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

CARLO M. CROCE,	:	
	:	Case No. 2:17-cv-00402
Plaintiff,	:	
	:	Judge James L. Graham
	:	
v.	:	Magistrate Judge
	:	Elizabeth Preston Deavers
	:	
THE NEW YORK TIMES COMPANY, et al.,	:	
	:	
	:	
Defendants.	:	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Thomas W. Hill (0012182)
Loriann E. Fuhrer (0068037)
KEGLER, BROWN, HILL & RITTER
A Legal Professional Association
65 E. State Street, Suite 1800
Columbus, Ohio 43215
(614) 462-5400 Phone
(614) 464-2634 Fax
thill@keglerbrown.com
lfuhrer@keglerbrown.com
Attorneys for Plaintiff, Carlo M. Croce, M.D
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TABLE OF POINTS AND AUTHORITIES

There was no "public controversy" relating to Dr. Croce until Defendants published the Defamatory Article and manufactured one. Inadmissible matters outside the pleadings should be excluded.

"[T]he law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement." *McKimm v. Ohio Elections Commission*, 89 Ohio St. 3d 139, 145 (2000). The court must read the statements "in the context of the entire article." *Murray v. Knight-Ridder, Inc.*, 2004-Ohio-821, at ¶41 (7th Dist. 2004); *Mendise v. Plain Dealer Publishing Co.*, 69 Ohio App.3d 721, 726 (1990). Not all of the statements in an allegedly defamatory article need be false or defamatory, and the defamatory article need not expressly state the defamatory falsehood. The court must "assess[] the '***clear impact***,' '***general tenor***,' and '***impression'*** created by the statements in the column." *McKimm* at 144.

To constitute defamation *per se*, the "words must be of such a nature that courts can presume as a matter of law that they *tend to* degrade or disgrace the person of whom they are written or spoken, or hold him up to public hatred, contempt or scorn." *Moore v. P.W. Publishing Co.*, 3 Ohio St.2d 183, 188 (1965). A statement will also be considered defamation *per se* "if the statement *tends* to injure a person in his or her trade, profession, or occupation." *Knowles v. The Ohio State University*, 2002-Ohio-6962 (10th Dist. 2002), *citing Becker v. Toulmin*, 165 Ohio St. 549, 553-554 (1956), *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App. 3d 345, 353 (6th Dist. 1992). "Defamation *per se* occurs when material is defamatory on its face." *Konica Minolta Bus. Sols., U.S.A., Inc. v. Allied Office Prods., Inc.*, 724 F. Supp. 2d 861, 870 (S.D. Ohio 2010).

Even if a statement is "apparently harmless" and is, therefore, not defamatory *per se*, it may still be actionable as defamation *per quod*. Statements that are defamatory *per quod* are those that are not defamatory on their face "but become so by the use of an innuendo *rendering the apparently harmless words* into libelous ones *by extrinsic evidence*." *Conway v. Heat and Frost Insulators*, 209 F. Supp. 2d 731, 755-756 (N.D. Ohio 2002).

To determine whether a reasonable reader will perceive the statement as a fact or opinion, the court considers "at least four factors": (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. *Scott v. The News Herald*, 25 Ohio St.3d at 250. In this case, an additional factor helps direct the compass—the actual statements of reasonable readers whose contemporaneous comments documented their actual understanding of the Defamatory Article to be that Dr. Croce is a research fraud, a crook, a con man, and a liar.

Under Ohio law, "whether a defamatory statement is substantially true is a question of fact." *Murray v. Knight Ridder*, 2004-Ohio-821 at ¶46; *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 110; *Young v. The Morning Journal* (1996), 76 Ohio St.3d 627, 669 N.E.2d 1136 (summary judgment improper where question as to whether the report was substantially accurate pursuant to R.C. 2317.05).

False Statement 14 must be read in its context. *Murray v. Knight-Ridder, Inc., supra* at ¶41. In context, False Statement 14 communicates to ordinary readers that "at least 20" papers reporting Dr. Croce's research have been retracted, corrected or subject to editor's notices due to *"falsified data"* or "*plagiarism," "as a result of complaints by Dr. Sanders and others.*" But this is entirely false. No papers reporting Dr. Croce's research have been retracted, corrected, or subject to editors' notices due to falsified data or plagiarism. (Compl. at ¶¶37, 82, 182.)

Defendants mischaracterize the falsehoods contained in False Statements 6 and 7 as they are alleged in the Complaint. No discussions of "wrongdoing" or "accusations" against Dr. Croce occurred at all in the October, 2016 interview. (Compl. at ¶108.) Nor did Dr. Croce "in a later statement . . . place the blame for any problems with figures or text on junior researchers or collaborators at other labs." (*Id.* at ¶111.)

Under settled Ohio law, as set forth by the Ohio Supreme Court, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it, even where he names the original speaker or author of the defamatory statement. *Haines v. Welling*, 7 Ohio 253 (1835); *Fowler v. Chichester*, 26 Ohio St. 9 (1874); *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968) ("one may not avoid the consequences of making a libelous statement

merely by saying that he is repeating the words of another, even when that person is identified"); 3 Restatement 2d of the Law, Torts (Defamation), §578, cmt. B (one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it).

Defendants' suggestion that the cumulative import of these false statements should not be considered is directly contrary to Ohio law requiring (1) statements to be read in context, (2) that the court consider the totality of the circumstances, and (3) that the court assess the '*clear impact*,' '*general teno*r,' and '*impression*' created by the statements in the column." *McKimm* at 144, citing *Milkovich v. Lorain Journal Co*. (1990), 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1, 19 (emphasis added). *See also Scott v. News-Harold, supra*, at 250; *Murray v. Knight-Ridder, Inc.*

Applying Ohio's legal test for defamation *per se*, the Defamatory Article and the False Statements within it are defamatory *per se*. Statements far milder that those in the Defamatory Article have been held to be defamatory *per se. Murray v. Knight Ridder, supra.* The false statements made about Dr. Croce in the Defamatory Article, on their face and without any extrinsic evidence, tended to (and in fact did) degrade or disgrace Dr.Croce (he's a "disgrace to the institution and a fraud to science"), held him up to public hatred, contempt or scorn (he's a "crook," a "liar," a "con man," a "criminal," and even a "murderer") and injured him in his trade, profession, and occupation (he's a "research fraud," guilty of "dishonest work," whose science is "incredibly corrosive;" "What does it take for Ohio State University to fire this man?"). The Defamatory Article cannot be reasonably described as anything other than defamatory *on its face.*

The Ohio Supreme Court's decision in *Am. Chem. Society* does not support a "balanced news report privilege" that "shields" all news articles regardless of topic. To the contrary, the Supreme Court of Ohio has repeatedly declined to adopt a common law neutral reportage privilege. *Young v. The Morning Journal*, 76 Ohio St. 3d 627, 629 (1996) ("This court has never recognized the 'neutral reportage' doctrine, and we decline to do so at this time."). *See also Bahen v. Diocese of Steubenville*, 2013-Ohio-2168, ¶2 (App. 7th Dist.).

"[M]ere publication of a denial by the defamed subject does not absolve a defendant from liability for publishing knowing or reckless falsehoods." *Connaughton v. Harte Hanks*

Under the four-factor *Vail* test, the reasonable reader will not perceive the False Statements as opinions. *Scott v. The News Herald*, 25 Ohio St.3d 243, 250 (Ohio 1986); *Vail v. The Plain Dealer Pub'g Co.*, 72 Ohio St.3d 279, 282 (1995).

In this case, both the general and broader contexts communicates to the reasonable reader that the Defamatory Article is reporting factual information, not opinions.

Defendants are not entitled on a Motion to Dismiss to an assumption that the Defamatory Article accurately reported what unidentified "scientists" allegedly said or "argued." Even if a false statement contains some element of opinion, "[i]f the defendant expresses a derogatory opinion without disclosing the facts upon which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts." *Natl. Rifle Assn. v. Dayton Newspapers. Inc.*, 555 F. Supp. 1299, 1312 (S.D. Ohio 1983), *citing* Restatement (Second) of Torts § 566, cmt. C. *See also Plough v. Schneider*, No. 10496, 1982 BL 148 (Ohio App. 9th Dist. April 28, 1982); *Harris v. Bornhorst*, 513 F.3d 503, 522 (6th Cir. 2008); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) ("expressions of 'opinion' may often imply an assertion of objective fact").

The False Statements are not statements about Dr. Croce's "motives" at all. Ohio Supreme Court precedent makes clear that false and defamatory statements about one's state of mind are actionable where, under the four-part *Vail* test, the context is such (as is the case here) that the ordinary reader would understand the statement to be one of fact, rather than opinion. *Scott v. News-Herald*, 25 Ohio St.3d 243 (1986).

Ohio courts have specifically stated that "[a]n allegation that one has acted unprofessionally constitutes defamation *per se*." *Sygula v. Regency Hosp. of Cleveland E.*, 64 N.E.3d 458, 466 (8th Dist. 2016); *Kanjuka v. MetroHealth Medical Ctr*., 2002-Ohio-6803, P17, 151 Ohio App. 3d 183 (8th Dist. 2002); *Gosden v. Louis*, 116 Ohio App. 3d 195, 207 (App. 9th Dist. 1996).

Defendants' assertion that the false light claim rises or falls with the defamation claim is without merit. Defendants' claim that Dr. Croce failed to sufficiently plead his claims in Counts II and III is likewise without merit.

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MEMORANDUM IN OPPOSITION

I. INTRODUCTION.

Defendants' Motion to Dismiss is wholly without merit and should be denied. The Complaint sets forth multiple specific allegations that more than satisfy each of the elements of Dr. Carlo M. Croce's claims for defamation, false light invasion of privacy, and intentional interference with emotion distress. This Response summarizes (in the Table of Points and Authorities) the deficiencies in Defendants' arguments and explains those deficiencies in detail in the Argument below.

Fundamental to this Court's consideration of Defendants' Motion to Dismiss are the allegations of Dr. Croce's Complaint. Defendants correctly point out that those allegations are contained in 223 numbered paragraphs, covering over fifty-eight pages. In their Memorandum, Defendants water down and summarize those detailed factual allegations in three pages. In so doing, Defendants have omitted many of the critical allegations and blandly or pejoratively paraphrased others.

For example, "the law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement," *McKimm v. Ohio Elections Commission*, 89 Ohio St. 3d 139, 144-145 (2000). The Complaint quotes the comments of actual reasonable readers that forthrightly reveal their clear understanding of the Defamatory Article's meaning. It is revealing that Defendants' Motion is bereft of any reference to a single one of those comments that condemn Dr. Croce as a "con man," a "fraud," a "crook," a "liar," a "cockroach" that "scurried out from under a rock," a "murderer," and a scientist "guilty of misconduct."

A computer search of Defendants' Motion will also reveal that Defendants completely ignore the fact that the Defamatory Article appeared directly below the tag line "**Journalists on**

the ground. Stories grounded in facts." (Compl. at ¶¶77, 169.) Their Motion is also bereft of any acknowledgment of the companion article entitled "**Open Records Close the Case**" in which Defendants tout the thoroughness of their factual "investigation" of Dr. Croce and say that "**Here, everything just kept adding up.**" (*Id.* at ¶176.) The headline saying that open records "close the case" was clearly intended to tell Defendants' readers that the "case" stated against Dr. Croce in the Defamatory Article is proven fact. (*Id.*)

Defendants' Motion also relies heavily on the existence of a purported "balanced news report" defense, stating that balanced news reports are "shielded by Ohio law." (MTD at 16, 20.) In fact, two of Defendants' key defenses are dependent upon this assertion. But there is no such defense for all balanced news reports regardless of topic. Defendants cite *Am. Chem. Soc'y v. Leadscope, Inc.*, 133 Ohio St. 3d 366, 389 (2012) for the proposition that "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." *Am. Chem. Soc'y* does not so hold. The holding in *Am. Chem. Society* is literally limited to a "*true and accurate* ***summary of . . . legal proceedings."*** As discussed in Part (F)(1), *infra*, this is consistent with the statutory law of Ohio as set forth in Rev. Code 2317.05. Nowhere in *Am. Chem. Society* or in any other case does the Ohio Supreme Court adopt a *carte blanche* "shield" for every "balanced news report" regardless of topic. To the contrary, the Ohio Supreme Court has repeatedly declined to adopt a common law neutral reportage privilege. *Young v. The Morning Journal*, 76 Ohio St. 3d 627, 629 (1996) ("This court has never recognized the 'neutral reportage' doctrine, and we decline to do so at this time. Accordingly, we will not uphold the grant of summary judgment based on the 'neutral reportage' doctrine.").

