IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

ROBERT E. MURRAY and MURRAY ENERGY CORPORATION, Plaintiffs, v. PUBLIC CITIZEN, INC., PUBLIC CITIZEN FOUNDATION, INC., KEYMARKET OF OHIO, LLC, JERRY L. HANNAHS, CAPSTAR TX LLC, CHUCK POET, JIM ELLIOTT, CBS RADIO EAST, INC., MICHAEL J. YOUNG, MICHAEL SPACCIAPOLLI, and JOHN DOES 1-10, Defendants.	Civil Action No. 14-cv-235 Judge Frank A. Fregiato **ORAL ARGUMENT REQUESTED**

MOTION BY DEFENDANTS PUBLIC CITIZEN, INC. AND PUBLIC CITIZEN FOUNDATION, INC. TO DISMISS THE FIRST AMENDED COMPLAINT

Pursuant to Ohio Rule of Civil Procedure 12(B)(6), defendants Public Citizen, Inc. and Public Citizen Foundation, Inc. (together, "Public Citizen") hereby move this Court to dismiss the First Amended Complaint filed by Plaintiffs Robert Murray and Murray Energy Corporation for failure to state a claim upon which relief can be granted.

As described more fully in the attached memorandum, all of Plaintiffs' claims fail as a matter of law. First, Plaintiffs fail to state a claim for defamation because all of the challenged statements are either true or are expressions of opinion, and are therefore not actionable under Ohio law and First Amendment precedent. Second, Plaintiff Robert E. Murray fails to state any claim because none of the challenged statements are "of and concerning" him. Third, as a corporate entity, Plaintiff Murray Energy Corporation cannot assert a claim for false light invasion of privacy under Ohio law. Finally, the same grounds that mandate dismissal of

Plaintiffs' defamation and false light claims also require dismissal of Plaintiffs' unfair trade practice claims. Accordingly, this Court should dismiss this action with prejudice.

Respectfully Submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANTS PUBLIC CITIZEN, INC. AND PUBLIC CITIZEN FOUNDATION, INC. TO DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

This lawsuit is aimed at chilling speech that lies at the core of the First Amendment—public debate on the nation's energy and climate policy. Plaintiffs, a major coal-mining company and its individual chief executive, have sued a nonprofit consumer advocacy group and various radio stations over a political issue ad that criticized the company's attempts to block federal environmental and coal mine safety regulations from going into effect. Seeking to motivate the public to take action in support of these proposed regulations, Defendant Public Citizen[1] ran a radio ad informing listeners that Murray Energy Corporation ("Murray Energy") had recently sued federal agencies to stop the regulations and criticizing Murray Energy's arguments as "scare tactics" that are "ignoring the science." (First Amended Complaint ("Am. Compl.") Ex. A.)

Plaintiffs' own involvement in the public debate surrounding national energy and environmental policy extends well beyond Murray Energy's lawsuits against the federal government. Plaintiff Robert Murray in particular is well known for his outspoken advocacy and colorful rhetoric on this issue, including opinionated language similar or identical to that used by Public Citizen. Nevertheless, Plaintiffs have sued Public Citizen for expressing its own contrary opinions on this important public issue.

Black-letter law in Ohio—and core First Amendment principles—plainly protect such expressions of opinion by all sides in a political debate, and Plaintiffs therefore have no chance of prevailing in this frivolous lawsuit. But prevailing does not seem to be Plaintiffs' objective; instead, this lawsuit is just the latest installment in Murray Energy's ongoing strategy of

[1] Plaintiffs have sued both Public Citizen, Inc., and Public Citizen Foundation, Inc. Collectively, these two defendants will be referred to as "Public Citizen."

employing meritless libel actions as a weapon to punish and silence critics.[2] Many states have enacted anti-SLAPP[3] laws precisely to shift the cost burdens in such situations, where a wealthy and powerful plaintiff uses the expense of defending against meritless litigation as a cudgel against those who disagree with it on issues of public concern. But even without an anti-SLAPP law, Ohio courts do not look kindly on such tactics, and they do not hesitate to dismiss frivolous claims over protected speech at the earliest opportunity.

Taking Plaintiffs' allegations in the light most favorable to them, it is plain that the First Amended Complaint fails to state any cause of action. First, two of the statements that Plaintiffs challenge are indisputably true: Murray Energy *did* sue federal agencies to block federal regulations designed to protect miners' safety and to protect the public from air pollution, and this Court can take judicial notice of the existence of these lawsuits.[4] Second, the remaining statements challenged by Plaintiffs constitute opinion. A corporation with its own political action committee that frequently takes a vocal position on matters of public policy, Murray Energy should certainly be aware that opinion is not actionable in Ohio. Therefore, because all

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[2] *See, e.g., Murray, et al. v. The Chagrin Valley Publishing Company,* Case No. CV-13-811106 (Court of Commons Pleas, Cuyahoga County, Ohio) (dismissed; on appeal); *Murray v. TheHuffingtonPost.com, Inc.* (S.D. Ohio May 12, 2014), --- F. Supp. 2d ---, 2014 WL 1884319 (motion to dismiss granted); *Robert E. Murray, et al. v. Daily Gazette Co., et al.* (S.D. Ohio), 2:12-cv-00767 (dismissed); *Murray v. Ciocia*, Case No. CV-13-801057 (Court of Commons Pleas, Cuyahoga County, Ohio) (pending).

[3] SLAPP is an acronym for strategic lawsuits against public participation. Anti-SLAPP statutes target meritless lawsuits aimed at chilling speech on public issues.

