IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

THE MARSHALL COUNTY COAL COMPANY, THE MARION COUNTY COAL COMPANY, THE MONONGALIA COUNTY COAL COMPANY, THE HARRISON COUNTY COAL COMPANY, THE OHIO COUNTY COAL COMPANY, MURRAY ENERGY CORPORATION, and ROBERT E. MURRAY, Plaintiffs, v. JOHN OLIVER, CHARLES WILSON, PARTIALLY IMPORTANT PRODUCTIONS, LLC, HOME BOX OFFICE, INC., TIME WARNER INC., and DOES 1 through 10, Defendants.	Civil Action No. 17-c-124 Judge Jeffrey D. Cramer

MEMORANDUM IN SUPPORT OF PARTIALLY IMPORTANT PRODUCTIONS, LLC, HOME BOX OFFICE, INC., AND TIME WARNER INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

Last Week Tonight with John Oliver is a half-hour television program that presents a satirical look at the week in news, politics, and current events. Produced by Partially Important Productions, LLC and distributed on Home Box Office, Inc.'s ("HBO") premium pay television service, new episodes premiere on Sunday night. Each episode generally begins with a satirical take on news highlights from the previous week, and then moves to a main story that tackles an issue of public interest in an in-depth and humorous manner. The main story on June 18, 2017, examined issues facing the coal mining industry. Part of the segment discussed Robert Murray, the CEO of Murray Energy Corporation ("Murray Energy")—his political advocacy, his history of being at odds with federal safety regulators and some of his own workers, and his attempts to use defamation lawsuits to silence his critics. The presentation was humorous, full of jokes and comedic asides, and included a vignette with an actor dressed as a talking squirrel named "Mr. Nutterbutter."

Murray and several companies he controls (collectively, "Plaintiffs") allege that this episode amounted to defamation, false light invasion of privacy, and intentional infliction of emotional distress. Plaintiffs, however, do not come close to satisfying the legal requirements for these speech-based tort claims. In fact, their complaint disregards long-settled First Amendment and common law protections for the two types of speech challenged here: accurate reporting on government activity, and commentary and satire on matters of public concern.

Plaintiffs do not take serious issue with the accuracy of the factual statements of which they complain—namely, statements concerning a fatal mining accident and a Murray company bonus program. Those statements were based squarely on judicial opinions and government reports that were quoted and displayed on the screen. They are privileged as fair and accurate

reports of government action and are also protected under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, which require plaintiffs to plead and prove knowledge of falsity or a high degree of awareness of probable falsity. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *N.Y. Times Co.*, 376 U.S. at 279-80.

The other statements Plaintiffs challenge consist of humor, hyperbole, opinion, and satire that cannot be proven false because no reasonable viewer would understand them to convey actual facts about the Plaintiffs. Indeed, many of Plaintiffs' allegations boil down to hurt feelings about jokes. They complain that the coal story "childishly demeaned and disparaged them," poked fun at Murray's age and appearance, and generally caused Murray embarrassment and stress. Compl. ¶¶ 5-6. But the fact that Murray found this speech embarrassing or disagreeable does not remove it from the broad protection of the First Amendment. The Supreme Court has stated time and again that the type of speech at issue here—news and commentary about public figures and issues of public importance—"occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion." *N.Y. Times Co.*, 376 U.S. at 269 (alteration omitted).

The irony of this ill-considered lawsuit is that the coal story featured clips of Murray exercising his own First Amendment rights by vigorously denouncing former President Barack Obama as "an outlaw" with an "evil agenda" who "never had a job." But, here, Murray calls it "ruthless character assassination" when a quip described him as a "geriatric Dr. Evil." Compl. ¶ 51. Murray wants his own pedestal to influence public debate, through hyperbole and

invective, but not the consequences of his public participation. That is not the way the First Amendment works. Once a plaintiff has "voluntarily exposed himself to the public eye," he cannot "at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place." *Time, Inc. v. Johnston*, 448 F.2d 378, 382 (4th Cir. 1971). Murray and the companies he controls are no exception.

Repeatedly, however, Murray and Murray Energy have engaged in "punitive litigation designed to chill constitutionally protected speech" with which they disagree. *Murray v. Chagrin Valley Publ'g Co.*, 25 N.E.3d 1111, 1124-25 (Ohio Ct. App. 2014). Courts have found, repeatedly, that the First Amendment protects against their petty grievances. This case is no different and should be dismissed.

BACKGROUND

The episode of *Last Week Tonight* that Plaintiffs challenge here broadly canvassed issues relevant to the coal industry, from declining job prospects to campaign promises made by President Trump.[1] About five minutes into the piece, John Oliver, the host of *Last Week Tonight*, introduced Bob Murray. Oliver explained that many involved in the coal industry blame President Obama for its job losses, and that Murray was among the "loudest" critics of Obama's policies. Ex. 1 at 11:00. The show excerpted television news interviews in which Murray harshly criticized the former president as "an outlaw" with an "evil agenda" who was "destroying entire segments of America." *Id.* at 11:09. "I pray every day that this man's

[1] The Court may consider documents attached to a motion to dismiss if they are incorporated by reference or integral to the complaint. *Forshey v. Jackson*, 222 W. Va. 743, 747-49, 671 S.E.2d 748, 752-54 (2008). The June 18 episode is referenced extensively throughout the Complaint. Exhibit 1 is a DVD of the episode.

incompetence will be overcome," Murray inveighed, before excoriating Obama for "never [having] had a job." *Id.* at 11:16, 11:24.

When the segment returned to Murray six minutes later, Oliver noted that, after *Last Week Tonight* contacted Murray Energy for the coal story, the company sent cease-and-desist letters threatening "immediate litigation" that would be pursued "to the level of the Supreme Court of the United States." *Id.* at 19:46. Oliver continued, "So I have to proceed with caution. I'm not going to say, for instance, that Bob Murray looks like a geriatric Dr. Evil, even though he clearly does." *Id.* at 20:16. Side-by-side images of Murray and the movie character Dr. Evil then flashed on the screen. Oliver went on to explain that Murray had a history of lawsuits against the media, and that during one such lawsuit against a newspaper, Murray's general counsel "told reporters that this paper had inflicted a potential economic loss of—and I'm not making this up—one billion dollars." *Id.* at 20:39. Oliver joked that was "exactly what you'd expect from a geriatric Dr. Evil," the campy villain from the *Austin Powers* comedies who tried to hold the world ransom for "one hundred billion dollars." *Id.* at 20:48.

Oliver then discussed a lawsuit Murray Energy filed "to block a rule aimed at reducing miners' exposure to coal dust that causes black lung." *Id.* at 21:45. He explained Murray's position that "the rule was illegal, destructive, and did nothing for miners, nothing for their health." *Id.* at 21:57. He then joked that "even appear[ing] to be on the same side as black lung" was like "rooting for the bees" that stung a child protagonist in the movie *My Girl*. *Id.* at 22:10.