Interestingly, Defendants make only one reference to the Defamatory Article's headline, and that single reference *only* appears in the Appendix, accompanied by the assertion that it is

"part of and summary of a balanced news report." Nowhere do Defendants deny the fact that this headline and the entire Defamatory Article on which it is based is a knowing falsehood. (Compl. at ¶¶180-186.) As OSU had told Defendants before Defendants published the Article, OSU had spent significantly more to support Dr. Croce's research program than he brought in from outside sources, such as grants. (*Id.* at ¶181.) Even if there were a "balanced news report shield" for Defendants, it is no balanced news report to say that Dr. Croce has been given a pass for years of ethics violations because "OSU reaps millions from his grants," when the truth is that OSU spends more on Dr. Croce's research that it receives from his grants.

One other point about Defendants' Motion is worth noting at the outset. Defendants' Motion states that "*The Article also discusses* Croce's . . . *acceptance of grant money from the [Council for Tobacco Research], which was funded by the tobacco industry*." (MTD at 5-6.) The Article in fact does not say that. Nonetheless, based upon this false assertion, Defendants' Motion says, "Essentially, *Croce's research into the causes of cancer was supported by sales of cigarettes, one of the leading causes of cancer*." *Id.* This is also outrageously and maliciously false. Dr. Croce has never accepted grant money from the CTR, and his research into the causes of cancer has never been supported by the sales of cigarettes. These false facts are not even expressly alleged in the Defamatory Article. Yet this is what the *Defendants themselves* apparently understood to be the "clear impact" and "general tenor" of their own Defamatory Article.

As Justice Stewart said fifty-two years ago "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92-3, 86 S. Ct. 669, 679, 15 L.Ed.2d 597 (1966) (concurring opinion of Justice Stewart), quoted in *Milkovich v. Lorain Journal Co.*,

497 U.S. 1, 22, 110 S. Ct. 2695, 2708, 111 L. Ed. 2d 1, 20 (1990). Defendants' Defamatory Article with its multitude of falsehoods has indisputably provoked vicious and venomous condemnations of Dr. Croce from ordinary reasonable people who simply read the Article and concluded from the Article *on its face* that Dr. Croce is a research fraud, a disgrace to science, a crook, a con man, and worse. There is no doubt that Dr. Croce has been degraded and disgraced. There is no doubt that he has been held up to public hatred, contempt, and scorn. There is no doubt that he has been injured in his trade, profession, and occupation. The reputation of one of the great pioneers of cancer genetics, whose discoveries have resulted in life-saving treatments, is falsely attacked. Dr. Croce has turned to this Court for a remedy. A remedy to which he is, in justice and under the law, entitled.

II. STATEMENT OF FACTS.

A. Dr. Carlo M. Croce.

Plaintiff Carlo M. Croce, M.D., has devoted his life to cancer research. (Compl. at ¶1.) He began his pioneering research into the genetic anomalies in cancer at a time when little was known of the human genome. (*Id.* at ¶22.) His decades-long work thereafter uncovered the early events involved in the pathogenesis of leukemias and lymphomas, and lung, nasopharyngeal, head and neck, esophageal, gastrointestinal and breast cancers. (*Id.* at ¶23.) Dr. Croce's research and his discoveries have been described by other distinguished scientists in his field as pioneering, paradigm-shifting, field-expanding, trailblazing, visionary, and meriting generational fame. (*Id.* at ¶¶2, 61 and Ex. B at 10.) Dr. Croce's work has had, and is having, a major impact in the diagnosis, prognosis and treatment of cancer. (*Id.* at ¶3.)

Among Dr. Croce's discoveries is the BCL2 gene that resulted in the development of a drug, Venetoclax (also called Venclexta), that is now saving or prolonging the lives of those suffering with advanced chronic lymphocytic leukemia. (*Id.* at ¶¶5, 25.) The FDA reported that

80 percent of clinical trial participants who have a 17p deletion (a particularly high-risk form of CLL) and were treated with Venetoclax experienced complete or partial remission of their cancer. (*Id.* at ¶25.) The FDA therefore gave Venclexta a "breakthrough therapy designation" with "priority review status" and "accelerated approval" for patients who have CLL with a 17p deletion. *Id.* Venetoclax is now described as a "powerful new kind of cancer drug." (*Id.*) Dr. Croce's discovery of the BCL2 gene has thus resulted in prolonging or saving the lives of those afflicted with CLL and will likely continue to prolong or save the lives of many more. (*Id.)*

Dr. Bruce A. Beutler, the 2011 Winner of the Nobel Prize in Physiology or Medicine, recently described Dr. Croce as "one of the great pioneers of cancer genetics." Dr. Beutler describes Dr. Croce's discovery of the key molecular defect responsible for Burkitt's lymphoma as "nothing short of sensational," because it "came at a time when practically nothing was known of the organization of the human genome." (Compl. at ¶61 and Ex. B at 9-10.) Dr. Beutler lauds Dr. Croce's discovery of the BCL2 gene that led to effective therapy for follicular lymphoma. *Id.* Dr. Beutler states that Dr. Croce's later discovery that the deletion of non-coding RNAs miR-15a and miR-16-1 were observed in numerous cases of CLL, and his determination that these two miRNAs target BCL2 mRNA for degradation "opened still another vista in cancer research." (*Id*.) Dr. Beutler concludes with the following:

> In a field replete with stellar scientists, he [Dr. Croce] has constantly maintained a position near the very top, and in the field of lymphoma pathogenesis, he has always been the "lodestar." His extraordinary citation record makes this apparent. But since numbers alone do not suffice to judge quality, and some have achieved renown by sensationalism, I must add that Croce's work has been incisive, path-breaking, and exceptional in its durability.

(*Id.*)

Since 2004, Dr. Croce's research has been conducted at The Ohio State University ("OSU"), where he is the John W. Wolfe Chair, Human Cancer Genetics, Director of the Human

Cancer Genetics Program, Director of the Institute of Genetics, Professor of Internal Medicine, and Professor and Chair of the Department of Molecular Virology, Immunology & Medical Genetics. (Compl. at ¶8.) At OSU, Dr. Croce continued and expanded his research on the involvement of non-coding RNAs in cancer pathogenesis. (*Id.* at ¶¶27, 28(b).) For his work, Dr. Croce received the 2013 InBev-Baillet Latour Fund International Health Prize. (*Id.* at ¶26(e).) The Chair of the Committee that awarded that prize to Dr. Croce was the 2008 winner of the Nobel Prize in Physiology or Medicine. (*Id.*)

Since 1975, Dr. Croce has been honored on more than sixty-four occasions with awards recognizing the path-breaking and paradigm-shifting importance of his research and discoveries in the field of cancer genetics. (*Id.* at ¶¶ 26, 27.) In his more than 45 years of scientific research, Dr. Croce has never committed or been found to have committed any scientific misconduct or fraud. (*Id.* at ¶37.)

B. Glanz' Visit to Columbus and His False Statements About That Visit in the Defamatory Article.

On September 24, 2016, Defendant James Glanz ("Glanz") sent an email to Dr. Croce stating that Glanz was "at the very beginning" of "doing some reporting on promising anti-cancer results at a basic research level." Explaining that he lacked background in the field of cancer research, Glanz asked Dr. Croce if he could "speak to you [briefly] on the fascinating topic of microRNA." (Compl. at ¶40.)

Unaware of any ulterior motive for this visit, Dr. Croce invited Glanz to visit with Dr. Croce in Columbus and to tour Dr. Croce's lab at OSU. (*Id.* at ¶41.) Glanz did so, arriving in Columbus on the evening of October 2, 2016. He had dinner with Dr. Croce that evening, and spent the next day with Dr. Croce at his lab. *Id.* During this visit, Dr. Croce explained microRNA to Glanz and introduced him to one of Dr. Croce's post-doctoral fellows. (*Id.*) At no time during

this visit to Columbus did Glanz ever mention anything to either Dr. Croce or the post-doctoral fellow about any scientific misconduct or "wrongdoing" by Dr. Croce. (*Id.*)

On October 4, 2016, Glanz sent an email to Dr. Croce stating:

> Thanks again for inviting me to Columbus and spending so much time explaining the science to a novice in the area. I'll talk over the material with colleagues here and be in touch.

To this, Dr. Croce responded on the same day: "Dear Jim, I enjoyed meeting you! I hope you had a good time. Ciao, Carlo." (*Id.* at ¶14.)

In the Defamatory Article published over six months later, Glanz stated that "during this interview in October . . . , Dr. Croce denied any wrongdoing, said he had been singled out in some of the accusations simply because he was a prominent figure." (*Id.* at ¶107.) This is false. No such discussion occurred. Glanz did not ask about or mention, to either Dr. Croce or to Dr. Croce's post-doctoral fellow, the topic of misconduct or allegations of "wrongdoing" by Dr. Croce. (*Id.* at ¶108.)

The Defamatory Article also stated that "during [the] October interview, Dr. Croce largely placed the blame for any problems with figures or text on junior researchers or collaborators at other labs." This is also false. Had Glanz stated or even implied that Dr. Croce had been accused of or guilty of research misconduct or ethical violations of any sort during that October 2-3 meeting, Dr. Croce would never have responded to Glanz' post-visit, thank-you email with a cheery "Dear Jim, I enjoyed meeting you! I hope you had a good time. Ciao, Carlo."[1]

C. The Defamatory Letter.

Three weeks later, on November 23, 2016, Glanz sent a letter on New York Times

[1] Because this is a Motion to Dismiss under Fed. R. Civ. Proc. 12(b)(6), all reasonable inferences from the facts alleged must be drawn in favor of plaintiff. This is one of those reasonable inferences, from which a jury could conclude that Glanz was perfectly willing to lie in the Defamatory Article.

letterhead to OSU and Dr. Croce stating that Glanz had "questions" he wanted to "put urgently" to Dr. Croce and OSU "as part of an article" Glanz was preparing. Glanz' letter was six pages long, single-spaced, and contained twenty-five paragraphs. (Compl. at ¶¶47, 48 and Ex. A.)[2]

Disturbingly, Glanz' letter was riddled with false and defamatory statements about Dr. Croce and his career. It also contained "questions," many of which were loaded, misleading, and/or based on false and defamatory premises. *Id.* at ¶48. Glanz sent it not just to Dr. Croce. He sent it also to Dr. Croce's employer, OSU. *Id.* at ¶49.

Dr. Croce was stunned to receive this letter from Glanz, especially in light of Glanz' prior representation that he was reporting on "promising anti-cancer results," and Glanz' visit to Columbus during which Glanz said not a word about any allegation of scientific misconduct or wrongdoing by Dr. Croce. *Id.* at ¶48.

The Defamatory Letter was a blatantly false attack on Dr. Croce's honesty and integrity as a scientist. (*Id.* at ¶50.) It contained statements of fact that were defamatory and verifiably false. It stated that "Dr. Croce is knowingly engaging in scientific misconduct and fraud." In making this statement, Glanz quoted and thereby republished a defamatory falsehood uttered by an Associate Professor at Purdue University named David A. Sanders. Dr. Croce has never engaged in scientific misconduct or fraud. Dr. Croce had never heard of Sanders prior to receiving the Glanz Letter. (*Id.* at ¶51.)

The Defamatory Letter also stated that "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

[2] Defendants' Motion to Dismiss states that he sent the Defamatory Letter to OSU "at Croce's direction." (MTD at 4.) There is nothing in the Complaint to support this and it is not true.