[4] *See Murray Energy Corp. v. Sec. of Lab.*, No. 14-12163 (consol. with No. 14-11942) (11th Cir., May 15, 2014); *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir., filed June 18, 2014). Ohio courts may take judicial notice of appropriate matters in deciding a Rule 12(B)(6) dismissal motion without converting it to a motion for summary judgment. *State ex rel. Neff v. Corrigan* (1996), 75 Ohio St.3d 12, 18 661 N.E.2d 170. Specifically, this Court may take judicial notice of the caption and publicly filed documents in Murray Energy's lawsuits to establish the fact that such litigation has occurred. *See State ex rel. Coles v. Granville* (2007), 116 Ohio St.3d 231, 2007-Ohio-6057, at ¶ 20 ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.") (*per curiam*) (quoting *Kramer v. Time Warner, Inc.* (2d Cir. 1991), 937 F.2d 767, 774 (allowing judicial notice of publicly filed documents on motion to dismiss)); *In re Helfrich*, (5th Dist.), 2014-Ohio-1933, at ¶ 35 (A "court can take judicial notice of judicial opinions and public records accessible from the internet."); *State ex rel. Everhart v. McIntosh* (2007), 2007-Ohio-4798, 874 N.E.2d 516, at ¶¶ 10-11 (taking judicial notice of a state court docket available online and citing to Kentucky state court case doing same in context of federal court docket (citation omitted)).

of the statements are either true or protected opinion, plaintiffs' defamation and false light invasion of privacy claims must be dismissed. Third, all claims asserted by plaintiff Robert E. Murray fail for the independent reason that none of the statements in suit are "of and concerning" him, and, as a result, he cannot state a claim for defamation or false light. Fourth, as a corporate entity, Murray Energy is barred from asserting a claim for false light invasion of privacy under Ohio law. Finally, Plaintiffs' unfair trade practice claims must be dismissed for the same reasons that require dismissal of their defamation and false light claims, as courts apply the same protection for truth and opinion in the context of unfair trade practice claims as they do in false light and defamation cases.

For all the reasons set forth herein, Plaintiffs' First Amended Complaint should be dismissed in its entirety, with prejudice.

FACTUAL BACKGROUND

Public Citizen is a non-profit consumer rights advocacy group based in Washington, D.C. Plaintiffs' claims arise from a press release (the "Press Release") issued by Public Citizen on July 28, 2014, announcing its intent to run a "hard-hitting" political radio advertisement "criticizing Murray Energy Corporation's legal challenges to proposed federal clean air standards and protections for mine workers from coal dust," as well as from the advertisement itself (the "Issue Ad"). (Am. Compl. Ex. A.)

As the Press Release explains, Murray Energy is a privately owned coal-mining company with 3,000 employees and eight underground mines in six U.S. states. *Id.* The Press Release notes that (a) in May 2014, Murray Energy "sued the U.S. Department of Labor to block new rules designed to protect coal miners from coal dust, which can cause black lung disease;" and (b) one month later, "Murray Energy sued to block a proposal by the U.S. Environmental

Protection Agency (EPA) to cut carbon pollution from existing power plants." (*Id.*) It is indisputable that Murray Energy has indeed brought lawsuits to block these federal regulations. Both lawsuits are still ongoing, and their filings are publicly available and subject to judicial notice. *See Murray Energy Corp. v. Sec. of Lab.*, No. 14-12163 (consol. with No. 14-11942) (11th Cir. May 15, 2014); *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir. June 18, 2014).

As the Press Release further explains, Public Citizen created and released the Issue Ad because it vigorously disagrees with Murray Energy's political positions on these environmental regulations. The Press Release opines that Murray Energy's actions in "trying to block important health and safety protections for workers and public health" are "unconscionable" and amount to "working against the interests of mine workers and the public." (Am. Compl. Ex. A.)

To publicize Murray Energy's controversial lawsuits—and to persuade members of the public to join Public Citizen in expressing support for these environmental regulations—Public Citizen created and aired the following political advertisement:

> Imagine you're a coal miner, waiting in your doctor's office. Your doctor comes in and shows you a scan of your lung. You have Pneumoconiosis … Black Lung Disease. Black Lung can harden your lungs … shorten your breath … it can even cause cancer and death. And there's no cure. Safety standards can reduce the dangerous coal dust that causes Black Lung. But recently, a coal company called Murray Energy sued to stop these protections against dangerous coal dust from going into effect. Now Murray Energy is also suing to block new clean air standards that would protect everyone from air pollution… including children and seniors with asthma. Murray is using scare tactics and ignoring the science. And that's just wrong. No one wants to worry about the air they breathe.

(*Id.*) The Issue Ad closed with a call to action, exhorting listeners to "[p]lease visit www.citizen.org, sign the petition and speak out now to protect our families' health and our kids' future." (*Id.*) That is the entire text of the Issue Ad.

From July 28 through August 1, 2014, the Issue Ad ran on three of the main radio stations that reach Murray Energy's headquarters in St. Clairsville, Ohio, as well as on "the No. 1

rated station in Pittsburgh." (Am. Compl. Ex. A.) The timing of the Issue Ad was strategic, coinciding with a public hearing held by the EPA in Pittsburgh July 31 and August 1 that focused on the proposed carbon emission regulations that were the subject of Murray Energy's lawsuit. (*Id.*)

On August 1, 2014—the last day on which the Issue Ad ran, and the second day of the EPA hearing on carbon emissions—Plaintiffs filed the instant lawsuit, claiming that the Issue Ad and the Press Release contained "multiple false and defamatory statements" and that they invaded the privacy of Robert Murray and Murray Energy by placing them in a false light. Specifically, Plaintiffs allege that the following five statements from the Press Release and Issue Ad are defamatory:

- "[Murray Energy] is working against the interests of mine workers and the public";
- "Murray Energy sued to stop these protections against dangerous coal dust from going into effect";
- "Murray Energy is also suing to block new clean air standards that would protect everyone from air pollution . . . including children and seniors with asthma";
- "Murray is using scare tactics"; and
- "Murray is . . . ignoring the science."

(Am. Compl. ¶ 22 (collectively, the "Challenged Statements").)

Plaintiffs have sued not only Public Citizen, but also 18 additional defendants—including the radio broadcasters who operate the stations that ran the Issue Ad, individual employees of those stations, and ten unnamed parties (together, the "Broadcast Defendants").[5] The original

[5] Presumably, these parties—which include two alleged Ohio residents—were named in an effort by Plaintiffs to

Complaint alleged a defamation claim and a "false light invasion of privacy claim" against all defendants. On September 2, 2014, Plaintiffs filed a First Amended Complaint that adds claims against all defendants for "deceptive and unfair trade practices" under Ohio Rev. Code § 4165.02 and Ohio common law. The First Amended Complaint names as plaintiffs both Murray Energy and Robert Murray, the chairman, president, and CEO of Murray Energy (*see* Am. Compl. ¶ 2), even though no statements in the Press Release or Issue Ad refer to Robert Murray.