Next, Oliver described a Murray program that gave miners bonuses based upon the amount of coal they extracted, while showing on the screen a National Labor Relations Board

("NLRB") judicial decision that arose out of a dispute over the program.[2] *Id.* at 22:27. Drawing facts directly from the NLRB decision—and showing direct quotations on screen—Oliver explained that when the program was voted down by miners over safety concerns, Murray imposed it anyway, saying the miners could void their bonus checks if they did not want to participate. *Id.* at 22:30. One miner wrote "eat shit, Bob" on his voided check; another wrote "kiss my ass, Bob." *Last Week Tonight* showed images of those two checks on the screen.

The segment then moved to the 2007 collapse at the Crandall Canyon mine in Utah, operated by a Murray Energy subsidiary, in which nine people died. *Id.* at 23:17. The show included video of a press conference shortly after the accident in which Murray insisted that the collapse "was caused by an earthquake." *Id.* 23:30. Oliver explained, accurately, that the official government investigation concluded that the collapse had been "caused by 'unauthorized mining practices' and there was 'no evidence that a naturally occurring earthquake caused the collapse.'" Ex. 1 at 24:00 (quoting Ex. 3).

The government investigation Oliver referenced was conducted by the Mine Safety and Health Administration ("MSHA"). Ex. 4, at i. The federal agency issued a report of over 472 pages analyzing the causes of the collapse. *Id.* It also published a two-page summary document entitled "Crandall Canyon Accident Investigation Summary and Conclusions." Ex. 3. The government's lead conclusions included that Murray Energy's subsidiary, GRI, had "continued to mine coal in areas with unsafe conditions," and that "MSHA found no evidence that a

[2] The Court may consider such public records on this Motion. *See, e.g.*, *Forshey*, 222 W. Va. at 747-49, 671 S.E.2d at 752-54. The NLRB Decision is attached as Exhibit 2. The underlying NLRB case was initiated after Murray American Energy (a Murray Energy subsidiary) suspended and ultimately fired the two miners in response to their protest. *Id.* at 6-7. The decision concluded that the company had "engaged in unfair labor practices" when it "discriminatorily discharged" the two union members, and ordered them reinstated. *Id.* at 31-32.

naturally occurring earthquake caused the collapse on August 6." *Id.* The report also noted (though Oliver never did) that GRI had "withheld information" and "misled MSHA" during its investigation. *Id.*

The story moved from Crandall Canyon to a lighter subject. Oliver shared an "apocryphal tale" from Murray company lore that Murray was approached by a squirrel who encouraged him to launch his mining company. Ex. 1 at 25:20. Oliver made clear that Murray's representative denied that this ever actually happened. *Id.* "And you know what? I actually believe Murray on that one," Oliver said. "Because I think deep down we all know if squirrels could talk, they wouldn't be giving career advice to coal executives. They'd be loudly listing their favorite nuts." *Id.*

Oliver then returned to the subject of job prospects in the coal industry, observing: "Murray has said he provided thousands of them to mining communities, and he's right about that." *Id.* at 26:16. Oliver then closed the segment by saying: "Bob Murray, . . . I know that you are probably going to sue me. But, you know what? I stand by everything I said. Although, just to reiterate, I do not think you claimed a squirrel talked to you. Even by your standard, that would be a pretty ridiculous thing to say." *Id.* at 29:12. A costumed actor playing a squirrel named "Mr. Nutterbutter" then entered the stage and addressed Murray: "Hey, Bob! Just wanted to say, if you're planning on suing, I do not have a billion dollars, but I do have a check for three acorns and eighteen cents." In a parody of the bonus checks voided by Murray's workers, Mr. Nutterbutter held up an oversized check made out to "Eat Shit, Bob," with the memo line "Kiss My Ass."

Three days later, on June 21, 2017, Plaintiffs filed their Complaint alleging defamation, false light invasion of privacy, and intentional infliction of emotional distress.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION.

In West Virginia, the "essential elements" for a successful defamation action are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) fault; and (6) resulting injury. *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 706, 320 S.E.2d 70, 77 (1983). Because defamation claims challenge pure speech, the First Amendment places "stringent limitations upon the permissible scope" of liability. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 12 (1970). Among other things, the First Amendment, like the common law, provides a privilege for fair and accurate reporting on government activity. *See Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991) (en banc). And where, as here, the plaintiffs are public figures, the First Amendment further requires plaintiffs to plead and prove that the defendant acted with "actual malice"—that is, with "knowledge that [his publication] was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.*, 376 U.S. at 279-80. Collectively, these principles secure our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. For "[w]hatever is added to the field of libel is taken from the field of free debate." *Id.* at 272.

Because even the mere pendency of defamation actions may chill free speech, the law of libel assigns the trial court a critical role in enforcing these First Amendment and common law limits at the outset of the case. On a motion to dismiss, the court must decide as a matter of law whether the publication can reasonably be understood to convey the defamatory meaning that plaintiff alleges. *Long v. Egnor*, Syl. Pt. 6, 176 W. Va. 628, 637, 346 S.E.2d 778, 787 (1986); Restatement (Second) of Torts § 614(1). That inquiry includes a determination of whether the speech can reasonably be understood to assert actual facts about the plaintiff or whether it

consists only of protected opinion or "rhetorical hyperbole." *Long*, Syl. Pt. 7, 176 W. Va. at 634 n.8, 346 S.E.2d at 784 n.8; *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293-94 (4th Cir. 2008). Courts undertake this assessment even in the absence of discovery because, in defamation actions, "the central event—the communication about which suit has been brought—is ordinarily before the judge at the pleading stage." 2 Robert D. Sack, *Sack on Defamation* § 16:2:1, at 16-3 to -4 (5th ed. 2017).

Although courts must generally accept allegations in a complaint as true on a motion to dismiss, they need not credit allegations that are incredible or internally contradictory, or that contradict documents attached to or incorporated by reference into the complaint. *See, e.g.*, *Forshey v. Jackson*, 222 W. Va. 743, 747-49, 671 S.E.2d 748, 752-54 (2008); *Amherst Land Co. v. United Fuel Gas Co.*, 140 W. Va. 389, 394, 84 S.E.2d 225, 228 (1954); *see also Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014); *Basile v. Calwell Practice, PLLC*, 2017 WL 656993, at *3 n.5 (W. Va. Feb. 17, 2017) (dismissing case). In a defamation case particularly, a plaintiff cannot survive a motion to dismiss by offering a strained or artificial interpretation of the underlying publication or other documents properly considered on a motion to dismiss. *See* Restatement (Second) of Torts § 563, Reporter's Note cmt. f.

Indeed, the West Virginia Supreme Court has recognized that defamation actions brought by public figures constitute a "significant exception to the general rule that the complaint will be construed liberally on a Rule 12(b)(6) motion" and required that these claims be assessed under a "stricter standard." *Long*, 176 W. Va. at 635, 346 S.E.2d at 785-86. "Unless the complaint demonstrates on its face sufficient facts to support the elements of a defamation action, the complaint should be dismissed under Rule 12(b)(6)." *Id.* at 636, 346 S.E.2d at 786; *see also W. Va. Bd. of Ed. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015). West Virginia is not

an outlier—federal and state courts routinely grant motions to dismiss in public-figure defamation actions, and these dismissals are routinely upheld on appeal. *See, e.g.*, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091 (4th Cir. 1993); *Cruse v. Frabrizio*, 2014 WL 3045412, at *9 (S.D. W. Va. July 2, 2014); *Murray v. Chagrin Valley Publ'g Co.*, 25 N.E.3d at 1117; *see also Long*, 176 W. Va. at 638, 346 S.E.2d at 788 (issuing writ of prohibition to prohibit further prosecution of defamation action after erroneous denial of motion to dismiss).