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." (*Id.* at ¶52.) These too are factual statements that are verifiably false. (*Id.*) Dr. Croce and the operation he oversees do not routinely handle experimental data improperly. (*Id.*) They do not routinely use data duplicated from one experiment in figures for unrelated experiments. (*Id.*) Dr. Croce's colleagues do not routinely "engage in those practices for papers on which Dr. Croce is an author." (*Id.*) Dr. Croce and the operation he oversees do not routinely plagiarize or allow to be plagiarized, text from papers written by other authors. (*Id.*)

The Defamatory Letter also stated that "Dr. Croce reviewed and awarded countless grants using Council for Tobacco Research ("CTR") money, often in cases with clear conflicts of interest involving grantees at his own institution (Thomas Jefferson University at the time)." (*Id.* at ¶53.) This too is a factual statement that is verifiably false. (*Id.*) Dr. Croce did not review and award grants using CTR money involving grantees at his own institution at the time, Thomas Jefferson University. (*Id.*) To the contrary, in every case in which a grant application came up for discussion involving anyone from Thomas Jefferson University, Dr. Croce left the room, did not participate in the discussion on that application, and did not vote on it. (*Id.* at ¶53.)[3]

The Defamatory Letter further stated,

> [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." (*Id.* at ¶54.)

[3] As will be discussed below, Glanz and Defendants also misrepresented in the Defamatory Article and their Motion the important grant-making role of the Scientific Advisory Board, upon which Dr. Croce served, and the scientific focus and value of the grants awarded by that body. The SAB funded significant research having nothing to do with tobacco, at a time when research funds were scarce.

This too is a factual statement that is verifiably false. The fact that the FHIT gene is a tumor suppressor gene has been widely established, with respect to a wide range of human cancers, including lung, esophagus, colon, kidney, ovarian, cervical and breast cancers. (*Id.* at ¶55.) The FHIT gene continues to be an important focus in cancer research, as evidenced by the fact that, in the eighteen months prior to the filing of the Complaint alone, at least twenty-one new papers involving FHIT appeared on www.pubmed.gov, an online repository of medical research and review papers maintained by the U.S. National Library of Medicine, National Institutes of Health. (*Id.*) Research involving the FHIT gene is conducted around the world, with recent papers from researchers in the United States, China, Korea, Italy, Poland and Turkey. (*Id.*) The FHIT gene is also not a "puzzling byproduct of cancer," and the therapeutic promise of the FHIT gene is still significant. (*Id.*) As delivery methods of gene therapy improve, and as scientists are able to increase the effective delivery of gene therapies into cells, FHIT, as well as p53 and other known tumor suppressor genes, will be the focus of that therapy. (*Id.*)

The Defamatory Letter also stated, "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?" (*Id.* at ¶56.) The factual statement that is the premise of Glanz' question is that Dr. Croce's research on the FHIT gene was an "almost complete failure." (*Id.*) This is a statement of fact that is verifiably false and defamatory. (*Id.*) Many scientific papers from around the world continue to investigate the FHIT gene's operation and promise in tumor suppression. (*Id.*) Glanz' assertion that Dr. Croce interfered or failed to cooperate in the correction of errors in figure construction called for in an Alternative Resolution is likewise false. (*Id.*) Further, Dr. Croce was, appropriately, not required to retract any paper. (*Id.*)

All of the above statements reflect injuriously on Dr. Croce's reputation and expose him to public hatred, contempt, ridicule, shame or disgrace. (*Id.* at ¶57.) They also affect Dr. Croce adversely in his trade, business and profession. They are all therefore defamatory *per se*. They were also all published to Dr. Croce's employer. (*Id.*)

The Defamatory Letter contained the following invitation to Dr. Croce and OSU: "If I can clarify any of these questions or provide further information, please let me know." (*Id.* at ¶60.)

D. Dr. Croce's Response to the Defamatory Letter.

In light of the maliciously false and defamatory statements and the loaded and misleading questions in the Defamatory Letter, coupled with Glanz' assertion that these questions are "put to you as part of an article I am preparing," Dr. Croce found it necessary to retain legal counsel to respond. (Compl. at ¶61.) On January 25, 2017, Dr. Croce responded (by means of a letter from his legal counsel) to each of the questions directed to Dr. Croce in the Glanz Letter. ("Dr. Croce's Response"; Compl. at ¶61, Ex. B).

Dr. Croce's Response spelled out in detail facts that refuted the false and defamatory allegations in the Glanz Letter. (*Id.* at ¶62.) Dr. Croce's Response also asked Glanz to provide information that Glanz claimed supported his defamatory statements in the letter. Dr. Croce's requests for that information were in response to Glanz' offer in the Defamatory Letter to provide that further information. Glanz did not respond to Dr. Croce's requests. (*Id.*)

On January 26, 2017, Glanz sent an email to Dr. Croce's legal counsel asking two follow-up questions. The next day, Dr. Croce fully responded by email (through his counsel) to both questions. Having responded with facts refuting every false statement in the Defamatory Letter and Glanz' email, Dr. Croce asked Glanz for the "following reciprocal courtesies:"

> **First,** if you believe that anything contained in Dr. Croce's responses is inaccurate, please state, in a responsive email or letter directed to me, specifically and exactly what you contend is inaccurate and why you contend it is inaccurate. **Second,**

> please provide the information that Dr. Croce requested of you in the following paragraphs of my January 25, 2017, letter to you: paragraphs 1, 5, 7, 8, 11, 12, 14, 18, 22, and 25. We ask that you do these things before any article is published."

Neither Glanz nor anyone at the New York Times denied or disputed the factual accuracy of anything in Dr. Croce's Response. Nor did they provide any of the further information that Dr. Croce had requested regarding the allegations contained in paragraphs 1, 5, 7, 8, 11, 12, 14, 18, 22, and 25 of the Defamatory Letter. (*Id.* at ¶64.)

E. The Defamatory New York Times Article.

The Defamatory Article first appeared in the digital version of The New York Times on March 8, 2017 under the headline:

> **"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."**

(Compl. at ¶77, False Statement 1[4].) This front page headline appears directly below the tag line "**Journalists on the ground. Stories grounded in facts**." (*Id.*)

The March 8, 2017, digital version of the Defamatory Article was published to tens of millions of "unique visitors" in the United States and around the world. (*Id.* at ¶69.) Defendants then republished the Defamatory Article on social media. The defamatory social media posts on Twitter and Facebook extended the reach of the digital version of the Defamatory Article still farther. (*Id.*)

Shortly after its publication, the New York Times reported that the Defamatory Article was

[4] The Complaint refers to "False and Defamatory Statement Number" 1-16. For readability only, we refer to them here as simply "False Statement" 1-16. We do not mean by this simplification to suggest they are not defamatory. Each of the statements is both false and defamatory.

Number One on the list of "Most Popular" articles in the digital version of The New York Times. (*Id.* at ¶70.) On the day of, and within days shortly thereafter, 444 readers had posted comments about it on the New York Times website. (*Id.*)

On March 9, 2017, the Defamatory Article was published on the front page of the New York Times' print version, above the fold, under the headline "**Years of Questions but Researcher Gets a Pass**." (*Id.* at ¶68.) According to SEC filings, the New York Times has more than 3 million subscribers. (*Id*. at 9.)

Photos of Dr. Croce culled by the New York Times from other sources and taken for unrelated purposes accompanied both the digital and print versions of the Article. (*Id*. and Ex. C thereto.)

F. The Defendants' Defamatory "Tweet" and Facebook Post.

On March 8, 2017, the same day the digital version of the Defamatory Article was published, the New York Times also "tweeted" the following false and defamatory tagline through its Twitter social media account, @nytimes, to all of The New York Times' Twitter "followers:"

> **"A star cancer researcher accused of fraud was repeatedly cleared by Ohio State, which reaps millions from his grants."**

(Compl. at ¶83, False Statement 2.) This tweet included a link to the Defamatory Article. The New York Times has more than 35 million Twitter followers. The New York Times used this tag line again that same day to promote the Defamatory Article on its Facebook social media page. The New York Times' Facebook page has nearly 14 million "likes" and followers. These social media posts by The New York Times are reasonably believed to have been shared within Twitter and Facebook thousands of times. (*Id.* ¶84.)

This tagline, coupled with the Defamatory Article's headline, communicated to readers that Dr. Croce is in fact guilty of fraud, but "repeatedly cleared of fraud" because of the "millions"

OSU "reaps" from his grants. (*Id.* at ¶85.) Ordinary readers understood the meaning of the words exactly that way, saying Dr. Croce is a "research fraud," an "academic fraud," and a "fraud to science." (*Id.*)

G. "Open Records Close the Case."

Also, on the same day that the Defamatory Article was published in the digital and print versions of the New York Times, a related article appeared in both versions, entitled "**Open Records Close the Case**." The digital version of this article is also accompanied by the tagline: "**Journalists on the ground. Stories grounded in facts**." (*Id.* at ¶176.)

The "**Open Records Close the Case**" article quotes Defendant Glanz as saying that "Ohio is paradise for open documents" and states that "[r]arely do reporters encounter as few obstacles as they did in this case," suggesting that the "investigation" produced evidence to support the facts recited in the Defamatory Article. (*Id.* at ¶177.) Defendant Armendariz is quoted as saying "Here, everything just kept adding up." (*Id.*) The headline saying that the open records "close the case" is clearly intended to mean that the "case" stated against Dr. Croce in the Defamatory Article is proven fact. (*Id.*)

H. Ordinary Readers' Understanding of the Defamatory Headline and the Defamatory Article as a Whole.

Both the headline and the article as a whole were understood by ordinary readers to mean 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. (Compl. at ¶78.) The comments quoted below (with bolded emphasis added) were all posted online by ordinary readers of the Defamatory Article on the same day it was published or within a week thereafter:

- "**Research frauds like Croce** might explain why after billions are spent on cancer research, we have made only modest progress . . . **Why isn't he in jail already? It's criminal**. His grant money should be returned by Ohio State to the federal government where it can be re-awarded to a bona fide researcher: "I suppose cancer

research is such a lucrative business, it doesn't pay to find actual cures?"[5]

- "While we otherwise believe that Academia always stands healthy and strong 'in the shoulder of Giants', **dishonest work by people like Mr. Croce's [sic] silently spreads for years in the scientific community**. Millions have been wasted, and we will never know what findings were slowed down or prevented from happening in our lifetime."

- "THIS SHOULD BE RIGOROUSLY PROSECUTED BECAUSE TO DECEIVE ONE'S FELLOW SCIENTISTS WITH FALSE FACTS, AND TO STYMIE PROGRESS AND THE CURE OF DISEASES BY DISSEMINATING "FABRICATIONS, DEMONSTRATES A GROTESQUE AND MALEVOLENT ATTITUDE TOWARDS ONE [sic] FELLOW MAN. **He, in a sense, committed a form of murder.** He did not shoot anyone with a gun, but **he led scientists astray,** and these doctors spent precious hours **examining his concoted [sic] falsehoods** when they could have been finding actual cures**. There is a body count**." (All capital letters in the original.)

- "**Carlo Croce is a disgrace to the institution and a fraud to science**. As an alumni, I feel disgust at how The Ohio State University has dealt with this man." (This was a post on Facebook on March 8, 2017, that "shared" the Defamatory Article with others.)

- "**Here's a scientist who turns out to be a crook and a liar** and all the right-wing crazies come out to declare science itself has been refuted."

- "**Stunning how many individuals and institutions have been complicit in obvious academic fraud**. An isolated incident one could shrug off. . . . **What does it take for Ohio State University to fire this man**? Afraid of losing grant money? You can hire another geneticist with better credentials **to replace this con man**."

- "The Ohio State University has a penchant for the mercenary. It overlooks ethical issues as long as the money keeps flowing in."

- "Why can't the supposed adults in charge in Columbus realize that whatever they thought 'Carlo' was bringing to their campus has now been vastly outweighed by the negative publicity **once the rock was finally lifted so the cockroach could scurry out**?"

- "There's a glut of biomedical researchers in the US, certainly **there's no need to rehab those found guilty of misconduct**."

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[5] Ironically, Dr. Croce did indeed discover the gene involved in causing chronic lymphocytic leukemia, which led to remission or cure for thousands of people suffering from advanced stage of that deadly disease.

- "Peel back the curtains of what really happens in academic research, and **you will find a boneyard of fraud.** Winning/extending a grant is the primal driver. . . . Long story short - **there are many more 'Dr. Croces' out there draining the NIH research gravy train that will never get caught**."

- "**Unfortunately, like too many other senior star researchers, he is a blowhard sales-person who has created a lab culture which rewards positive data at the expense of scientific method**. Grad students and post-docs who do things properly and find negative results are pushed to the side. High-profile publications and grant money are the only thing that matters**. In almost every field, there are some star scientists doing things properly, and making real contributions. And then there are people like this.**"

- "**This man's fraudulent research** has led to the approval and sale of pharmaceutical products, products which are presumably still on the market."

