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

CARLO M. CROCE, Plaintiff, v. THE NEW YORK TIMES COMPANY, *et al.*, Defendants.	Civil Action 2:17-cv-402 Judge James L. Graham Magistrate Judge Elizabeth A. Preston Deavers

DEFENDANTS' MOTION TO DISMISS

Defendants The New York Times Company, James Glanz, Augustin Armendariz, Arthur Ochs Sulzberger, Jr., and Dean Baquet (together, "The Times"), by and through their undersigned attorneys, respectfully move this Court pursuant to Federal Rule of Civil Procdure 12(b)(6) to issue an order dismissing the Complaint with prejudice.

For the reasons set forth in the accompanying memorandum of law, Plaintiff Carlo M. Croce cannot state any plausible claim for relief. Accordingly, Defendants ask that this Court dismiss the Complaint with prejudice.

Dated: July 10, 2017

By: /s/ Keith W. Schneider
Keith W. Schneider (0041616)

MAGUIRE & SCHNEIDER, LLP
1650 Lakeshore Drive
Columbus, Ohio 43204
Phone: (614) 224-1222
Fax: (614) 224-1236
kwschneider@ms-lawfirm.com

Michael D. Sullivan*
Jay Ward Brown*
Matthew E. Kelley*
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street NW, Suite 200
Washington, DC 20036
Tel: (202) 508-1100
Fax: (202) 861-9888
msullivan@lskslaw.com
jbrown@lskslaw.com
mekelley@lskslaw.com
* Admitted pro hac vice

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, a copy of the foregoing motion was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system.

/s/ Keith W. Schneider
Keith W. Schneider

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

CARLO M. CROCE,	:	
Plaintiff,	:	Civil Action 2:17-cv-402
	:	Judge James L. Graham
v.	:	
	:	Magistrate Judge Elizabeth A. Preston Deavers
THE NEW YORK TIMES COMPANY, *et al.*,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

Keith W. Schneider
MAGUIRE & SCHNEIDER, LLP
1650 Lakeshore Drive
Columbus, Ohio 43204
Phone: (614) 224-1222
Fax: (614) 224-1236
kwschneider@ms-lawfirm.com

Michael D. Sullivan*
Jay Ward Brown*
Matthew E. Kelley*
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street NW, Suite 200
Washington, DC 20036
Tel: (202) 508-1100
Fax: (202) 861-9888
msullivan@lskslaw.com
jbrown@lskslaw.com
mkelley@lskslaw.com
*Admitted pro hac vice

Counsel for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

I. THE PRE-EXISTING CONTROVERSY REGARDING CROCE'S RESEARCH 2

II. THE LETTER, THE ARTICLE AND THE INTERVIEW AT ISSUE 4

III. THE COMPLAINT IN THIS ACTION 7

ARGUMENT 8

I. PLAINTIFF'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW FOR MULTIPLE INDEPENDENT REASONS 9

To establish his defamation claim, Plaintiff "must show (1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement." *Susan B. Anthony List v. Driehaus*, 779 F.3d 628, 632-33 (6th Cir. 2015) (quoting *Am. Chem. Soc'y v. Leadscope, Inc.*, 133 Ohio St. 3d 366, 389 (2012)). Because he limits his claim to one for defamation *per se*, Plaintiff must show that the harm to his reputation is obvious from the face of the statements, and that they impute the commission of a crime, infection with a loathsome disease, or are injurious in his business or occupation. This determination is a question of law for the court. *Konica Minolta Bus. Sols., U.S.A., Inc. v. Allied Office Prods., Inc.*, 724 F. Supp. 2d 861, 870 (S.D. Ohio 2010); *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1314 (S.D. Ohio 2001). Plaintiff also must show the statements are capable of only one, defamatory meaning, and cannot use innuendo to aver a fact or enlarge, extend or restrict the natural meaning of the language used. *Murray v. Knight-Ridder, Inc.*, 2004-Ohio-821, ¶ 31; *Ambro v. Holtec Int'l*, No. 2:11-cv-173, 2012 WL 529584, at *7 (S.D. Ohio Feb. 17, 2012).

A. Plaintiff's Own Allegations Demonstrate That Twelve Of The Challenged Statements Are Substantially True 10

The allegations and admissions in the Complaint and its attachments show that twelve of the challenged statements are substantially true as a matter of law: the number of papers that required correction or retraction (Statement 14); the true statement that Croce blamed others for those errors (Statements 6 & 7); and the accurate account of criticism of Croce's work by others in his field (Statements 3-5, 11-13, and 16-18). Statements need not be precisely true in every detail to be non-actionable; it is enough that the gist or sting of the statement is true, or that there is at least "some truth" in the statement. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991); *Driehaus*, 779 F.3d at 633. Accurate reports that third parties have made allegations are not defamatory as a matter

of law. *Blesedell v. Chillicothe Tel. Co.*, No. 2:13-CV-451, 2015 WL 1968870, at *24 (S.D. Ohio May 1, 2015), *aff'd*, 811 F.3d 211 (6th Cir. 2016). Further, Ohio does not recognize libel through implications made by true statements. *Krems v. Univ. Hosps. of Cleveland*, 133 Ohio App. 3d 6, 12 (1999).

B. Plaintiff Cannot Meet His Burden Of Showing That The Challenged Statements Are Defamatory For Two Independent Reasons.....15

1. The overall context of the challenged statements renders them non-defamatory as a matter of law.....15

In determining whether a statement is defamatory as a matter of law, the court must consider the entire publication as a whole and in context, including the type of publication and the expectations of the audience. *Am. Chem. Soc'y*, 133 Ohio St. 3d at 389; *Sabino v. Woio, L.L.C.*, 2016-Ohio-491, ¶¶ 49-64. Statements made in the context of balanced news reports, such as the Article and the Interview, are not defamatory as a matter of law. *Am. Chem. Soc'y*, 133 Ohio St. 3d at 390-91. The Letter is not defamatory in context because it is presented to Plaintiff and an OSU spokesman as a series of questions and statements to which they are asked to respond, not affirmative assertions of the statements' truth. *Id.* at 390.

2. The challenged statements also are non-actionable as a matter of law under Ohio's "innocent construction rule" 21

Ohio's "innocent construction rule" bars recovery for statements that are capable of having more than one meaning, at least one of which is non-defamatory. The innocent interpretation must be adopted, so long as it is reasonable. *Holley v. WBNS 10TV, Inc.*, 149 Ohio App. 3d 22, 27-28 (2002); *McKimm v. Ohio Elections Comm'n*, 89 Ohio St. 3d 139, 146 (2000); *Sweitzer v. Outlet Commc'ns, Inc.*, 133 Ohio App. 3d 102, 111-12 (1999); *Konica Minolta*, 724 F. Supp. 2d at 870–71. The challenged publications are not actionable pursuant to the innocent construction rule because they may all be innocently construed as balanced accounts of a controversy that take no sides and reach no conclusions. Each of the challenged statements also carries a non-defamatory meaning.

C. Many of The Challenged Statements Are Non-Actionable Expressions Of Opinion.....25

As a matter of Ohio law, a statement of opinion is not actionable as defamation; rather, under the Ohio Constitution opinions are generally accorded absolute immunity from liability. Whether a statement is one of opinion is a matter of law for the court. The court makes this determination by considering whether a reasonable reader, under the totality of the circumstances, would consider the statement one of opinion or fact. The four factors to consider are the specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. *Wampler v. Higgins*, 93 Ohio St. 3d 111 (2001); *Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St. 3d 279, 281-82 (1995); *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250 (1986); *Conway v. Int'l Ass'n of Heat & Frost Insulators & Asbestos*

Workers, 209 F. Supp. 2d 731, 754 (N.D. Ohio 2002). Weighing these factors, it is clear that many of the challenged statements are non-actionable opinions.

1. Statements regarding the scientific value or impact of Croce's work.....27

Statements regarding whether Croce's research findings are "puzzling," "expansive," "overstated," and the like are non-actionable value judgments. They also constitute the kind of loose and figurative language that cannot be objectively proven true or false. Moreover, all of these statements are made in the context of publications that provide alternative explanations and differing views, further illustrating that they are opinions. *Wampler*, 93 Ohio St. 3d at 113, 128; *Vail*, 72 Ohio St. 3d at 283.

2. Statements in the Article speculating on Croce's motivation or state of mind.....29

Statements that speculate regarding Croce's state of mind also are non-actionable opinions. These include statements that Croce knew what the tobacco industry would do with his research; that his lab is more focused on churning out papers than carefully assessing its research data; and that he was willing to buck scientific consensus. Statements that are clearly conjecture or surmise are opinions immune from liability. *Wampler*, 93 Ohio St. 3d at 129-30; *Vail*, 72 Ohio St. 3d at 282-83; *Chagrin Valley*, 2014-Ohio-5442, ¶ 23; *Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 680-81 (6th Cir. 2005).

3. Statements that Croce exceeded "norms" or "bounds".....31

Statements that Croce stepped outside generally accepted bounds of cancer research and bucked scientific consensus are non-actionable opinion because there is no way to objectively measure whether such norms and bounds exist, or where the line should be drawn if they do. *Vail*, 72 Ohio St. 3d at 282; *Roberts v. Murawski*, 2007-Ohio-3555, ¶ 19; *Adams v. Coughlin*, No. 2:14-cv-41, 2015 WL 300465, at *3 (S.D. Ohio Jan. 22, 2015).

II. PLAINTIFF'S "TAG ALONG" CLAIMS FOR FALSE LIGHT AND EMOTIONAL DISTRESS LIKEWISE FAIL AS A MATTER OF LAW FOR AT LEAST TWO REASONS.....33

A. Because The Defamation Claim Fails As A Matter Of Law, The Tag-Along Claims Based On The Same Publication Necessarily Fail As Well.....33

Where a plaintiff alleges defamation and the defamation claim fails as a matter of law, other purported causes of action for injury based on the same publication are equally barred. Thus, Croce's claims for false light and intentional infliction of emotional distress fail for the same reasons as the defamation claim. *Welling v. Weinfeld*, 113 Ohio St. 3d 464, 472 (2007); *Patrick v. Cleveland Scene Publ'g*, 582 F. Supp. 2d 939, 955 (N.D. Ohio 2008), *aff'd*, 360 F. App'x 592 (6th Cir. 2009).

B. Plaintiff In Any Event Has Not And Cannot Adequately Plead Essential Elements Of His Tag-Along Claims 34

It is an essential element of a claim for false light that "the false light in which the other was placed would be highly offensive to a reasonable person." *Welling*, 113 Ohio St. 3d at 473. Similarly, it is an essential element of a claim for IIED that the defendant's conduct was "extreme and outrageous." *Alahverdian v. Grebinski*, No. 3:13-cv-00132, 2014 WL 2048190, at *16 (S.D. Ohio May 19, 2014). In both respects, it is a threshold question of law for the court whether the defendants' alleged conduct meets these demanding standards. *Reamsnyder v. Jaskolski*, 10 Ohio St. 3d 150, 153 (1984); *Mann v. Cincinnati Enquirer*, 2010-Ohio-3963, ¶¶ 22-24.

