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

ROBERT E. MURRAY, et al.,	
Plaintiffs,	Case No. 2:13-cv-01066-GLF-TPK
v.	Judge Gregory L. Frost
THE HUFFINGTONPOST.COM, INC., et al.,	Magistrate Judge Terence P. Kemp
Defendants.	ORAL ARGUMENT REQUESTED

REPLY BRIEF IN SUPPORT OF THE HUFFINGTON POST DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs Robert E. Murray and Murray Energy Corporation (collectively "Murray") do not dispute that the sole question before the Court on the motion to dismiss filed by TheHuffingtonPost.com, Inc., Arianna Huffington, Roy Sekoff, Stuart Whatley, and Jason Cherkis (collectively "The Huffington Post") is a legal question amenable to resolution pursuant to Rule 12(b)(6) – namely, whether the statements Murray complains of are actionable statements of fact or protected statements of opinion. *See* Opp'n at 5, ECF No. 26; *see, e.g.*, *Taylor Bldg. Corp. of Am. v. Benfield*, 507 F. Supp. 2d 832, 839 (S.D. Ohio 2007); *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 702 N.E.2d 149, 152 (Ohio Ct. App. 1997). Consequently, no discovery is necessary at this stage of the proceedings. Because all of the statements at issue are fully protected under the First Amendment of the United States Constitution and Article 1, Section 11, of the Ohio Constitution as statements of opinion, the Court should dismiss the Amended Complaint with prejudice.

Nor is there any dispute as to the standard that governs the Court's determination of that question. Under the Ohio Constitution, statements of opinion enjoy categorical protection. *See, e.g.*, *Wampler v. Higgins*, 752 N.E.2d 962, 971 (Ohio 2001). To make the required categorical determination, the Court must assess the totality of the circumstances through consideration of the four factors identified in *Vail v. Plain Dealer Publishing Co.*, 649 N.E.2d 182 (Ohio 1995). *See* Opp'n at 5. As The Huffington Post explained in its opening brief, proper consideration of these factors, in view of the totality of the circumstances, commands the conclusion that the statements at issue constitute protected opinion. Murray reaches the opposite conclusion only through misapplication of the relevant case law, mischaracterization of the statements themselves and the context in which they appear, and misstatement of The Huffington Post's arguments.

The Huffington Post does not concede that Murray has satisfied any of the remaining elements of his claims for defamation and false light invasion of privacy. To the contrary, The Huffington Post views the Amended Complaint's spurious allegations regarding Jason Cherkis's involvement with the Blog Post as a transparent attempt to plead around the constitutional actual malice requirement applicable to public figures such as Murray. *See* Huffington Post Mem. in Supp. of Mot. to Dismiss 3, 5. But accepting these allegations as true for purposes of its motion to dismiss, The Huffington Post has narrowed its arguments to the dispositive issue now before the Court: whether the statements at issue, regardless of who authored them and why, are statements of protected opinion. Because the statements are constitutionally protected, Murray's claims necessarily fail as a matter of law.

II. ARGUMENT

In response to The Huffington Post's motion to dismiss, Murray limits the allegedly defamatory statements to the following: "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." Opp'n at 2. Murray continues to misquote the statements in the Blog Post, which actually describes him as an "extremist billionaire" and which merely suggests that his "firing" of more than 150 employees "*may well have been* the fulfillment of a promise." First Am. Compl. ("FAC") at Ex. A, ECF No. 16-1 (emphasis added). But even in Murray's own reformulation, those statements qualify as fully protected opinion.

A. The Statements At Issue Are Protected Opinion.

Nothing in Murray's opposition brief refutes the conclusion that all of the statements identified in the Amended Complaint are protected opinion rather than actionable fact under the *Vail* test. It is clear that the specific statements themselves convey no factual information that is capable of objective verification. *See* Huffington Post Mem. in Supp. of Mot. to Dismiss 8-10 (discussing first and second *Vail* factors). Murray disputes this reality without offering any indication of what evidence might be presented at trial to prove or disprove those statements. Indeed, it is difficult to imagine what instructions the Court could possibly give to guide the jury in determining whether Murray is in fact an "extremist billionaire" or whether he was in part motivated by President Obama's reelection in firing his employees.