- "Good news, but the culture of fraud and especially abuse of power in the world of academic science research is breathtakingly widespread. **Because people like Croce are very successful, they infect the entire culture, and expecting to have people above you behave honestly is completely naive**."

- "**Science as practiced by Dr. Croce is incredibly corrosive**. **Aside from slowing research in his own field**, think of the effect he has on the general public's perception of scientific research, and how that changed perception can erode support for governmental funding for all types of research."

- "Why look! Years of Ethics Charges, but Star #Cancer Researcher Gets a Pass **even though proven guilty**." (This was a "retweet" on March 8 of The New York Times' post on Twitter of the Defamatory Article that day).

(*Id.* at ¶79.) As the above comments and many others reveal, readers of both the headline and the content of the Defamatory Article understood them to mean that Dr. Croce was in fact guilty of "years of ethics charges," including "scientific fraud," "fraudulent research," "academic fraud," "dishonest work," "scientific misconduct," and "disseminating fabrications." (*Id.*)

Ordinary readers therefore concluded that Dr. Croce is a "con man," a "fraud," a "crook," a "liar," a "cockroach" that "scurried out from under a rock," and a "murderer," but that he was "given a pass" for his research fraud because of the "millions" in grants he generates for OSU. (*Id.* at ¶80.) The facts are the opposite. Dr. Croce was in fact not guilty of any ethics charges. He could not therefore have been "given a pass" for ethics violations he did not commit. (*Id.* at ¶81.)

I. The Fabricated Allegation That Dr. Croce Got A Pass Because OSU "Reaped Millions" From His Grants

Defendants knew, before they published the Defamatory Article, that Dr. Croce had never committed or been found to have committed any ethical violations, scientific misconduct or fraud. (Compl. at ¶82, 182.) However, a scientist who has committed no wrongdoing is not front-page material. So, Defendants made up a story: Dr. Croce was actually *guilty* of wrongdoing, but "got a pass" because OSU "reaped millions from his grants." The problem is, this story is demonstrably and factually false, and Defendants knew it.

Defendants knew, at the time they published the Defamatory Article, that OSU had spent significantly more money to support Dr. Croce's research program than he brought in from outside sources, such as grants. (*Id*. at ¶181.) They knew this because OSU told Glanz before the Article was published. They therefore knew that the factual premise for their story was entirely false. (*Id.* at ¶180.)

During a radio interview on WOSU on March 9, 2017, Glanz was asked about the fact that OSU had spent more to support Dr. Croce's research than he brought in from grants and other outside sources. Glanz responded, "Right, we were not able to verify that, but that is what they told us, that's all I know about that." (*Id.* at ¶183.) Defendant Glanz' dismissive assertion that "we were not able to verify" what OSU told him is also false. (*Id.* at ¶185.) Defendant Glanz was indeed able to "verify" OSU's assertion, but made no effort to do so, by public records request or otherwise. (*Id.*)

On information and belief, Defendants did not seek verification because they did not want verification. (*Id.* at ¶187.) Glanz and his collaborators had worked for months on an incendiary article that would make the inflammatory and explosive accusation that a major university had allowed one of its leading scientists to repeatedly "get a pass" on ethics charges, scientific

misconduct, and fraud because the university "reaped millions" from his grants. (*Id.* at ¶187.) Defendants were not going to let the true facts stand in the way of a front page headline and story that was sensational enough to grab the attention of (and, indeed, incite the wrath of) millions of readers. (*Id.* at ¶188.)

Defendants accomplished their objective. The Defamatory Article spread rapidly throughout the United States and the world. It immediately rose to Number One on the New York Times' list of Most Popular articles. (*Id.*) It generated venomous and accusatory comments from readers who read it exactly as Defendants maliciously intended it. (*Id.*)

Dr. Croce is 72 years old. He has devoted his life—his life's work—to uncovering the secrets of one of the world's most pernicious diseases. He is one of the most talented and productive cancer researchers in the world, whose discoveries have opened new vistas in cancer research and have led to life-saving treatment. As a result of the malicious falsehoods published and disseminated instantly to millions around the world, Dr. Croce is now called a "con man," a "fraud," a "crook," a "liar," a "cockroach" that "scurried out from under a rock," a "murderer" and a "fraud to science."

III. LAW AND ARGUMENT.

A. The Standard of Review.

This Court is, of course, fully familiar with the standard of review on a Motion to Dismiss under Fed. R. Civ. Proc. 12(b)(6). The court accepts all well-pled facts in the complaint as true, and draws all reasonable inferences in the plaintiff's favor. So construed, if the complaint alleges sufficient facts to state a claim that is plausible on its face, then the motion should be denied. *Savoie v. Martin*, 673 F.3d 488, 492 (6th Cir. 2012). The allegations of Dr. Croce's Complaint in this case are more than sufficient to state a plausible claim. They state powerful claims for defamation, false light invasion of privacy, and intentional infliction of emotional distress.

B. Defendants' Attempt To Establish A "Public Controversy" Is Legally Improper And Factually Wrong.

Defendants open their "Factual Background" with a section called "The Pre-Existing Controversy Regarding Croce's Research," in which they attempt to introduce extraneous materials not found in or referenced in the Complaint and not properly considered here. Defendants claim that those materials support an "ongoing public controversy regarding Croce's work." (MTD at 2, 4 and Exs. B-E to Declaration of Matthew E. Kelley.)

Those extraneous materials should be disregarded and stricken by the Court because they are not relevant under Ohio law to any legal argument pursued in the Motion. Defendants refer to them in connection with their argument that the Defamatory Article is "shielded" from a defamation claim because it is a "balanced news report."[6] But, as discussed below, there is no "balanced news report" defense applicable to the Defamatory Article. (*See* Part III(F), *infra*.) Because that defense is unavailable under Ohio law, the "evidence" of "public controversy" Defendants claim in support of that defense is irrelevant.

Even if the public controversy issue were relevant to Defendants' Motion, the cases Defendants cite for taking "judicial notice" of the extrinsic materials do not support judicial notice of the website posts they attach at Exs. B and D to the Kelley Declaration.[7] Both of the cases cited in footnote 2 of Defendants' Motion involved judicial notice for the purpose of determining the statute of limitations. Only one of the two involved a newspaper article, and that Court effectively disregarded it, finding "persuasive [those] decisions … that have found that

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[6] *See* MTD at 21 (the "challenged publications are non-defamatory because they are balanced reports on, or questions regarding, an on-going controversy"); 22 ("balanced accounts of a controversy"); 24 ("presenting both sides of an on-going controversy without taking sides" and part "of a balanced news report on an existing controversy"); and 36 ("discussing both sides of a pre-existing controversy").

[7] The Court must disregard such improperly submitted materials pursuant to Fed. R. Civ. Proc. 12(d), unless it provides notice of an intention to convert the motion to one under Rule 56.

press reports … do not constitute a sufficient basis at the Rule 12(b)(6) stage to conclude as a matter of law that the limitations period was triggered on or before a date certain." *Western Southern Life Ins. Co. v. JPMorgan Chase Bank, N.A.*¸ 54 F. Supp.3d 888, 903 (S.D. Ohio 2014). The tests applied in *Western Southern Life Ins. Co.* also make clear that a website post is not the type of material about which judicial notice may properly be taken: It is not a "matter of common knowledge" or "generally known within the trial court's jurisdiction" or a "source[] whose accuracy cannot reasonably be questioned." *Id*. at 898.

Defendants also rely on assertions in their own Defamatory Article as evidence of a "public controversy." Specifically, their second through the fifth bullet points (MTD at 3) are public statements that Defendants themselves made in their own Defamatory Article. As the United States Supreme Court has stated, "Those charged with alleged defamation cannot, by their own conduct, create their own defense." *Hutchinson v. Proxmire*, 443 U.S. 111, syllabus (1979). Thus, Defendants cannot rely on their own Defamatory Article as evidence of a public controversy. There is no evidence that any of the cited statements from the Defamatory Article were made public prior to publication of the article by Defendants.

The assertion that David Sanders made complaints to academic journals about Dr. Croce's work (*id*, bullet 6) also does not evidence a "public controversy." There is no evidence that any complaints made by Sanders to journals were disclosed to the public—that is until the Defendants wrote about them in the Defamatory Article. Sanders is a defendant in a related case for his role in defaming Dr. Croce and appears to have engineered at least one of the website posts attached to the Kelley Declaration. *See* Kelley Decl., Ex. B, p. 3 ("Hat tip: David Sanders"). Neither Sanders nor the Defendants in this action can claim any benefit of an alleged "public controversy" of their own creation.

Exhibit C to the Kelley Declaration is a Stipulation of Dismissal and Settlement Agreement ("Agreement") from more than seventeen years ago, while Dr. Croce was with Thomas Jefferson University ("TJU"). Such an Agreement can hardly be considered evidence of an "on-going" controversy. Moreover, the actual agreement itself negates any contention that it is evidence of a controversy "Regarding Croce's Research," as Defendants claim. The Agreement settled two cases, and Dr. Croce was not even a party to one of them. With respect to the other, Dr. Croce was named in the suit because he was the Cancer Center Director (referred to in the Agreement as the "Department Chair") at the time. (Kelley Decl., Ex. C, at p. 3.) The government alleged that TJU had failed to advise it that the Principal Investigator (not Dr. Croce) on a grant had left the country during the grant period. (*Id.*) "TJU contend[ed] that the absences of the PI for personal reasons, were reported to NIH" and that other qualified scientists at TJU performed the work. (*Id.* at 5-6.) Nothing contained in the agreement refers or relates to Dr. Croce's research, and it is therefore irrelevant to any claim of a "pre-existing controversy regarding [Dr.] Croce's research."

There simply was no actual "public controversy" surrounding Dr. Croce's research until Defendants, with Dr. Sanders' assistance, manufactured one.

C. The Relevant Law Of Defamation.

1. The Elements of a Claim for Defamation.

"In Ohio, defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Jackson v. City of Columbus*, 2008-Ohio-1041, 117 Ohio St. 3d 328, ¶9

(2008). Because Dr. Croce is a private figure,[8] the applicable degree of fault is ordinary negligence, *i.e.*, that the defendants did not act reasonably in attempting to discover the truth or falsity or defamatory character of the publication. *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St. 3d 176, 180 (1987). Defendants' negligence must be proven by clear and convincing evidence. *Id.*

2. Determining The Meaning of Challenged Statements.

The first step in analyzing whether challenged statements are false and defamatory is to determine the statements' meaning. As the Ohio Supreme Court stated in *McKimm v. Ohio Elections Commission*, 89 Ohio St. 3d 139, 145 (2000), "the law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement." The Court in *McKimm* also refers to that reader as the "ordinary reader" and "the average reader." *Id.*

To determine the statements' meaning to an ordinary or reasonable reader, the court must read the statements "in the context of the entire article." *Murray v. Knight-Ridder, Inc.*, 2004-Ohio-821, at ¶41 (7th Dist. 2004), quoting *Mendise v. Plain Dealer Publishing Co.*, 69 Ohio App.3d 721, 726 (1990), citing *Shellenberger v. Scripps Publishing Co.*, 20 Ohio Dec. 651 (1909), aff'd, 85 Ohio St. 492 (1912).

Not all of the statements in an allegedly defamatory article need be false or defamatory, and the defamatory article need not expressly state the defamatory falsehood. As the Ohio Supreme Court stated in *McKimm* at 144, quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1, 19 (1990), "The dispositive question * * * becomes whether a reasonable factfinder could conclude that the statements in the * * * column ***imply an assertion*** that petitioner Milkovich perjured himself in a judicial proceeding." (Emphasis added.)

[8] The Complaint alleges and provides the facts establishing that Dr. Croce is a private figure (*see* ¶74), and Defendants do not argue otherwise in their Motion.

To answer that question, the court must "assess[] the '***clear impact***,' '***general tenor***,' and '***impression'*** created by the statements in the column." *McKimm* at 144, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1, 19 (1990) (emphasis added). Thus, even though the words of the news article in *Milkovich, supra,* did not explicitly state that the plaintiff perjured himself, the United States Supreme Court concluded that the average reader of the column "would be left with just such an impression." *Id.*

As the Supreme Court stated in *McKimm,* quoting the rule stated in 3 Restatement of the Law 2d, Torts (1977), Section 563:

> The meaning of a communication is that which the *recipient correctly, or mistakenly but reasonably, understands that it was intended to express.*

(Emphasis added.) As the Supreme Court explained, "If the law were otherwise, publishers of false statements of fact could routinely escape liability for their harmful and false assertions simply by advancing a harmless, subjective interpretation of those statements." *McKimm* at 145. Hence, the publisher's perception of the meaning of the statement is irrelevant. *Id.* at 144.