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Coughlin,
No. 2:14-cv-41, 2015 WL 300465 (S.D. Ohio Jan. 22, 2015).....32

Alahverdian v. Grebinski,
No. 3:13-cv-00132, 2014 WL 2048190 (S.D. Ohio May 19, 2014).....34, 35

American Chemical Society v. Leadscope, Inc.,
133 Ohio St. 3d 366, 389 (2012).....15, 16, 17, 19

Ambro v. Holtec International,
No. 2:11-cv-173, 2012 WL 529584 (S.D. Ohio Feb. 17, 2012).....10, 21, 32

Andrews v. Stallings,
1995-NMCA-015, 119 N.M. 478, 892 P.2d 611.....36

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....8

Ashcroft v. Mt. Sinai Medical Center,
68 Ohio App. 3d 359 (1990).....14

Baxter v. Sandusky Newspapers, Inc.,
2012-Ohio-1233.....13, 14

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007).....8

Blesedell v. Chillicothe Telephone Co.,
811 F.3d 211 (6th Cir. 2016).....14

Blesedell v. Chillicothe Telephone Co.,
No. 2:13-CV-451, 2015 WL 1968870 (S.D. Ohio May 1, 2015).....13

Boddie v. Landers,
2016-Ohio-1410.....12

Bustos v. A & E Television Networks,
646 F.3d 762 (10th Cir. 2011).....12

Cadle Co. v. Schlichtmann,
123 F. App'x 675 (6th Cir. 2005).....30

Condit v. Clermont County Review,
110 Ohio App. 3d 755 (1996) 31

Connaughton v. Harte Hanks Communications, Inc.,
842 F.2d 825 (6th Cir. 1988) 16

Conway v. International Association of Heat & Frost Insulators & Asbestos Workers,
209 F. Supp. 2d 731 (N.D. Ohio 2002) 25

Curry v. Village of Blanchester,
2010-Ohio-3368 35

Early v. Toledo Blade,
130 Ohio App. 3d 302 (1998) 17, 24

Ferreri v. Plain Dealer Publishing Co.,
142 Ohio App. 3d 629 (2001) 23, 31

Hach v. Laidlaw Transit, Inc.,
No. 02 C 996, 2004 WL 2966946 (N.D. Ill. Nov. 24, 2004) 28

Haynes v. Alfred A. Knopf, Inc.,
8 F.3d 1222 (7th Cir. 1993) 30

Holley v. WBNS 10TV, Inc.,
149 Ohio App. 3d 22 (2002) 21

Johnson v. Campbell,
91 Ohio App. 483 (1952) 9

Johnson v. J.B. Hunt Transport, Inc.,
No. 3:09CV1352, 2010 WL 3069547 (N.D. Ohio Aug. 2, 2010) 15

Kanjuka v. MetroHealth Medical Center,
151 Ohio App. 3d 183 (2002) 21

Konica Minolta Business Solutions, U.S.A., Inc. v. Allied Office Products, Inc.,
724 F. Supp. 2d 861 (S.D. Ohio 2010) 9, 21

Krems v. University Hospitals of Cleveland,
133 Ohio App. 3d 6 (1999) 14, 23

Lauderback v. American Broadcasting Cos.,
741 F.2d 193 (8th Cir. 1984) 33

Lombardo v. Mahoney,
2009-Ohio-5826 35

Machleder v. Diaz,
801 F.2d 46 (2d Cir. 1986).....36

Manjarres v. Nalco Co.,
No. 09 C 4689, 2010 WL 918072 (N.D. Ill. Mar. 9, 2010).....32

Mann v. Cincinnati Enquirer,
2010-Ohio-3963.....34, 36

Masson v. New Yorker Magazine, Inc.,
501 U.S. 496 (1991).....10, 11, 12

McCollins v. Health Management Group,
No. 1:10-CV-1193, 2011 WL 1743419 (N.D. Ohio May 6, 2011).....34

McGee v. Simon & Schuster, Inc.,
154 F. Supp. 2d 1308 (S.D. Ohio 2001).....9, 20, 33

McKimm v. Ohio Elections Commission,
89 Ohio St. 3d 139 (2000).....21

Mendise v. Plain Dealer Publishing Co.,
69 Ohio App. 3d 721 (1990).....15, 16

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990).....28

Miller v. Currie,
50 F.3d 373 (6th Cir. 1995).....35

Miller v. Delaware County Commissioners,
No. 2:13-cv-501, 2015 WL 4593864 (S.D. Ohio July 30, 2015).....35

Murray v. Chagrin Valley Publishing Co.,
2014-Ohio-5442..... *passim*

Murray v. Knight-Ridder, Inc.,
2004-Ohio-821.....9

National Medic Services Corp. v. E.W. Scripps Co.,
61 Ohio App. 3d 752 (1989).....10

New England Health Care Employees Pension Fund v. Ernst & Young, LLP,
336 F.3d 495 (6th Cir. 2003).....3

Ollman v. Evans,
750 F.2d 970 (D.C. Cir. 1984).....27

Osborn v. Knights of Columbus,
401 F. Supp. 2d 822 (N.D. Ohio 2005).....14

In re Palmer,
555 B.R. 611 (Bankr. N.D. Ohio 2016).....35

Parry v. Mohawk Motors of Michigan, Inc.,
236 F.3d 299 (6th Cir. 2000).....10

Patrick v. Cleveland Scene Publishing,
582 F. Supp. 2d 939 (N.D. Ohio 2008).....33

Pope v. Chronicle Publishing Co.,
891 F. Supp. 469 (C.D. Ill. 1995).....36

Price v. Viking Penguin, Inc.,
881 F.2d 1426 (8th Cir. 1989).....30

Reamsnyder v. Jaskolski,
10 Ohio St. 3d 150 (1984).....34

Reilly v. Meffe,
6 F. Supp. 3d 760, 768 (S.D. Ohio 2014).....8

Roberts v. Murawski,
2007-Ohio-3555.....32

Roe ex rel. Roe v. Heap,
2004-Ohio-2504.....35

Sabino v. Woio, L.L.C.,
2016-Ohio-491.....16, 17

Scholz v. Delp,
41 N.E.3d 38 (Mass. 2015).....30

Scott v. News-Herald,
25 Ohio St. 3d 243 (1986).....26, 29, 30

Sethi v. WFMJ Television Inc.,
134 Ohio App. 3d 796, 808 (1999).....25

Sheppard v. Stevenson,
1 Ohio App. 2d 6 (1964).....10

SPX Corp. v. Doe,
253 F. Supp. 2d 974 (N.D. Ohio 2003).....26, 27, 29

Strussion v. Akron Beacon Journal Publishing Co.,
No. 20833, 2002 WL 1371166 (Ohio Ct. App. June 26, 2002) 14

Susan B. Anthony List v. Driehaus,
779 F.3d 628 (6th Cir. 2015) 9, 11, 15

Sweitzer v. Outlet Communications, Inc.,
133 Ohio App. 3d 102 (1999) 21, 23

Sygula v. Regency Hospital of Cleveland East,
2016-Ohio-2843 9

Tri-County Concrete Co. v. Uffman-Kirsch,
No. 76866, 2000 WL 1513696 (Ohio Ct. App. Oct. 12, 2000) 31

Vail v. Plain Dealer Publishing Co.,
72 Ohio St. 3d 279 (1995) ..... *passim*

Vogel v. Sekulich,
No. 16105, 1993 WL 347096 (Ohio Ct. App. Sept. 15, 1993) 24

Western & Southern Life Insurance Co. v. JPMorgan Chase Bank, N.A.,
54 F. Supp. 3d 888, 898 (S.D. Ohio 2014) 3

Wait v. Beck's North America, Inc.,
241 F. Supp. 2d 172 (N.D.N.Y. 2003) 33

Wampler v. Higgins,
93 Ohio St. 3d 111 (2001) ..... *passim*

Welling v. Weinfeld,
113 Ohio St. 3d 464 (2007) 33, 34

Wilson v. Wilson,
2007-Ohio-178 35

United States ex. rel. Wu v. Thomas Jefferson University,
No. 97-3396 (E.D. Pa. June 6, 2000) 3

Other Authorities

FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) 8

Merriam-Webster, Webster's Dictionary (2016) 32

PRELIMINARY STATEMENT

This defamation suit arises out of an article published on March 8, 2017, by The New York Times Company (together with the four individual defendants, "The Times") titled, "Years of Ethics Charges, but Star Cancer Researcher Gets a Pass" (the "Article"). In the Article, The Times recounted a history of controversy surrounding the scientific research and practices of a prominent scientist, Dr. Carlo M. Croce, and how that specific controversy is emblematic of wider issues in the scientific community. Those issues include the lack of direct government oversight of federally-funded scientific research, the conflicts of interest inherent in a system that relies on academic institutions to investigate their own researchers, evidence of widespread errors in the use of a routine scientific lab technique, and the impact of these issues on academic publishing and scientific integrity. It was an in-depth report on a complex issue with which lay readers may not have been familiar—but that implicates significant public interests including federal funding and public health.

This is precisely the kind of journalism the First Amendment and the Ohio Constitution are intended to protect and foster. Nevertheless, Croce now alleges that virtually every statement about him in the Article that is not laudatory is false and defamatory. Moreover, Croce premises a large part of his Complaint on a letter a reporter sent to him and to The Ohio State University ("OSU")—a letter designed to allow them to respond to criticism and to make sure the Article was accurate. Such reportorial diligence should be encouraged, not censured. As The Times demonstrates below, the Article, and the related communications to which Croce objects, are classic examples of reports that accurately present charges and counter-charges on matters of significant public concern and, as a result, they are not actionable as a matter of law for multiple reasons.

FACTUAL BACKGROUND[1]

Croce is an internationally recognized scientist with more than 45 years of experience and a high-visibility position in the field of cancer research. Compl. ¶¶ 1-4, May 10, 2017, Doc. No. 1. He is the director of the Institute of Genetics and of the Human Cancer Genetics program at OSU's Comprehensive Cancer Center, and professor and chair of the Department of Molecular Virology, Immunology, and Medical Genetics at OSU's School of Medicine. *Id.* ¶ 8. He is the recipient of more than sixty-four awards for his work, *id.* ¶ 26, and claims to be a named author of more than 1,000 publications, of which he claims to be the first- or last-named author (suggesting a significant role in the publication) of more than 560, *id.* Ex. B at 1, although in connection with this lawsuit, he asserts a substantive role in "only" 398 scientific research papers and 150 scientific reviews or comments, *id.* ¶¶ 31-32. By either measure, according to his Complaint, he is among "the most cited scientists in the world . . . and the most cited Italian scientist ever." *Id.* Ex. B at 9. As part of his role at OSU, Croce is responsible for overseeing and administering millions of dollars in public funding for scientific research. *Id.* Ex. C at 1.

I. THE PRE-EXISTING CONTROVERSY REGARDING CROCE'S RESEARCH

Perhaps not surprisingly, given his prominence, Croce has attracted his share of controversy over the years, including numerous allegations of academic misconduct, some of which attracted widespread attention in the scientific community. *See, e.g.*, Declaration of Matthew E. Kelley ("Kelley Declaration") Ex. B (*When does 'overlap' become plagiarism? Here's what PLOS ONE decided*, RETRACTION WATCH (Sept. 16, 2016).[2] Although Croce

[1] As is required, for purposes of this preliminary motion only, defendants accept as true the well-pleaded factual allegations of the Complaint.

[2] The Court is entitled on this motion to take judicial notice of the existence of this article and the other public records cited by The Times as proof of the existence of a public controversy (but not

Continued on following page . . . .

vigorously denies that any of the complaints about him have any merit, he does not dispute that, as recounted in the Article, these controversies have included:

- In the 1990s, prior to joining OSU, Croce and a colleague faced federal allegations of submitting false claims for payment of grant money. Thomas Jefferson University, where Croce worked at the time, paid $2.6 million to the federal government to settle the claims, without admitting wrongdoing. Kelley Decl. Ex. C at 12 (Order, *United States ex. rel. Wu v. Thomas Jefferson Univ.*, No. 97-3396 (E.D. Pa. June 6, 2000)).

