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

ROBERT E. MURRAY and MURRAY ENERGY CORPORATION, *Plaintiffs*, v. THE HUFFINGTONPOST.COM, INC., et al., *Defendant*s.	Case No. 2:13-cv-01066-GLF-TPK Judge Gregory L. Frost Magistrate Judge Terrence P. Kemp ORAL ARGUMENT REQUESTED

THE HUFFINGTON POST DEFENDANTS' MOTION TO DISMISS

Defendants TheHuffingtonPost.com, Inc., its editors Arianna Huffington, Roy Sekoff, and Stuart Whatley, and its reporter Jason Cherkis (collectively "The Huffington Post") respectfully move under Federal Rule of Civil Procedure 12(b)(6) to dismiss the First Amended Complaint ("Amended Complaint") filed by Plaintiffs Robert E. Murray and Murray Energy Corporation (collectively "Murray"). For the reasons set forth in the accompanying Memorandum in Support of The Huffington Post Defendants' Motion to Dismiss, the Court should dismiss Murray's Amended Complaint for failure to state a claim upon which relief can be granted.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(b)(2), The Huffington Post Defendants respectfully request that the Court allow for oral argument on this motion to dismiss.

Respectfully submitted,

Dated: November 27, 2013

By: /s/ John J. Kulewicz

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this case, an avowedly partisan and high-profile businessman seeks to penalize The Huffington Post for hosting a blog piece written by a third-party activist criticizing Murray's political activities. The Court should dismiss the Amended Complaint out of hand because all of the statements about which Murray complains are fully protected statements of opinion that are shielded from liability under both the First Amendment and the Ohio Constitution.

At issue is a blog post that was published on The Huffington Post Blog website on September 20, 2013 ("Blog Post"), during the midst of a hard-fought political campaign for Virginia governor between Republican Ken Cuccinelli and Democrat Terry McAuliffe. The Blog Post, titled "Meet the Extremist Coal Baron Bankrolling Ken Cuccinelli's Campaign" and written by Defendant Wilfred Michael Stark III ("Stark"), noted Murray's generous contributions to Cuccinelli's campaign and discussed Murray's statements and actions surrounding the 2012 presidential election – including reports by The Washington Post and other news outlets that Murray had fired 150 employees immediately after President Obama was re-elected. The Blog Post describes Murray as an "extremist billionaire" who "fires his workforce wholesale in fits of spite when electoral results disappoint him," and warned that "Murray's status as the largest individual donor to Cuccinelli's campaign should raise questions in Virginia." First Am. Compl. ("FAC") at Ex. A, ECF No. 16-1.

Four days after the Blog Post appeared, Murray sued Stark and The Huffington Post in state court for defamation and false light invasion of privacy. Notably, Murray did not – and does not – allege that its employees were *not* fired following the 2012 presidential election. Rather, the gravamen of the Amended Complaint is that the Blog Post describes Murray as an "extremist" and suggests that Murray had a *political motive* for firing his employees. But calling

someone an "extremist" or criticizing his motives are exactly the kind of hyperbole and subjective statements of opinion that are constitutionally immune from suit under either a defamation or false light invasion of privacy theory. And because this Court, the Sixth Circuit, and Ohio courts consistently have made clear that whether a statement is actionable fact or protected opinion is a legal question, both of Murray's claims fail as a matter of law.

Murray's transparent attempt to keep his claim alive by amending his original complaint to add a number of inflammatory accusations about a Huffington Post reporter should also be rejected. The Amended Complaint is almost identical to the original complaint, except that it includes a number of scurrilous assertions about the alleged involvement in the research and drafting of the Blog Post by Jason Cherkis ("Cherkis"), a reporter and employee of The Huffington Post. Those inflammatory allegations (which The Huffington Post vigorously denies) represent nothing more than a futile attempt to artfully plead around Defendants' legal defenses, including The Huffington Post's defense under Section 230 of the Communications Decency Act.[1] But ultimately those allegations are beside the point. Regardless of who actually wrote the article, all of the statements challenged by Murray are non-actionable statements of opinion. Thus, even taking all of the facts alleged in the Amended Complaint as true, this case must be dismissed because Murray has failed to state a viable claim for either defamation or false light invasion of privacy.

[1] Section 230 immunizes interactive computer service providers such as The Huffington Post from liability for content posted on its website by a third party such as Stark. *See* 47 U.S.C. § 230.

