Vail* factor, the broader context in which the statement appeared. "Some types of writing or speech by custom or convention signal to readers and listeners that what is being read or heard is likely to be opinion, not fact." *Wampler*, quoting *Ollman*, 750 F.2d at 983. In *Vail* and in *Wampler*, the court found it significant that the subject article appeared on a newspaper opinion page, a placement that signals to readers that they are being "exposed to personal opinions of the writer." *Vail*, 72 Ohio St.3d at 282. Articles so placed "are 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." *Id*.

[1] http://www.huffingtonpost.com/mike-stark/
[2] http://fossilagenda.com/about/
[3] http://www.starkreports.com/
[4] http://en.wikipedia.org/wiki/Mike_Stark

The Court may 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.[5] Featured writers on a given day may include: liberal media watchdog David Brock; Christian progressive advocate Jim Wallis; Douglas Holtz-Eakin, president of the conservative American Action Forum; Diann Rust-Tierney, Executive Director of the National Coalition to Abolish the Death Penalty; and Craiglist founder Craig Newmark. For the most part, contributors to the Huffington Post blog are not writing straight news stories. Instead they are largely advocates for causes, writing pieces containing opinion and analysis. The Huffington Post blog has its own separate Internet address, http://www.huffingtonpost.com/the-blog/, and its content, even when posted on other Huffington Post pages, is a separately-marked category of content ("Featured Blog Posts" or "Recent Blog Posts"), posted in the left-hand column and separated from the news articles written by Huffington Post staff.

The Court in *Vail* also found -- supporting the conclusion that the broader context factor pushed in favor of finding that a statement was opinion -- the fact that the article at issue "appeared in the midst of a political campaign, which provided the subject for the column." 72 Ohio St.3d at 282. The same is true for Stark's Article, which was about Virginia candidate Cuccinelli and Murray's support for his campaign.

Accordingly, the two contextual *Scott / Vail* factors weigh heavily in favor of a finding that the alleged defamatory statements in the Article are protected opinion. So do the other two *Scott / Vail* factors, which focus on the specifics of the statements themselves -- the specific language used, and whether the statement is verifiable.

[5] http://www.huffingtonpost.com/the-blog/

Alleged statement (i)

Plaintiffs claim that the Article asserts, "Murray 'announced he was firing more than 150 of his miners' following and in response to President Obama's reelection in 2012." In fact, the relevant sentence reads, merely, "Murray announced he was firing more than 150 of his miners." Plaintiffs cannot and do not assert that the actual statement in the Article is false, because it is true – Murray did make that announcement. Instead, Plaintiffs impute an additional assertion to this sentence, namely that Murray announced the firings "in response to President Obama's reelection in 2012." Plaintiffs invent that the sentence makes the factual assertion that Murray fired the workers "in response to" the election. The sentence makes no such assertion. And to the extent that Plaintiffs may surmise from the remainder of the article that Stark believes and wishes to imply that Murray fired the workers in response to the election, that would be Plaintiffs' conjecture about Stark's conjecture or opinion about why Murray fired the workers.

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 verify precisely why Murray made the decision that he made. Stark could, at most, only offer his opinion. The Sixth Circuit addressed this precise issue in *Bentkowski v. Scene Magazine*, 637 F.3d 689 (6th Cir. 2011). There, the court held that under Ohio defamation law and its test for determining fact from opinion, an article's purported claim that a public official had improper motives in sending a letter was not verifiable "because there are no objective tests to determine [the letter writer's] internal motivation…." *Id.*, at 694. Speculation about motivation is opinion. Opinion is not actionable as defamation, and a plaintiff's conjecture about a defendant's opinion certainly is not actionable as defamation.

Alleged statement (ii)

Plaintiffs claim that the Article asserts, "(ii) Murray's firing of 150 of his miners was the 'fulfillment of a promise" – i.e. a promise to fire his miners if Obama won reelection." In fact, the Article states, "Firing so many employees *may well have been* the fulfillment of a promise" (emphasis added). This sentence is clearly not an assertion of fact, but rather an expression of an opinion about how the firings might have related to statements made by Murray. As with alleged statement (i), Stark cannot purport to know what precisely motivated Murray to fire his workers. No one would be able to verify Murray's precise motivation. Stark could, at most, only offer his opinion. Opinion is not actionable as defamation.