- In 2007, an official at the NIH, the federal grant-giving authority, alleged that a grant proposal by Croce was plagiarized from a junior colleague. OSU opened an investigation and ultimately determined that no wrongdoing had occurred. Compl. Ex. C at 7-8.

- In the late 2000s, accusations were made that an official at Croce's lab used grant money for personal trips abroad and engaged in other misconduct. OSU opened an investigation and ultimately determined that no wrongdoing had occurred. *Id.* at 8.

- In the late 2000s, a former research colleague accused Croce of scientific misconduct, including using the researcher's work without credit. OSU opened an investigation and ultimately determined that no wrongdoing had occurred. *Id.* The Retraction Watch website, which reports on corrections of scientific papers, quoted Croce as saying that he had been cleared of a plagiarism accusation by OSU, although it is unclear to which investigation he was referring. Kelley Decl. Ex. B at 2.

- In 2013, an anonymous critic, known by the pseudonym "Clare Francis," contacted OSU and federal authorities at the Office of Research Integrity ("ORI"), alleging falsified data in more than 30 of Croce's papers. Kelley Decl. Ex. D (*Retractions 3 and 4 appear for researcher facing criminal probe; OSU co-author won't face inquiry*, RETRACTION WATCH (May 5, 2014); *see also* Compl. Ex. C at 8-9. ORI opened an investigation in August 2013 into the merits of those claims. *Id.*

- Beginning in 2014, Dr. David A. Sanders, a virologist at Purdue University, contacted academic journals where more than 20 of Croce's papers were published, alleging plagiarism and falsified data. *See* Kelley Decl. Ex. E (Complaint, *Croce v. Sanders*, 2:17-cv-00338-JLG (Ohio Ct. Comm. Pl. April 20, 2017) (defamation action against Sanders)).

Continued from previous page . . . .

as proof of the matters asserted within the articles or records). *See, e.g.*, *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *W. & S. Life Ins. Co. v. JPMorgan Chase Bank, N.A.*, 54 F. Supp. 3d 888, 898 (S.D. Ohio 2014).

- Croce's published papers also have been the subject of criticism on the professional website Pubpeer. Compl. Ex. A at 1, Ex. B at 2-3 (acknowledging criticisms).

Although he attempts to distance himself from responsibility, *id.* ¶¶ 31, 150-53, Croce does not dispute that retractions or corrections have been made to almost two dozen papers to which his name is attached. Even under Croce's own definition of what constitute "his" papers, he concedes that a dozen have been the subject of corrections and one has been retracted. *Id.* ¶¶ 31-36. Another six papers for which Croce was a "middle author" – neither the first nor the last name on the list of coauthors – have been corrected. *Id.* Ex. B at 4-8. As to these conceded errors, Croce asserts that they neither were deliberate nor affected the validity of his research findings. *Id.* ¶¶ 34-39.

II. THE LETTER, THE ARTICLE AND THE INTERVIEW AT ISSUE

In 2016, defendants James Glanz and Agustin Armendariz, reporters for The Times, began an investigation into the ongoing public controversy regarding Croce's work. Compl. ¶¶ 40-41; Ex. A. Defendants dispute Croce's characterization of Glanz's communications with Croce in Fall 2016 but, insofar as relevant to this motion, Glanz traveled to Columbus in late October 2016 to interview Croce. *Id.* ¶ 41. On October 2, they dined together and, on October 3, Croce led Glanz on a tour of his laboratory at OSU. *Id.*

Subsequently, on November 23, Glanz contacted Croce and, at Croce's direction, Chris Davey, an Assistant Vice President for media relations at OSU, by letter, seeking additional information regarding various allegations that had been made against Croce and OSU, and regarding Croce's work and career more generally. *See* Compl. ¶¶ 47-60 & Ex. A (the "Letter"). Croce responded to the Letter through legal counsel on January 25, 2017. *See* Compl. Ex. B (the "Response"). The specific substance of the Letter and the Response are addressed below as it becomes relevant.

On March 8, 2017, The Times published the Article. The Article begins by explaining to its lay readers Croce's stature in the scientific community and within OSU, the accolades that he has received, and the considerable amount of public funds that have been invested in his research. Compl. Ex. C at 1. It then observes that, "[w]ith that flamboyant success has come a quotient of controversy." *Id.* That controversy included, first, that some scientists questioned the scientific importance of his research and, second, that numerous "allegations of data falsification and other scientific misconduct" had been made, "according to federal and state records, whistle-blower complaints and correspondence with scientific journals." *Id.* at 1-2. Many of these allegations "involve[d] the improper manipulation of a humble but universal lab technique called western blotting." *Id.* at 2. As a result of the allegations, academic journals had issued corrections, retractions and editors notices for "at least 20" of "Dr. Croce's papers." *Id.*

The Article then connects the specific controversy about Croce to a broader context: "Dr. Croce's story is a case study of the complex and often countervailing forces at work as science seeks to police itself." *Id.* at 2. Those "forces" were that allegations of fraud had increased within the field, but that the scientific community relied on its institutions to police their own researchers and administrators, an inherent conflict of interest. *Id.* This theme is interwoven throughout the Article.

The Article next provides background regarding Croce, including that he does not fit the stereotype of a Midwestern scientist: He disdains what he called the lack of culture in Columbus and Ohio State Football, and he has a private collection of Italian Renaissance and Baroque paintings. *Id.* at 5. The Article also discusses Croce's controversial involvement in the 1990s with the Council for Tobacco Research ("CTR"), and his acceptance of grant money from the organization, which was funded by the tobacco industry. *Id.* Essentially, Croce's research into

the causes of cancer was supported by sales of cigarettes, one of the leading causes of cancer. In addition, as the Article explains, the tobacco industry attempted to exploit the credibility of scientists like Croce to give credibility to the industry. *Id.* at 6.

The Article then returns in greater detail to some of the allegations made against Croce over the years, and OSU's response to those complaints. *Id.* at 7-9. The Article explains that the ORI's powers are limited and it cannot conduct fully independent investigations; it relies on the institution. *Id.* The Article details the significant conflicts of interest likely to arise where institutions such as OSU derive substantial financial and reputational benefits from the very researchers they are tasked with investigating. *Id.* at 9-10. The Article discusses an unrelated case at OSU, and how that case also highlighted some of those potential conflicts. *Id.* at 10-11.

The Article concludes with a section titled, "Raising Larger Questions," in which the authors discuss why errors in western blot diagrams of the kind identified in certain of Croce's papers are significant. *Id.* at 12. The Article then ties the controversy regarding Croce's work back to the larger issue of how to better detect and address errors or misconduct in scientific research, because "[c]oncerns about falsified data in the scientific literature run far deeper than Dr. Croce's papers." *Id.* at 13-14. The Article discusses a survey of 20,000 biomedical research papers that identified almost 800 manipulated images and the "distressing" impact such widespread errors could have. *Id.* Despite the fact that those errors were reported to journals, the majority of publishers had taken no action. *Id.* Finally, the Article closes by reporting that, for one of Croce's papers in which potential errors had been identified by The Times, the journal was "planning to issue a notice to readers about concerns regarding . . . the paper." *Id.* at 15.

Following publication of the Article, on March 9, 2017, reporter Glanz was interviewed by WOSU-FM, a National Public Radio station. Compl. ¶ 163. During the interview, Glanz

discussed the Article, the prior allegations against Croce, and the inherent conflicts of an institution, such as OSU, investigating allegations against its own researchers and administrators. *Id.* Asked to summarize the nature of the allegations against Croce, Glanz replied:

> Well, the allegations are that in the lab he oversees, and on papers on which he's a co-author, there are call them fabricated figures. They're duplications of data from unrelated experiments used to prove a point in another experiment. I think that's probably at the center of things and then there's some other ethics charges including plagiarism and misappropriation of grant money and things like that. But it's really the data manipulation that's at the center of the allegations.

Kelley Decl. Ex. A at 2:21-3:7 (transcript of WOSU-FM interview with J. Glanz). The radio host noted that Croce's lawyers had released a statement saying that any mistakes were "honest errors." *Id.* at 5:3-7. The broadcast also included an excerpt from an interview with OSU President Michael Drake, who said that OSU had engaged outside experts to investigate the allegations in the Article, and that they had concluded OSU had properly followed its policies. *Id.* at 3:17-23.

III. THE COMPLAINT IN THIS ACTION

Croce filed his 223-paragraph Complaint in this action on May 10, 2017. It does not appear useful to recount in detail all of his allegations, which are addressed below as relevant. Suffice to say that Croce apparently alleges that fourteen statements in the Article, Compl. ¶¶ 71-149, one statement in the Interview, *id.* ¶ 163, and five statements in the Letter, *id.* ¶¶ 51-56,[3] communicated to readers purportedly false and defamatory implications about him, principally the over-arching implication that he "has for years conducted fraudulent science and that the

[3] The Complaint does not number the specific statements in the Letter that are the basis for plaintiff's claims. *See* Compl. ¶¶ 51-56. For the convenience of the Court, Defendants will refer to these statements as Statements 17, 18, 19, 20 and 21.

scientific conclusions" in his papers "are fraudulent and false," *id.* ¶ 154. Based on these allegedly false implications, Croce purports to state a claim for defamation (Count I), false light invasion of privacy (Count II), and intentional infliction of emotional distress (Count III).

Because Croce challenges as defamatory so many separate statements in the publications at issue, and because multiple grounds for dismissal apply to some but not all of the statements, for the convenience of the Court, The Times attaches to this memorandum an Appendix consisting of a chart that lists the challenged statements and identifies the principal grounds for dismissal raised below by The Times as to each statement.

ARGUMENT

A complaint is properly dismissed if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The factual allegations must be enough to raise the claimed right to relief above the speculative level and to create a reasonable expectation that discovery will reveal evidence to support the claim. *Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 555–56. "Despite [a] liberal pleading standard, the 'tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Reilly v. Meffe*, 6 F. Supp. 3d 760, 768 (S.D. Ohio 2014) (quoting *Iqbal*, 556 U.S. at 678). Here, it is apparent

from the Complaint and from related documents of which the Court may take judicial notice, that Croce cannot state any plausible claim for relief.

I. PLAINTIFF'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW FOR MULTIPLE INDEPENDENT REASONS

In Count I, Croce purports to state a claim for defamation based on statements in the Article, the Letter, and the radio Interview. Under Ohio law, to establish his claim, Croce

> must show (1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement.

Susan B. Anthony List v. Driehaus, 779 F.3d 628, 632-33 (6th Cir. 2015) (citation omitted).

Ohio recognizes two species of defamation, *per se* and *per quod*. Croce expressly limits his claim to one for defamation *per se*. Compl. ¶¶ 202-03. He therefore must show that the harm to his reputation is obvious from the face of the challenged statements. *Konica Minolta Bus. Sols., U.S.A., Inc. v. Allied Office Prods., Inc.*, 724 F. Supp. 2d 861, 870 (S.D. Ohio 2010) (Graham, J.); *Sygula v. Regency Hosp. of Cleveland E.*, 2016-Ohio-2843, ¶¶ 16-17, *appeal not allowed*, 2016-Ohio-7199. "In order for a remark to be considered defamatory *per se*, it must consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, impute some loathsome or contagious disease which excludes one from society, or tend to injure one in his trade or occupation." *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1314 (S.D. Ohio 2001) (citation and internal marks omitted). Whether a challenged statement is actionably defamatory is a question of law for the court, appropriately considered on a motion to dismiss. *Id.*

Significantly, because he alleges defamation *per se*, Croce must show that the challenged statements are susceptible of only one meaning, and that meaning must be opprobrious. *Murray*

v. Knight-Ridder, Inc., 2004-Ohio-821, ¶ 31 ("If a statement has more than one interpretation, it cannot be defamatory per se."); *see also, e.g.*, *Johnson v. Campbell*, 91 Ohio App. 483 (1952). Moreover, Croce cannot use innuendo to aver a fact, enlarge, extend or restrict the natural import of the language used in the challenged publication. *E.g.*, *Ambro v. Holtec Int'l*, No. 2:11-cv-173, 2012 WL 529584, at *7 (S.D. Ohio Feb. 17, 2012); *Sheppard v. Stevenson*, 1 Ohio App. 2d 6 (1964).