II. BACKGROUND

The facts, viewed in the light most favorable to Murray, are as follows.[2] Defendants Arianna Huffington, Roy Sekoff, and Stuart Whatley are editors and employees of TheHuffingtonPost.com, Inc., "a media company that owns and operates a website . . . (www.huffingtonpost.com)." FAC ¶ 4; *see id.* ¶¶ 6–8. Cherkis is a reporter for and employee of The Huffington Post. *Id.* ¶ 9. Stark is an individual who contributes "Internet articles" to The Huffington Post. *Id.* ¶ 5.

On September 20, 2013, the Blog Post was published on The Huffington Post Blog website under Stark's byline. *Id.* ¶ 12; *see id.* at Ex. A. The Blog Post opens by describing the recent scandals involving Ken Cuccinelli, "the Tea Party/GOP candidate for governor in Virginia," and reports that Murray Energy Corporation was Cuccinelli's largest individual contributor. *Id.* at Ex. A. The Blog Post then discusses some of Mr. Murray's public appearances, statements, and actions during the 2012 presidential election in opposition to President Obama's re-election. In particular, the Blog Post reports that Murray closed one of his mines during a Mitt Romney campaign speech and "communicated" to his employees that their attendance at the speech was mandatory, *id.* (citing Stephen Koff, *Coal mine owner Bob Murray defends no-pay action on day of Romney visit*, Plain Dealer (Cleveland), Aug. 28, 2012[3]); that Mr. Murray gave a "prayer" the day after the election suggesting that he was forced by the

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[2] In addition to the Amended Complaint and the Blog Post (attached to the Amended Complaint as Exhibit A), this motion also references and attaches a number of articles that were linked to in the Blog Post and which are specifically cited in the Amended Complaint. *See* FAC ¶ 20. Because those hyperlinked items are "referred to in [the complaint] and integral to the claims," the Court can properly consider those documents without converting the instant motion into one for summary judgment. *See Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007) (citing *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

[3] *Available at* http://www.cleveland.com/open/index.ssf/2012/08/coal_mine_owner_bob_murray_def.html (attached as Exhibit 1).

electoral result to reduce his workforce, *id.* (citing Steven Mufson, *After Obama reelection, Murray Energy CEO reads prayer, announces layoffs*, Washingtonpost.com, Nov. 9, 2012[4]); and that Murray's salaried workers faced pressure to contribute to the Murray Energy political action committee and its selected candidates, *see id.* (citing Alec MacGillis, *Coal Miner's Donor*, New Republic, Oct. 4, 2012[5]).

Four days after the Blog Post appeared, Murray sued Stark and The Huffington Post in state court. The original complaint singled out four specific assertions in the Blog Post that Murray contended were false and defamatory: "(i) Murray 'announced that he was firing more than 150 of his miners' following and in response to President Obama's reelection in 2012; (2) 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'; [and] (iv) Murray 'fires his workforce wholesale in fits of spite when electoral results disappoint him.'" Compl. ¶ 12, ECF No. 4. Alleging that these statements were intended to and did convey to readers "that Murray is an 'extremist' and . . . cares so little for his employees that he would fire them *en masse* just to make a political statement," *id.* ¶ 15, Murray filed claims for defamation and false light invasion of privacy.

Defendants removed the action to this Court on October 25, 2013 in accordance with 28 U.S.C. §§ 1441 and 1446. The Huffington Post entered into a stipulation with Murray extending the deadline to answer or otherwise respond to the complaint. *See* Stipulation, ECF No. 11. On

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[4] *Available at* http://www.washingtonpost.com/business/economy/after-obama-re-election-ceo-reads-prayer-to-staff-announces-layoffs/2012/11/09/e9bca204-2a63-11e2-bab2-eda299503684_story.html (attached as Exhibit 2). According to The Washington Post article, "Murray's prayer from Wednesday first appeared on the Web site of the Intelligencer/Wheeling News-Register. The newspaper said Murray supplied his text. The Washington Post confirmed its legitimacy with a [Murray Energy] spokesman, Gary M. Broadbent." *Id.*

[5] *Available at* http://www.newrepublic.com/article/politics/108140/coal-miners-donor-mitt-romney-benefactor (attached as Exhibit 3).