Here, Plaintiffs' meritless Complaint fails to overcome these formidable hurdles. Plaintiffs challenge four sets of statements: (1) statements concerning the fatal Crandall Canyon mine collapse and related government investigation; (2) statements addressing the NLRB bonus dispute; (3) a joking reference to Murray's opposing a health and safety regulation and the risk of even appearing to be "on the same side as black lung"; and (4) other jokes and satirical commentary, including that Murray looks like "a geriatric Dr. Evil." None of these statements can support a defamation claim as a matter of law for multiple separate and independently sufficient reasons. Plaintiffs have no basis to dispute the program's fair and accurate descriptions of the official Crandall Canyon investigation report and the NLRB bonus dispute because Defendants drew them entirely from government records and, as such, they are entitled to the fair report privilege. Further, Plaintiffs cannot possibly allege that *any* of the joking or satirical references are false statements of fact, much less that Defendants published them with actual malice. Additionally, the claims brought by the subsidiary corporate plaintiffs fail for the separate reason that none of the challenged statements concerns them. In short, this action must be dismissed because Plaintiffs have not come close to clearing the constitutional and common law hurdles to their defamation claims.

A. The Fair Report Privilege Protects the Accurate Account of the Crandall Canyon Mine Investigation and NLRB Bonus Dispute.

The fair report privilege shields the media from liability for their coverage of any official government action or proceeding, provided the report "is accurate and complete or a fair abridgement of the occurrence reported." *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 175, 423 S.E.2d 560, 578 (1992) (quoting Restatement (Second) of Torts § 611); *see also Chapin*, 993 F.2d at 1097 (affirming dismissal of complaint). The privilege exists in order to foster "the open relationship we seek to share with our own government" and to encourage the press to "inform citizens of what the government is doing." *Reuber*, 925 F.2d at 712. Without such a privilege, the "harsh effects" of defamation republication liability would deter the media from openly reporting on government affairs and official documents. *Id.*

In West Virginia, plaintiffs must plead and prove a statement is not entitled to the privilege as an "essential element[]" of their claim for defamation. *See Crump*, 173 W. Va. at 706, 320 S.E.2d at 77. Although the fair report privilege had its roots in state law, *see, e.g.*, *id.*; Ohio Rev. Code §§ 2317.04, 2317.05, the Fourth Circuit and other federal courts have recognized it is constitutional in nature, *see, e.g.*, *Reuber*, 925 F.2d at 712.

Courts routinely dismiss defamation claims on the basis that the published statements are privileged. *See Chapin*, 993 F.2d at 1098; *Cruse*, 2014 WL 3045412, at *9; *Crain v. Lightner*, 178 W. Va. 765, 768, 364 S.E.2d 778, 781 (1987). The result should be no different here. The show's description of the government's Crandall Canyon investigation report and the NLRB bonus dispute were both fair and accurate, and therefore protected by the constitutional privilege.

1. The Accurate Account of the Government's Investigation Into the Crandall Canyon Mining Accident Is Privileged.

The first statement challenged by Plaintiffs is the show's description of the Crandall Canyon mine collapse:

> Murray says that the evidence proves he was correct that an earthquake caused the collapse. But that was decidedly not the conclusion of the government's investigation, which found it was caused by "unauthorized mining practices," and there was "no evidence that a naturally occurring earthquake caused the collapse."

Ex. 1 at 23:53 (quoting Ex. 3, p. 1); Compl. ¶ 38.

The fair report privilege plainly protects this accurate account of the government's conclusions. When *Last Week Tonight* stated that "there was 'no evidence that a naturally occurring earthquake caused the collapse,'" it was directly quoting from, and displaying, a publicly available government reported titled Crandall Canyon Accident Investigation Summary and Conclusions. It is indisputable that the government concluded that "unauthorized mining practices increased geological stress levels in the vicinity of working coal miners," and there was "no evidence that a naturally occurring earthquake caused the collapse," as *Last Week Tonight* accurately reported. Ex. 3. The quotation of the MSHA's own "Summary and Conclusions" was unquestionably a fair and accurate account of an official government report.

Under these circumstances, the complaint not only fails to state a claim; it is subject to sanction. Plaintiffs had an obligation to make a "reasonable inquiry" into whether this privilege protects the speech they challenge. *See Bowman v. Carper*, No. 01-C-1804 (W. Va. Cir. Ct. Oct. 29, 2001) (dismissing complaint with prejudice and ordering sanctions where challenged speech was plainly privileged); *Straitwell v. Nat'l Steel Corp.*, 905 F.2d 1532 (4th Cir. 1990) (upholding Rule 11 sanctions for failure to anticipate a defamation privilege defense). Plaintiffs' apparent failure to recognize the plainly privileged nature of this report is all the more egregious given that they *admit* that Oliver was quoting from an official government report. Compl. ¶ 40.

Plaintiffs' complaint that the "MSHA and its 'experts' chose not to analyze" certain evidence to Plaintiffs' satisfaction, Compl. ¶ 34(e), just goes to show that this lawsuit is really about their disagreement with the *government's* conclusion, not Defendants' speech. This is

precisely why the privilege exists. If accurate summaries of government investigations were actionable, then any plaintiff aggrieved by a government report could sue any reporter covering the report. The First Amendment does not permit such an absurd result. *See Cruse*, 2014 WL 3045412, at *9.

Plaintiffs also protest that the quote *Last Week Tonight* used was an "out-of-context" snippet, and that, in context, the report included evidence "that an earthquake or earthquake-like event triggered the Mine collapse." Compl. ¶ 40. That is a blatant mischaracterization of the report that the Court does not have to credit, even at the motion to dismiss stage. *See Amherst Land Co.*, 140 W. Va. at 394, 84 S.E.2d at 228 ("Exhibits filed in support of a pleading are considered parts thereof, and, if they contradict the matters alleged, will control."). Not one of the other five key government findings even remotely supports Murray's discredited excuse that a naturally occurring earthquake was to blame for the mine collapse. Ex. 3. If anything, the "context" that Plaintiffs claim Defendants omitted included findings that were even *more damaging* to Murray Energy—such as the finding that its subsidiary mine operator GRI "failed to revise its mining plan following coal bursts . . . but rather *continued to mine coal in areas with unsafe conditions*." *Id.* (emphasis added). Contrary to Plaintiffs' misrepresentation, the government's full report is unambiguous, and states repeatedly and authoritatively that the collapse was not caused by a naturally occurring earthquake.[3]

[3] *See, e.g.*, Ex. 4 at 1 ("The August 6 collapse was not a 'natural' earthquake, but rather was caused by a flawed mine design."); *id.* at 51 ("Seismological analyses indicate that the 3.9 magnitude event associated with the August 6 failure was characteristic of a collapse event and not a naturally occurring earthquake."); *id.* at 57 ("The preliminary location of the seismic event near the Joes Valley fault apparently led to speculation by some that the event was a naturally occurring earthquake. However, additional analyses of the event . . . determined that the seismic event was the result of the mine collapse.") (footnotes omitted).