A. Plaintiff's Own Allegations Demonstrate That Twelve Of The Challenged Statements Are Substantially True

Although the entire defamation claim should be dismissed for each of the independent reasons set forth in Part I.B. below, there is a fundamental, threshold reason why twelve of the allegedly defamatory statements are non-actionable as a matter of law: They are true.[4] These twelve statements include: the number of papers that required correction or retraction (Statement 14); the true statement that Croce blamed others for those errors (Statements 6 & 7); and the accurate account of criticism of Croce's work by others in his field (Statements 3-5, 11-13, and 16-18).

It is an essential element of his defamation claim that Croce plead and prove that each challenged statement is false; there is no liability for speaking the truth. *Nat'l Med. Servs. Corp. v. E.W. Scripps Co.*, 61 Ohio App. 3d 752, 755 (1989); *Parry v. Mohawk Motors of Michigan, Inc.*, 236 F.3d 299, 312 (6th Cir. 2000). Moreover, a statement need not be exactingly accurate in every minute detail to be considered true, because "[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge [is] justified." *Masson*

[4] To be clear, The Times is confident that it could demonstrate on summary judgment that all of the challenged statements are accurate. Even at this preliminary stage, however, at which the Court is required to accept as true Croce's well-pleaded factual allegations, it is clear as a matter of law based exclusively on his *own* allegations that twelve of the statements are true.

v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (citation and internal marks omitted). Put differently, the question is whether the published statement would "have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation and internal marks omitted). Or, as the Sixth Circuit has put it, "it is enough that the statements had some truth, were substantially true, or were subject to differing interpretations." *Driehaus*, 779 F.3d at 633. As the Court of Appeals emphasized, "[t]his is a low threshold." *Id.*

First, Croce contends it was false to have stated that the number of "corrections, retractions and editor's notices" for "Dr. Croce's papers" "has ballooned to at least 20." Compl. ¶ 149 (Statement 14). Croce, however, admits that one of "his" papers has been retracted. *Id.* ¶ 34 & Ex. B at 1, 7-8. Further, he admits that, of the "only Research Papers that can honestly be called 'Dr. Croce's papers,'" nine have been the subject of corrections because of errors in figures, and three of them "have been corrected for 'text overlap.'" *Id.* ¶¶ 31 -36; *see also id.* Ex. B at 1 (admitting that, "of the 560+ publications for which Dr. Croce is a first or last author, we are aware of corrections with respect to fewer than 2%" of them."). Thus, in his Complaint Croce admits to *no fewer than 13 corrections* to "his" papers. Further, Croce's counsel admitted that one paper on which he is listed as a "middle" co-author has been corrected, *id.* Ex. B at 4-5; that three others have been retracted, *id.* at 7; and that, pursuant to a "written Action Plan" imposed by OSU after one of the university's investigations, corrections have been published regarding another two papers, *id.* at 8. In sum, Croce and his counsel have expressly conceded in the Complaint that *19* papers that list Croce as an author have been corrected or retracted – more than two-thirds of them listing him as first- or last-named author.[5]

[5] Croce's contention that papers on which he is neither the first- nor last-named author cannot properly be called "his," Compl. ¶¶ 150-51, is a classic red herring. At most, whether it is

Continued on following page . . . .

Given these pleaded facts, there indisputably is "some truth" to the assertion that at least 20 of the papers that bear Croce's name have been corrected or retracted. Whether the actual number is 19, as Croce himself admits, or at least 20, which the Article says, is immaterial: One flawed paper more or less would not cause reasonable readers to take a different view of the matter. *See Masson*, 501 U.S. at 517; *Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) ("A report that the defendant committed 35 burglaries when he actually committed 34 isn't enough to warrant relief."); *Boddie v. Landers*, 2016-Ohio-1410, ¶¶ 23-25 (overall gist of report that plaintiff was guilty of domestic violence was substantially true "[e]ven if, as appellant contends, [the victim] did not call 911 34 times and appellant did not injure [her] face and spleen"), *appeal not allowed*, 2016-Ohio-5585. Quite simply, regarding Statement 14, Croce has pleaded himself out of court.

Similarly, Croce's own pleading likewise demonstrates the substantial truth of Statements 6 and 7 – the Article's recounting of Croce's denials of wrongdoing and his placement of blame for any errors on others. Compl. ¶¶ 107 & 110. In the letter from Croce's counsel attached to the Complaint, he asserts that "Dr. Croce has not engaged in 'misconduct,'" and characterizes the criticism of Croce by other scientists as "completely false and defamatory." *Id.* Ex. B at 3 & 7. Croce's counsel also acknowledges that there was "text overlap" in some articles on which Croce was listed as an author, but attributes those errors to specific collaborators who are not "native English speaker[s]." *Id.* at 4-5, 6. Croce's counsel also states that, regarding corrected or

---

Continued from previous page . . . .

accurate to attribute all papers that carry his name to Croce is an issue that is "subject to different interpretations," and therefore it is not materially false to characterize them one way or the other. *Driehaus*, 779 F.3d at 633. Moreover, even accepting Croce's premise, failing to mention that he was a "middle author" on one-third of the flawed papers would not affect the meaning derived by a reasonable reader and therefore does not render the statement actionably false.

retracted papers in which he was neither the first nor the last author, "the research described typically did not take place in his lab or under his supervision," and that "if the research was conducted in someone else's lab, Dr. Croce relies on that lab to prepare accurate figures." *Id.* at 2; *see also id.* at 7. Any reasonable person would understand these pre-publication statements as Croce "den[ying] wrongdoing" and "plac[ing] the blame for any problems" on others, which is precisely what The Times said in Statements 6 and 7. Compl. Ex. C at 3. Accordingly, these statements are literally true and therefore non-actionable.

Furthermore, Croce alleges to be false various allegations made by third parties about him that are reported in the Article, or referenced in the Letter and the radio Interview. Compl. ¶¶ 51-52 & Ex. A at 1 (Statements 16 & 17: references in Letter to "claims" made by others about Croce) and ¶¶ 88, 98, 102, 132, 136, 149, 163 (Statements 3-5, 11-13, and 16). As this Court has held, however, a report that third parties have *made* allegations – as distinct from affirmatively asserting those allegations as if they were established fact – is not materially false as a matter of Ohio law. *Blesedell v. Chillicothe Tel. Co.*, No. 2:13-CV-451, 2015 WL 1968870, at *24 (S.D. Ohio May 1, 2015) (Graham, J.), *aff'd*, 811 F.3d 211 (6th Cir. 2016); *see also Murray v. Chagrin Valley Publ'g Co.*, 2014-Ohio-5442, ¶ 12; *Baxter v. Sandusky Newspapers, Inc.*, 2012-Ohio-1233, ¶¶ 39-41.

In *Blesedell*, a fired employee sued his former employer's human resources manager for defamation for telling law enforcement and the worker's union that the worker had been accused of selling drugs. 2015 WL 1968870 at *23-24. This Court held that the statements were not false because another worker had indeed accused the plaintiff of selling drugs – a fact the plaintiff himself had relayed to the investigating officer before his manager said the same thing in a separate interview. *Id.* at *23. The Sixth Circuit affirmed, holding that, "[b]ecause [the

manager] truthfully reported that an individual made an allegation about Blesedell, Blesedell cannot prove defamation." *Blesedell v. Chillicothe Tel. Co.*, 811 F.3d 211, 225 (6th Cir. 2016). Likewise, the state appellate court agreed there was no falsity in a newspaper's report that a county prosecutor's brother had alleged that the prosecutor had used cocaine, noting that the article included denials of that accusation by the prosecutor and others. *Baxter*, 2012-Ohio-1233 ¶¶ 39-41. The court observed that the author of the article "did not indicate that [the brother's] statements were actually true; he just recounted the allegations" in the course of informing readers about a state report that contained similar allegations of drug use. *Id.* ¶ 40. So, too, here – The Times cannot be liable for defamation for truthfully stating the fact – uncontested by Croce – that allegations had been *made* against him. And Croce cannot point to any language in the Article, the Letter or the radio Interview in which The Times adopted or endorsed the allegations as representing established fact.

Further, it is of no help to Croce to assert that these true statements nonetheless convey or contribute to a defamatory implication, such as the alleged "cumulative import" of the challenged statements that Croce engaged in wholesale scientific fraud. Compl. ¶ 154. Where the overt statements are factually accurate "Ohio does not recognize libel through implied statements." *Krems v. Univ. Hosps. of Cleveland*, 133 Ohio App. 3d 6, 12 (1999) (citing *Ashcroft v. Mt. Sinai Med. Ctr.*, 68 Ohio App. 3d 359 (1990)); *Osborn v. Knights of Columbus*, 401 F. Supp. 2d 822, 828 (N.D. Ohio 2005) (same). Consequently, courts applying Ohio law repeatedly have rejected claims for defamation by implication where the overt statements are true. *See, e.g., Strussion v. Akron Beacon Journal Publ'g Co.*, No. 20833, 2002 WL 1371166, at * ¶ 24 (Ohio Ct. App. June 26, 2002) (rejecting claim that truthful report that plaintiffs were cooperating with Medicaid fraud investigation gave rise to defamatory implication of criminal

conduct); *Osborn*, 401 F. Supp. 2d at 828 (dismissing defamation claim where truthful statements "arguably impliedly defame[d]" plaintiff but "[b]ecause absent implication, the statement itself is not libelous, plaintiff's defamation claim on the first statement is not actionable"); *Johnson v. J.B. Hunt Transp., Inc.*, No. 3:09CV1352, 2010 WL 3069547, at *3 n.3 (N.D. Ohio Aug. 2, 2010) (granting summary judgment to defendant on arguably impliedly defamatory statement because "Ohio does not recognize libel through implied statements" (citation omitted)).

To the extent that Count I for defamation is premised on these twelve statements, therefore, it should be dismissed on the ground that each is demonstrably true or substantially true as a matter of law based on Croce's own pleading.

B. Plaintiff Cannot Meet His Burden Of Showing That The Challenged Statements Are Defamatory For Two Independent Reasons

As noted, it is an essential element of Croce's claim that he demonstrate that the statements on which his claim is based are properly characterized as defamatory *per se*. *E.g.*, *Driehaus*, 779 F.3d at 632-33. He cannot do so, because Ohio law protects statements that are, in their full context, not defamatory, and those that are subject to a non-defamatory, innocent construction. The complaint therefore should be dismissed for its failure to meet this basic requirement of Ohio defamation law.

1. The overall context of the challenged statements renders them non-defamatory as a matter of law

Context is the key factor in determining whether, as a matter of law, a challenged statement is defamatory. *Am. Chem. Soc'y v. Leadscope, Inc.*, 133 Ohio St. 3d 366, 389 (2012); *Mendise v. Plain Dealer Publ'g Co.*, 69 Ohio App. 3d 721, 726 (1990). Courts making this legal determination must "review the statement under the totality of the circumstances" in considering

whether a reasonable reader would interpret it as defamatory. *Id.* In other words, under Ohio law,

> [t]he words of the publication should not be considered in isolation, but rather within the context of the entire [publication] and the thoughts that the [publication] through its structural implications and connotations is calculated to convey to the reader to whom it is addressed.