ARGUMENT

I.

OHIO COURTS PROVIDE STRONG PROTECTION FOR SPEECH ON MATTERS OF PUBLIC CONCERN

The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 270. In recognition of this principle, Ohio has chosen to provide even greater protection for speech than that afforded by the federal Constitution. *Vail v. The Plain Dealer Publ'g Co.* (1995), 72 Ohio St. 3d 279, 281-82, 649 N.E.2d 182. Ohio courts have long recognized that the courts should not "interfere[] with the free flow of debate on matters of profound public concern," because doing so would be "repugnant to our democratic way of life." *Varanese v. Gall* (1988), 35 Ohio St. 3d 78, 83, 518 N.E.2d 1177. "Indeed, public discussion of public issues is a civic duty; the very survival of our system of government depends upon its free exercise." *Stow v. Coville* (9th Dist. 1994), 96 Ohio App. 3d 70, 73, 644 N.E.2d 673. Defamation claims seeking a court's intervention in matters of public debate, therefore, should be met with great skepticism from the court: "Preservation of free expression is of particular

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avoid removal to the same federal court that recently dismissed Plaintiff's similar defamation suit against the Huffington Post over an online article critical of Murray Energy's political positions. *See Murray v. TheHuffingtonPost.com, Inc.* (S.D. Ohio May 12, 2014), --- F. Supp. 2d ---, 2014 WL 1884319. As set forth in their separate filings, the Broadcast Defendants join in Public Citizen's arguments for dismissal of this suit.

urgency in the political arena, since it is almost universally agreed that a major purpose of the First Amendment is to ensure vigorous, uninhibited discussion of governmental affairs." *Varanese*, 35 Ohio St. 3d at 84 (quoting *Buckley v. Valeo* (1976), 424 U.S. 1, 14). In recognition of these compelling interests, courts in Ohio and throughout the United States have responded by disposing of defamation actions at the earliest possible opportunity. *Id.* These considerations "apply with special force to paid political advertisements," such as the Issue Ad here. *Id.*

At bottom, this lawsuit represents Murray Energy's attempt to stifle debate on an unsettled issue of tremendous public interest, impact and concern. For the reasons set forth below, and consistent with the compelling constitutional interests at stake, this Court should dismiss all of Plaintiffs' claims with prejudice.

II.

THE DEFAMATION CLAIM AGAINST PUBLIC CITIZEN MUST BE DISMISSED BECAUSE THE CHALLENGED STATEMENTS ARE NOT ACTIONABLE AS A MATTER OF LAW

A. The Statements About Murray Energy's Lawsuits Are True

Under Ohio law, "material falsity is an essential element of a libel claim." *Bruss v. Vindicator Printing Co.* (7th Dist. 1996), 109 Ohio App. 3d 396, 400, 672 N.E.2d 238. Therefore, "truth is always a defense in any action for libel or slander." *Shifflet v. Thomson Newspapers (Ohio), Inc.* (1982), 69 Ohio St. 2d 179, 184-85, 431 N.E.2d 1014 (report based on court proceeding was true and, therefore, not actionable); *see also* Ohio Rev. Code Ann. § 2739.02 (truth is a complete defense in actions for libel and slander). Literal truth is not required; instead, the challenged statement need only be "substantially true." *Nat'l Medic Serv. Corp. v. E.W. Scripps Co.* (1st Dist. 1989), 61 Ohio App. 3d 752, 755-56, 573 N.E.2d 1148. Particularly in the context of legal proceedings, substantial truth is broadly construed. *Saferin v. Malrite Commc'ns Grp., Inc.* (6th Dist. Mar. 24, 2000), No. L-99-1193, 2000 WL 299454, at *3-

4 (report of legal proceeding is not actionable if it is substantially true, even if the language used is "technically inaccurate").

Here, Plaintiffs have challenged the following two statements from the Issue Ad which note that Plaintiffs have sued to block federal environmental regulations:

- "[A] coal company called Murray Energy sued to stop these protections against dangerous coal dust from going into effect."
- "Now Murray Energy is also suing to block new clean air standards that would protect everyone from air pollution . . ."

(Am. Compl. ¶ 22, Ex. A.) Because both statements are indisputably true, neither is actionable.

The first statement—that Murray Energy sued to stop safety standards regulating coal dust from going into effect—is true. On May 1, 2014, Murray Energy filed a petition in the U.S. Court of Appeals for the Sixth Circuit, which was later transferred to the Eleventh Circuit, arguing that a new safety regulation promulgated by the U.S. Department of Labor was unlawful. *See Murray Energy Corp. v. Sec. of Lab.*, No. 14-12163 (consol. with No. 14-11942) (11th Cir. May 15, 2014). According to the Department of Labor's summary of the regulation, it is intended to "greatly improve health protections for coal miners by reducing their occupational exposure to respirable coal mine dust." *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors*, 79 Fed. Reg. 24,814 (May 1, 2014). The title of the regulation makes the same point: *Lowering Miners' Exposure to Respirable Coal Mine Dust*. *Id.* Therefore, Murray Energy has, in fact, sued to stop the enactment of regulations that are intended to "protect[] against dangerous coal dust." (Am. Compl. Ex. A.)[6]

The second Challenged Statement—that Murray Energy is also suing to block new clean-

[6] While a truth defense may sometimes raise questions of fact in situations where the plaintiff and the defendant present competing versions of the "truth," this is not such a case. Plaintiffs cannot in good faith allege that they have *not* filed lawsuits against the Department of Labor and the Environmental Protection Agency to block the environmental regulations in question, given that these filings are publicly available on the federal court dockets and subject to judicial notice.

air standards that would protect everyone from air pollution—is also true. On June 18, 2014, Murray Energy filed a petition for a writ of mandamus in the U.S. Court of Appeals for the District of Columbia Circuit, asking the court to prevent the EPA from promulgating a new regulation under the Clean Air Act. *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir. June 18, 2014). That regulation, according to the Federal Register, seeks to "reduce carbon dioxide emissions from existing fossil fuel-fired power plants in the United States." *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014). As the EPA explains, the proposed regulation also seeks to substantially reduce other emissions from coal-fired plants for the benefit of public health, as well as the environment. *See, e.g., id.* at 34, 931§ X(A) ("The guidelines are projected to result in substantial co-benefits through reductions of SO2, $PM_{2.5}$ and NOx that will have direct public health benefits by lowering ambient levels of these pollutants and ozone."). In other words, Murray Energy is—quite literally—suing to stop a regulation that is intended to protect the public from air pollution. (Am. Compl. Ex. A.)