Alleged statement (iii)

Plaintiffs accurately plead that the Article refers to Murray as an "extremist." (Specifically, Stark used the phrase "extremist billionaire" using "extremist" not as a noun but as an adjective modifying the word "billionaire.") Under the *Scott* / *Vail* test, a court "must determine whether a reasonable reader would view the words used to be language that normally conveys information of a factual nature" or instead "hype or opinion." *Vail*, 72 Ohio St.3d at 282. The Court must examine "'whether the alleged defamatory statement has a precise meaning and thus is likely to giver rise to clear factual implications.'" *Wampler*, 93 Ohio St.3d at 127-28, quoting *Ollman*, 750 F.2d at 979-80. A classic example of a statement with a well-defined meaning is a an accusation of a specific crime or disciplinary rule violation, *Wampler*, Ohio St. 3d at 128, *Vail*, Ohio St. 3d at 182, whereas "statements that are 'loosely definable' or 'variously interpretable' cannot in most contexts support an action for defamation.... 'Readers are … considerably less

likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning.'" *Wampler*, 93 Ohio St.3d at 128, quoting *Ollman*, 750 F.2d at 979-980.

Calling someone an extremist -- "a person who holds extreme or fanatical political or religious views, especially one who resorts to or advocates extreme action" (Oxford Dictionaries online) -- is not alleging a fact. Readers will be unable to infer specific facts from such a statement, and such statement is not susceptible to being proven or disproven. Extremism is in the eye of the beholder. Calling someone an extremist is an expression of opinion or rhetorical hyperbole about where a person fits on a scale of views.

Indeed, Murray's suing because Stark called him an "extremist" is quite comparable to a claim rejected as non-actionable by the court in *Wampler,* where the defendant's description of the rent proposed by plaintiff was described as "exorbitant." Exorbitant means "(of a price or amount charged) unreasonably high." (Oxford Dictionaries online.) Just as one cannot verify that a price is unreasonably high, one cannot verify that someone's views are unreasonably radical, fanatical, or extreme. The court in *Wampler* stated that the defendant's "description of Wampler's proposed rent as 'exorbitant,' much like his characterization of Wampler as 'ruthless," and his distaste for Wampler's 'faceless,' 'mindless," or 'heartless' corporate vendee, are standardless statements not amenable to objective proof or disproof." 93 Ohio St.3d at 129. The court in *Wampler*, also compared the use of those adjectives in the case to the rejected defamation claim in *Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976), in which the court held that an accusation that a columnist was a "fellow traveler" of "fascists" was susceptible of widely differing interpretations. *Id.* See also *Condit v. Clermont County Review*, 110 Ohio App. 3d 755 (1996) (reference to plaintiff as a "fascist" was "too general to be verifiable"). Like the phrase

"fellow traveler" of "fascists," the word "extremist" is imaginative expression, a label used by one actor in the political arena to express an opinion about another. It is not an assertion of fact.

Alleged statement (iv)

Plaintiffs accurately plead that the Article alleges that Murray "fires his workforce wholesale in fits of spite when electoral results disappoint him." This sentence, as with statements (i) and (ii), relates to Stark's opinion about why Murray fired his employees. Again, what precisely motivated Murray to fire his workers cannot be known and cannot be proven true or false. A "fit of spite" is neither the formal designation of a crime, nor a medical diagnosis, nor any other specific factual description -- it is rhetorical hyperbole, expressing the writer's dismay with Murray's behavior in the political arena. The additional element is the word "wholesale," as used in the context of 150 workers being fired in the same day. Wholesale means "being sold in large quantities to be retailed by others." (Oxford Dictionaries online.) No reasonable reader would believe that Murray was selling his workers in large quantities. "Wholesale" in this context is clearly being used as rhetorical hyperbole or imaginative expression, as a metaphor to describe the large number of workers fired on a single day. It is not an assertion of fact, nor is it subject to verification.

"Other statements" (v)

The First Amended Complaint further alleges that the defamatory statements include "(v) other statements contained in the Article…." But an element of a complaint plainly cannot survive a motion to dismiss without alleging any facts, so the Court should dismiss this element, along with the others.

All four of the factors deemed relevant by the Ohio Supreme Court to determine whether a statement is an actionable fact or a non-actionable opinion strongly favor the conclusion that

each statement at issue in this case is an opinion, not fact. Accordingly, this Court should dismiss Count One of the First Amended Complaint.