More broadly, in attempting to recast the *Vail* factors in his favor, Murray entirely ignores the truculent tone and hyperbolic language of the Blog Post as a whole and sidesteps the significance of the broader context in which it appeared – namely, a blog containing political commentary during a heated and controversial gubernatorial campaign. Viewing the allegedly defamatory statements in that context, the average reader of the Blog Post would understand the author's statements about Murray to be statements of opinion rather than fact.

1. The Language Of The Blog Post As A Whole Puts The Reader On Notice That The Statements Are The Author's Opinions.

As Murray acknowledges, evaluating whether a particular statement constitutes fact or opinion requires courts to "examine more than simply the alleged defamatory statements in isolation." *Wampler*, 752 N.E.2d at 980. Thus, in addition to the challenged statements themselves, this Court must look to the "general tenor" of the Blog Post to determine whether, as a whole, it is characterized by "statements of objective facts or subjective hyperbole." *Vail*, 649 N.E.2d 182 at 186.

Murray tries to characterize the Blog Post as a "serious news article" by pointing out that it contains some facts, such as Cuccinelli's acceptance of gifts and other contributions and Murray's activities in the 2012 presidential campaign. *See* Opp'n at 11-12. But "[m]erely because an editorial article contains factual references does not transform an opinion into a factual article. It is the language of the entire article, and not a singular factual reference, that determines whether an article is fact or opinion." *Sikora v. Plain Dealer Publ'g Co.*, No. 81465, 2003 WL 21419279, at *3 (Ohio Ct. App. June 19, 2003) (citing *Ferreri v. Plain Dealer Publ'g Co.*, 756 N.E.2d 712, 721 (Ohio Ct. App. 2001), in turn citing *DeVito v. Gollinger*, 726 N.E.2d 1048, 1051 (Ohio Ct. App. 1999)); *see Rich v. Thompson Newspapers. Inc.*, 842 N.E.2d 1081, 1087 (Ohio Ct. App. 2005) ("The use of factual references does not automatically transform an opinion into a factual report.").

The Blog Post's language and general tenor serve to "place the reasonable reader on notice that what is being read is the opinion of the writer." *Wampler*, 752 N.E.2d at 980; *see also Ferreri v. Plain Dealer Publ'g Co.*, 756 N.E.2d 712, 721 (Ohio Ct. App. 2001) ("[T]he language of the entire column may signal that a specific statement which, sitting alone, would appear to be factual is in actuality a statement of opinion." (quotation marks omitted)). The Blog

Post as a whole is replete with rhetorical hyperbole and political vitriol. Indeed, even the factual assertions to which Murray points in an attempt to characterize the Blog Post as a "serious news article" are intermingled with sarcastic commentary. For example, Murray notes that the Blog Post makes a number of factual assertions regarding the relationship between Cuccinelli and a company called Star Scientific. Opp'n at 12. Murray fails to point out, however, that the Blog Post also describes that relationship as "Cuccinelli . . . literally in [sic] sleeping in Star Scientific's bed" and compares its exposure to "learning your divorce lawyer concealed that she had accepted thousands of dollars from your ex-spouse while the case was pending." FAC at Ex. A.

The Blog Post's transition to discussing Murray and Murray Energy is similarly sardonic: "One might think that an embattled politician struggling to overcome the headwinds of scandal would be cautious before accepting fat envelopes of cash from extreme and unsavory donors. Not Cuccinelli." *Id.* Also significant is the fact that the Blog Post's author makes absolutely no effort to appear impartial or hide his bias, directly opining in the very first sentence of the Blog Post that Cuccinelli's campaign activities "cast doubt upon his character and integrity." *Id.*; *see, e.g.*, *Jorg v. Cincinnati Black United Front*, 792 N.E.2d 781, 786 (Ohio Ct. App. 2003) (context of letter "weigh[ed] strongly against actionability" where persuasive objective was "clearly stated . . . in bold type in the first paragraph"); *Sikora*, 2003 WL 21419279, at *3 (use of "rhetorical devices," including phrases such as "calls into question" and "casts doubt on" "gives the impression that it is the writer's *opinion* that is being expressed rather than fact"). That is classic opinion, not a statement of fact. The author underscores that opinion in the last paragraph of the Blog Post. Immediately after the challenged statements identified in the Amended

Complaint, the author skeptically asks the reader to consider a number of questions regarding the relationship between Cuccinelli and Murray:

> 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?