2. The Accurate Coverage of the NLRB Bonus Dispute Is Privileged.

The Complaint also challenges the show's account of Murray's controversial bonus program for miners:

> Murray proposed a program where miners could receive bonuses based on the amount of coal they extracted. It was voted down by employees who believed it would have an adverse impact on safety in the mines. But the company did it anyway, saying if workers didn't like it, they could just write "void" on their checks. And, amazingly, around 62 employees did just that, with two going even further—one returning a check for $11.58 by writing "kiss my ass, Bob" on it, and another taking a check for $3.22 and writing, "eat shit, Bob."

Ex. 1 at 22:25. Plaintiffs argue that, with this statement, "Defendants . . . falsely broadcasted that Mr. Murray and the other Plaintiffs implemented bonus policies that sacrificed the health and safety of their employees." Compl. ¶ 49.

This account is also fully protected as a matter of law by the fair report privilege. The Episode accurately summarized a National Labor Relations Board judicial decision about the bonus program and quoted directly from that decision, displaying direct quotations in large text on the screen, along with an image of the NLRB's decision.[4] *See* Ex. 1 at 22:30−23:05; Ex. 2. The Complaint not only fails to argue that the episode's summary of the NLRB decision was incorrect in any way; it fails even to mention that the coal story discussed and displayed excerpts from the NLRB decision. Every factual statement made about the bonus program—that bonuses would be paid to miners based on the quantity of coal they extracted, that the miners rejected the bonus program because of safety concerns, that sixty-two miners voided their bonus checks, and that two of them had vulgar messages for Murray—came straight from the NLRB decision and

[4] For example, as Oliver explained that the bonus program was rejected by employees who "believed [it] would have an adverse impact on safety in the mines," the show displayed a graphic image that made clear this was a direct quote from the NLRB decision. *See* Ex. 1 at 22:35.

was clearly presented as such. Ex. 2, at 4-5. Plaintiffs allege that Defendants should have published *other* details about the bonus program that would have cast them in a more flattering light, in particular that "the title of the bonus program was the 'Safety and Production Bonus Plan,'" Compl. ¶ 49, but that title is not even in the NLRB opinion, so any complaint Plaintiffs have is with the NLRB opinion itself, not Defendants' accurate account of it. A plaintiff cannot state a claim for defamation where the defendant accurately summarized a judicial opinion about the plaintiff. The fair report privilege thus defeats this claim as well as a matter of law. *See, e.g.*, *Chapin*, 993 F.2d at 1097; *Reuber*, 925 F.3d at 712.

B. The Statements Concerning the Crandall Canyon Mine and the Bonus Program Were Substantially True.

Last Week Tonight's account of the fatal mine collapse and the bonus dispute was not only privileged; it was substantially true. Both the First Amendment and state law require plaintiffs to plead and prove material falsity as an essential element of their claim. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986); *Crump*, 173 W. Va. at 706, 320 S.E.2d at 77. Plaintiffs cannot satisfy the falsity requirement by pointing to minor inaccuracies or technical errors: "substantial truth" is the standard. *State ex rel. Suriano v. Gaughan*, Syl. Pt. 4, 198 W.Va. 339, 352, 480 S.E.2d 548, 561 (1996). The statements at issue need not be literally true in every respect "so long as the substance, the gist, the sting of the libelous charge is justified." *Id.* If it is clear from the face of the complaint that "a defamatory statement is 'substantially true,' a claim of libel is legally insufficient and should be dismissed." *Tannerite Sports, LLC v. NBCUniversal News Group*, 864 F.3d 236, 242 (2d Cir. 2017).

Here, Plaintiffs' *own allegations* establish the substantial truth of the assertion that "there is no evidence that a naturally occurring earthquake caused the collapse" of the Crandall Canyon mine. Plaintiffs complain that they pointed Defendants to various studies that supposedly

bolstered their earthquake theory. Compl. ¶ 34. But the best Plaintiffs can say about these studies is that they described not a naturally occurring earthquake, but an event "very similar to the United States Geological Survey's definition of an 'earthquake.'" *Id.* ¶ 34(e); *see also id.* ¶ 34(f) ("what many would characterize as an earthquake"); *id.* ¶ 34(i) ("a seismic event akin to an earthquake"). Plaintiffs can hardly allege that Defendants published a false statement of fact when their own allegations attribute the mine collapse to something other than an *actual*, naturally occurring earthquake. *See Ludlow v. Northwestern Univ.*, 79 F. Supp. 3d 824, 837 (N.D. Ill. 2015) (dismissing defamation and false light claims where plaintiff's "own allegations" showed the allegedly defamatory statements were "substantially true").

It is also clear from the face of the Complaint that Plaintiffs have no basis to dispute the truth of *Last Week Tonight*'s discussion of the NLRB bonus dispute. Plaintiffs allege that Defendants "falsely broadcasted" that the bonus program "sacrificed the health and safety of their employees." Compl. ¶ 49. But *Last Week Tonight* in fact took no position on whether the bonus program imperiled the safety of miners. It merely noted that miners voted down the bonus program because they "*believed* it would have an adverse impact on safety." Ex. 1 at 22:32 (emphasis added). Plaintiffs make no allegation that the show in any way misrepresented the nature of the complaints lodged by Murray's employees. Absent such an allegation, which Plaintiffs do not and cannot make, Plaintiffs have not plead falsity as a matter of law.

This case is like *Hupp v. Sasser*, 200 W. Va. 791, 490 S.E.2d 880 (1997), where the West Virginia Supreme Court held that a plaintiff cannot prove falsity where the defendant merely published a truthful account of complaints and criticisms others had made about the plaintiff. In *Hupp*, the plaintiff, a graduate student, sued a college dean for disclosing to another faculty member that he had received numerous complaints about plaintiff's abusive behavior and lack of

professionalism. The Supreme Court concluded that, because the dean truthfully conveyed the substance of these complaints, his remarks fell "*outside the realm of defamation law* on grounds of truth." *Id.* at 798, 490 S.E.2d at 887 (emphasis added). So too here, Plaintiffs cannot satisfy the falsity requirement as a matter of law where they do not dispute that *Last Week Tonight* accurately conveyed the gist of the miners' complaints about safety.

C. The Other Challenged Statements Consist of Opinion or Hyperbole That Receive the Full Protection of the First Amendment.