Am. Chem. Soc'y, 133 Ohio St. 3d at 396-97 (quoting *Connaughton v. Harte Hanks Commc'ns, Inc.*, 842 F.2d 825, 840 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989)). The "totality of the circumstances" include the type of publication and the audience's expectations about what they are reading, hearing or viewing. *See Sabino v. Woio, L.L.C.*, 2016-Ohio-491, ¶¶ 49-64 (considering images, audio and television news broadcast as a whole, graphic stating "Child Porn Found on Computer" did not defame plaintiff). Thus, the overall context in which a statement appears can be sufficient to render non-defamatory a statement that, if viewed in isolation, might be considered defamatory. *See Chagrin Valley*, 2014-Ohio-5442, ¶¶ 20-21 ("taken in isolation," statement that plaintiff is "real liar" could be defamatory, but it was not defamatory in context).

- **The Article and Interview**

Taking the Article first, under Ohio law, statements published as part of a news organization's "balanced report of both parties' arguments and defenses" are not defamatory as a matter of law – and that is so even where the defamation defendant is the speaker quoted in the article, not the news organization that published the article. *Am. Chem. Soc'y*, 133 Ohio St. 3d at 390-91. In that case, a business publication printed an article about a trade secrets lawsuit between the American Chemical Society and a competing company founded by former employees; the company filed a counterclaim for defamation against the Society over, among other things, statements attributed to the Society in the news article. *Id.* The Ohio Supreme

Court held that the Society's statements were not actionable as defamation because they were presented in the context of a news report in which the publication summarized the dispute and "gave the parties an opportunity to comment on the case and, in fact, both parties took advantage of that opportunity." *Id.*

Ohio's intermediate appellate courts likewise have held that balanced news reports are not defamatory as a matter of law. For example, a newspaper article was held non-actionable where it included both criticism of the plaintiff police officer's inattention to a stabbing victim and the facts that she had been cleared of neglect of duty charges and that officials said she did not cause the victim's death. *Early v. Toledo Blade*, 130 Ohio App. 3d 302, 325 (1998). The court in *Sabino* likewise held that, despite the "sensationalistic tone" of the broadcast at issue and an associated graphic that said porn was "found" on plaintiff's computer, it was not defamatory in part because it repeatedly stated that the plaintiff teacher was only suspected of having child pornography on his computer and the school's investigation was ongoing. 2016-Ohio-491, ¶¶ 54-64.

Here, the overall context of the Article renders non-defamatory as a matter of law all of the specifically challenged statements within it or associated with it (Croce specifically refers to the headline and the social media posts about the Article, *see* Compl. ¶¶ 77-80). The individual statements challenged by Croce are part of, or direct readers to, a balanced news report that describes (accurately) prior public criticisms of or allegations about Croce, his response, and discussion of the evidence advanced by each side in support of their respective positions. *See generally* Compl. Ex. C. For example, the Article repeatedly notes that Croce has "never been penalized for misconduct, either by federal oversight agencies or by Ohio State," during his time with OSU. Compl. Ex. C at 2; *see also, e.g.*, *id.* at 3 (quoting statement by Croce's counsel that

any mistakes in figures in articles in which Croce was a co-author were "honest errors"); *id.* at 7-8 (describing several OSU investigations that "cleared" Croce); *id.* at 11 (reporting that OSU official had told one frequent critic of Croce that continued complaints would be "frivolous allegations and a waste of university and state resources.").

The same is true of reporter Glanz's statement during the radio Interview. The radio station itself presented a balanced news report in which the interviewer states that OSU never penalized Croce for any alleged misconduct, reads from the statement by Croce's counsel that any errors in figures were "honest mistakes," and plays an excerpt from an interview with OSU's Michael Drake in which the president said a follow-up investigation found the university acted properly regarding its probes of the allegations against Croce. Kelley Decl. Ex. A (transcript). For his part, during the Interview, Glanz clearly and repeatedly stated that he was describing allegations made by others against Croce, without adopting them himself. *Id.* at 2:21, 3:2-7, 5:13-24, 6:1-11.

In short, the overall gist of the Article and the Interview at issue in this case is that multiple accusations of scientific misconduct have been made against Croce, who has denied wrongdoing and has been cleared by multiple investigations undertaken by OSU. Under settled Ohio law, therefore, the Article and Interview are non-defamatory as a matter of law.

- **The Letter**

The same principles also apply to the Letter that The Times sent to Croce and Davey prior to publication of the Article. The Letter is not defamatory in its full context because it merely presents its questions and assertions for which the reporter seeks comment without endorsing their accuracy.

Ohio courts recognize that balanced news accounts are not the only context that negates defamatory meaning. In *American Chemical Society*, the Ohio Supreme Court reversed a defamation judgment premised on, among other things, a memorandum the Society had circulated to its employees regarding the trade secrets litigation in which it was involved. 133 Ohio St. 3d at 390. Despite derogatory statements about the defamation plaintiff, the memorandum was not defamatory in context and under the totality of the circumstances because it "was simply a directive to all employees from [the society's] legal administration manager not to speak about the litigation" that summarized the society's position in the litigation. *Id.* The Court said that "[i]t was understandable and reasonable for the legal administration manager to disseminate an internal memorandum regarding an important legal matter to employees," and, in that context, the memorandum was not actionable. *Id.*

The context of reporter Glanz's Letter to Croce and Davey negates any inference that the statements in the Letter were meant to be taken as assertions of established fact and renders it non-defamatory as a matter of law. Glanz prefaces the Letter by stating that it is comprised of "questions I would like to put urgently to you as part of an article I am preparing." Compl. Ex. A at 1. The first paragraph of the letter repeatedly and exclusively refers to the rest of the document as a list of "questions" for which he is seeking answers or responses. *Id.* Even the specific passages Croce challenges themselves make clear that Glanz is seeking Croce's and OSU's side of the story: He asks whether "Croce disagree[s] with the following claims made in many of these cases," *id.*; he requests a response to Sanders' assertion "that Dr. Croce is knowingly engaging in scientific misconduct and fraud," *id.*; he asks why Croce participated in the CTR grant process, *id.* at 4; he asks why "Croce [had] not renounced those initial claims" about the FHIT gene, *id.*; and he asks whether Croce was attempting to "cover up the almost

complete failure of this line of research," *id.* Notably, Glanz did not ask, "why did you engage in a cover up," he inquired *whether* Croce had done so. In context, it is clear that Glanz is asking questions – albeit quite pointed ones – and presenting criticism raised by others to obtain Croce's and OSU's response to those questions and statements. This context negates any defamatory meaning from the Letter that might otherwise arise from any one of the statements if made in isolation.

To hold otherwise would render it nearly impossible for news organizations to report on on-going public controversies. Like the routine intra-company memorandum in *American Chemical*, the sending of the Letter was a routine practice for Glanz in the course of reporting – in this context, to gather information to provide a balanced report to The Times's readers. Asking pointed questions and conveying allegations made by others to obtain a subject's response are, to borrow words from the *American Chemical* court, an "understandable and reasonable" journalistic method to gather the information necessary to provide the kind of balanced reports that are shielded by Ohio law.

When the Article, the Interview and the Letter each are considered in their full context, none of the statements Croce challenges are actionable because it is not reasonable for readers to construe them in the defamatory sense Croce alleges – *i.e.*, that it has been established that Croce "for years conducted fraudulent science" and that his scientific conclusions "are fraudulent and false." Compl. ¶ 154. For this reason alone, the defamation claim in Count I should be dismissed with prejudice.[6]

[6] Even when viewed individually, most or all of the challenged statements cannot properly be characterized as defamatory *per se*, for any of several reasons. For some of the statements, it is not obvious from the face of the language used that they would pose injury to Croce in his occupation, as Ohio law requires. *McGee*, 154 F. Supp. 2d at 1314. For others, it requires

Continued on following page . . . .

2. The challenged statements also are non-actionable as a matter of law under Ohio's "innocent construction rule"

For the foregoing reasons, Count I should be dismissed in its entirety on the basis that the challenged publications are non-defamatory because they are balanced reports on, or questions regarding, an on-going controversy. In addition, a separate principle of Ohio law - the "innocent construction rule" - requires dismissal of Croce's defamation claim.

Ohio's "innocent construction rule," as this Court has noted, "bars recovery for statements susceptible of two meanings, one innocent and one potentially defamatory." *Konica Minolta*, 724 F. Supp. 2d at 870–71 (quoting *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App. 3d 183, 193 (2002)). Under this rule, the innocent interpretation *must* be adopted if it is a reasonable one, even if a defamatory meaning could also reasonably flow from the statement. *McKimm v. Ohio Elections Comm'n*, 89 Ohio St. 3d 139 (2000). Indeed, a statement is not actionable even if the non-defamatory meaning is less plausible than the defamatory one, provided that the non-defamatory one is at least reasonable. *Sweitzer v. Outlet Commc'ns, Inc.*, 133 Ohio App. 3d 102, 111-12 (1999) (statement that was "imprecise at best and entirely inaccurate at worst" was reasonably susceptible to non-defamatory interpretation and thus not actionable). Whether the innocent construction rule applies is a question of law, *id.* at 112, and, as with other aspects of the defamatory meaning question, the court must consider the statements in full and in context rather than as isolated phrases, *Holley v. WBNS 10TV, Inc.*, 149 Ohio App. 3d 22, 27-28 (2002).

Continued from previous page . . . .

innuendo to enlarge the meaning of the words use to find a defamatory aspect, as Ohio law prohibits. *Ambro*, 2012 WL 529584, at *7. And for still others, the alleged defamatory meaning is expressly alleged to be an implication, but one which flows (if it is reasonably drawn at all) from accurately stated facts, which Ohio law holds is not actionable. *See supra* Part I.A.

Croce's central allegation is that the challenged publications, each taken as a whole, through a variety of purportedly false statements, convey the overarching defamatory implication "that Dr. Croce has for years conducted fraudulent science and that the scientific conclusions reached in Dr. Croce's Research Papers are fraudulent and false." Compl. ¶¶ 154-162; 178-179.[7] Even assuming, for the sake of argument, that this is one reasonable meaning a reader or listener could take from the Article, the Letter or the Interview, it certainly is not the only meaning. Indeed, it would be entirely reasonable to read the challenged publications for what they are: balanced accounts of a controversy that take no sides and reach no conclusions.

More specifically, the Article does not purport to be, and was not an investigation into whether or not Croce actually committed wrongdoing—much less whether any alleged wrongdoing meant that the scientific results of his work were "false." Rather, the Article used the pre-existing controversy over Croce's work as a "case study" in a wider discussion of the conflicts of interest inherent in the U.S. scientific community, where academic institutions are expected to police their own researchers and federal oversight is limited. This was explicitly stated early in the article: "Dr. Croce's story is a case study of the complex and often countervailing forces at work as science seeks to police itself." Compl. Ex. C at 2. Those countervailing forces, the Article explained, were that "[f]indings of fraud in biomedical research have surged" but "the primary burden for investigating and punishing misconduct falls to inherently conflicted arbiters: universities like Ohio State . . ." who derive significant reputational and financial benefits from researchers of Croce's standing.

[7] It bears repeating in this regard that a plaintiff cannot premise a defamation claim under Ohio law on an allegedly libelous implication from factually accurate statements. *See supra* Part I.A.