3. Determining Whether The Statement is Defamatory *Per se* or *Per Quod*.

Once the meaning of the statements as reasonably understood by average readers is determined, the court must determine whether ***that meaning*** is defamatory *per se,* and if not, whether it is defamatory *per quod*.

a) Defamation per se

To constitute defamation *per se*, the "words must be of such a nature that courts can presume as a matter of law that they *tend to* degrade or disgrace the person of whom they are written or spoken, or hold him up to public hatred, contempt or scorn." *Moore v. P.W. Publishing Co.*, 3 Ohio St.2d 183, 188 (1965), cert. denied, 382 U.S. 978, 86 S.Ct. 549 (1966). A statement will also be considered defamation *per se* "if the statement *tends* to injure a person in his or her

trade, profession, or occupation." *Knowles v. The Ohio State University*, 2002-Ohio-6962, ¶24 (10th Dist. 2002), *citing Becker v. Toulmin*, 165 Ohio St. 549, 553-554 (1956), *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App. 3d 345, 353 (6th Dist. 1992).[9]

As this Court has stated, "Defamation *per se* occurs when material is defamatory on its face." *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.) When a statement is found to be defamation *per se*, both damages and actual malice are presumed to exist. *Knowles, supra* at ¶23.

b) Defamation per quod.

Even if a statement is "apparently harmless" and is, therefore, not defamatory *per se*, it may still be actionable as defamation *per quod*. Statements that are defamatory *per quod* are those that are not defamatory on their face "but become so by the use of an innuendo *rendering the apparently harmless words* into libelous ones *by extrinsic evidence*." *Conway v. Heat and Frost Insulators*, 209 F. Supp. 2d 731, 755-756 (N.D. Ohio 2002).

The phrase "become so by the use of innuendo" has a narrow and specific meaning in defamation jurisprudence. As Restatement §563 at Official Comment *f*, explains, under common law pleading, an "innuendo" was part of a pleading called an "inducement." The inducement was a prefatory statement used in cases where the defamatory meaning depended upon extrinsic circumstances. The inducement had two parts: "In what was ordinarily called the 'colloquium,' [the plaintiff] alleged that the publication was made of and concerning the plaintiff and of and

[9] Defendants state that "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." For this proposition, Defendants cite *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1314 (S.D. Ohio 2001). *McGee* in turn cites to an Ohio Court of Appeals case. But the test for defamatory *per se* as established by the Ohio Supreme Court is not as so narrow, as the Ohio Supreme Court decisions in *Moore, supra*, and *Becker, supra* demonstrate.

concerning the extrinsic circumstances. The communication he [the plaintiff] set forth verbatim and in the 'innuendo' explained the meaning of the words." Restat. 2d of Torts, § 563, cmt. f. The "use of an innuendo" thus rendered "the apparently harmless words into libelous ones by extrinsic evidence." *Becker* at 556 (emphasis added).

The following is an example of defamation per quod:

> Suppose … that a newspaper prints that the plaintiff has given birth to twins. There is nothing defamatory about this statement until an extrinsic fact is introduced, namely, that the plaintiff has been married only one month. Plaintiff must allege this fact and that the recipients of the publication had knowledge of the fact and thus derived a meaning from the publication defamatory of the plaintiff. *This would be done by inducement and innuendo*….

Isham, Duane L., "Libel *Per Se* and Libel Per Quod in Ohio," Ohio St. Law Journal, vol. 15, no. 3, 303-310, at 304 (1954) (emphasis added).[10]

In their Motion to Dismiss, Defendants state that Dr. Croce "expressly limits his claim to one for defamation *per se*." (MTD at 9.) As will be discussed in greater detail, below (Part III(I)(4)), this is inaccurate. Defendants' statements *are* indeed defamatory *per se*, but Plaintiff does not "limit his claim" to a *per se* claim. If this Court were to determine that the statements are not actionable *per se*, then, at a minimum, they are actionable *per quod*, and the Complaint has alleged special damages sufficient to satisfy the elements of a *per quod* claim.[11]

4. Whether Defamatory Statements Are Statements of Fact or Opinion.

The next step is to determine whether the statements as read and reasonably understood by ordinary readers in the context of the entire article are statements of fact or opinion. Once again,

[10] As another example, this Court held a statement that a settlement agreement was entered into and contained a confidentiality agreement to be actionable *per quod*. *McGee v. Simon & Schuster*, 154 F. Supp.2d 1308 (S.D. Ohio 2001) (Marbley).

[11] If the court should determine that defamation is not adequately pled, Dr. Croce respectfully requests the opportunity to amend his Complaint to state a claim for defamation *per quod*.

the reasonable reader test applies and the authors' intent is irrelevant. *McKimm v. Ohio Elections Comm., supra,* at 144-145, citing *Vail*, 72 Ohio St.3d at 282-283; and *Scott v. The News Herald,* 25 Ohio St.3d 243, 251-253 (Ohio 1986).

To determine whether a reasonable reader will perceive the statement as a fact or opinion, the court considers "at least four factors": (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared (the "*Vail* test"). *Scott v. The News Herald,* 25 Ohio St.3d at 250. These four factors, however, "can only be used as a compass to show general direction and not a map to set rigid boundaries." *Id.* In this case, an additional factor helps direct the compass—the actual statements of reasonable readers whose contemporaneous comments documented their actual understanding of the Defamatory Article to be that Dr. Croce is a research fraud, a crook, a con man, and a liar.

5. Determining Whether the Challenged Statements are True or False.

The final question is whether the false statements as reasonably understood by ordinary readers in the context of the entire article and after considering the entirety of the circumstances are true or false. This is a question of fact. Defendants argue that twelve of the allegations in the Complaint are "substantially true." As will be discussed below, Defendants' argument on this point is meritless. For now, the legal point is that, under Ohio law, "whether a defamatory statement is substantially true is a question of fact." *Murray v. Knight Ridder,* 2004-Ohio-821 at ¶46; *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 110; *Young v. The Morning Journal* (1996), 76 Ohio St.3d 627, 669 N.E.2d 1136 (summary judgment improper where question as to whether the report was substantially accurate pursuant to R.C. 2317.05).

In the following sections of this Response, Dr. Croce will address each of Defendants' arguments for dismissal. None of them has merit.

D. Defendants' Argument That Twelve of the False Statements are "Substantially True" Is Incorrect.

Defendants' first argument, that twelve of the challenged statements in the Defamatory Article are "substantially true," is incorrect. Every one of those statements is false, and that falsity is supported by the allegations of the Complaint.

1. False Statement 14 is in Fact False.

False Statement 14 asserted that:

> **"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.'"**

(Compl. at ¶149.) Defendants do not deny that this is a statement of fact. Defendants contend instead that Dr. Croce has "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." (MTD at 11.) Based on this assertion, Defendants argue that False Statement 14 is "substantially true." Defendants are wrong.

False Statement 14 must be read in its context. *Murray v. Knight-Ridder, Inc.*, *supra* at ¶41. In context, False Statement 14 appears in the fourth of the following four consecutive paragraphs near the beginning of the Defamatory Article:

> Over the last several years, Dr. Croce has been fending off a tide of allegations of ***data falsification and other scientific misconduct***, according to federal and state records, whistle-blower complaints and correspondence with scientific journals obtained by The New York Times.
>
> In 2013, an anonymous critic contacted Ohio State and the federal authorities with ***allegations of falsified data in more than 30 of Dr. Croce's papers***. 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.
>
> ***As a result of complaints by Dr. Sanders and others***, *journals have been posting*

> *notices of problems with* ***Dr. Croce's papers*** *at a quickening pace. From just a handful of notices before 2013 —* ***known as corrections, retractions and editors' notices — the number has ballooned to at least 20,*** with at least three more on the way, according to journal editors. Many of the notices involve the *improper manipulation* of a humble but universal lab technique called western blotting, *which measures gene function in a cell and often indicates whether an experiment has succeeded or failed.*

(Compl. Ex. B; emphasis added.) To average reasonable readers, the phrase "Dr. Croce's papers" used in these paragraphs means papers that report research conducted by Dr. Croce or by others in Dr. Croce's laboratory under his supervision. This is confirmed by the actual comments of those readers condemning "*this man's* fraudulent research," "*science as practiced by Dr. Croce*," and "*dishonest work by people like Mr. Croce.*" *Id.* at ¶79.

Read in context, an average reasonable reader of these four sequential paragraphs would understand that the "corrections, retractions and editors' notices" are all for the alleged data falsification or plagiarism referred to in the immediately preceding paragraphs. This reading is supported by the fact that the fourth paragraph begins with the lead-in phrase "***As a result of complaints by Dr. Sanders and others,***" corrections, retractions, and editors' notices in "Dr. Croce's papers" have "ballooned to at least 20." (Emphasis added.) The *only* "complaints" that "Dr. Sanders and others" are said in the Article to have made are allegations of "data falsification" and "plagiarism."

Read in context, False Statement 14 therefore communicated to ordinary readers that "at least 20" papers reporting Dr. Croce's research have been retracted, corrected or subject to editor's notices due to "*falsified data*" or "*plagiarism,*" "*as a result of complaints by Dr. Sanders and others.*" But this is entirely false. No papers reporting Dr. Croce's research have been retracted, corrected, or subject to editors' notices due to falsified data or plagiarism. (Compl. at ¶¶37, 82, 182.)

Nonetheless, Defendants argue that "Croce and his counsel have expressly conceded in

the Complaint that *19* papers that list Croce as an author have been corrected or retracted." (MTD at 11.) Dr. Croce's Complaint makes no such concession. None of the papers included in their count of 19 was corrected or retracted due to any "falsified data" or "plagiarism." Here are the facts.

First, Defendants state that "Croce, . . . admits that one of 'his' papers has been retracted. *Id.* ¶ 34 & Ex. B at 1, 7-8." But Defendants know that that one withdrawn paper had nothing to do with any allegation of falsified data or plagiarism. It was not a research paper at all. (MTD at 4.) It was a Commentary Paper (an opinion piece) published under "News & Views" in a journal called Nature Reviews Clinical Oncology. (Compl. at ¶32 and Ex. B thereto, at 1, 7.) The withdrawal of that paper had nothing to do with any falsified data or plagiarism. To the contrary, Dr. Croce *himself* initiated the withdrawal because the journal declined to include a sentence in his opinion piece that Dr. Croce believed needed to be included. Dr. Croce's direction to the journal was either to "include [his] comments on Cell or I withdraw the paper." (*Id.* at ¶34.) To include this paper as having been retracted because of "falsified data" or "plagiarism" is utterly false. Defendants also knew this before they published the Defamatory Article, because Dr. Croce told them the true facts in his Response to the Defamatory Letter from Defendant Glanz. (Compl. Ex. B at 1, 7.)

Next, Defendants say that "nine [papers] have been the subject of corrections because of errors in figures." (MTD at 11.) For this, Defendants cite Paragraph 35 of the Complaint. But Paragraph 35 of the Complaint states as fact that "all of those [corrections] *were the result of honest error*" and "the scientific conclusions in every one of those papers has been confirmed by subsequent research conducted and reported by other scientists at other institutions." Not one of those nine papers' corrections was due to data falsification or plagiarism and therefore cannot be

counted among the 20 referenced in the Defamatory Article.[12]

Defendants also say that "three [papers] 'have been corrected for 'text overlap.'" (MTD at 11.) Not one of those papers contained any falsified data either. Nor were any of them found to constitute plagiarism. (Compl. at ¶36.) Each of those corrections states that no concerns have been raised regarding the originality, the results, or the conclusions of the research reported in those Research Papers. (*Id*. at ¶36; emphasis added.) Those three papers therefore do not confirm the "truth" of False Statement 14.