None of the other statements Plaintiffs challenge here can support a defamation claim, because they consist of opinion or rhetorical hyperbole rather than provably false facts. Plaintiffs can satisfy the falsity element of their claim only if the speech they challenge contains an assertion of *fact* that can be proven false. *See Hupp*, 200 W. Va. at 798, 490 S.E.2d at 887. If a statement "cannot reasonably be interpreted as stating actual facts about an individual," then it is not actionable as defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (alteration omitted). Where it is clear that the speaker is expressing only "a subjective view, an interpretation, a theory, conjecture or surmise, rather than a claim to be in possession of objectively verifiable false facts," then his speech receives full constitutional protection. *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 186 (4th Cir. 1998) (affirming dismissal of complaint); *accord Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 607, 447 S.E.2d 293, 299 (1994) ("A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection.").

This principle shelters "vigorous epithet," "rhetorical hyperbole," and other "loose, figurative" language that cannot reasonably be understood to convey facts about the plaintiff. *Milkovich*, 497 U.S. at 21; *CACI Premier Tech.*, 536 F.3d at 293, 300-02. To give two quintessential examples, the Supreme Court held that a newspaper's use of the term "blackmail"

to describe plaintiff's negotiating tactics was not actionable, because in context its readers would not have understood it to accuse plaintiff of an actual crime. *Greenbelt Coop. Publ'g*, 398 U.S. at 14. And it further recognized that the epithet "traitor" could not "be construed as [a] representation[] of fact" when used in the thick of a labor dispute. *See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). This protection for exaggerated and hyperbolic rhetoric unquestionably extends to parody and satire. *See, e.g.*, *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988); *Farah v. Esquire Magazine*, 736 F.3d 528, 535, 537 (D.C. Cir. 2013) (affirming dismissal of complaint); *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1017 (1st Cir. 1988) (dismissing claim against magazine for satirical headline where "the average reader understands that the headline is the editors' ironic comment upon, rather than a literal representation of, what appears in the story"); *Busch v. Viacom Int'l, Inc.*, 477 F. Supp. 2d 764, 775 (N.D. Tex. 2007) (dismissing defamation claim against nightly news satire program *The Daily Show* because, among other reasons, no reasonable viewer would have believed the challenged clip was an actual assertion of fact); *cf. Seemuller v. Fairfax Cty. Sch. Bd.*, 878 F.2d 1578, 1583 (4th Cir. 1989) ("Seemuller's use of satire to comment on a matter of public concern did not deprive him of the protection afforded by the first amendment.").

1. The "Black Lung" and "Killer Bees" Statements Are Obvious Rhetorical Hyperbole That Do Not Convey Actual Facts.

Plaintiffs complain about the following statements concerning their challenge to a regulation aimed at reducing miners' exposure to the coal dust that causes black lung disease:

> Murray's company recently unsuccessfully sued to block a rule aimed at reducing miner's exposure to coal dust that causes black lung—a disease which killed as many as 10,000 people between 1995 and 2005. Murray insisted that the rule was illegal, destructive, and did nothing for miners, nothing for their health. Although last year, with the rule in effect, government reports indicated respirable dust levels fell to historic lows. And, look, if you even appear to be on the same side as black lung, you're on the wrong fucking side. That's the equivalent of watching *My Girl* and rooting for the bees.

Ex. 1 at 21:35. Plaintiffs fail to state a claim for defamation because no reasonable viewer would understand these statements to mean that Plaintiffs are *in fact* "on the same side as black lung" or that "their position regarding a coal dust regulation was the equivalent of rooting for bees to kill a child," as the Complaint alleges. Compl. ¶ 46.

Oliver explained that Murray Energy had filed a lawsuit to block the coal dust regulation. He described the reasons for the opposition, explaining Murray's contention that the rule "was illegal, destructive, and did nothing for miners, nothing for their health." Ex. 1 at 22:00. As the passage quoted above plainly shows, Oliver did *not* say that Murray or any other plaintiff supported black lung—at most he suggested, satirically, that opposing black lung health regulations can carry the risk of *appearing* to be on the side of black lung.

And even if Oliver had said anything close to suggesting that Murray had aligned himself with black lung—or with bees, for that matter—such statements are clearly flights of rhetorical hyperbole that are not meant to be taken literally. *Last Week Tonight* gives a satirical take on news, politics, and current events, and its viewers would have understood these remarks as Oliver's signature biting commentary rather than objective statements of fact. *See Farah*, 736 F.3d at 535, 537; *Raye v. Letterman*, 14 Media L. Rep. 2047, 2047 (Cal. Super. Ct. 1987) (dismissing defamation claim against David Letterman arising out of an obvious joke). The sheer outlandishness of the idea that Murray and Murray Energy could be "on the same side as black lung" signaled that these comments were not to be taken literally. *See Greenbelt Coop. Publ'g*, 398 U.S. at 14; *Farah*, 736 F.3d at 537-38.

2. The Remaining Satirical Statements About Bob Murray Cannot Support a Claim For Defamation.

Murray's claim that Defendants defamed him by joking that he "looks like a geriatric Dr. Evil" is also frivolous. *See* Compl. ¶ 51. At multiple points in the Episode, Oliver lampooned

the physical appearance of various public figures, teasing that Senator Orrin Hatch "looks like a . . . ventriloquist dummy of [Vice President] Mike Pence," Ex. 1 at 3:42, and comparing his own looks to "the result of a drunk threesome between Chris Hayes, Austin Powers, and a potato," *id.* at 14:50. In the context of a comedy show laced with silly and over-the-top insults, there can be no question that the "geriatric Dr. Evil" comparison was precisely the type of vigorous epithet or rhetorical hyperbole that cannot reasonably be understood to convey actual facts about Murray. *See Hupp*, 200 W. Va. at 798, 490 S.E.2d at 887. At the very least, the remark is a protected opinion based on disclosed fact: *Last Week Tonight* showed side-by-side images of Dr. Evil and Murray, allowing the audience to judge for itself whether these two individuals actually look alike. *See Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987); *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994); Restatement (Second) of Torts § 566 cmt. c.

Dr. Evil was the campy criminal mastermind from the *Austin Powers* comedies who tried to hold the world ransom for "one hundred billion dollars." Oliver reprised the "geriatric Dr. Evil" remark as he was describing a claim by Murray's lawyer that a newspaper Murray was suing for libel "had inflicted a potential economic loss of . . . one billion dollars." Ex. 1 at 20:38. In context, the remark was an obvious attempt to spoof Murray's antagonistic relationship with the press rather than to convey actual facts about him. Despite the humorless spin Murray attempts to put on this remark, no reasonable viewer would have understood it to mean that Murray is "villainous," as the Complaint alleges. Compl. ¶ 47.[5]

[5] Moreover, it is deeply ironic that Murray has filed suit over these statements, considering his own penchant for bluster on TV. For example, the show featured clips of him calling President Obama "an outlaw" with an "evil agenda" who "never had a job." Ex. 1 at 11:05.

Similarly, Plaintiffs cannot state a claim for defamation because an actor dressed up as a giant talking squirrel and presented a check made out to "Eat shit, Bob!," with the memo line "Kiss my ass, Bob." Compl. ¶ 51. While the segment may have mocked Murray, no reasonable viewer could have understood these imprecations to convey any facts about him at all. *See Farah*, 736 F.3d at 540 (holding that magazine's reference to plaintiff as "an 'execrable piece of shit' does not appear to convey *any* factual assertion").