In sum, it is a matter of public record that Murray Energy has sued multiple government agencies to prevent health and safety regulations relating to coal-mine operations and coal-burning power plants from taking effect. Because these two statements in the Issue Ad are substantially—indeed, completely—true, they are not actionable as a matter of law. *Shifflet,* 69 Ohio St. 2d at 183-84. Plaintiffs' claims as to these two statements must be dismissed.

B. The Three Remaining Challenged Statements Are Expressions of Opinion That Are Constitutionally Protected and Not Actionable Under Federal and Ohio Law

As a matter of bedrock principle under both the First Amendment and the Ohio State Constitution, a defamation claim must be based on statements of fact, not expressions of opinion. The First Amendment "provides protection for statements that cannot 'reasonably [be]

interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 20 (quoting *Hustler Magazine v. Falwell* (1988), 485 U.S. 46, 50).

"The Ohio Constitution provides a separate and independent guarantee of protection for opinion" that is even broader than the protection of the First Amendment. *Vail*, 72 Ohio St. 3d at 281-82. Ohio's highest court has recognized that "[o]ur democratic society is founded upon the freedom to voice objections concerning the status quo, and is dependent upon the interplay of conflicting viewpoints to improve itself and our justice system." *Scott v. News-Herald* (1986), 25 Ohio St. 3d 243, 245, 496 N.E.2d 699. In *Wampler v. Higgins* (2001), 93 Ohio St. 3d 111, 752 N.E.2d 962, the Ohio Supreme Court ruled that the absolute immunity for opinion should not be limited to media defendants, stating that:

> Constitutionally significant debate on matters of public concern is not the sole province of the media. The robust exchange of ideas that occurs each day on the editorial pages of our state's newspapers could indeed suffer if the nonmedia authors of letters to the editor published in these forums were denied the same constitutional protections enjoyed by the editors themselves.

93 Ohio St. 3d at 124. The high court accordingly extended protection to defendants "who, though personally unaffiliated with the media, utilize a media forum to comment on a matter of public concern." *Id.* at 121. Thus, regardless of the status of the defendant, "[e]xpressions of opinion are generally accorded absolute immunity from liability under the First Amendment" and may not give rise to a cause of action for defamation. *Scott*, 25 Ohio St. 3d at 250.

Whether a particular statement is fact or opinion is a threshold question of law to be determined by the Court. *Fuchs v. Scripps Howard Broadcasting Co.* (1st Dist. 2006), 170 Ohio App. 3d 679, 2006-Ohio-5349, 868 N.E.2d 1024, at ¶ 39. "Once a determination is made that specific speech is 'opinion,' the inquiry is at an end. It is constitutionally protected.'" *Vail*, 72 Ohio St. 3d at 284 (Douglas, J. concurring); *see also Scott*, 25 Ohio St. 3d at 250 (same).

Accordingly, Ohio courts widely recognize that "the resolution of these issues is amenable to a Civ. R. 12(B)(6) motion." *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.* (1st Dist. 1997), 122 Ohio App. 3d 499, 503-504, 702 N.E.2d 149.

1. The Totality of the Circumstances Demonstrates That the Challenged Statements Constitute Protected Opinion.

Before permitting a defamation claim to proceed, the Court must make a "*categorical* determination of whether, under the totality of the circumstances, an ordinary reader of the allegedly defamatory statements would deem them to be statements of fact or opinion." *Wampler*, 93 Ohio St. 3d at 119 (emphasis in original). In making this threshold inquiry, this Court must consider: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. *See Vail*, 72 Ohio St. 3d at 282; *Scott*, 25 Ohio St. 3d at 250 (the "*Scott/Vail* test"). "While each of the four factors must be analyzed, the weight given to any one [may] vary depending on the circumstances presented." *Vail*, 72 Ohio St. 3d at 282. The mere presence of "factual references does not transform an opinion into a factual article"; rather, "[i]t is the language of the entire article, and not a singular factual reference, that determines whether an article is fact or opinion." *Rich v. Thompson Newspapers, Inc.* (11th Dist. 2004), 2004 Ohio 1431, at ¶ 44. Application of these factors makes clear that the remaining Challenged Statements are expressions of opinion.

i. The Language Used Signifies Opinion

Under the first factor of the *Scott/Vail* test, courts must analyze the "common usage" of the allegedly defamatory words and "determine whether the allegedly defamatory statement has a precise meaning … giv[ing] rise to clear factual implications." *Wampler*, 93 Ohio St. 3d at 127-28. The language used in the Press Release and Issue Ad is quintessential protected opinion because a reasonable reader would view it as "loosely definable," "variously interpretable," or

"ambiguous," *Wampler*, 93 Ohio.3d at 128, rather than "information of a factual nature" capable of a "precise meaning," *Vail*, 72 Ohio St. 3d at 282.