Finally, Defendants say, "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." (MTD at 11.) As the Complaint explains, Middle Author Papers are papers on which Dr. Croce is listed in the middle of the list of authors. (*Id.* at ¶38.) The one corrected paper to which Defendants' refer was not found to contain any falsified data or plagiarism. (Compl. Ex. B at 4-5.) Dr. Croce's Response Letter, upon which Defendants rely for the "admission" that "three other [middle author papers] have been retracted," specifically told Defendants that: (1) Dr. Croce's contribution to those papers was limited to supplying genetically modified mice or other reagents, (2) the research underlying those papers was not performed in Dr. Croce's lab; (3) Dr. Croce was not involved in the underlying research or the writing of the papers, and (4) Dr. Croce was not

[12] Defendants also miscount and double-count papers in their effort to reach their fallacious total of 19. The "nine papers" include all of Dr. Croce's Research Papers that had figure corrections. (Compl. at ¶35.) This number therefore already included the two that were corrected for honest error pursuant to a "written action Plan" from OSU. (Compl. Ex. B, at 8, noting that corrections had been made to those two papers.) Defendants incorrectly count those same two papers a second time, stating 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." (MTD at 11; emphasis added.) That is simply factually incorrect. The two papers corrected pursuant to the "written Action Plan" are included in the nine. And, in any event, none of them was corrected because of any "falsified data" or "plagiarism." (Compl. at ¶¶35, 37, 82, 182.)

involved in any discussions with journals about retractions. (*Id.* at 7.)[13]

False Statement 14, read in context, is no "minor inaccuracy," nor is it "substantially true." It is, instead, a serious and knowing falsehood. It communicates to the reasonable reader that twenty of Dr. Croce's papers have been corrected or retracted due to falsification of data and plagiarism. That is why reasonable readers of the Defamatory Article repeatedly declared Dr. Croce to be a research fraud. The truth is that Dr. Croce *never* had a paper corrected, retracted, or subject to any editors' notices for any "falsification of data" or "plagiarism."

2. False Statements 6 and 7 are in Fact False.

Defendants argue that False Statements 6 and 7 are true because they merely recount "Croce's denials of wrongdoing and his placement of blame for any errors on others." (MTD at 12.) Defendants mischaracterize the falsehoods contained in those statements as they are alleged in the Complaint.

a) False Statement 6.

In False Statement 6, Defendants state:

> "**During an interview in October . . . Dr. Croce, 72, denied any wrongdoing, said he had been singled out in some of the accusations simply because he was a prominent figure**."

This is a false statement of fact. No discussions of "wrongdoing" or "accusations" against Dr. Croce occurred at all in the October, 2016 interview. (Compl. at ¶108.) During that interview,

[13] In many of the middle author papers, Dr. Croce's participation was only to contribute important reagents or genetically modified mice to the laboratory in which the work was done. (*Id.*) It is not the custom in the scientific community to identify a paper by the name of a middle author. (*Id.*) Nor has it been a standard practice among research scientists or scientific journals to hold middle authors responsible for portions of research they did not conduct or papers they did not prepare and that were conducted and prepared outside of their control and in the labs of others. (*Id.* at ¶39.) Defendants knew all of these facts as well, because Dr. Croce told them in his Response Letter. (Compl. at ¶151, Exh. B at 2.)

Defendant Glanz did not ask about or mention, to either Dr. Croce or to Dr. Croce's post-doctoral fellow, the topic of misconduct or allegations of "wrongdoing" by Dr. Croce. (*Id.*) Nor did Dr. Croce say during that interview that he had been singled out in some of the accusations simply because he was a prominent figure. (*Id.*) Defendant Glanz knew these statements were false. (*Id.* at ¶109.)

b) False Statement 7.

In False Statement 7, Defendants state:

> **"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."**

(Compl. at ¶110.) This too is false. No such discussion occurred in the October interview with Dr. Croce. (*Id.* at ¶111.) During that interview Glanz did not ask about or mention the topic of misconduct or allegations of "wrongdoing" by Dr. Croce. (*Id.*) Defendants published False Statement 7 with knowledge of its falsity and with reckless disregard of whether it was false or not. (*Id.* at ¶112.)

Nor did Dr. Croce "in a later statement . . . place the blame for any problems with figures or text on junior researchers or collaborators at other labs." (*Id.* at ¶111.) Defendants argue that "any reasonable person would understand the [following] statements in Dr. Croce's Response to be '*placing blame* for any problems on others:'"

- for "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
- "if the research was conducted in someone else's lab, Dr. Croce relies on that lab to prepare accurate figures."

(MTD at 12-13.) These statements do not "place blame" on anyone for anything. (*Id.* at ¶45.) They are statements of fact regarding how scientific research works. (*Id.*) In the context of the

Defamatory Article's repeated false condemnations of "Dr. Croce's papers," ordinary readers would understand False Statement 7 to mean that Dr. Croce "placed blame" for his own "wrongdoing" on others. That assertion is false. Dr. Croce did not blame others for his own alleged wrongdoing, in the two statements above or in any other statements.

3. Defendants Are Liable For Republishing Defamatory Statements Made by Third Parties (False Statements 3-5, 11-13, 16-18).[14]

Defendants' claim that the remaining nine statements are true is based upon their contention that, as long as they attribute false and defamatory statements to third parties, those statements are "not materially false as a matter of law." (MTD at 13.) Defendants' argument fails on both the law and the facts.

a) Under Ohio law, one who repeats a defamatory statement is liable for republication of the defamatory statement.

Under the *Erie* doctrine, a federal court in a diversity action "must apply [to substantive state law issues] the state law as declared by the highest state court." *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009). A federal court sitting in diversity must "follow the decisions of the state's highest court when that court has addressed the relevant issue." *Savedoff v. Access Grp. Inc.*, 524 F.3d 754, 762 (6th Cir. 2008), citing *Talley v. State Farm Fire & Cas. Co.*, 223 F.3d 323, 326 (6th Cir. 2000). The Supreme Court of Ohio has directly addressed the issue of liability for republication of a defamatory statement. That law as enunciated by the Ohio Supreme Court has been in effect and unchanged since 1835.

[14] Although Dr. Croce did not number the defamatory statements in the Defamatory Letter in the Complaint, for the sake of consistency Dr. Croce will use the numbers assigned to those statements by Defendants in the Appendix to the MTD. When Defendants refer to "Statements 16 & 17" on page 13 of the MTD, we understand them to have meant to refer to False Statements 17 and 18, based on the Complaint paragraphs they reference and notations in their Appendix.

The Ohio Supreme Court first addressed the issue in *Haines v. Welling*, 7 Ohio 253 (1835). In *Haines*, the plaintiff alleged that the defendant had uttered slanderous words charging plaintiff with larceny. The principle defense was that, "when he [the defendant] spoke the words, he stated that he had heard them from another, naming at the same time the author [of that statement]." The Ohio Supreme Court rejected that defense, stating:

> Now there can be no doubt that as great and lasting injury may be done to reputation, as deep an impression may be made upon the minds of those who hear, where the slanderer speaks of a charge made *as a report, tracing that report to a particular individual*, as if he made the charge upon his own responsibility. ***In many cases, there is no more effectual way of destroying character than by dark insinuations****, that the individual referred to is suspected, that this, that, and the other say that he is guilty.* ***In truth, this is the course more usually resorted to, by him who is determined to inflict an aggravated injury upon his neighbor***.

Id. at 254-255 (emphasis added).

The Ohio Supreme Court addressed the issue for a second time in 1874, in *Fowler v. Chichester*, 26 Ohio St. 9 (1874). In that case, the defendant falsely imputed "want of chastity" to the plaintiff. The defendant asked the trial court to charge the jury that the "action cannot be maintained," if, "at the time of the alleged speaking of the words, [the defendant] stated them as a report." Once again, the Ohio Supreme Court rejected that argument, stating:

> The proposition is, that if at the time of the speaking of the words, the defendant stated them as a report, and gave her authority, *such communication of the previous publication is a justification of the repetition*. ***This, we think, is not the law****. A party is not protected from an action by the party injured, by communicating a previous publication and giving the name of the publisher at the time he repeats the slanderous words. Haines v. Welling*, 7 Ohio, 253.

Fowler at 13 (emphasis added).

Almost one hundred years later, in 1968, the United States Court of Appeals for the Sixth Circuit examined Ohio law on the issue in *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968). The plaintiff in *Theiss*, the vice president of an insurance company, alleged that the defendant had accused plaintiff of "being a wastrel, with dissipating his assets, and with committing the crime of

blackmail." The Sixth Circuit rejected the defense that the defendant was only repeating what the he had been told, stating:

> ***We agree with appellant that one may not avoid the consequences of making a libelous statement merely by saying that he is repeating the words of another, even when that person is identified***. *Fowler v. Chichester*, 26 Ohio St. 9 (1874); *Haines v. Welling*, 7 Ohio 250 (1835). ***We note once more that these cases are old, but again we are of the opinion they clearly state the prevailing Ohio rule***. Moreover, the general rule is that one who repeats a libelous remark is liable for his republication. 33 Am.Jur., Libel and Slander § 95.

Theiss, 396 F.2d at 648 (emphasis added).

Notably, Defendants do not cite to any Ohio Supreme Court decision to support their argument that "a report that third parties have *made* allegations" is "not materially false as a matter of Ohio law." Our research has likewise not discovered any Ohio Supreme Court case so holding.

The two intermediate Ohio court of appeals decisions Defendants cite (MTD at 13) are therefore not dispositive, even if they held differently. *Murray v. Chagrin Valley Publ'g Co.*, 2014-Ohio-5442 (8th Dist. 2014); *Baxter v. Sandusky Newspapers, Inc.*, 2012-Ohio-1233 (6th Dist. 2012). Other intermediate Ohio appellate decisions apply the law enunciated by the Ohio Supreme Court that "In Ohio, one who repeats a libelous statement is liable for republication of the libelous statement." *Sawyer v. Devore*, 1994 Ohio App. LEXIS 4954 (8th Dist. 1994), citing *Theiss v. Scherer* (1968), 396 F.2d 646, 648 (6th Cir.). *See also, e.g., Spingola v. Stonewall Columbus, Inc.*, 2007-Ohio-381, ¶24 (10th Dist. 2007).

Defendants also cite to this Court's decision in *Blesedell v. Chillicothe*, 2015 WL 1968870 (S.D. Ohio 2015) (Graham, J.) (MTD at 13). *Blesedell* sued under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that his former employer violated its collective bargaining agreement when it discharged him without just cause. Plaintiff also alleged that the former employer's human resources manager (Stevens) had defamed plaintiff when Stevens told a deputy sheriff that "Blesedell was fired for selling parts for drugs." *Id.* at *23. This

court held that Stevens' statement was not false in the sense argued by plaintiff because Stevens did not tell the deputy sheriff that Blesedell was in fact dealing drugs, only that he had been so accused by someone else. *Id.* This court also found the statement non-actionable because Stevens' report of that information was made to law enforcement authorities and therefore "entitled to a qualified privilege." *Id.*

With the greatest of respect and deference, neither this Court's decision in *Blesedell*, nor the Sixth Circuit decision affirming it, cited or addressed the Ohio Supreme Court cases (*Haines* and *Chichester*) or the Sixth Circuit decision in *Theiss v. Scherer, supra,* all of which hold that under Ohio law "one may not avoid the consequences of making a libelous statement merely by saying that he is repeating the words of another, even when that person is identified." An examination of the trial and appellate briefs in *Blesedell* reveals that neither party cited the Ohio case law or the Sixth Circuit case law discussed above. In any event, and again with the greatest respect and deference to this Court, we suggest that the *Blesedell* decision is not dispositive in the case at bar, and that the existing Ohio law is as the Ohio Supreme Court stated it in *Haines* and *Fowler* and as the Sixth Circuit recognized it in *Theiss.*

It is also worth pointing out that the law as established by the Ohio Supreme Court in 1835 is not outdated. It finds its current articulation in 3 Restatement 2d of the Law, Torts (Defamation), §578, which provides as follows:

> Except as to those who only deliver or transmit defamation published by a third person, *one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.*[15]

[15] The stated exception for "those who only *deliver* or *transmit* defamation published by a third person" is contained in Restatement §581. It is inapplicable to this case. Section 581 defines "deliver" as "the transfer of possession of a physical embodiment of the defamatory matter," such as "selling, renting, or otherwise transferring or circulating a book . . . containing defamation published by a third person." It defines "transmit" as "the conveyance of defamatory words by methods other than physical delivery, as in the case of a telegraph company putting through a call."