Furthermore, the Article reinforced its non-defamatory meaning by emphasizing that Croce had never been penalized for any misconduct by either state or federal authorities and that OSU had investigated Croce on at least five occasions and found no wrongdoing. Thus, the Article's innocent construction – and, The Times submits, its most reasonable construction – is that Croce's experience is typical of a system in which prominent researchers who bring prestige and money to their institutions are increasingly facing questions about their methods and about the mechanisms meant to guard against scientific misconduct. As a result, the Article as a whole is not actionable. *Ferreri v. Plain Dealer Publ'g Co.*, 142 Ohio App. 3d 629, 642 (2001) (article as a whole did not defame juvenile court judge described as at the "center" of internal strife and bickering at the court because it did not make any assertion, positive or negative, about judge's conduct); *Sweitzer*, 133 Ohio App. 3d at 112-13 (affirming dismissal of defamation claim where challenged broadcast, in its full context, supported both non-defamatory meaning and plaintiff's proffered defamatory meaning).

The same is true of the Interview, in which reporter Glanz simply summarized the fact and nature of the allegations against Croce in an otherwise balanced segment of the broadcast – a broadcast discussing the same larger issue in the scientific community and containing the same types of cautions regarding any conclusion about the accuracy of the allegations. And in his Letter, the text repeatedly signals to the reader that Glanz is asking questions about allegations made by others, not adopting the allegations as true. In both instances, therefore, under Ohio's "innocent construction" rule, the Court is required to reject Croce's attempts to force the adoption of a defamatory meaning – even if that alleged defamatory meaning is an alternative reading that some persons could adopt. *E.g., Krems*, 133 Ohio App. 3d at 12–13 (article about parents raising money ostensibly to pay for medical care for their child that quoted hospital

officials as saying parents did not owe any money was innocently construed because it "merely reports what the hospital officials said"); *Early*, 130 Ohio App. 3d at 329 (newspaper article's account of brutality allegations against police officer was innocently construed as "a simple statement of what allegations were made"); *Vogel v. Sekulich*, No. 16105, 1993 WL 347096, at *4 (Ohio Ct. App. Sept. 15, 1993) (article about attorney's arrest and unrelated disciplinary proceedings was properly construed innocently because it also recounted attorney's assertion that he was "set up" by police and his denials of disciplinary charges).

For the foregoing reasons, as a matter of well-settled law, the Article, the Interview and the Letter each as a whole are not defamatory pursuant to the innocent construction rule. What's more, a statement-by-statement review demonstrates that each individual challenged statement is at least reasonably susceptible of a non-defamatory interpretation:

- Statements 17-21: All of the challenged statements in the Letter can be innocently construed, in the context of a letter from a reporter to subjects of his reporting, as seeking verification, denial or comment on criticisms by others or unconfirmed propositions, rather than as making direct assertions of fact. Compl. Ex. A.

- Statement 20: The statement reflects criticism of Croce's initial conclusions regarding the FHIT gene, and can be innocently construed to mean that Croce's initial enthusiasm for his discovery has not yet been fully realized. *Id.* Ex. A at 4.

- Statement 21: The question, "Was this refusal an attempt to cover up the almost complete failure of this line of research?" can be innocently construed as seeking comment regarding whether the FHIT research was a "failure" and whether Croce in fact "refused" to correct or retract the paper at issue. *Id.*

- Statements 1-16: All of the challenged statements in the Article and the Interview can be innocently construed, in context, as presenting both sides of an on-going controversy without taking sides.

- Statements 1-2: The headline and tweet, are innocently construed in the context of the balanced Article as merely summarizing its content.

- Statements 3-5, 11-12, and 16: The statements expressly attributed to Croce's critics are innocently interpreted as reflecting the statements of others in the context of a balanced news report on an existing controversy.

- Statements 8-11: The statements regarding Croce's work for the Center for Tobacco Research (Statements 8-11) can be innocently construed, in context, as reflecting the criticisms and actions of others.

- Statements 6-7: The Article's account of Croce's denials can be innocently construed as reflecting his honestly held belief that he has done nothing wrong. *Cf. Sethi v. WFMJ Television Inc.*, 134 Ohio App. 3d 796, 808 (1999) (statement in television news report that plaintiff was unavailable to comment would fail under innocent construction rule because it "could also be interpreted as meaning that [plaintiff] was unable to comment for valid reasons").

- Statement 13 regarding the ORI investigation of the Clare Francis allegations can be innocently construed as meaning that federal officials only deemed two allegations worth investigating and were satisfied with the OSU investigation that cleared Croce on those two points.

- Statement 14 about the corrections and retractions of Croce's papers can be innocently interpreted as meaning that the errors in those papers were honest mistakes, as Croce asserts.

In short, whether each of the challenged publications is viewed as a whole in light of the over-arching defamatory meaning alleged by Croce, or whether each individual challenged statement is viewed independently, the allegedly defamatory material is subject to a reasonable innocent construction and Count I therefore should be dismissed for this independent reason.

C. Many Of The Challenged Statements Are Non-Actionable Expressions Of Opinion

Entirely separate from the question of whether any of the statements at issue can properly be classified as defamatory *per se*, there is a separate obstacle to his defamation claim that Croce is unable as a matter of law to overcome: As to many of the statements, he cannot meet his burden of showing that they are false statements of "fact." Rather, as a matter of law, many of the statements at issue clearly constitute expressions of opinion, and "a statement of opinion cannot provide the basis for a claim of defamation." *Conway v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers*, 209 F. Supp. 2d 731, 754 (N.D. Ohio 2002). "The Ohio

Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press" under the First Amendment. *Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St. 3d 279, 281 (1995); *see also Wampler v. Higgins*, 93 Ohio St. 3d 111 (2001). Pursuant to those constitutional protections, in Ohio "[e]xpressions of opinion are generally accorded absolute immunity from liability." *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250 (1986), *as reaffirmed by Vail*, 649 N.E.2d at 185 ("[T]he law in this state is that embodied in *Scott*."). Whether a statement is properly characterized as opinion is a question of law for the court, appropriately decided on a motion to dismiss. *Wampler*, 93 Ohio St. 3d at 126.

To determine whether a statement is protected opinion, "the court should consider: the specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared." *Vail*, 72 Ohio St. 3d at 282 (citing *Scott*, 25 Ohio St. 3d at 250). Because the inquiry is "fluid," "[e]ach of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented." *Id.* Ultimately, the determination is "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. It is not necessary for all of the factors to be met. *See, e.g., SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 979 (N.D. Ohio 2003) (discussing *Scott*, 25 Ohio St. 3d at 252-54).

As to the first factor, the court must "determine whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications." *Wampler*, 93 Ohio St. 3d at 127-28. In doing so, the court must "focus[ ] on the common meaning ascribed to the words by an ordinary reader." *Vail*, 72 Ohio St. 3d at 282. "[S]tatements that are 'loosely definable' or 'variously interpretable' cannot in most contexts

support an action for defamation." *Wampler*, 93 Ohio St. 3d at 128 (citing *Ollman v. Evans*, 750 F.2d 970, 980 (D.C. Cir. 1984)).

As to the second factor, statements are not "verifiable" unless "(1) the author represents that he has first-hand knowledge which substantiates the statements, and (2) if there is a plausible method to verify what was said." *SPX Corp.*, 253 F. Supp. 2d at 979. The court:

> seek[s] to determine whether the allegedly defamatory statements are objectively capable of proof or disproof, for a reader cannot rationally view an unverifiable statement as conveying actual facts. . . . An 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 (citations and quotations omitted); *see also Vail*, 72 Ohio St. 3d at 283 ("Where the statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." (citations and quotations omitted)). Weighing these factors, it is clear that many of the statements challenged by Croce are non-actionable opinion, and to the extent Count I is based on them, it fails as a matter of law.

1. Statements regarding the scientific value or impact of Croce's work

Many of the statements at issue are non-actionable opinion because they are value judgments regarding the scientific importance or impact of Croce's work. For example, Croce argues that it is false and defamatory to assert in Statement 20 that "almost none of the sweeping claims [he] and his research team initially made for the importance of the FHIT gene have stood the test of time," that "its mutation may simply be a puzzling byproduct of cancer," and "[t]herefore, it is almost certainly not a promising route for therapeutics." Compl. ¶ 54. Similarly, Croce alleges as false and defamatory Statement 3, that "[s]ome scientists argue that Dr. Croce has overstated his expansive claims for the therapeutic promise of his work," and

Statement 4, that his "laboratory is focused more on churning out papers than on carefully assessing its experimental data." Compl. ¶¶ 88, 98.

Whether claims are "sweeping" "expansive" or "overstated," whether discoveries have "stood the test of time" and are "promising," or are merely "puzzling" are all examples of non-actionable value judgments and critical assessments. *See, e.g.*, *Vail*, 72 Ohio St. 3d at 283 (language that was "value-laden and represents a point of view that is obviously subjective" is opinion). Moreover, this is precisely the kind of "loose, figurative" language that cannot be proved objectively incorrect, and therefore is opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). *See, e.g.*, *Wampler*, 93 Ohio St. 3d at 113, 128 (whether rent was "exorbitant," or a sale was for an "astronomical sum" were "loosely definable," "variously interpretable," "indefinite," and "ambiguous" terms and therefore not actionable); *Hach v. Laidlaw Transit, Inc.*, No. 02 C 996, 2004 WL 2966946, at *5 (N.D. Ill. Nov. 24, 2004) (assertions of "waning" and "weak" financial results, and "disrupt[ive]" and "negative" management style non-actionable because minds can differ as to what qualifies). The Complaint itself concedes the point by suggesting that the foregoing statements should be "verifi[ed]" by surveying the opinions of "other recognized experts." Compl. ¶ 90; *see also id.* ¶¶ 91-94. In other words, Croce seeks to rebut opinion with opinion. But to be an actionable false statement of *fact*, the statement must plausibly be capable of objective verification.

In addition, both the general context and the wider context of the statements further emphasize their subjective nature. The assertion that Croce's overstated the promise of his work was immediately prefaced by the explanation that, "[w]ith [his] flamboyant success has come a quotient of controversy," signaling there were differing views on the point. Compl. Ex. C at 1. The statements also were couched in equivocal terms – "almost none," "may simply," "almost

certainly," "some scientists argue" – indicating the possibility of other points of view. *See generally* Compl. Such "[c]autionary terms or 'language of apparency' weigh against liability." *SPX Corp.*, 253 F. Supp. 2d at 981 (citing *Scott*, 25 Ohio St. 3d at 252; *Wampler*, 93 Ohio St. 3d at 130). The Article also included contrary views, such as that of Dr. Philip Sharp of MIT, who opined that Croce had made "important contributions." Compl. Ex. C at 4-5. Based on the specific language, the lack of any plausible means of verification, and the context in which the statements were made, any reasonable reader would have understood the Article's statements regarding the value or impact of Dr. Croce's work to be expression of opinion, which are non-actionable.

2. Statements in the Article speculating on Croce's motivation or state of mind

Croce asserts that the Article makes a number of false, defamatory statements regarding his priorities, motivations, or state of mind. Specifically, he alleges the following statements are defamatory: Statement 4, that "[s]ome scientists argue that . . . [Dr. Croce's] laboratory is focused more on churning out papers than on carefully assessing its experimental data," Compl. ¶ 98; Statement 5, that one critic charges that numerous allegations of falsified data and plagiarism indicate a "reckless disregard for the truth," *id.* ¶ 102; and Statement 9, that Croce "showed his own willingness to buck scientific consensus" by advising the Council for Tobacco Research, *id.* ¶ 123. Similarly, Croce challenges Statement 11 – a quotation, attributed to another researcher, that Croce "knows damn well" what use the tobacco industry might make of his research, *id.* ¶ 132, and Statement 17, that Sanders asserts that "Croce is knowingly engaging in scientific misconduct and fraud." *Id.* ¶ 51.