November 11, 2013, after Stark had filed a motion to dismiss the complaint and after learning that The Huffington Post planned to move to dismiss the complaint in part on the basis of Section 230, Murray filed the Amended Complaint. The most significant change to the Amended Complaint is the addition of Cherkis as a defendant and the inclusion of a number of inflammatory allegations about Cherkis's role in the publication of the Blog Post. Specifically, the Amended Complaint alleges – entirely on the basis of "information and belief" – that the Blog Post was "originally researched and/or drafted by" Mr. Cherkis; that "an unknown employee" of The Huffington Post determined that Mr. Cherkis's "work product . . . lacked sufficient verifiable information"; that Mr. Cherkis has a "history of fabricating stories and quotes, and badgering or misquoting sources"; and that someone from The Huffington Post therefore asked Mr. Stark to post the Blog Post under his name "rather than have the [Blog Post] posted on The Huffington Post under the byline of Defendant Cherkis." FAC ¶¶ 13-17.

In asserting that the Blog Post defamed Murray, the Amended Complaint notably mischaracterizes what the Blog Post actually says about the firing of Murray's employees. For example, the Amended Complaint alleges that the Blog Post said that firings were "following and in response to President Obama's reelection in 2012." FAC ¶ 19. But in fact, the Blog Post merely reprints a prayer that Mr. Murray recited to his employees after the election (the authenticity of which was confirmed by a Murray Energy Corporation spokesperson) and states: "With that, Murray announced he was firing more than 150 workers." *Id.* at Ex. A; *compare also id.* ¶ 19 (alleging the Blog Post asserted that "Murray's firing of 150 of his miners *was* the 'fulfillment of a promise'" (emphasis added)), *with id.* at Ex. A ("Firing so many employees *may well* have been the fulfillment of a promise" (emphasis added)).

III. LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual assertions, accepted as true, to state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Seaton v. TripAdvisor LLC*, 728 F.3d 592, 596 (6th Cir. 2013). A claim is plausible where the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Yet "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

Although a complaint need not state detailed factual allegations, a plaintiff's obligation to provide the grounds of her or his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Furthermore, the court "need not adopt 'a legal conclusion couched as a factual allegation.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 246 (6th Cir. 2012) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Finally, "[a]lthough [m]atters outside of the pleadings are not to be considered by a court in ruling on a 12(b)(6) motion to dismiss, documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim." *Seaton*, 728 F.3d at 596 (internal quotation marks omitted, first bracket added).

IV. ARGUMENT

The Amended Complaint must be dismissed because all of the statements that Murray has identified as allegedly defamatory are constitutionally protected statements of opinion that cannot form the basis of a claim either for defamation or false light invasion of privacy under

well-established Ohio law. Courts applying Ohio law evaluate the totality of the circumstances to determine, as a matter of law, whether a given statement constitutes actionable fact or protected opinion. Applying that analysis here leads inexorably to the conclusion that – regardless of who actually wrote the Blog Post – all of the allegedly defamatory statements in the Amended Complaint are protected under both the Ohio Constitution and the First Amendment.

A. Statements Of Opinion Are Shielded From Liability As A Matter Of Law, And The Question Of Whether A Statement Constitutes Opinion Is A Legal Question.

It is well-settled that statements of *opinion* – in contrast to false statements of *fact* – are categorically protected under the Ohio Constitution and shielded from liability as a matter of law.[6] *See, e.g.*, *Wampler v. Higgins*, 752 N.E.2d 962, 971 (Ohio 2001) (explaining that "the Ohio Constitution requires . . . a *categorical* determination of whether" an allegedly defamatory statement constitutes fact or protected opinion) (emphasis in original); *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182, 186 (Ohio 1995) (same); *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986) (same); *see also Welling v. Weinfeld*, 866 N.E.2d 1051, 1058 (Ohio 2007) ("False-light defendants enjoy [constitutional] protections at least as extensive as defamation defendants."). This is true even where the statements complained of are insulting or offensive to the plaintiff. *See Stepien v. Franklin*, 528 N.E.2d 1324, 1329-30 (Ohio Ct. App. 1988) (concluding that allegedly defamatory statements were protected opinion, and noting that "[t]he First Amendment militates the protection of unrestricted and hearty debate on issues of concern to the public, including the protection of what 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254,

[6] As the Sixth Circuit has recognized, the Ohio Constitution is broader than the U.S. Constitution in this regard. *See Bentkowski v. Scene Magazine*, 637 F.3d 689, 693 (6th Cir. 2011) (explaining that unlike the Ohio Constitution, "[t]he United States Supreme Court does not recognize 'a wholesale defamation exemption for anything that might be labeled '"opinion"'" (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990))).