Here, none of the three remaining statements—that Murray Energy is "using scare tactics," "ignoring the science," or "working against the interests of mine workers and the public"—has an *objectively* ascertainable meaning. To the contrary, this 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*, 72 Ohio St. 3d at 282-83. Indeed, similar characterizations criticizing the merits of someone else's position have consistently been held to constitute opinion. *See, e.g., Sikora v. Plain Dealer Publ. Co.* (8th Dist. 2003), 2003-Ohio-3218, 2003 Ohio App. LEXIS 2880, at ¶ 17 (defendant's statement that judges "did not know or simply disregarded the applicable rules of court" was an expression of "opinion as to the knowledge of the judges based on her observation of their conduct and her understanding of the rules"). Likewise, a reasonable reader would understand the statement that Murray Energy "is working against the interests of mine workers and the public" to be Public Citizen's subjective opinion about Murray Energy's efforts to block legislation intended to protect miners and the public, and not a statement of objective fact. (*See* Am. Compl. Ex. A.)[7] And criticizing Murray Energy for using "scare tactics" is paradigmatic rhetoric of the type courts routinely find to be incapable of precise meaning. *See, e.g., Stow*, 96 Ohio App. 3d at 75, 76 (defendant's comment to newspaper characterizing tax administrator's handling of her tax dispute as "extortion" was non-actionable rhetorical hyperbole); *Rizvi v. St. Elizabeth Hosp. Med. Ctr.* (7th Dist. 2001), 146 Ohio App. 3d 103, 110, 765 N.E.2d 395 (statement by teaching physician describing medical student as

[7] Indeed, the paragraph of the Press Release immediately preceding this statement sets forth the facts upon which the opinion was based, and Plaintiffs cannot dispute those facts. "In May, Murray Energy sued the U.S. Department of Labor to block new rules designed to protect coal miners from coal dust, which can cause black lung disease. In June, Murray Energy sued to block a proposal by the U.S. Environmental Protection Agency (EPA) to cut carbon pollution from existing power plants." (*See* Am. Compl. Ex. A; *see also* Section II.A, *supra.*)

"crazy" is non-actionable opinion); *Kilcoyne v. Plain Dealer Publ'g Co.* (8th Dist. 1996), 112 Ohio App. 3d 229, 235, 678 N.E.2d 582 (epithets such as "miscreant," "despicable," "seedy," "sordid" and "bum" are not actionable); *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 372, 453 N.E.2d 666 (references to plant manager as a "Little Hitler" running a "concentration camp" in context of labor dispute are nonactionable expressions of opinion).

In case after case, Ohio courts have consistently found such "value-laden" and "subjective" language to be protected opinion that does not communicate an objective fact about the plaintiff. *See, e.g., Vail*, 72 Ohio St.3d at 282-83 (statement that plaintiff engaged in an "anti-homosexual diatribe" was "value-laden" and "subjective" and could "conjure[] a vast array of highly emotional responses that will vary from reader to reader"); *Wampler*, 93 Ohio.3d at 128-29 (finding statements describing plaintiff as a "ruthless speculator" possessed of "self-centered greed" charging "exorbitant rent" to be opinion because they are "all inherently imprecise and subject to myriad subjective interpretations").

While Plaintiffs may find the specific words used to be insulting, offensive or unreasonable, that is legally irrelevant. "The 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.'" *Stepien v. Franklin* (8th Dist. 1988), 39 Ohio App. 3d 47, 51, 528 N.E.2d 1324 (quoting *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 270). Charged language has long been recognized as one of the hallmarks of opinion, and therefore protected speech. *See, e.g., Ferreri v. Plain Dealer Publ. Co.* (8th Dist. 2001), 142 Ohio App. 3d 629, 640, 756 N.E.2d 712 (determining that "vivid rhetoric by characterizing appellant as a reckless, arrogant, publicity-hungry bully"

supported a finding of opinion under the first factor) (citing *Milkovich* (1990), 497 U.S. 1).[8]

ii. The Three Statements Are Not Verifiable.

The second factor used to distinguish opinions from assertions of fact asks whether the statements complained of "are objectively capable of proof or disproof, for 'a reader cannot rationally view an unverifiable statement as conveying actual facts.'" *Wampler*, 93 Ohio St. 3d at 129 (quoting *Ollman v. Evans D.D.C.* (1984), 750 F. 2d 970, 981)); *see also Scott*, 25 Ohio St. 3d at 251-52 ("Where the statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content."). As the Ohio Supreme Court has recognized, "[a]n obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits of no method of verification." *Wampler*, 93 Ohio St. 3d at 129 (citing *Ollman*, 750 F. 2d at 981-82). The inquiry is not whether "any factual references" made by the author are verifiable; rather, it is "the conclusions that are drawn from any factual references that epitomize the classification as fact or opinion." *Sikora v. Plain Dealer Publ. Co.* (6th Dist. 2003), 2003-Ohio-3218, at ¶ 17.

Here, the second factor likewise shows that the Challenged Statements are opinion because they cannot be objectively proved or disproved. *Wampler*, 93 Ohio St. 3d at 129. There are no "objective tests" to establish whether Murray Energy is using "scare tactics," "ignoring

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[8] Plaintiffs are well aware of the protections applied to rhetoric, charged language, and value-laden opinions. Robert Murray has frequently taken advantage of these protections in expressing his own opinions using nearly identical language related to the very same issues. Robert Murray can hardly deny, for example, that "ignoring the science" is part of the rhetorical back and forth in this important public debate, given that he so often uses the same phrase himself. *See, e.g.*, Tim Loh, Bloomberg News, "Coal Mogul Murray says More Bankruptcies Probable," *available at* http://www.bloomberg.com/news/2014-09-22/coal-mogul-murray-says-more-bankruptcies-probable.html (last visited Oct. 3, 2014); Darren Epps, SNL Financial, "Murray Energy founder Robert Murray: The coal market is not coming back," *available at* https://www.snl.com/InteractiveX/Article.aspx?cdid=A-29288382-11050 (last visited Oct. 3, 2014) (reporting Robert Murray's statements that the EPA's proposed rule on carbon emissions will have virtually no effect on the global climate; that the global climate issue is "purely political" and not based on any science; that global warming is a hoax; and that "[t]he insane, regal administration of King Obama has *ignored science*, economics, our poorer citizens and those on fixed incomes, our manufacturers, and the constitution, as it has bypassed our Congress." (emphasis added)).

the science" or "is working against the interests of mine workers and the public." *See Ferreri*, 142 Ohio App. 3d at 640. "Any such determinations would necessarily be based only on an individual's opinion, not objectively verifiable facts." *Id.* Nor is this a case where an "author represents that he has private, first-hand knowledge which substantiates the opinions he expresses." *Scott*, 25 Ohio St. 3d at 251-52. Both the Press Release and Issue Ad clearly disclose the basis for Public Citizen's opinions: the fact that Murray Energy had filed two lawsuits to block regulations intended to protect the health of coal workers and the public and address climate change. Murray Energy cannot contest the truth of the fact that it filed these lawsuits.