The Article makes clear that each of these statements is speculation or characterization, in all but one instance by third parties, regarding Croce's mindset or motives. They were not direct

quotations from Croce, speaking about himself. None of the people who are quoted suggested that they had private knowledge of Croce's thoughts. Instead, the assertions were premised on publicly observable behavior detailed in the Article. "If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Chagrin Valley*, 2014-Ohio-5442, ¶ 23 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

Courts repeatedly have held that imputing a motive or mindset to a person, based on that person's conduct, is opinion and not actionable. This is because a plaintiff's internal thoughts "can never be known for sure (even by [plaintiff]) and anyone is entitled to speculate on a person's motives from the known facts of his behavior." *Haynes*, 8 F.3d at 1227. *See also Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir. 1989) ("Statements regarding motive, are 'intrinsically unsuited' to serve as a basis for libel" (citation omitted)); *Scott*, 25 Ohio St. 3d at 265 (Celebrezze, J., concurring) ("[I]nquiry into motivation is within the scope of absolute privilege . . . ." (citation and quotation omitted)); *Scholz v. Delp*, 41 N.E.3d 38, 46 (Mass. 2015) (speculation regarding the motivations or reasons for a person's actions are non-actionable opinion (collecting cases)).

Consistent with that reasoning, courts applying Ohio law repeatedly have held that negative aspersions regarding an individual's mindset or motives are not actionable as defamation. *See, e.g.*, *Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 680-81 (6th Cir. 2005) (statements that plaintiff was "destroying people's lives in order to squeeze money" non-actionable opinion); *Wampler*, 93 Ohio St. 3d at 129-30 (statements that plaintiff had "no motive but profit" and "self centered greed" non-actionable opinions); *Vail*, 72 Ohio St. 3d at 282-83

(allegation that plaintiff "doesn't like gay people" non-actionable opinion); *Ferreri*, 142 Ohio App. 3d at 634 (allegation that plaintiff was "reckless," "arrogant," and motivated by publicity non-actionable opinion); *Tri-Cty. Concrete Co. v. Uffman-Kirsch*, No. 76866, 2000 WL 1513696, at *6 (Ohio Ct. App. Oct. 12, 2000) (allegation that plaintiff had "total disregard" for the law non-actionable opinion); *Condit v. Clermont Cty. Review*, 110 Ohio App. 3d 755, 756-62 (1996) (allegation plaintiffs "would be dangerous if they could" non-actionable opinion). Consistent with these decisions, the statements regarding Croce's priorities, motivations, and state of mind are opinion and not actionable.

3. Statements that Croce exceeded "norms" or "bounds"

Croce asserts as false and defamatory Statements 8 and 9, suggesting that he "stepped beyond the generally expected bounds of cancer research" and "buck[ed] scientific consensus" by becoming an advisor to the Council for Tobacco Research. Compl. ¶¶ 113, 123. He similarly challenges Statement 12 by another researcher, Sanders, characterizing Croce's office at OSU as "[a] lab that is engaging in violating scientific *norms* [that] is being rewarded for that very effort." *Id.* ¶ 136 (emphasis added).

The Complaint itself demonstrates the impossibility of precisely defining these terms, much less proving or disproving the truth of the statements. Croce alleges, for example, that he could not have exceeded "the generally expected bounds of cancer research" because such standards are "imaginary," "there were 'persuasive arguments on both sides of the question'" and Croce was "not alone" in working with the Council for Tobacco Research. *Id.* ¶¶ 114, 118, 119, 121. Croce further argues that he did not act counter to "generally expected" norms and consensus based on the fact that "other distinguished scientists" and "esteemed academic institutions" made decisions similar to his. *Id.* ¶¶ 115-18. But, again, each of these is a

subjective assertion and it is difficult to imagine on what objective basis one might set out to verify them, particularly if, as he himself alleges, such standards are "imaginary."

In an effort to convert Sanders' statement of opinion into one of fact, Croce suggests that the "norms" to which he refers must be the Federal Policy on Research Misconduct, administered by the Federal Office of Research Integrity. *Id.* ¶ 138. But that policy is never mentioned by Sanders – or anywhere else in the Article, and Croce cannot by innuendo attempt to enlarge or alter the plain meaning of the words actually used. *E.g.*, *Ambro*, 2012 WL 529584, at *7. The "norms," "bounds," and "consensus" mentioned in the Article are undefined. A court considering a defamation claim is to give the words "the common meaning ascribed to the words by an ordinary reader." *Vail*, 72 Ohio St. 3d at 282. On that basis, "norms," "bounds," and "consensus," may refer to "a widespread or usual practice, procedure, or custom," "a limiting line," and "a general agreement." *Norms*, Merriam-Webster, Webster's Dictionary (2016); *Bounds*, *id.*; *Consensus*, *id.* These are not precise "rules" the overstepping of which is capable of legal proof.

For exactly this reason, courts in this and other jurisdictions repeatedly have found that allegations a plaintiff violated undefined professional standards, customs, or ethics are protected opinion, incapable of definition or proof. *See, e.g.*, *Roberts v. Murawski*, 2007-Ohio-3555, ¶ 19 (statements questioning plaintiff's "business ethics" and "professionalism," "were opinions, not factual, provable statements"); *Adams v. Coughlin*, No. 2:14-cv-41, 2015 WL 300465, at *3 (S.D. Ohio Jan. 22, 2015) (allegations that attorney conduct "warrants our concern," "towed [sic] the line of unethical conduct," and was not "consistent" with professional standards" were opinion); *Manjarres v. Nalco Co.*, No. 09 C 4689, 2010 WL 918072, at * 4-5 (N.D. Ill. Mar. 9, 2010) ("While broad terms like "unethical" may imply general ideas, they do not imply the

underlying specific facts necessary to support a claim for defamation.") (collecting cases); *Lauderback v. Am. Broad. Cos.*, 741 F.2d 193, 197 (8th Cir. 1984) ("[B]road brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion.") (citations omitted); *Wait v. Beck's N. Am., Inc.*, 241 F. Supp. 2d 172, 183 (N.D.N.Y. 2003) ("Statements that someone has acted unprofessionally or unethically generally are constitutionally protected statements of opinion.") (collecting cases). Consistent with those decisions, statements regarding Croce as exceeding scientific "norms" or "bounds" are opinion and not actionable.

II. PLAINTIFF'S "TAG ALONG" CLAIMS FOR FALSE LIGHT AND EMOTIONAL DISTRESS LIKEWISE FAIL AS A MATTER OF LAW FOR AT LEAST TWO REASONS

In Counts II and III of his Complaint, Croce purports to state claims for false light invasion of privacy and intentional infliction of emotional distress ("IIED") based exclusively on publication of the allegedly defamatory statements in the Article, the Letter, and the radio Interview. Compl. ¶¶ 211, 221. But these causes of action, too, fail as a matter of law.

A. Because The Defamation Claim Fails As A Matter Of Law, The Tag-Along Claims Based On The Same Publications Necessarily Fail As Well

Simply put, where a plaintiff alleges defamation and the defamation claim fails as a matter of law, other purported causes of action for injury based on the same publication are equally barred. *See, e.g.*, *Welling v. Weinfeld*, 113 Ohio St. 3d 464 (2007) ("False-light defendants enjoy [constitutional] protections at least as extensive as defamation defendants."); *Patrick v. Cleveland Scene Publ'g*, 582 F. Supp. 2d 939, 955 (N.D. Ohio 2008) (where false light claim is based on same statements as defamation claim, failure of defamation claim also defeats false light claim), *aff'd*, 360 F. App'x 592 (6th Cir. 2009); *McGee*, 154 F. Supp. 2d at 1315 (IIED claim arising from the same facts as failed defamation claim "cannot survive the dismissal

of the underlying [defamation] cause of action"). Thus, to the extent the Court concludes that Count I for defamation must be dismissed, Counts II and III must be dismissed along with it.

B. Plaintiff In Any Event Has Not And Cannot Adequately Plead Essential Elements Of His Tag-Along Claims

Even if the Court were to determine that some portion of the defamation claim survives this motion, Croce's false light and IIED claims still should be dismissed because he has failed to plead sufficient factual matter to plausibly support at least one essential element of each of those claims.

It is an essential element of a claim for false light that "the false light in which the other was placed would be highly offensive to a reasonable person." *Welling*, 113 Ohio St. 3d at 473. Similarly, it is an essential element of a claim for IIED that the defendant's conduct was "extreme and outrageous." *E.g.*, *Alahverdian v. Grebinski*, No. 3:13-cv-00132, 2014 WL 2048190, at *16 (S.D. Ohio May 19, 2014) (to state claim for IIED, "the alleged conduct must be 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") (citation and internal marks omitted); *McCollins v. Health Mgmt. Grp.*, No. 1:10-CV-1193, 2011 WL 1743419, at *5 (N.D. Ohio May 6, 2011) (same). In both respects, it is a threshold question of law for the court whether the defendant's actions as alleged meet these high standards of misconduct. *Reamsnyder v. Jaskolski*, 10 Ohio St. 3d 150, 153 (1984) (affirming dismissal of IIED claim where pleaded conduct was not extreme and outrageous as matter of law); *Mann v. Cincinnati Enquirer*, 2010-Ohio-3963, ¶¶ 22-24 (affirming dismissal of false light claim where alleged false light was not highly offensive as matter of law).

Merely annoying, obnoxious or offensive behavior does not constitute IIED. As the *Alahverdian* court put it, "major outrage is essential to the tort. The fact that the actor knows the

other will regard the conduct as insulting and may have their feelings hurt is not enough." 2014 WL 2048190, at *16. Because this is such a rigorous standard, "[i]t is well accepted that intentional infliction of emotional distress claims may entirely appropriately be dealt with . . . in a motion to dismiss." *Miller v. Currie*, 50 F.3d 373, 377-78 (6th Cir. 1995). Courts likewise have rigorously enforced the requirement that a false light claim be based on conveying a false impression that is beyond the pale. *See, e.g.*, *Chagrin Valley*, 2014-Ohio-5442, ¶ 39 (no action for false light where statements at issue painted plaintiff coal company owner in "a light merely contrary to [plaintiff's] public narrative"); *Miller v. Delaware Cty. Comm'rs*, No. 2:13-cv-501, 2015 WL 4593864, at *10 (S.D. Ohio July 30, 2015) (statement in press release regarding plaintiffs' indictment for elder abuse that alleged victim was diagnosed with Alzheimer's and dementia and could not care for herself was not highly offensive regarding plaintiffs), *aff'd sub nom. Miller v. Davis*, 653 F. App'x 448 (6th Cir. 2016).