Plaintiffs have also not stated a claim for defamation based on Oliver's remarks that "I actually believe Murray on that one" when he denied that a squirrel talked to him, and that "even by your standard, that would be a pretty ridiculous thing to say." Compl. ¶ 44. Both of these remarks are far too loose and ambiguous to support the alleged implication that Murray "is a liar in general" or on "other, more important matters." Compl. ¶¶ 43-44. At most, they suggest that Oliver thinks that some of the positions Murray had taken on other matters addressed in the episode are "ridiculous." And that kind of suggestion, based on truthful facts set forth in the episode, is protected as pure opinion. *See Maynard*, 191 W. Va. at 607, 447 S.E.2d at 299; *Potomac Valve*, 829 F.2d at 1290; *Moldea*, 15 F.3d at 1144-45.

D. Plaintiffs Have Failed to Plead Facts To Support a Claim of Actual Malice.

Plaintiffs' defamation claim should also be dismissed because they have failed to plead facts sufficient to establish that Defendants acted with "actual malice"—that is, "knowledge [their report] was false" or "reckless disregard of whether it was false or not." *N.Y. Times Co.*, 376 U.S. at 279-80. Although *New York Times* uses the language of recklessness, it does not provide an objective standard of care.[6] The actual malice standard is "a subjective one,"

[6] Actual malice also has "nothing to do" with common law malice, hatred, or ill will toward the plaintiff. *Harte-Hanks*, 491 U.S. at 666 n.7. Accordingly, allegations that defendants desired to injure, embarrass, or harm the plaintiff are insufficient to satisfy this element of the claim.

requiring plaintiff to plead and prove that "the defendant actually had a high degree of awareness of probable falsity." *Harte-Hanks*, 491 U.S. at 688 (ellipsis omitted). To satisfy this element of the claim, plaintiffs must allege facts sufficient to draw the conclusion that defendants published a "calculated falsehood" or "knowing[] and deliberate[]" "lie." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *Long*, 176 W. Va. at 635, 346 S.E.2d at 785-86.

The actual malice standard applies where plaintiffs are public figures—*i.e.*, individuals who "are involved in issues in which the public has a justified and important interest." *Time, Inc.*, 448 F.2d at 380. The First Amendment requires such plaintiffs to satisfy this heightened fault requirement because, when they entered the public arena, they "knowingly exposed themselves to a predictable risk of being burned." *State ex rel. Suriano*, 198 W. Va. at 348, 480 S.E.2d at 557. What is more, public figures typically have greater access to the media than private persons do and will have "ready outlets to respond to attacks" without resort to a libel lawsuit. *Id.* The actual malice standard is but a recognition that "public men are, as it were, public property, and . . . the right . . . of criticism must not be stifled" unless plaintiff can prove the defendant published a knowing falsehood. *N.Y. Times Co.*, 376 U.S. at 268.

1. Murray and His Companies Are Public Figures and Must Plead Actual Malice In Order To State a Claim For Defamation.

There can be no dispute that Murray is a public figure who must plead and prove actual malice to recover on a defamation claim. Public figures include individuals or corporations who "have assumed roles of especial prominence in the affairs of society" or otherwise "invite attention and comment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). A plaintiff qualifies as a public figure if he (1) has voluntarily engaged in significant efforts to influence public debate, (2) he was involved in that debate before defendant published the allegedly defamatory statement, and (3) he has access to the media that "would permit him to make an

effective response to the defamatory statement in question." *State ex rel. Suriano*, 198 W. Va. at 348-49, 480 S.E.2d at 557-58. Murray easily satisfies this test.

As chief executive of "the largest underground coal mining company in the United States," Compl. ¶ 9, Murray is unquestionably a public figure in relation to public debates concerning the coal industry. He has "thrust [himself] to the forefront" of public debate on the industry, *see Gertz*, 418 U.S. at 345, appearing on national television news shows to discuss declining employment prospects for miners, critique President Obama's regulatory agenda, and tout his relationship with President Trump. Ex. 1 at 11:05. *Last Week Tonight* described him as "one of the loudest voices" on issues facing the coal industry. Ex. 1 at 10:58. Far from denying that characterization, Murray embraces it in the Complaint, styling himself "as one of the staunchest defenders and most ardent champions of the United States coal industry and America itself." Compl. ¶ 9. As a vocal commentator and cable news guest who has "voluntarily exposed himself to the public eye," *Time, Inc.*, 448 F.2d at 382, Murray cannot use the law of libel to disarm critics who place him under the scrutiny that he invites.[7] *See Gertz*, 418 U.S. at 345.

2. Plaintiffs Have Not Carried Their Burden of Pleading Actual Malice As To Any of the Claims.

Plaintiffs have not come close to pleading sufficient facts to support their charge that Defendants published a false statement with actual malice. *See Long*, 176 W. Va. at 635, 346 S.E.2d at 785. They have no basis to claim that Defendants subjectively believed their

[7] Murray's companies are public figures as well, as at least one court has already held. *See Murray v. Chagrin Valley Publ'g Co.*, 25 N.E.3d at 1117. Murray Energy and its operating entities are public figures because they constitute "the largest underground coal mining company in the United States." Compl. ¶ 9. The other corporate plaintiffs should also be treated as public figures because they allege simply that "the public equates the mining business of each Plaintiff with Mr. Murray," *id.* ¶ 10, and claim injuries purely derivative of his. Plaintiffs cannot have it both ways—if they allege that statements about Murray inherently are statements about all his companies, then they must also accept that those companies qualify as public figures.

statements concerning Crandall Canyon accident were false, when Defendants quoted directly from the findings and conclusions of the official government investigation of the accident. Where a publication accurately attributes a statement to a government report, there can be no actual malice as a matter of law. *See, e.g.*, *Chapin*, 993 F.2d at 1098 (no actual malice where reporter "accurately attributed the quote"); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 260 (D.D.C. 2016) ("Generally, a defendant's good faith reliance on previously published reports in reputable sources precludes a finding of actual malice as a matter of law."); *Murray v. Chagrin Valley Publ'g Co.*, 25 N.E.3d at 1119.

Plaintiffs allege that they supplied Defendants with seismology literature showing the collapse was caused by "what is commonly understood as an earthquake." Compl. ¶ 34. But this allegation does not come close to satisfying the actual malice test because not one of those studies actually says that a naturally occurring earthquake caused the mine collapse.[8] *See Amherst Land Co.*, 140 W. Va. at 394, 84 S.E.2d at 228 (court should defer to documents attached to the complaint where they contradict its allegations). This is why Plaintiffs are forced to allege in ambiguous terms that the studies described an event "very similar to the United States Geological Survey's definition of an 'earthquake.'" *Id.* ¶ 34(e). Defendants cannot be said to have published a knowing falsehood when the studies to which Plaintiffs' allegations point do not come close to refuting the government's decisive and unambiguous conclusions.