Further, to the extent this action arises out of differing opinions on the science supporting climate change, the courts have made clear that "as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation." *ONY, Inc. v. Cornerstone Therapeutics, Inc.* (2d Cir. 2013), 720 F.3d 490, 492; *see also, e.g., Underwager v. Salter* (7th Cir. 1994), 22 F.3d 730, 736 ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation."); *Oxycal Labs., Inc. v. Jeffers* (S.D. Cal. 1995), 909 F. Supp. 719, 724 ("The Court cannot inquire into the validity of [defendant's] scientific theories, nor should it. [Defendant's] expressions in the Book could be impermissibly silenced if she had to worry about liability of every statement made in her work.").

In this vein, statements advocating for one scientific perspective are considered nonactionable opinion, and therefore cannot give rise to a claim for defamation or false light. For example, the court in *Arthur v. Offit* dismissed on opinion grounds a libel claim arising from statements criticizing the plaintiff's views on whether vaccines trigger autism, because the

plaintiff's allegation of falsity:

> threatens to ensnare the Court in the thorny and extremely contentious debate over the perceived risks of certain vaccines, their theoretical association with particular diseases or syndromes, and, at bottom, which side of this debate has 'truth' on their side. That is hardly the sort of issue that would be subject to verification....

(E.D. Va. Mar. 10, 2010), 2010 WL 883745, at *6; *see also Freyd v. Whitfield* (D. Md. 1997), 972 F. Supp. 940, 945 (statements taking a position on a controversial psychological theory "cannot be objectively characterized as true or false" and "are particularly appropriate, and expected"). As the Second Circuit recently noted, "courts are ill-equipped to undertake to referee such controversies." *ONY*, 720 F.3d at 497. That Murray Energy does not agree with Public Citizen about the scientific basis for climate change and the scientific benefits of government regulation does not give rise to a cause of action.

iii. The General and Broader Context of the Statements Ineluctably Signify Opinion.

The third and fourth factors of the totality of circumstances test require an examination of the general and broader contexts of the allegedly defamatory statements. The general or "immediate" context factor recognizes that "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 (citing *Ollman*, 750 F.2d at 979); *see also Bentkowski v. Scene Magazine* (6th Cir. 2011), 637 F.3d 689, 695. Similarly, "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.'" *Ferreri*, 142 Ohio App. 3d at 640. The fourth factor examines "the broader social context into which the statement fits." *Wampler*, 93 Ohio. St. 3d at 131. This factor recognizes that "'[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.'" *Id.* (quoting *Ollman*, 750 F.2d at 983) (emphasis in original). The identity of the speaker and the nature of the forum inform the contextual inquiry. *Vail*, 72 Ohio St. 3d at 282; *see also Wampler*, 93 Ohio St. 3d at 131-32.

Here, the tenor and immediate context of the Press Release and Issue Ad "place the reasonable reader on notice that what is being [expressed] is the opinion of the writer." *Wampler*, 93 Ohio St. 3d at 130. The "general tenor" of both pieces, which are clearly advocating for a position with respect to a public controversy, is "more typical of persuasive speech than factual reporting." *Vail*, 72 Ohio St. 3d at 282; *see also Condit v. Clermont C'ty Review* (12th Dist. 1996), 110 Ohio App. 3d 755, 761-62, 675 N.E.2d 475 (context favors opinion where the author's statements are "pointed, biting, and tough," and "it is apparent that the writer's intent is to persuade readers to his point of view"). The Press Release broadcasts Public Citizen's intent to engage in public debate about Murray Energy's efforts to block two key pieces of environmental legislation—as the Press Release headline, "Public Citizen Launches Radio Ad Criticizing Murray Energy Lawsuit Against Clean Air Safeguards," makes abundantly clear. (*See* Am. Compl. Ex. A.)

The tenor of the Issue Ad likewise unmistakably communicates that Public Citizen is seeking to persuade members of the public to join Public Citizen in expressing support for these environmental regulations. (*See* Am. Compl. Ex. A ("Message Brought to You By Public Citizen"; "Please visit www.citizen.org , sign the petition and speak out now to protect our families' health and our kids.")).

Where, as here, "a review of the context of the statements in question demonstrates that [Defendants are] not making an attempt to be impartial," courts have consistently held that the third factor weighs in favor of opinion. *Scott*, 25 Ohio St. 3d at 253; *see also Condit*, 110 Ohio

App. 3d at 761 (context favors opinion where author made "no attempt to hide his bias or to be impartial" and it is unlikely that a reader would view the comments "as an attempt at impartial reportage"); *Bentkowski*, 637 F.3d at 695 (finding that where "the author makes no attempt to hide his bias, … it would be unreasonable for a reader to view his comments as impartial reporting.").

The fourth factor—the broader social context—also supports a finding of protected opinion. Public Citizen's status as a well-known consumer advocacy group informs the broader context, as does its reputation for speaking out on issues of climate change, public health, environmental legislation, and the role of big business in government. *See, e.g., Vail*, 72 Ohio St. 3d at 282 ("The author's reputation as an opinionated columnist should also be considered" as part of the broader context). Both the type of publication (a Press Release announcing a "hard-hitting" radio ad criticizing Murray Energy) and the forum (Public Citizen's website) alert readers that the Press Release reflects Public Citizen's subjective opinions and is not an impartial news item. *See Wampler*, 93 Ohio St. 3d at 132 (where defendant is "normally not engaged in the business of factual reporting or news dissemination," the fourth factor weighs in favor of opinion). Likewise, any reasonable listener understands that a paid political advertisement commenting on a matter a public controversy represents subjective opinion. *Id.* at 130.