(Emphasis added.) Official Comment (b) to Restatement Section 578 explains:

> *b. Republication of libel.* Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability. Thus one who reprints and sells a libel already published by another becomes himself a publisher and is subject to liability to the same extent as if he had originally published it. Subject to the limitation stated in § 581, the same is true of one who merely circulates, distributes or hands on a libel already so published.
>
> *It is no defense that the second publisher names the author or original publisher of the libel. Thus a newspaper is subject to liability if it republishes a defamatory statement, although it names the author and another newspaper in which the statement first appeared. . .*

(Emphasis added.) In Comment *d*, the Restatement makes clear that "[t]he liability of the republisher is determined by the application to the republication of the rules governing defamation. *The fact that the defamer has republished matter originated by a third person is immaterial*." (Emphasis added).

As the unwavering precedent from the Ohio Supreme Court has held for over 130 years, and as the Restatement Second of Torts, Defamation, confirms, "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."

b) Whether the third parties actually said what the Defamatory Article said they said is a question of fact.

In addition to being contrary to Ohio law, Defendants' argument that it is entitled to republish defamatory statements made by third parties assumes that the third parties actually made the defamatory statements attributed to them. Defendants are not entitled to that assumption, especially in light of the fact that Dr. Sanders has already *denied* making "some or all" of the statements attributed to him.

As this Court is aware, Dr. Croce filed a separate lawsuit against Dr. Sanders based upon the false statements attributed to Dr. Sanders in the Defamatory Letter, dated November 23, 2016. (*Croce v. Sanders,* Case No. 2:17-CV-00338, the "Sanders Case"). After the Defamatory Article

was published, Dr. Croce filed an Amended Complaint in the Sanders Case adding claims based on statements Dr. Sanders was reported in the Defamatory Article to have said. In Dr. Sanders' Answer to the Amended Complaint, Dr. Sanders states as Affirmative Defense 7 that "*Some or all* of the communications made by Dr. Sanders that are the subject of this lawsuit *were not made about [Dr. Croce]*." (Sanders Answer, Ex. A to Declaration of Loriann E. Fuhrer, Ex. 1 hereto).[16]

Dr. Sanders also conceded in that Answer that he did not have sufficient knowledge or information to know whether any of the statements attributed to him in either the Defamatory Letter or the Defamatory Article were true. (Sanders Answer at ¶¶31, 40, and 46.) If Dr. Sanders does not know whether those defamatory statements attributed to him about Dr. Croce were true or false, then either Dr. Sanders lied when he made those statements to Defendants *or Dr. Sanders, as he states in his Answer, did not make them.*

In short, whether the third parties, both named and unnamed, in the Defamatory Article actually made the false and defamatory statements attributed to them present fact questions not appropriate for resolution on a motion to dismiss.

4. Defendants' "Cumulative Import" Argument is Meritless.

Defendants next argue that "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." (MTD at

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[16] Unlike the extraneous materials Defendants attempt to put before the court, which are not "matter[s] of common knowledge" or "generally known within the trial court's jurisdiction" or from a "source[] whose accuracy cannot reasonably be questioned" (*see supra* Part III(B)), "[c]ourts may consider matters of public record without converting a motion to dismiss into a motion for summary judgment, particularly when authenticity is not in dispute." *Clark v. The Walt Disney Co.*, 642 F. Supp. 2d 775 (S.D. Ohio 2009); see also *McGath v. Hamilton Local Sch. Dist.*, 848 F. Supp. 2d 831 (S.D. Ohio 2012) (holding matters of public record can be considered on a motion for judgment on the pleadings).

14.) The twelve statements that Defendants claim to be "true" are not true, as explained above. The Complaint alleges them to be false, and they are false. (*See, generally*, Compl. at ¶¶77-167.) Defendants knew they were false when they published both the Defamatory Letter and the Defamatory Article. (*Id.*)

In addition, defendants' suggestion that the cumulative import of these false statements should not be considered is directly contrary to Ohio law requiring (1) statements to be read in context, (2) that the court consider the totality of the circumstances, and (3) that the court assess the '*clear impact*,' '*general teno*r,' and '*impression*' created by the statements in the column." *McKimm* at 144, citing *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1, 19 (emphasis added). *See also Scott v. News-Harold, supra*, at 250; *Murray v. Knight-Ridder, Inc., supra* at ¶41.

E. The Overall Context of the Challenged Statements Render Them Not Only Defamatory, but Defamatory *Per Se*.

Defendants argue that "the overall context of the challenged statements renders them non-defamatory as a matter of law." (MTD at 15-20.) This argument is meritless both on the law and the facts.

As discussed above, under Ohio law, words that ***tend to*** (a) degrade or disgrace Dr. Croce, (b) hold Dr. Croce "up to public hatred, contempt, or scorn," or (c) injure him in his trade or profession, are defamatory *per se*. The Defamatory Article and the False Statements within it did more than "tend to" do these things; they **in fact** did these things. One could only scratch one's head to figure out how an article that generates comments declaring Dr. Croce to be a con man, a crook, a fraud on science, and a murderer is not defamatory *per se.*

Statements far milder than those in the Defamatory Article have been held to be defamatory *per se.* For example, in *Murray v. Knight Ridder, supra,* a news article entitled "Mine Owner Isn't

the Shy, Quiet Type" was published in the Akron Beacon Journal. The article quoted the mine owner as having said, "The only thing I want is a long line at my funeral. I'm sick. I bought my cemetery plot." *Id.* at ¶5. Because the mine owner was generally perceived as a "one man operation," the court of appeals found that this statement implying that the mine owner is dying adversely affected him in his business. *Id.* at ¶¶21-28. The court of appeals held that "By indicating that the owner and controller of these various companies is dying, appellees have injured appellant Murray in his business in that other parties will be deterred from dealing with him for fear that he will die and the operations he heads up will subsequently change." *Id.* at ¶29. The court of appeals therefore held the statement to be defamatory *per se* because it tended to injure the mine owner in his trade or business.

Three other allegedly defamatory statements in *Murray* attacked the mine owner's integrity *without explicitly calling him a liar*. The court of appeals noted that, to determine whether a reader would interpret them as defamatory, the statements must be read in the context of the entire article. *Id.* at ¶41. The court stated that "[t]he article titled 'Mine owner isn't the shy, quiet type' paints a destructive picture of" the mine owner. The court added that "[r]eading the three statements at issue together further supports the notion that appellant Murray is an untruthful person in his business dealings" and that he is a "liar." *Id.* at ¶¶43-44. The court concluded:

> Consequently, reading all three statements in light of one another only serves to further reinforce the notion of appellant Murray's dishonesty. No extrinsic evidence is needed to derive the defamatory meaning, as it is evidenced by the very words of the statement themselves. ***As such, these three statements are, as a matter of law, defamatory per se***.

Id. at ¶45 (emphasis added). These comments about the mine owner in *Murray* pale in comparison to the false statements made about Dr. Croce in the Defamatory Article; statements that led reasonable readers to condemn him as a fraud and a crook. (Compl. ¶¶6, 79, 80, 184, and 213.)

The actual comments of the reasonable readers of the Defamatory Article establish beyond

cavil that the Defamatory Article *on its face* (a) tended to (and in fact did) degrade or disgrace Dr.Croce (he's a "disgrace to the institution and a fraud to science"), (b) hold him up to public hatred, contempt or scorn (he's a "crook," a "liar," a "con man," a "criminal," and even a "murderer") and (c) injured him in his trade, profession, and occupation (he's a "research fraud," guilty of "dishonest work," whose science is "incredibly corrosive;" "What does it take for Ohio State University to fire this man?"). The Defamatory Article cannot be reasonably described as anything other than defamatory on its face. It is therefore defamatory *per se.*

F. Defendants' "Balanced News Report" Argument Fails Both as a Matter of Law and Fact.

Defendants next argue that the Defamatory Article is not defamatory because "a news organization's balanced report of both parties' arguments and defenses [is] not defamatory as a matter of law. . . " (MTD at 16.) After introducing this argument at page 16, Defendants refer to it eleven times in the body of their brief and sixteen times in their chart at the end. It is the lynchpin upon which many of Defendants' other arguments depend. Defendants' argument is both wrong on the law and refuted by the facts.

1. Defendants' "Balanced News Report" Argument Is Wrong on the Law.

Defendants begin their legal argument by stating that an Ohio Supreme Court decision held that, "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." (MTD at 16, *citing Am. Chem. Soc'y v. Leadscope, Inc.*, 133 Ohio St. 3d 366, 389 (2012).) *Am. Chem. Soc'y v. Leadscope* does not so hold.

The defamation claim in *Am. Chem. Soc'y* was asserted as a counterclaim. 133 Ohio St. at 369. The counterclaim defendant was American Chemical Society ("ACS"), which owned

Chemical Abstracts. The counterclaim defendant, ACS, was not a news organization. 133 Ohio St. 3d at 396. And, Business First, the news organization referenced in the decision, *was not a defendant* in the action. Because the defendant was not a news organization, the court did not, and could not, *hold* that "statements published as part of a news organization's 'balanced report of both parties' arguments and defenses'" are not defamatory as a matter of Ohio law, as Defendants seem to claim.

Importantly, the Business First article referenced in the Court's decision was a "report on the filing of the *ACS lawsuit and the allegations made by ACS*." *Id.* at 390. The article was titled "Leadscope, its founders sued by former employer." *Id.* The alleged defamatory statement reported in the Article was made by ACS's outside counsel to Business First about the litigation, stating "Our motivation in filing suit is to acquire back the protected information that they took from us." *Id.* at 390. The Court noted that Leadscope's counsel was also quoted in the article saying the lawsuit "has no merit." *Id*. at 368.

The Court held that, "[c]onsidering the article as a whole and *the fact that the article contained a true and accurate* ***summary of the legal proceedings*** *at the time*, we hold that the statements in the article are, as a matter of law, not defamatory." (*Id.* at 391; emphasis added.) The Supreme Court's holding was thus expressly limited to "true and accurate summaries of *legal proceedings*." Nothing more. The Court's holding is entirely consistent with (and supported by) Ohio Rev. Code 2317.05, which provides a limited statutory privilege for "a fair and impartial report" of proceedings in a civil or criminal lawsuit. That statute states:

> The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document ***in any criminal or civil cause*** in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, ***unless*** it is proved that the same was published maliciously, or that defendant has refused or neglected to publish in the same manner in which the

> publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action. This section and section 2317.04 of the Revised Code do not authorize the publication of blasphemous or indecent matter.

(Emphasis added.) Neither this limited statutory privilege, nor the Ohio Supreme Court's decision in *Am. Chem. Society*, supports the *carte blanche* "balanced news report privilege" for all news articles regardless of topic, as Defendants suggest. To the contrary, Ohio Rev. Code 2317.05 reflects the Ohio legislature's public policy decision to limit any such privilege to the topics expressly identified in the statute. Since Revised Code 2317.05 was adopted in October 1953, it has never been expanded to provide an unlimited "balanced news report" privilege for all news articles. Moreover, this limited statutory privilege is itself not absolute. It is subject to all the conditions that are listed after the word "unless" in the statute. Defendants have thus misstated the holding in *Am. Chem. Society.*

Nor has the Ohio Supreme Court ever adopted a common law "balanced" or "fair" or "neutral" news report privilege for all news articles by any news organization regardless of topic. To the contrary, the Supreme Court of Ohio has repeatedly declined to adopt a common law neutral reportage privilege. *Young v. The Morning Journal*, 76 Ohio St. 3d 627, 629 (1996) ("This court has never recognized the 'neutral reportage' doctrine, and we decline to do so at this time. Accordingly, we will not uphold the grant of summary judgment based on the 'neutral reportage' doctrine."). *See also Bahen v. Diocese of Steubenville*, 2013-Ohio-2168, ¶2 (App. 7th Dist.) ("The trial court erred in applying the neutral reportage privilege because the Ohio Supreme Court has declined to adopt the doctrine.").

Having incorrectly cited an Ohio Supreme Court case for their unlimited "balanced news report" privilege, Defendants add that "Ohio's intermediate appellate courts *likewise have held* that balanced news reports are not defamatory as a matter of law." (MTD at 17; emphasis added.)