Indeed, courts routinely grant motions to dismiss these types of claims in cases based on speech, including especially speech in the form of news reports. In Ohio, for example, courts have rejected IIED claims premised on speech far more disturbing than the letter and news reports at issue here. *See, e.g.*, *Curry v. Village of Blanchester*, 2010-Ohio-3368, ¶ 55 (accusing female plaintiff of having an affair with police chief and calling her "all tits and no brain"); *Lombardo v. Mahoney*, 2009-Ohio-5826, ¶¶ 10-11 (obscene tirade including threat of physical violence); *In re Palmer*, 555 B.R. 611, 627 (Bankr. N.D. Ohio 2016) (defendant's false accusations that neighbors had tried to "run over" his wife and son). Even falsely accusing the plaintiff of being a pedophile, *Wilson v. Wilson*, 2007-Ohio-178, ¶¶ 19-20, or a "sex offender," *Roe ex rel. Roe v. Heap*, 2004-Ohio-2504, ¶ 122, is insufficiently extreme and outrageous to constitute IIED. Ohio courts also frequently have rejected false light claims based on speech

such as news reports. *See, e.g.*, *Chagrin Valley*, 2014-Ohio-5442, ¶ 39; *Mann*, 2010-Ohio-3963, ¶ 23 (affirming dismissal of plaintiff exotic dancer's false light claim where overall gist of newspaper article was that he was fired for refusing to have sex with his clients).[8]

Here, where the claims are based on a news organization's report discussing both sides of a pre-existing controversy regarding allegations of scientific misconduct, Croce as a matter of law cannot make out the "highly offensive" or "extreme and outrageous" conduct elements of his causes of action, and the claims therefore should be dismissed for this additional reason.

CONCLUSION

Croce, like many other prominent individuals, understandably dislikes criticism. But, under the First Amendment and Ohio's own Constitutional protection for speech and the press, the proper remedy for Croce is to address those criticisms in public fora, precisely as The Times gave him opportunity to do in its Article, which fairly reported the facts of the pre-existing controversies surrounding Croce's academic activities and his response to those controversies. However unpleasant Croce may have found the Article, it is not actionable at law. For the foregoing reasons, The Times respectfully requests that the Complaint be dismissed with prejudice.

[8] The same is true in other jurisdictions. *See, e.g.*, *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986) (broadcast including plaintiff's reaction to "ambush" interview did not place him in highly offensive false light as "intemperate and evasive"); *Pope v. Chronicle Publ'g Co.*, 891 F. Supp. 469, 477-78 (C.D. Ill. 1995) (dismissing false light claim against newspaper and observing that "the mission of news agencies and journalists is to present all sides of a story so as to fully inform the public. Were they to do otherwise, the news media would be reduced to the role of performing public relations and publicity for entities seeking to publicize their activities."), *aff'd*, 95 F.3d 607 (7th Cir. 1996); *Andrews v. Stallings*, 1995-NMCA-015, 119 N.M. 478, 492, 892 P.2d 611, 625 ("As a general proposition, accurate publication of newsworthy events does not give rise to a cause of action for intentional infliction of emotional distress.").

Dated: July 10, 2017

By: /s/ Keith W. Schneider
Keith W. Schneider (0041616)

MAGUIRE & SCHNEIDER, LLP
1650 Lakeshore Drive
Columbus, Ohio 43204
Phone: (614) 224-1222
Fax: (614) 224-1236
kwschneider@ms-lawfirm.com

Michael D. Sullivan*
Jay Ward Brown*
Matthew E. Kelley*
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street NW, Suite 200
Washington, DC 20036
Tel: (202) 508-1100
Fax: (202) 861-9888
msullivan@lskslaw.com
jbrown@lskslaw.com
mekelley@lskslaw.com
* Admitted pro hac vice

Counsel for Defendants

APPENDIX

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
1	"Years of Ethics Charges, but Star Cancer Researcher Gets a Pass. Dr. Carlo Croce was repeatedly cleared by Ohio State University, which reaped millions from his grants. Now, he faces new whistle-blower accusations." [Alleged defamatory implication: "that Dr. Croce has been guilty of repeated ethical violations but got away with them because of the millions of dollars in grants he has generated for OSU." ¶ 78]	77	NYT Article [Headline]	Non-defamatory and subject to an innocent construction as part of and summary of a balanced news report.
2	"A star cancer researcher accused of fraud was repeatedly cleared by Ohio State, which reaps millions from his grants." [Alleged defamatory implication: Croce is guilty of fraud. ¶ 85]	83	NYT Tweet and Facebook post	Non-defamatory and subject to an innocent construction as part of and summary of a balanced news report.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
3	"Some scientists argue that Dr. Croce has overstated his expansive claims for the therapeutic promise of his work." [Alleged defamatory implication: "that Dr. Croce falsely promotes the promise of his work in order to enhance his stature and his grants at the expense of the truth." ¶ 89]	88	NYT Article	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding scientific importance of Croce's work. Non-actionable opinion regarding motive or state of mind.
4	"Some scientists argue that . . . [Dr. Croce's] laboratory is focused more on churning out papers than on carefully assessing its experimental data."	98	NYT Article	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding scientific importance of Croce's work. Non-actionable opinion regarding motive or state of mind.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
5	"Since 2014, another critic, David A. Sanders, a virologist who teaches at Purdue University, has made claims of falsified data and plagiarism directly to scientific journals where more than 20 of Dr. Croce's papers have been published. 'It's a 'reckless disregard for the truth,' Dr. Sanders said in an interview."	102	NYT Article	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding motive or state of mind.
6	"During an interview in October . . . Dr. Croce, 72, denied any wrongdoing, [and] said he had been singled out in some of the accusations simply because he was a prominent figure."	107	NYT Article	Substantially true; admitted in Compl. Ex. B. Non-defamatory and subject to an innocent construction as part of a balanced news report. Subject to innocent construction as reflecting honest belief in innocence.
7	"During an interview in October and in a later statement, Dr. Croce, 72, . . . largely placed the blame for any problems with figures or text on junior researchers or collaborators at other labs."	110	NYT Article	Substantially true; admitted in Compl. Ex. B. Non-defamatory and subject to an innocent construction as part of a balanced news report. Subject to innocent construction as reflecting honest belief in innocence.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
8	"Even before his arrival at Ohio State in 2004, Dr. Croce had stepped beyond the generally expected bounds of cancer research. In 1994, he joined the scientific advisory board of the Council for Tobacco Research, which the tobacco companies created to fight the public perception—supported by increasingly overwhelming scientific evidence—that smoking caused cancer. Dr. Croce said in the interview and the statement that he had always believed that tobacco smoking caused cancer."	113	NYT Article	Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding exceeding norms or bounds.
9	"Dr. Croce, who has a medical degree but no Ph.D., showed his own willingness to buck scientific consensus when he became an adviser to the Council for Tobacco Research."	123	NYT Article	Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding motive or state of mind. Non-actionable opinion regarding exceeding norms or bounds.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
10	"Some of the research Dr. Croce pioneered in those years [1994-1998, while he was on the SAB] was used by the tobacco industry to fight the assertion that smoking caused cancer." [Alleged defamatory implication: "that Dr. Croce's research actually supported the tobacco industry's 'fight' against the 'assertion that tobacco caused cancer,' and that Dr. Croce was therefore complicit with the tobacco industry in fighting that assertion." ¶ 129]	128	NYT Article	Non-defamatory and subject to an innocent construction as part of a balanced news report.
11	"[F]or the [tobacco] industry, it wouldn't have mattered, said William Farone, once a scientist for the tobacco industry who has repeatedly testified against it. 'He knows damn well what use of the genetic information there would be to someone in the tobacco industry,' Dr. Farone said."	132	NYT Article	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding motive or state of mind.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
12	"After receiving several tips on Dr. Croce's work, Dr. Sanders said, he decided to undertake yet another moonlighting effort: as a 'freelance ethicist.' 'A lab that is engaging in violating scientific norms is being rewarded for that very effort,' he said."	136	NYT Article	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report. Non-actionable opinion regarding exceeding norms or bounds.
13	"Dr. Dahlberg trimmed Clare Francis' initial list of allegations to the two he considered the most actionable." [Alleged defamatory meaning: "that two of the allegations were the 'most actionable,' meaning that others were also 'actionable' but less so." ¶ 145] "Defendants also falsely state that, as to the two referred allegations, ORI merely 'accepted the result' reached by OSU and imply as fact that ORI gave in reluctantly to a determination by OSU with which it did not agree."	143 147	NYT Article	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report. Subject to innocent construction that federal officials only deemed two allegations worth investigating and were satisfied with OSU's investigation.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
14	The number of "corrections, retractions and editors' notices" in "Dr. Croce's papers" has "ballooned to at least 20, with at least three more on the way, according to journal editors."	149	NYT Article	Substantially true; admitted in Complaint & Ex. B. Non-defamatory and subject to an innocent construction as part of a balanced news report. Subject to innocent construction that any errors were honest mistakes.
15	"The cumulative import of the Defamatory Article and all of the False and Defamatory Statements read in context and as a whole communicated to actual ordinary readers that Dr. Croce has for years conducted fraudulent science and that the scientific conclusions reached in Dr. Croce's Research Papers are fraudulent and false."	154	NYT Article	Non-defamatory and subject to an innocent construction as a balanced news report.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
16	"Well, the allegations are that in the lab he oversees and on papers which he is co-author, there are -- call them fabricated figures, they're duplications of data from unrelated experiments used to prove a point you know in another experiment, I think that's probably at the center of things and then there were some other ethics charges including plagiarism uh and uh misappropriation of grant money and things like that but it's really the data manipulation that's at the center of the allegations."	163	Glanz WOSU interview	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as part of a balanced news report.
17	[Quoting Sanders] "Dr. Croce is knowingly engaging in scientific misconduct and fraud."	51	Glanz letter to OSU ¶ 2	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as questions posed by a reporter to Plaintiff and university spokesman in order to obtain comment. Non-actionable opinion regarding motive or state of mind.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
18	"Dr. Croce and the operation he oversees routinely handles [sic] experimental data improperly; routinely uses [sic] data duplicated from one experiment in figures for unrelated experiments; exercises [sic] little oversight when colleagues engage in those practices for papers on which Dr. Croce is an author; and routinely plagiarizes [sic] or allows to be plagiarized, text from papers written by other authors."	52	Glanz letter to OSU ¶ 1	Substantially true as a report of others' allegations. Non-defamatory and subject to an innocent construction as questions posed by a reporter to Plaintiff and university spokesman in order to obtain comment.
19	"Dr. Croce reviewed and awarded countless grants using CTR money, often in cases with clear conflicts of interest involving grantees at his own institution (Thomas Jefferson University at the time)."	53	Glanz letter to OSU ¶ 19	Non-defamatory and subject to an innocent construction as questions posed by a reporter to Plaintiff and university spokesman in order to obtain comment.

Stmt. No.	Challenged Statement	Compl. ¶	Where appeared	Grounds for Dismissal
20	"[A]lmost none of the sweeping claims [Dr. Croce] and his research team initially made for the importance of the FHIT gene have stood the test of time. It is not a trigger for all sorts of human cancers and its mutation may simply be a puzzling byproduct of cancer. Therefore, it is almost certainly not a promising route for therapeutics, as he told Ohio State officials when he was recruited to the university, according to minutes that are available online."	54	Glanz letter to OSU ¶ 22	Non-defamatory and subject to an innocent construction as questions posed by a reporter to Plaintiff and university spokesman in order to obtain comment. Subject to innocent construction that Croce's initial enthusiasm for the discovery has not been realized. Non-actionable opinion regarding scientific importance of Croce's work.
21	"Finally, the paper Dr. Croce was required to retract or correct as part of the 'Alternative Resolution,' but did not, involved research on the FHIT gene. Was this refusal an attempt to cover up the almost complete failure of this line of research?"	56	Glanz letter to OSU ¶ 24	Non-defamatory and subject to an innocent construction as questions posed by a reporter to Plaintiff and university spokesman in order to obtain comment. Subject to an innocent construction as seeking comment regarding whether FHIT research was a "failure" and whether Croce had refused to correct the paper. Non-actionable opinion regarding scientific importance of Croce's work.

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, a copy of the foregoing memorandum was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system.

/s/ Keith W. Schneider
Keith W. Schneider