In sum, given that the Challenged Statements were made by an advocacy organization in an advocacy ad discussing an issue of heated public debate, the context of the statements reinforces the conclusion that these three Challenged Statements are expressions of opinion. *See Condit*, 110 Ohio. App. 3d at 761 (statements appearing in "columns of political commentary" during ongoing political campaign were opinion); *Ferreri*, 142 Ohio App. 3d at 641 (statements in editorials published shortly after conclusion of "a matter of keen public interest and concern"

were opinion).

* * *

In sum, all four factors of the *Scott/Vail* analysis compel the conclusion that the three remaining Challenged Statements are constitutionally protected statements of opinion that cannot form the basis of a claim for defamation.

III.

PLAINTIFFS CANNOT STATE A FALSE LIGHT CLAIM

The same deficiencies that require dismissal of Plaintiffs' defamation claim—specifically, that the Challenged Statements are all either true or statements of protected opinion—require dismissal of the false light invasion of privacy claim as well. *See, e.g., Wellingv. Weinfeld* (2007), 113 Ohio St. 3d 464, 472, 2007-Ohio-2451, 866 N.E.2d 1051, at ¶ 52 (holding that, to be actionable as false light, "the statement made must be untrue"); *Murray v. The HuffingtonPost.com, Inc.* (S.D. Ohio May 12, 2014), --- F. Supp. 2d ---, 2014 WL 1884319, at *9 (dismissing both libel and false light claims brought by Robert Murray and Murray Energy where court found that the statements at issue were protected opinion); *Strutner v. Dispatch Printing Co.* (10th Dist. 1982), 2 Ohio App. 3d 377, 380-81, 442 N.E.2d 129 (to be actionable as false light, statement must be false).

In addition, corporate plaintiff Murray Energy cannot bring a claim for false-light invasion of privacy for yet another compelling reason. As Section 652I of the Restatement (Second) of Torts states: "[A]n action for invasion of privacy can be maintained only by a *living individual* whose privacy is invaded." *Id.* (emphasis added). Comment C to Section 652I explains further: "A corporation, partnership or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion [of privacy]," including false light. *Id.*, cmt. c.

Courts in Ohio have adopted this reasoning, holding that a corporation, "which is not a living individual, may not maintain a cause of action" for invasion of privacy. *Brit Ins. Holdings N.V. v. Krantz* (N.D. Ohio Jan. 5, 2012), No. 1:11 CV 948, 2012 WL 28342, at *10-11; *see also Duer v. Henderson* (2d Dist. Dec. 23, 2009), 2009-Ohio-6815, at ¶ 46 (noting that the trial court dismissed a false light claim brought on behalf of a trust, because a trust was not a living person (citing Restatement (Second) of Torts § 652I)); *Rothstein v. Montefiore Home* (8th Dist. 1996), 116 Ohio App. 3d 775, 778, 689 N.E.2d 108 (same); *FCC v. AT & T Inc.* (2011), 131 S. Ct. 1177, 1183-84 (Roberts, C.J.) (noting that corporations do not have personal privacy); *Seaton v. TripAdvisor LLC* (6th Cir. 2013), 728 F.3d 592, 601 (a corporation "does not have the right … to recover for a violation of its privacy"); *Kole v. Vill. of Norridge* (N.D. Ill. 2013), 941 F. Supp. 2d 933, 964 ("[T]he tort of false light invasion of privacy does not protect a party's reputation; it protects an individual's personal privacy interest to be free from false publicity. Corporations do not have such a privacy interest."). Accordingly, Murray Energy cannot state a claim for false light invasion of privacy for this independent reason.

IV.

ALL CLAIMS BY PLAINTIFF ROBERT MURRAY ALSO FAIL FOR THE INDEPENDENT REASON THAT NO STATEMENTS ARE "OF AND CONCERNING" HIM

The defamation and false light invasion of privacy claims are also subject to dismissal as to Plaintiff Robert Murray for the independent reason that none of the Challenged Statements—indeed, no statement whatsoever in the Issue Ad or the Press Release—is "of and concerning" Robert Murray.

Under Ohio law and basic First Amendment principles, a statement is not actionable as defamation unless it is "of and concerning" the plaintiff. *Worldnet Software Co.*, 122 Ohio App. 3d at 504; *see also New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 288-92 (holding that

the "of and concerning" requirement is a *constitutional* limitation on actions sounding in defamation). Thus, a "plaintiff cannot recover damages by establishing that the defendant has defamed another person or entity." *Re/Max Int'l, Inc. v. Smythe, Cramer Co.* (N.D. Ohio 2003), 265 F. Supp. 2d 882, 894. So, too, the Ohio Supreme Court has ruled that "[f]alse light defendants enjoy [constitutional] protections at least as extensive as defamation defendants." *Welling*, 113 Ohio St. 3d at 472. This recognition is consistent with the holdings of courts from around the country, which have consistently held that the requirement that a statement be "of and concerning" the plaintiff applies with equal force to false light claims.[9]

Whether or not a publication is "of and concerning" a plaintiff depends on the publication as a whole. *Smith v. Huntington Pub. Co.* (S.D. Ohio 1975), 410 F. Supp. 1270, 1273. A court may properly decide this question on a motion to dismiss. *See, e.g., Worldnet Software Co.*, 122 Ohio App. 3d at 506-07.