FAC at Ex. A.

The overall language and tone of the Blog Post thus make clear – notwithstanding Murray's attempt to characterize it as a "serious news article" – that the Blog Post is in fact much more akin to the types of opinion pieces that courts repeatedly have concluded in the name of free expression are immune from liability. The acerbic language used throughout the Blog Post signals to any reasonable reader that the statements as to Murray's beliefs and his motivations for the firing of his employees are merely the author's opinion. *See, e.g.*, *Wampler*, 752 N.E.2d at 980 (concluding that the allegedly defamatory statements were opinion because "the average reader . . . would be unlikely to infer that those statements were factual" given that the "gist of [the defendant's] letter as a whole" was the defendant's opinion about the plaintiff's actions); *Scott v. News-Herald*, 496 N.E.2d 699, 708 (Ohio 1986) (statements in an article on the sports page constituted protected opinion where context made clear that the author "is not making an attempt to be impartial and no secret is made of his bias," and "the average reader viewing the words in their internal context would be hard pressed to accept [the author's] statements as an impartial reporting").

2. The Appearance Of The Challenged Statements On A Political Blog, While Not Dispositive, Connotes Their Status As Protected Opinion.

The Court should also reject Murray's argument that acknowledging The Huffington Post Blog as a forum where third parties often share opinions would permit "any online newspaper . . . [to] completely insulate itself from defamation liability simply by publishing questionable articles on the other side of an artificially created virtual wall." Opp'n at 16. The Huffington Post did not suggest that *any* blog is "automatically insulate[d]" from liability, *id.* at 15. Rather, The Huffington Post simply made the uncontroversial point that, under well-established Ohio law, the broader context of a challenged statement is relevant to whether that statement constitutes protected opinion or actionable fact. Huffington Post Mem. in Supp. of Mot. to Dismiss at 12; *see Scott*, 496 N.E.2d at 708 ("To evaluate an article's broader context we must examine the type of article and its placement in the newspaper and how those factors would influence the reader's viewpoint on the question of fact or opinion."). In this case, that broader context – namely, the fact that the statements appeared under the byline of a self-described "extreme political activist," on a blog known for political commentary, during a heated gubernatorial campaign – leads only to the conclusion that the statements are protected opinion.

Murray makes two overlapping arguments in an unavailing attempt to divert the focus from the literal text of the challenged statements. First, returning to the fact that The Huffington Post "recently won a Pulitzer Prize for *news reporting*," Murray claims that any distinction between the news section of the Huffington Post and The Huffington Post Blog is "false" because The Huffington Post Blog has a "serious news-oriented appearance and focus." Opp'n at 13-14 (emphasis in original). Contrary to Murray's misconstruction, however, The Huffington Post never claimed that the Blog is "the equivalent of a newspaper editorial page." *Id.* at 14. Rather, the point was simply that on the spectrum of media outlets in which a given statement

can be made, with the news section of a newspaper on one end and an editorial or opinion page on the other, The Huffington Post Blog falls closer to the latter end. As explained in The Huffington Post's opening brief, that characterization finds strong support in the case law. *See* Huffington Post Mem. in Supp. of Mot. to Dismiss 12 (citing cases); *see also, e.g.*, *Scott*, 496 N.E.2d at 708 (evaluating broader context of article relating to legal hearing written by sports writer appearing on the sports page, and noting that "we doubt that a reader would assign the same weight to [the author's] statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper").

Second, Murray argues that the average reader cannot tell the difference between content on the news section and opinion on The Huffington Post Blog because there is no explicit language "placing readers on notice that they are being exposed only to opinions." *See* Opp'n at 14. That argument unfairly disparages readers and gratuitously affronts writers. Readers ordinarily are able to identify statements of opinion without express labels, and Ohio law does not require the media to place such warnings on published content. *See Stepien v. Franklin*, 528 N.E.2d 1324, 1329 (Ohio Ct. App. 1988). Similarly, Murray's contention that the reference in The Huffington Post's Terms and Conditions to "opinions or other statements" has any bearing whatsoever on how a reasonable reader would perceive The Huffington Post Blog is entirely unpersuasive. *See* Opp'n at 14. If anything, that reference would alert readers to the likelihood that they will encounter various *opinions* on The Blog.