270 (1964))); *see also, e.g.*, *Farah v. Esquire Magazine*, No. 12-7055, -- F.3d --, 2013 WL 6169660, at *6 (D.C. Cir. Nov. 26, 2013) (satirical speech may be "cruel and mocking" but remain protected speech).

"[W]hether the allegedly defamatory statements involve opinions or facts is . . . a question of law." *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 702 N.E.2d 149, 152 (Ohio Ct. App. 1997) (citing *Scott* and *Vail*); *see, e.g., Taylor Bldg. Corp. of Am. v. Benfield*, 507 F. Supp. 2d 832, 839 (S.D. Ohio 2007); *Wampler*, 752 N.E.2d at 977. "Thus, the resolution of these issues is amenable to a [12(b)(6)] motion." *Worldnet Software*, 702 N.E.2d at 152.

B. The Totality Of The Circumstances Demonstrates That The Challenged Statements Constitute Protected Opinion.

In determining whether the allegedly defamatory statements "constitute[] protected opinion or actionable fact," this Court must consider the totality of the circumstances. *Bentkowski v. Scene Magazine*, 637 F.3d 689, 693 (6th Cir. 2011); *see Vail*, 649 N.E.2d at 186. "Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared." *Wampler*, 752 N.E.2d at 970; *see also Bentkowski*, 637 F.3d at 693-94. Here, those factors lead unequivocally to the conclusion that all of the allegedly defamatory statements included in the Amended Complaint are constitutionally protected opinion.

First, the specific language used in the Blog Post is quintessential protected opinion because a reasonable reader normally would view the allegedly defamatory statements as "hype and opinion" rather than "information of a factual nature." *See Vail*, 649 N.E.2d at 186. For example, the statements cited in the Amended Complaint include the description of Murray as an "extremist" and the suggestion that Murray "fire[d] his workforce wholesale in fits of spite."

FAC at Ex. A. But neither the terms "extremist" nor "fits of spite" have an objectively ascertainable meaning. To the contrary, that language "lacks precise meaning and would be understood by the ordinary reader for just what it is – one person's attempt to persuade public opinion." *Vail*, 749 N.E.2d at 186 (statement that plaintiff engaged in an "anti-homosexual diatribe" could "conjure[] a vast array of highly emotional responses that will vary from reader to reader"); *see also, e.g.*, *Seaton*, 728 F.3d at 598 (use of the word "dirtiest" indicates statement of opinion because word "conveys an inherently subjective concept"); *Wampler*, 752 N.E.2d at 979 (phrases such as "ruthless speculator," "self-centered greed," and "exorbitant rent" were "inherently imprecise and subject to myriad subjective interpretations"). For that reason, the types of language used in the Blog Post – including "sarcasm, editorial hyperbole, and epithets" – "ha[ve] long been recognized as constitutionally protected speech, regardless of whether the statements are characterized as 'opinion' or 'rhetorical hyperbole.'" *Ferreri v. Plain Dealer Publ'g Co.*, 756 N.E.2d 712, 720 (Ohio Ct. App. 2001) (citing, *inter alia*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

Second, the allegedly defamatory statements are not objectively verifiable. As the Supreme Court of Ohio explained in *Vail*, the key inquiry under the verifiability factor is whether "the author impl[ies] that he has first-hand knowledge that substantiates the opinions he asserts." *Vail*, 649 N.E.2d at 186. "Where the statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." *Id.* (internal quotation marks omitted). Because of its inherent subjectivity, the Blog Post's characterization of Murray as an "extremist" clearly is not verifiable. *See Condit v. Clermont Cnty. Review*, 675 N.E.2d 475, 478-79 (Ohio Ct. App. 1996) (epithets and slurs such as "fascist" and "anti-Semite"

were not verifiable because they were "value-laden and represent[ed] a point of view that is obviously subjective" (quoting *Vail*, 649 N.E.2d at 186)).