Here, Plaintiff Robert Murray does not—and cannot—identify any statements from the Issue Ad or the Press Release that are "of and concerning" him. The Issue Ad and the Press Release refer only to Murray Energy Corporation, "a privately owned mining corporation." (Am. Compl. Ex. A.) Mr. Murray's name is never mentioned, and the lawsuits that Public Citizen criticizes in its Issue Ad were filed only by the corporation, Murray Energy – not the individual, Robert Murray. Indeed, the sole basis for Robert Murray's claims appears to be his belief that any statement made about the corporation over which he presides is necessarily "of and concerning" him. But as courts in Ohio and across the country have made clear, that is not the law. *See, e.g., Worldnet Software Co.*, 122 Ohio App. 3d at 504-506 (defamatory statement about plaintiff's business is not "of and concerning" the plaintiff, even where the business is a

[9] *See, e.g., Washburn v. Lavoie* (D.C. Cir. 2006), 437 F.3d 84, 88; Muzikowski v. Paramount Pictures Corp. (7th Cir. Ill. 2003), 322 F.3d 918, 927; *Catalanello v. Kramer* (S.D.N.Y. May 7, 2014), --- F. Supp. 2d ---- ; 2014 U.S. Dist. LEXIS 63044.

sole proprietorship); *SDV/ACCI, Inc. v. AT&T Corp.* (9th Cir. 2008), 522 F.3d 955, 960-61 (affirming dismissal of defamation claims on grounds that statements about plaintiffs' company were not "of and concerning" plaintiffs); *Provisional Gov't of Republic of New Afrika v. ABC* (D.D.C. 1985), 609 F. Supp. 104, 108 (noting that "[a]llegations of defamation by an organization and its members are not interchangeable" and "statements which refer to an organization do not implicate its members").

The court's decision in *Worldnet Software* is instructive. In that case, plaintiff Mark Hanson, the operator of Worldnet, alleged that he was defamed by a newspaper article and television broadcast alleging, among other things, that Worldnet was a scam or a scheme. As in this case, the publication at issue never mentioned the individual owner of the company and none of the statements was about him individually. 122 Ohio App. 3d at 504-06. Nevertheless, Hanson argued that "there [was] no legal distinction between him and Worldnet" and therefore "any allegedly defamatory statement made about Worldnet [was] also made about him as the operator of Worldnet." The appellate court rejected that argument and affirmed the dismissal of all claims brought by Hanson on the ground that none of the statements about WorldNet were "of and concerning" him individually. *Id.* at 504-05. This court should do the same.[10]

V.

THE AMENDED COMPLAINT ALSO FAILS TO STATE A CLAIM FOR UNFAIR TRADE PRACTICES

Plaintiffs' attempt to assert unfair trade practice claims under the Ohio Deceptive Trade Practices Act ("ODTPA") and Ohio common law fail for the same reasons as the defamation and

[10] *Murray v. Knight-Ridder, Inc.* (7th Dist. Feb. 18, 2004), 2004 WL 333250, 2004-Ohio-821, at ¶ 98—yet another defamation suit by Plaintiffs– is not to the contrary. That case involved a profile about Robert Murray himself. The court allowed one of Robert Murray's corporations to sue as plaintiff because, in contrast to this case, that article referred to the corporation by name, "interchange[d] the names" of Murray and the corporation throughout the article, and referred to acts that were clearly taken by the corporation and not an individual. *Id.*

false light claims. Section A (10) of the ODTPA provides that "[a] person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person .... [d]isparages the goods, services, or business of another by *false representation of fact*." *See* Ohio Rev. Code § 4165.02 (A)(10) (emphasis added). The analysis under Ohio common law is substantively the same as under the ODTPA. *See Cesare v. Work* (9th Dist. 1987), 36 Ohio App. 3d 26, 28, 520 N.E.2d 586.

Courts in Ohio have repeatedly held that there can be no claim for "false representations of fact" where the challenged statements are substantially true or are "protected statement[s] of opinion." *Northeast Ohio Coll. of Massotherapy v. Burek* (7th Dist. 2001), 144 Ohio App. 3d 196, 205, 759 N.E.2d 869 (reviewing claim alleging a false representation of fact under Section 4165.02(A)(1) of the DTPA); *see also Leisure Sys. v. Roundup LLC* (S.D. Ohio Oct. 31, 2012), Case No. 11-cv-384, 2012 U.S. Dist. LEXIS 155948, at *72-73 ("When a deceptive trade practices claim is based on statements that are ... privileged under defamation law, the protection afforded those statements as to defamation is equally applicable to the deceptive trade practice claim.") (citing *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St. 3d 1, 14-15, 651 N.E.2d 1283). Courts use the same four-factor test applicable to defamation actions to determine whether a statement constitutes nonactionable opinion or a "false representation of fact" under the ODTPA or Ohio common law. *Burek,* 144 Ohio App. 3d at 206 (applying the four-factor *Scott/Vail* test and finding statements that plaintiff would go bankrupt or were "near insolvency," while inflammatory, to be unverifiable and therefore opinion) (citing *Scott*, 25 Ohio St.3d at 250); *see also White Mule Co. v. ATC Leasing Co., LLC* (N.D. Ohio 2008), 540 F. Supp. 2d 869, 895-96 (ODTPA); *Veracity Group, Inc. v. Cooper-Atkins Corp., Inc.* (S.D. Ohio Jan. 24, 2012), 2012 U.S. Dist. LEXIS

7997, at *11-13 (applying *Scott/Vail* test to ODTPA and common-law unfair trade practices claims).

Because all of the Challenged Statements are either substantially true or protected opinion, Plaintiffs' claims under the Ohio Deceptive Trade Practices Act and under Ohio common law must also be dismissed.

CONCLUSION

For all the reasons set forth herein, Public Citizen respectfully requests that this Court grant its motion to dismiss the First Amended Complaint in its entirety, with prejudice.

Dated: October 6, 2014

Respectfully Submitted,

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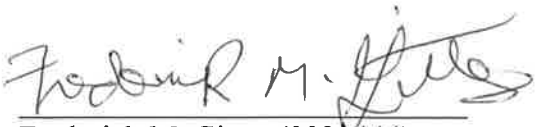
DEMAND FOR ORAL ARGUMENT

Pursuant to Local Rule 6.4, the movants hereby respectfully request oral argument as to all issues raised herein.



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October 2014, the foregoing Motion to Dismiss was served via regular U.S. mail and e-mail upon:

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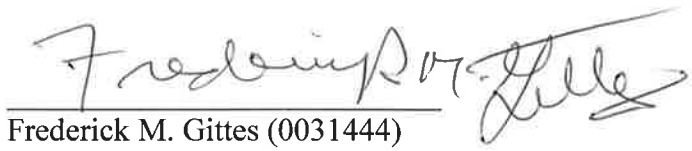

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