The Court should reject Murray's attempt to transform the contextual analysis required by Ohio's totality of the circumstances test into a rigid "disclaimer" requirement. *See, e.g.*, *Vail*, 649 N.E.2d at 185 ("Every case will present facts that must be analyzed in the context of the general test. Each of the four factors should be addressed, but the weight given to any one will

conceivably vary depending on the circumstances presented."); *Scott*, 496 N.E.2d at 706 (totality of the circumstances test "can only be used as a compass to show general direction and not a map to set rigid boundaries"). As explained in The Huffington Post's opening brief, the totality of the circumstances in this case compel the conclusion that the reasonable reader would view the statements challenged by Murray as statements of opinion.

B. As Protected Opinion, The Statements At Issue Are Not Actionable Under A Cause Of Action For False Light Invasion Of Privacy.

Murray's false light invasion of privacy claims fail for the same reason as his defamation claims: the statements at issue are constitutionally protected statements of opinion. *See* Huffington Post Mem. in Supp. of Mot. to Dismiss 1-2, 14. The key difference between defamation and false light invasion of privacy is that a statement need not be *defamatory* in order to support a claim for the latter – not, as Murray seems to suggest, *see* Opp'n at 17, that the statement need not be one of ascertainable truth. *See Welling v. Weinfeld*, 866 N.E.2d 1051, 1057 (Ohio 2007) ("The right to privacy naturally extends to the ability to control *false* statements made about oneself," including those "that, while not injurious to their reputation, place those persons in an undesirable false light." (Emphasis added.)). Indeed, in recognizing false light invasion of privacy as a cause of action under Ohio law, the Ohio Supreme Court made clear that "[f]alse-light defendants enjoy [constitutional] protections at least as extensive as defamation defendants." *Id*. at 1058. The Ohio Constitution's categorical protection of statements of opinion, *see Wampler*, 752 N.E.2d at 971, is thus no less applicable against Murray's false light invasion of privacy claims than against his defamation claims.

Attempting to diminish that protection in the false light invasion of privacy context, Murray again misconstrues both Ohio precedent and The Huffington Post's arguments.[1] In order to make out a claim for false light invasion of privacy, Murray must identify statements that are "untrue." *Welling*, 866 N.E.2d at 1057. Thus, the attribution of "certain qualities, characteristics, or beliefs" to a person may support such a claim, but only if the attribution itself is a statement of fact rather than protected opinion. By characterizing Murray's beliefs as "extreme," the Blog Post does not attribute any specific beliefs to Murray, but rather presents an inherently subjective value judgment, which is incapable of verification. *See Condit v. Clermont Cnty. Review*, 675 N.E.2d 475, 478-79 (Ohio Ct. App. 1996). Similarly, "because there are no objective tests to determine [plaintiff's] internal motivation" in taking a particular action, *Bentkowski v. Scene Magazine*, 637 F.3d 689, 694 (6th Cir. 2011), the Blog Post's suggestion regarding Murray's internal motivations in his post-election layoffs is equally unverifiable. Nowhere in the Blog Post does Stark indicate that he had first-hand knowledge of Murray's personal beliefs or internal motivations; nor do the statements themselves imply any such knowledge. Accordingly, in view of the totality of the circumstances described above, the average reader is left with the understanding that the statements at issue represent only the author's opinion, which enjoys full constitutional protection against Murray's claims, including those for false light invasion of privacy.

[1] The Huffington Post does not contend that the statements at issue "are not actionable" simply "because they concern Murray's beliefs," Opp'n at 17, thereby reducing the totality of the circumstances analysis to a single factor. Rather, hewing to Ohio case law, The Huffington Post maintains that the Blog Post's statements characterizing Murray's beliefs as "extreme" and positing certain internal motivations "lack[] a plausible method of verification," *Vail*, 649 N.E.2d at 186 (quotation marks omitted), which *weighs against* actionability. *See Bentkowski v. Scene Magazine*, 637 F.3d 689, 694 (6th Cir. 2011); *Ferreri*, 756 N.E.2d at 721.

III. CONCLUSION

For these reasons and those set forth in The Huffington Post's opening brief, the Court should dismiss the Amended Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief in Support of The Huffington Post Defendants' Motion to Dismiss was served on January 9, 2014 through the CM/ECF system of the Court, which will result in service upon all counsel of record.

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