The other allegedly defamatory statements are equally unverifiable. In addition to the use of the term "extremist," the Amended Complaint identifies three specific assertions that are alleged to be false and defamatory, all of which relate to Murray's firing of 150 employees after the 2012 presidential election. Murray does not contest the truth of the fact that those workers were fired. Rather, Murray alleges that the Blog Post is actionable because it implies that the reason for those firings was out of spite or in retribution for the 2012 presidential election results. *See* FAC ¶ 19 (allegedly defamatory statements include that the firings were "in response to President Obama's reelection in 2012," that they constituted "the fulfillment of a promise," and that they were a "wholesale" firing of the workforce that resulted from a "fit[] of spite" because Mr. Murray was disappointed by the results of the 2012 election).

But even if Murray's Amended Complaint accurately quoted the statements in the Blog Post – and, as explained above, it does not – the statements about Murray's *motives* for the firings are all inherently unverifiable. The Sixth Circuit made clear in *Bentkowski* that statements about an individual's motivations are not objectively verifiable. Thus, the *Bentkowski* court held that an article was protected opinion as a matter of law, despite the article's implication that the plaintiff had sent a letter with illicit motives, because "there are no objective tests to determine his internal motivation in sending the letter." 637 F.3d at 694. Similarly, because Murray's actual motivation for firing his employees after the 2012 election cannot be "objectively proved or disproved," the statements in the Blog Post suggesting a motivation for doing so are "necessarily based only on [the author's] opinion, not objectively verifiable facts." *Ferreri*, 756 N.E.2d at 721 (internal quotation marks omitted).

Finally, the third and fourth factors – the general context of the statements and the broader context in which they appeared – also lead ineluctably to the conclusion that the allegedly defamatory statements constitute protected opinion. In addition to the rhetorical hyperbole and loose exaggerations that characterize the language of the Blog Post as a whole, the overall gist of the Blog Post – that Cuccinelli accepted campaign contributions from questionable sources, including "extremists" like Murray – puts the reader on notice that Stark "sought to 'ventilate' his personal . . . opinions" and "not to set forth any verifiable statements of fact." *See Wampler*, 752 N.E.2d at 980; *see also, e.g.*, *Bentkowski*, 637 F.3d at 695 (noting that language and tone of the publication must be considered as a whole, because "the '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.'" (quoting *De Vito v. Gollinger*, 726 N.E.2d 1048, 1051 (Ohio Ct. App. 1999))); *Ferreri*, 756 N.E.2d at 721 (same). The series of rhetorical questions about Murray's connection to Virginia posed at the end of the Blog Post, in addition to the tagline on Stark's individual webpage on The Huffington Post Blog describing him as an "extreme political activist,"[7] highlight that conclusion. *See, e.g.*, *Ollman v. Evans*, 750 F.2d 970, 987 (D.C. Cir. 1984) (series of hypothetical questions underscored that columnists "meant to ventilate what *in their view* constituted the central questions posed" by plaintiff's possible appointment of faculty chair (emphasis added)); *Vail*, 649 N.E.2d at 186 ("The author's reputation as an opinionated columnist should also be considered."); *Condit*, 675 N.E.2d at 479 (context favors opinion where author made "no attempt to hide his bias or to be impartial"); *cf. Farah*, 2013 WL 6169660, at *8–9 (considering blog post in context and concluding that substance and stylistic elements of

[7] Like the other exhibits attached to this motion, that page is linked to in the Blog Post. *See* Contributor Page of Mike Stark, Huffington Post, http://www.huffingtonpost.com/mike-stark/ (attached as Exhibit 4).

story, as well as "the nature of the issue itself[,] showed it was political speech aimed at critiquing [plaintiffs'] public position").

More broadly, the Blog Post "appeared in the midst of" the ongoing political campaign for governor of Virginia, and the highly charged issue of campaign contributions was the subject of the Blog Post. *Condit*, 675 N.E.2d at 479 (statements appearing in "columns of political commentary" during ongoing political campaign were opinion); *see also Ferreri*, 756 N.E.2d at 721 (statements in editorials published shortly after conclusion of "a matter of keen public interest and concern" were opinion). The Amended Complaint attempts to distinguish the Blog Post from a more traditional opinion piece by repeatedly referring to the Blog Post as an "Article" and alleging that the Blog Post did not "appear[] on an 'Editorial' or 'Opinion' page." FAC ¶ 31. Murray, however, utterly ignores the fact that the Blog Post appeared on The Huffington Post Blog – an open forum for posts by individual users – rather than in The Huffington Post's traditional news section.[8] And just as editorial columns are "commonly understood" to be a forum where people express "views and opinion" rather than report news, *Condit*, 675 N.E.2d at 479, blogs are "a subspecies of online speech which inherently suggest that statements made there are not likely provable assertions of fact." *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1223-24 (D. Or. 2011) (citing cases); *see Farah*, 2013 WL 6169660, at *10 ("Any reasonable reader of political blog commentary knows that it often contains conjecture and strong language, particularly where the discussion concerns . . . a polarizing topic." (internal citation omitted)).