(b) False light invasion of privacy

In order to prevail on a claim of false light defamation of privacy, "the statement made must be untrue." *Welling v. Weinfeld*, 113 Ohio St.3d 464, 471; 866 N.E.2d 1051 (2007). The "test of whether … challenged statements are actually false" is the same for a claim of false light invasion of privacy as it is for a claim of defamation. *See Christiansen v. Pricer*, 2010-Ohio-2718, 2010 Ohio App. LEXIS 2238, 2010 WL 237782 (2010) (dismissing false light claims, including as to some assertions that the court determined to be constitutionally protected opinion), discretionary appeal not allowed, 126 Ohio St. 3d 1601, 2010 Ohio 4928, 935 N.E.2d 47 (2010). If the statements cited in the First Amended Complaint are non-actionable opinion, rather than actionable fact, for defamation law purposes, then they also cannot be the basis of a false light claim. Accordingly, this Court should also dismiss Count Two of the First Amended Complaint.

II. The complaint fails to allege specific facts to indicate that Murray is not a public figure *or* that Stark acted with actual malice

Even if the First Amended Complaint did contain any allegation that the Article included false statements of fact, any such allegation is not actionable under standards established by the U.S. Supreme Court. The First Amendment requires that a public figure may not recover damages for defamation unless he or she "proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. " *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (extending the rule to non-government public figures). Moreover,

"[a] showing of *New York Times* malice is subject to a clear and convincing standard of proof." *Milkovich*, 497 U.S. at 15, quoting *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 342 (1974).

In addition, under *Welling v. Weinfeld*, 113 Ohio St.3d at 473, a plaintiff, public figure or not, may not prevail on an Ohio false light invasion of privacy claim unless there is such knowledge that the information is false or there is reckless disregard for the truth – the same standard that applies to defamation claims brought by public figures.

Plaintiffs allege, First Amended Complaint ¶30, that Robert Murray "is neither a public figure nor a limited public figure in that he has neither voluntarily sought public media attention, nor has he achieved such status by reason of the notoriety of his achievements." This is a bare recitation of the legal test for public figure status, without factual support, and it is directly contradicted by the First Amended Complaint as a whole.

The First Amended Complaint attaches the Article at issue in this case, which recounts the following facts, among others:

(1) *Murray was the keynote speaker at the Bluefield Coal Show, where he called for the impeachment of President Obama*. Stark's article contains a hyperlink to an article in *The Intelligencer / Wheeling News-Register* describing Murray's September 2013 speech at this coal show in southern West Virginia.

(2) *Murray appeared at a 2012 Mitt Romney campaign speech, at which Romney nodded toward Murray and said, "I tell ya, you've got a great boss. He runs a great operation here*." Stark's article contains a hyperlink to an article in *The New Republic* magazine describing the Romney campaign event, which was held at Murray Energy's Century Mine in Beallsville, Ohio.

(3) *Murray told his miners that their attendance at the Romney event was mandatory*. Stark's article contains a hyperlink to an article in the *Cleveland Plain Dealer* describing August 2012 comments made by Murray in Tampa, Florida, at an Ohio delegation breakfast at the Republican National Convention. According to the *Plain Dealer* article, Murray "exchanged pleasantries and small talk with Ohio Attorney General Mike DeWine before breakfast was served." Then Murray made extensive comments to the Plain Dealer reporter about the Romney event and his workers' attendance at it.

(4) *Murray responded to President Obama's reelection with the prayer*. Stark's Article includes the text of the publicly-released prayer, which declared that the American people "have decided that America must change its course, away from the principals of our Founders," that Americans "will pay the price in their reduced standard of living and, most especially, reduced freedom," and then concluded:

> Lord, please forgive me and anyone with me in Murray Energy Corp. for the decisions that we are now forced to make to preserve the very existence of any of the enterprises that you have helped us build. We ask for your guidance in this drastic time with the drastic decisions that will be made to have any hope of our survival as an American business enterprise.

Stark's article contains a hyperlink to an article in the *Washington Post*. According to this *Washington Post* story, Murray's prayer first appeared on the website of the *Intelligencer/Wheeling News-Register*, and, "The newspaper said Murray supplied his text. The Washington Post confirmed its legitimacy with a company spokesman, Gary M. Broadbent." The *Post* story also recounts that on November 7, 2012, the day after the presidential election, Murray laid off 156 workers, blaming a "war on coal" by the

> Obama administration. The *Post* article further noted, "Murray Energy is the country's largest privately owned coal mining company, with about 3,000 employees producing about 30 million tons of bituminous coal a year, according to its Web site."