Other courts have rejected, on actual malice grounds, similarly vexatious challenges from Murray to news coverage of the government's damning Crandall Canyon analysis. In *Chagrin Valley Publishing Co.*, a newspaper reporter made various statements about Murray's response to

[8] Two of the three studies were considered by MSHA investigators as part of the government's exhaustive analysis that concluded that there was "no evidence that a naturally-occurring earthquake caused the collapse." Ex. 4; Compl. ¶¶ 34(h)(ii)-(iii).

the mine collapse, including that the Murray Energy subsidiary was fined "for violations that were determined to have directly contributed to those nine deaths." 25 N.E.3d at 1119. Murray complained of that statement, but the court held that he could not establish actual malice, since "the most substantive part of th[e] statement [was supported] with citations to governmental [MSHA] information releases. . . . The fact that the statements are supported leaves no material question of fact that [the reporter] did not knowingly publish false information with actual malice." *Id.* The same is true here. There is no plausible allegation that Defendants published a known falsity by directly quoting the conclusion of an authoritative government investigation.

For the same reason, Plaintiffs have failed to carry their burden of pleading actual malice as to *Last Week Tonight*'s accurate treatment of the NLRB bonus dispute: Defendants based all of their statements about that dispute directly on an NLRB judicial decision. It is no matter that Plaintiffs believe Defendants should have published other details about the bonus program that would have cast Plaintiffs in a more flattering light, such as the fact that the plan was called a "Safety and Production Bonus Plan," Compl. ¶ 49—a fact that was not even in the NLRB opinion. There is simply no duty to present facts in the light most favorable to a plaintiff. *See, e.g.*, *Reuber*, 925 F.2d at 716 ("Defamation judgments do not exist to police [] objectivity; the First Amendment presupposes that a veritable medley of opposing voices is better suited to the search for truth."); *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1307 (D.C. Cir. 1996) ("The fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false."); *Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 412 (6th Cir. 1991) (publisher has "no legal obligation to present a balanced view"); *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66, 68 (S.D.N.Y. 1984) ("The fairness of the broadcast is not at issue in [a] libel suit.").

Finally, any claim that Defendants published any of their hyperbolic or satirical statements with actual malice fails as a matter of law. Because none of these statements can reasonably be understood to convey actual facts, Plaintiffs cannot allege they are false, much less that Defendants published them with reckless disregard for the truth.

E. None of the Challenged Statements Are Of and Concerning the Subsidiary Plaintiffs.

The claims of the Murray Energy subsidiaries—the Marshall County, Marion County, Monongalia County, Harrison County, and Ohio County coal companies—fail for the additional reason that the Complaint makes no plausible allegation that the statements were "of and concerning" them. Under both the First Amendment and state law, the only party entitled to assert a claim for defamation is the party at whom the allegedly false statements were "specifically directed." *Rosenblatt v. Baer*, 383 U.S. 75, 81-82 (1966); *Crump*, 173 W. Va. at 706, 320 S.E.2d at 77. "In order to actionably defame an individual, a publication must contain some 'special application of the defamatory matter' to the individual," such that "[t]he 'circumstances of the publication . . . reasonably give rise to the conclusion that there is a particular reference' to the individual." *AIDS Counseling & Testing Ctrs. v. Grp. W Tel., Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990).

The Complaint makes no allegation that the coal story specifically addressed any corporate entity other than Murray Energy. In fact, other than in the paragraphs where it describes their state of incorporation, the Complaint contains no reference to these corporate plaintiffs at all. *See* Compl. ¶¶ 11-14. The only allegation that even remotely attempts to satisfy the "of and concerning" requirement is the vague and conclusory assertion that "the public equates the mining business of each Plaintiff with Mr. Murray." Compl. ¶ 10.

But corporations and their officers are not interchangeable, and when a statement is made about one or the other, it must "have been understood by a reasonable reader as being, in substance, actually about [the plaintiff bringing suit]." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398-99 (2d Cir. 2006); *see also* Restatement (Second) of Torts § 561 cmt. on clause (a) ("A corporation is not defamed by communications defamatory of its officers, agents or stockholders unless they also reflect discredit upon the method by which the corporation conducts its business."). Thus, for example, in *Kirch*, a broad allegation that an "exclusive agent" was known publicly as "the 'face'" of the corporation was insufficient to support a defamation claim by the agent. *Kirch*, 449 F.3d at 391, 398-99; *see also, e.g.*, *Afftrex, Ltd. v. Gen. Elec. Co.*, 555 N.Y.S.2d 903, 904-05 (App. Div. 1990) (statement that "the owner of Afftrex[] is also an evil man" was not sufficiently "of and concerning" Afftrex because, in context, the statement "reflect[s] directly on [the individual]" in connection with his former employment, rather than on the business). So too here, the statements challenged in the Complaint were not "actually *about*" the trade or business of the four subsidiary Plaintiffs and cannot support claims by those Plaintiffs. *See Kirch*, 449 F.3d at 399; *Afftrex*, 555 N.Y.S.2d at 904-05.

Nor may the various corporate plaintiffs maintain a claim by virtue of their corporate relationship with Murray Energy. Defamatory statements about a parent company do not give rise to claims for defamation by subsidiary corporations unless the statements specifically reference the subsidiary. *See, e.g.*, *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1089-90 (D.C. Cir. 2007) (statements were not "of and concerning" other corporations with shared ownership).[9]

[9] To the extent that the federal court in its remand order held that the speech could conceivably be seen as negatively impacting the subsidiary corporations, its remand analysis is irrelevant here because it was based on a "possibility of relief" standard that is substantially "more favorable to a plaintiff than the standard for ruling on a motion to dismiss." Judge Bailey made explicit that he "pass[ed] no judgment" as to the merits of the action. *See* Remand Order, Dkt. No. 32, at 10.

II. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST TIME WARNER.

The claims against Time Warner, HBO's parent company, must also be dismissed because the Complaint does not plausibly allege that it was responsible for the content of the challenged segment. "It remains 'a general principle of corporate law deeply ingrained in our economic and legal systems' that a parent corporation is not liable for the acts of its subsidiaries." *Susko v. Cox Enters., Inc.*, 2008 WL 4279673, at *8 (N.D. W. Va. Sept. 16, 2008) (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)); *Long*, Syl Pt. 3, 176 W. Va. 628, 346 S.E.2d 778. Thus, courts in West Virginia and across the country routinely dismiss defamation claims against parent corporations where there is no allegation of the parent's direct involvement in the allegedly defamatory speech, or some fraud or illegality to justify piercing the corporate veil. *See, e.g.*, *Susko*, 2008 WL 4279673, at *8 (holding that liability is "forbidden" where "the complaint does not mention, claim, or suggest, however, that [the parent corporations] took any part in, or had any control over . . . the alleged[ly defamatory] statements").[10] Here, because Plaintiffs make no allegations that Time Warner directed or participated in publishing any of the statements at issue, liability is "forbidden." *Id.*

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND FALSE LIGHT.