[8] For this reason, the Amended Complaint's citation of other "indicia" regarding The Huffington Post's news reporting, FAC ¶ 31, are entirely irrelevant to how an ordinary reader of The Huffington Post *Blog* would interpret the statements contained in the Blog Post.

Murray attempts anticipatorily to counter the analysis above by claiming in the Amended Complaint that the allegedly defamatory statements are "assertions of fact, not opinion." *See* FAC ¶¶ 31-33. That attempt is futile, however, because those paragraphs contain little more than a restatement of the standard for determining – *as a matter of law* – whether a particular statement is actionable fact or protected opinion. As such, they are legal conclusions couched as factual allegations that have no bearing on whether Murray has stated a claim for defamation or false light invasion of privacy. *See, e.g.*, *Republic Bank & Trust Co.*, 683 F.3d at 246-47. Once those conclusory assertions are dispensed with (as they must be), an analysis of all of the relevant factors – the hyperbolic language used in the Blog Post, the fact that none of the allegedly defamatory statements are verifiable, and both the general context of the allegedly defamatory statements and the broader context in which they appeared – compel the conclusion that the statements are constitutionally protected opinion.

C. The Statements In The Blog Post Are Constitutionally Protected No Matter Who Wrote The Blog Post.

The Amended Complaint's unfounded allegations about Cherkis's supposed involvement in ghost-writing the Blog Post similarly do not save it from dismissal. Before The Huffington Post filed a response to the original complaint, Plaintiffs learned that The Huffington Post planned to raise a defense under Section 230 of the Communications Decency Act, which fully immunizes websites against state law defamation claim and related claims for content posted by third parties. *See* 47 U.S.C. § 230(c)(1) ("No provider . . . of an interactive computer service shall be treated as the publisher . . . of any information provided by another information content provider."); *id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d

805, 822 (M.D. Tenn. 2013). The Amended Complaint's inflammatory "upon information and belief" allegations about Cherkis are plainly an attempt by Murray to undercut The Huffington Post's ability to raise a Section 230 defense on a motion to dismiss. The assertions about Cherkis are completely baseless, but ultimately beside the point. Regardless of who actually wrote the Blog Post, Murray cannot succeed on his defamation and false light invasion of privacy claims because all of the statements that he challenges are protected statements of opinion and therefore non-actionable. It would achieve nothing to allow Plaintiffs to proceed with their claims based on the unfounded allegations about Cherkis, when no factual development would change the fundamental fact that Murray's theory for defamation liability is barred as a matter of law.[9]

[9] If the Court denies this motion, The Huffington Post respectfully requests that the Court order limited, expedited discovery on the questions relating to § 230 immunity in order to resolve that issue as quickly as possible. *See, e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) ("We . . . aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ultimate liability, but also from 'having to fight costly and protracted legal battles.'" (quoting *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008))); *Nasser v. WhitePages, Inc.*, No. 12 cv 097, 2013 WL 2295678, at *4 (W.D. Va. May 24, 2013) (denying motion to dismiss on § 230 grounds but ordering limited preliminary discovery on that issue in view of "the need 'to resolve the question of Section 230 immunity at the earliest possible stage of the case'" (quoting *Nemet*, 591 F.3d at 255)).

V. CONCLUSION

For the reasons stated above, the Court should dismiss the Amended Complaint with prejudice. To elaborate on its constitutional arguments, The Huffington Post respectfully requests oral argument.

Respectfully submitted,

Dated: November 27, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Huffington Post Defendants' Motion to Dismiss and Memorandum in Support were served on November 27, 2013 through the CM/ECF system of the Court, which will result in service upon all counsel of record.

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