All of these facts have been brought into this Court by means of the First Amended Complaint, and they are not disputed by any other facts presented. Collectively, they make plain that Plaintiffs' claim that Murray is not a public figure lacks credibility and cannot be sustained. Murray is the well-known head of one of the country's largest corporations, and he has, by his own admission, deliberately asserted himself into public controversies about public policy, politics, and elections.

Given that the First Amended Complaint itself makes plain that Robert Murray is a public figure, given that the First Amended Complaint does not deny that Murray Energy is a public figure, and given the requirements of Ohio defamation and false light invasion of privacy law, Plaintiffs cannot survive a Rule 12(b)(6) motion brought by defendant Stark without alleging information regarding actual malice on Stark's part. However, the First Amended Complaint does not plead any specific facts indicating that Stark or the other defendants acted with actual malice. As with its claim that Robert Murray is a public figure, the First Amended Complaint offers only a bare legal assertion in this regard, along the lines of "Defendant committed an assault" or "Defendant was negligent."

Although "states of mind may be pleaded generally," a defamation plaintiff "must still point to details sufficient to render a claim [of actual malice] plausible." *Pippen v. NBCUniversal Media, LLC*, 7th Cir. April 19, 2013. *See also Mayfield v. NASCAR*, 674 F.3d 369 (4th Cir. 2012) ("a mere recitation of the legal standard" of actual malice insufficient to survive motion for judgment on the pleadings). In *Pippen*, the Seventh Circuit upheld the district court's dismissal

of a defamation claim against media company defendants brought by a public figure even where the reports about the plaintiff were indeed false and defendants had many ways to learn that their reports were false. In this case, the First Amended Complaint's only arguably relevant assertion regarding Stark -- that Stark did not contact Murray or his representatives to seek comment in advance of publication -- is hardly a specific allegation pointing to reckless disregard for the truth; as shown above, any factual assertions made in Stark's Article already had been reported earlier in respected mainstream press outlets, with passage of time that would have permitted Murray to obtain a correction had a report been inaccurate. Stark did not act with reckless disregard for the truth by reporting information already reported in those publications. *See Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012) ("to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred," as was not the case where what defendant alleged was consistent with published news reports). Accordingly, the requisite factual pleading of actual malice is absent, and the Court should dismiss each count in the First Amended Complaint on this basis as well.

CONCLUSION

Plaintiff Robert Murray is a sophisticated man. He may well be aware that his Complaint has no merit under established legal precedents. He knows, for example, after eagerly seizing the spotlight of media coverage, that he is a public figure. But he also likely realizes that a lawsuit like this – including, after Stark has gone to the effort of preparing a motion to dismiss, the filing of an amended complaint containing an utterly false new allegation -- has the effect of diverting resources that a writer or activist like Mike Stark might otherwise use to expose and question the actions of Murray, Murray Energy, and the coal industry. This kind of lawsuit could also deter others from engaging in commentary and criticism about Murray and these issues. Indeed, it

appears that Murray is using his wealth to engage in an ongoing effort to sue his critics for defamation. We note that Murray currently has at least two lawsuits for defamation pending in Cuyahoga County state court, one against a media defendant, *Robert E. Murray, et al. v. Chagrin Valley Publishing Company, et al*., Case No. CV-13-911106, and one against a citizen activist defendant, *Robert E. Murray, et al. v. James Ciocia, et al*., Case No. CV-13-8010571. Another defamation action that Murray filed last year in Belmont County state court, over an article in the Charleston (West Virginia) Gazette, was removed to this Court and subsequently dismissed. *Robert E. Murray, et al. v. Daily Gazette Co., et al*., 2:12-cv-00767 (SD Ohio).

To the extent that this lawsuit may have the purpose or the effect of chilling free speech on matters of public concern, it is precisely the kind of situation the courts have sought to address in cases like *New York Times v. Sullivan* and *Vail v. Plain Dealer*. Given the constitutional requirements of those cases, and the failure of the First Amended Complaint to plead a case for defamation under Ohio law, there is no basis to sustain this suit.

WHEREFORE, for the reasons stated immediately above, Defendant Stark respectfully requests that this Court dismiss the First Amended Complaint for failure to state a claim upon which relief may be granted. Mr. Stark also requests an opportunity for an oral hearing in order to persuade the Court to act decisively at the motion to dismiss stage, before Mr. Stark is required to expend additional time and expense on this oppressive lawsuit.

Respectfully submitted,

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