Plaintiffs' claims for false light invasion of privacy and intentional infliction of emotional distress must also be dismissed. None of the corporate Plaintiffs can assert these causes of action

[10] *See also, e.g.*, *Williby v. Hearst Corp.*, No. 5:15-CV-02538-EJD, 2017 WL 1210036, at *4 (N.D. Cal. Mar. 31, 2017) (dismissing defamation claim against parent corporation where plaintiff alleged no facts to suggest parent "authorized or otherwise manifested the intent for" the publisher to make the allegedly defamatory statements); *Haskell v. Time Inc.*, 857 F. Supp. 1392, 1403 (E.D. Cal. 1994) (dismissing Time Warner from lawsuit where there was no allegation that its subsidiary was "fraudulently incorporated"); *cf. Stern v. News Corp.*, 2010 WL 5158635 (S.D.N.Y. Oct. 14, 2010) (granting summary judgment in defamation action where no facts in the record indicated the parent controlled the subsidiary).

because they are not natural persons. *See, e.g.*, *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, Syl. Pt. 3, 176 W. Va. 39, 42, 341 S.E.2d 414, 417 (1986) ("[A] corporation cannot recover for the tort of outrage or infliction of severe emotional distress."); *Susko*, 2008 WL 4279673, at *5 (holding that a business "cannot assert a claim for false light invasion of privacy"). As for Murray, his claims fail under the same constitutional and common law principles that defeat his defamation claims. False light, intentional infliction, and defamation share interlocking elements—including falsity and actual malice—and are subject to the same First Amendment protections for opinion and rhetorical hyperbole. *See Hustler*, 485 U.S. at 56; *Crump*, 173 W. Va. at 711-17, 320 S.E.2d at 83-88. The fair report privilege likewise forecloses these claims when they are based on the same factual predicate as a failed defamation claim. *See Cruse*, 2014 WL 3045412, at *12. Indeed, numerous courts, including the Supreme Court, have cautioned that plaintiffs must not be permitted to evade the stringent limitations on defamation actions by simply relabeling their claims as false light or intentional infliction of emotional distress. *See, e.g.*, *Hustler*, 485 U.S. at 56; *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627-28 (D.C. Cir. 2001); *Partington v. Bugliosi*, 56 F.3d 1147, 1160 (9th Cir. 1995); *SIRQ, Inc. v. Layton Cos.*, 379 P.3d 1237, 1246 (Utah 2016).

Even aside from the constitutional impediments to the false light and intentional infliction claims, Murray has failed to plead the common law elements of these torts. An intentional infliction claim requires conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Kanawha Valley Power Co. v. Justice*, 181 W. Va. 509, 513, 383 S.E.2d 313, 317 (1989). "[C]onduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent" does not satisfy the outrageousness

requirement. *Hines v. Hills Dep't Stores, Inc.*, 193 W. Va. 91, 96, 454 S.E.2d 385, 390 (1994). Here, Plaintiffs allege that Defendants "outrageously conveyed" that Murray had "no evidence" to support his claim that an earthquake caused the collapse of the Crandall Canyon mine. Compl. ¶ 38. But this was the *government's* own conclusion, and there is nothing remotely improper—let alone outrageous or intolerable—about accurately conveying the results of an official investigation. To the extent Murray argues that Oliver's barbs and exaggerated rhetoric are outrageous, his claim is foreclosed by *Hustler*, 485 U.S. at 55, which held that "outrageousness" is too subjective a standard to invalidate speech on a matter of public concern. The mild tweaking that Murray sustained on *Last Week Tonight* is, in any event, a far cry from the type of "atrocious and utterly intolerable" conduct the tort was designed to punish.

Plaintiffs have likewise failed to plead facts to support each element of their false light claim. To establish their claim of false light, Plaintiffs must demonstrate "(1) the false (2) publication (3) of private facts (4) portraying the plaintiff in a false light (5) which would be highly offensive to a reasonable person." *Curran v. Amazon.com, Inc.*, No. 07-0354, 2008 WL 472433, at *8 (S.D. W. Va. Feb. 19, 2008); *Benson v. AJR, Inc.*, 215 W. Va. 324, 329, 599 S.E.2d 747, 752 (2004). Here, there is no allegation that Defendants disclosed any "private facts" about Murray. *See Susko*, 2008 WL 4279673, at *5. To the contrary, all of the facts discussed were already well within the public record. Additionally, there is no allegation of any statement that, taken in the context of the satirical show, would have been "highly offensive to a reasonable person." *Curran*, 2008 WL 472433, at *8; *see also Crump*, 173 W. Va. at 718, 320 S.E.2d at 90 ("the price of the license granted by the first amendment to the press to engage in robust activity is the necessity of every citizen of having some thickness of skin").

IV. THIS LAWSUIT IS PART OF MURRAY'S CAMPAIGN OF "PUNITIVE LITIGATION DESIGNED TO CHILL CONSTITUTIONALLY PROTECTED SPEECH."

This case is just the latest example of Murray and Murray Energy's well-documented practice of using "punitive litigation designed to chill constitutionally protected speech" in an attempt to intimidate and silence critics. *See Murray v. Chagrin Valley Publ'g Co.*, 25 N.E.3d at 1125. In the past few years alone, Plaintiffs have lost several similar lawsuits against the media on the pleadings.[11] This litigation campaign is so baseless, and so extraordinary, that it recently led the Ohio Court of Appeals to call for that state's legislature to pass legislation that would force plaintiffs like Murray to "pay the attorney fees of successful defendants." *Id.* at 1124. This case is part of a pattern of frivolous litigation, and it should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion to Dismiss. Because amendment of the Complaint would be futile due to its insurmountable constitutional and common law defects, dismissal should be with prejudice. *See, e.g.*, *Bee v. W. Va. Supreme Court*, 2013 WL 5967045, at *4 (W. Va. Nov. 8, 2013) (affirming dismissal with prejudice where amendment would have been futile).

[11] *See Murray Energy Corp. v. Reorg Research, Inc.*, 2017 WL 2977781, at *1 (N.Y. App. Div. July 13, 2017) (dismissing proceeding seeking pre-action disclosure of media company's confidential sources); *Murray Energy Holdings Co. v. Bloomberg, L.P.*, 2016 WL 3355456, at *8 (S.D. Ohio June 17, 2016) (dismissing complaint which "consists virtually entirely of legal conclusions couched as factual allegations"); *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, 2016 WL 3365422, at *4 (S.D. Ohio June 17, 2016) (same); *Murray v. Moyers*, 2015 WL 5626509, at *4 (S.D. Ohio Sept. 24, 2015) (dismissing complaint against journalist); *Murray v. HuffingtonPost.com, Inc.*, 21 F. Supp. 3d 879, 888 (S.D. Ohio 2014) (dismissing complaint against media defendants); *Murray v. Chagrin Valley Publ'g Co.*, 25 N.E.3d at 1125 (dismissing complaint against newspaper).

Dated: September 18, 2017 Respectfully submitted,

By: /s/ Robert P. Fitzsimmons

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CERTIFICATE OF SERVICE

I certify that this September 18, 2017, I caused a copy of the foregoing to be sent by first class mail to counsel for Plaintiffs:

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