For that proposition, defendants cite *Sabino v. WOIO, L.L.C.*, 2016-Ohio-491, ¶¶ 49-64 (8th Dist. 2016) and *Early v. Toledo Blade*, 130 Ohio App. 3d 302, 325 (6th Dist. 1998). Neither of them holds that "balanced news reports are not defamatory as a matter of law" regardless of topic.

In *Sabino*, defendant television station WOIO had broadcast a story about an unnamed high school teacher who allowed his students to access his personal laptop computer, on which a student saw pornographic images. 2016-Ohio-491 at ¶8. Before the broadcast, the television reporter obtained copies of search warrant documents in the case. *Id.* at ¶7. In the broadcast, the court reporter quoted a student's statement contained in the search warrant affidavit. The reporter said that the students' statement was part of "the inside story coming out now *in court records."* *Id.* at ¶¶7, 30 (emphasis added). As noted, Ohio Revised Code 2317.05 explicitly extends a limited privilege to a "fair and impartial report of . . . the issuing of any warrant, . . .or the filing of any affidavit . . . in any criminal or civil cause in any court of competent jurisdiction, or *of a fair and impartial report of the contents thereof.*" The Court of Appeals affirmed the trial court's directed verdict for defendant. Under a heading entitled "Fair Reporting Privilege," the Court of Appeals in *Sabino* quoted and applied Revised Code 2317.05. *Id.* at ¶¶43-45. Nowhere in that decision does the Court of Appeals state or hold that a "balanced news report" is "not defamatory as a matter of law."

In *Early v. Toledo Blade, supra*, seven members of the Toledo Police Department sued the Toledo Blade for defamation arising out of a series of articles in the Blade. The portion of the opinion cited by Defendants (130 Ohio App. 3d at 325) involves a police officer named Hodak, who was charged with and then cleared of "neglecting her duties." *Id.* at 325. The court's decision with regard to Officer Hodak makes no mention of any privilege at all. The court instead noted that Officer Hodak "does not dispute any of the facts recounted" and affirmed the

trial court's decision that "a thorough and reasonable reading of the article does not convey the impression that Ms. Hodak, by neglecting her duties as a police officer, caused Mr. Plenzler's death." *Early* does not hold that there is a "balanced news report" privilege under Ohio for any news article regardless of topic.

Thus, except for the inapplicable limited statutory privilege, there is no "balanced news report" defense under Ohio law. All of Defendants' arguments that rely upon the existence of such a privilege are therefore meritless.

2. Defendants' "Report" is Not "Balanced."

Even if there were a "balanced report" defense for a news organization under Ohio law (there is not), the Defamatory Article is not a balanced report. It does not, as Defendants contend, "describe[] (accurately) prior public criticisms about Dr. Croce, his response, and discussion of the evidence advanced by each side in support of their respective positions." (MTD at 17.) It does just the opposite. As discussed below, Defendants did not recite at all, let alone recite accurately, the evidence that Dr. Croce provided to Defendants in his Response Letter. Here are the facts that reveal the pernicious imbalance of the Defamatory Article.

a) Defendants' Unbalanced Statements Regarding Corrections, Retractions and Editors' Notices.

The Defamatory Article trumpets what it calls "a tide of allegations of data falsification and other scientific misconduct," resulting in corrections, retractions, and editors' notices "ballooning to at least 20, with three more on the way." As discussed above, there have not been 20 papers corrected, retracted, or subjected to editors' notices for data falsification or scientific misconduct. (*See* Part III.D.1.) Moreover, nowhere in the Article did Defendants balance their false "20 papers" accusation with the fact that fewer than 2% of the papers reflecting research done in Dr. Croce's laboratory have been subject to any correction or other notice, and that none of them

were for data falsification or scientific misconduct. (Compl. Ex. B at 1.)

b) Defendants' Unbalanced Report of Dr. Croce's Achievements.

The Article's false accusations that Dr. Croce falsified his data and plagiarized were completely unbalanced by any reference to Dr. Croce's pioneering and major contributions to cancer research. Entirely absent from the Article is any mention of the following ground-breaking cancer research discoveries during Dr. Croce's career (among many others of which Defendants knew before publishing the Defamatory Article):

- Dr. Croce discovered the key molecular defect responsible for Burkitt's Lymphoma (a form of non-Hodgkin's lymphoma that often strikes children). This was the "first confirmation of the hypothesis that oncongenes were activated by [genetic] translocations" and "established the causative link between cancer-specific chromosomal translocations and the activation of oncogenes." (Compl. Ex. B at 10, 11 and 13.)

- Dr. Croce developed a method of identifying genes involved in cancer by "chromosome walking from cancer-specific translocation points," and genes discovered by "Dr. Croce and his team helped to define cell signaling pathways that are altered in human cancer and are important in devising novel strategies for cancer therapy." (*Id*. at 11-12.)

- Dr. Croce discovered the BCL2 gene, which "opened the field of apoptosis [programmed cell death] research" and "its role in cancer development and treatment. (*Id*. at 11.)

- Dr. Croce discovered that the deletion of two, non-coding "microRNAs" were observed in numerous cases of Chronic Lymphocytic Leukemia ("CLL"), which was the "first demonstration of the role of microRNA genes in human cancer." Dr. Croce also demonstrated that the loss of microRNA affects expression of BCL2 in CLL, thus paving the way for effective therapy targeting BCL2, and opening "still another vista in cancer research." (*Id*. at 10-12.)

These were no routine achievements. They were fundamental contributions "to the acceleration of progress in cancer research." (*Id*. at 9.)

Instead of presenting these facts, Defendants instead refer to Dr. Croce's "success" with

the pejorative "flamboyant."[17] Ordinary readers had no idea that Dr. Croce's research has been path-breaking and resulted in drugs that are at this very moment saving lives. Because the Article was entirely imbalanced, ordinary readers condemned Dr. Croce for slowing down and stymieing the finding of a cure for cancer, saying such things as:

- "**Research frauds like Croce** might explain why after billions are spent on cancer research, we have made only modest progress . . . Why isn't he in jail already? It's criminal. . . . **I suppose cancer research is such a lucrative business, it doesn't pay to find actual cures**?"
- **"[D]ishonest work by people like Mr. Croce's** [sic] silently spreads for years in the scientific community. Millions have been wasted, and **we will never know what findings were slowed down or prevented from happening in our lifetime**."
- "**TO STYMIE PROGRESS AND THE CURE OF DISEASES** BY DISSEMINATING "FABRICATIONS, DEMONSTRATES A GROTESQUE AND MALEVOLENT ATTITUDE TOWARDS ONE [sic] FELLOW MAN. He, in a sense, committed a form of murder.

Had Defendants disclosed the true facts regarding Dr. Croce's remarkable contributions, which are saving lives and accelerating progress, the above comments would never have been made.

c) Defendants' Unbalanced and False Assertion Regarding the Comments of "Towering Figures" About Dr. Croce's Scientific Accomplishments.

Defendants also state in the Defamatory Article that, "In a world where most scientists are so wary of public conflict that they seem to apportion criticism with a pipette, the new doubts about Dr. Croce's work draw carefully measured opinions from some towering figures." (Compl. Ex. C, p. 4.) With this pithy phrase, Defendants suggest that "towering figures" in the world of cancer research, one of whom offered "qualified support," are skeptical of Dr. Croce's accomplishments, but "wary" of criticizing him.

Entirely omitted from the Defamatory Article are the comments of three of the world's

[17] A Thesaurus search for the word "flamboyant" produces the following: showy, colorful, loud, flashy, gaudy, glitzy, lurid, ostentatious, outrageous, and extravagant. This is not a compliment.

renowned cancer research scientists described above, including the comments of Nobel Prize winner Dr. Beutler, which would have more than balanced the scales. (Compl. Ex. B at 10-13.) Instead, the Defamatory Article, as written, prompted one reasonable reader to say "What does it take for Ohio State University to fire this man? Afraid of losing grant money? You can hire another geneticist *with better credentials* to replace this con man." (Compl. at ¶79(f).)

Defendants knew of the views of these preeminent scientists before they published the Defamatory Article, because they were provided to Defendants in Dr. Croce's Response Letter. Thus is revealed the striking emptiness of Defendants' self-serving statement that Glanz sent the Defamatory Letter to Dr. Croce and OSU in order "to allow them to respond to criticism and to make sure the Article was accurate." (MTD at 1.) This was no laudable example of "reportorial diligence." *Id.* There was no discussion of "the evidence advanced by each side in support of their respective positions." (MTD at 17.)

Thus, even if Ohio law permitted the publication of false and defamatory statements, so long as they are part of a "balanced report" (it does not), the Defamatory Article was a malicious one-sided attack on the Dr. Croce's integrity that came nowhere close to being a "balanced report."

3. Defendants' Statements that Dr. Croce "denies any wrongdoing" and has "never been penalized for misconduct" do not "balance" the Defamatory Article.

Defendants also argue that the "overall context" of the Article renders it "non-defamatory as a matter of law" because the Article reports that Dr. Croce "denies any wrongdoing" and has "never been penalized for misconduct, either by federal oversight agencies or by Ohio State." (MTD at 17.) This argument is meritless. The "mere publication of a denial by the defamed subject does not absolve a defendant from liability for publishing knowing or reckless falsehoods." *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, fn. 6 (6th Cir. 1988) quoting *Tavoulareas v. Piro*, 759 F.2d 90, 133 (D.C. Cir. 1985).

Here, the context of the entire Defamatory Article is that Dr. Croce has "for years" been guilty of "data falsification and other scientific misconduct" (Compl. Ex. C at 1, 3) but has "repeatedly" been "given a pass" by OSU because it "reaps millions from his grants." The falsity of this statement is not "balanced" by declaring that Dr. Croce "denies any wrongdoing" or that he has "never been penalized for misconduct." To reasonable readers, a scientist who has been guilty of wrongdoing for years and gotten away with it will, of course, "deny any wrongdoing." In the overall context of the Defamatory Article, to say that Dr. Croce has "never been penalized for misconduct" tells ordinary readers that, despite being guilty of misconduct, Dr. Croce, the "dishonest" researcher, has gotten away with it.

G. Defendants' Arguments Regarding False Statement No. 15 (the Glanz Radio Interview) are Meritless.

Defendants make two arguments regarding Defendant Glanz' statements in the WOSU radio interview: (1) that Defendant Glanz merely reported that third parties had made allegations, as distinguished from Glanz affirmatively asserting those allegations as if they were established fact (MTD at 14); and (2) that the radio interviewer's questions converted Glanz' false statements to a "balanced report." (MTD at 18.) Both arguments are meritless for the following reasons.

First, as discussed above, under Ohio law, one who repeats a false and defamatory statement is liable for its republication. (Part III(D)(3), *infra*). In the radio interview, Glanz repeated (and therefore republished) the false and defamatory statement that "Dr. Croce or the lab he oversees" "*used" "duplications of data from unrelated experiments" **to "prove a point** in another experiment*." (Emphasis added.) As the Complaint alleges, the phrase "to prove a point" can only be reasonably understood to mean that an act was done purposefully "to prove" the scientific "point." Glanz' statement was one of fact, and it is verifiably false. Neither Dr. Croce nor any person in his laboratory has ever used duplications of data from one experiment for the

purpose of proving a point in another experiment. *Id.* Glanz' statement was also defamatory on its face, as evidenced by the radio interviewer's immediate response, saying these are "certainly a lot of damning allegations for a researcher." (Kelly Declaration, Ex. A at 3:8-9.)

Second, just moments after republishing False Statement 15 in the interview, Defendant Glanz made it clear that Defendants were *affirmatively adopting* those allegations as established fact. The evidence of this comes in response to the interviewer's observation that "*the Times article seems to imply that these allegations are worse than* [honest errors]. The interviewer's logical question was, "That's why [the Times] wrote the article, right?' Here is Glanz' response, verbatim:

> MR. GLANZ: Well, again, I'm citing my sources here Steve.
>
> STEVE: Sure.
>
> MR. GLANZ: And the way it usually goes is that when these experts, forensic experts, we consulted look at an individual allegation, they're able to determine that an image has been manipulated. The scientific image has been manipulated. ***And we, to our satisfaction, contacted a lot of these experts, are satisfied that in fact that occurred in many images in papers co-authored by Dr. Croce.***
>
> Now the next level is intent, right. Did they mean to do it? And in any particular case, again, when you see something that looks like it's been photo-shopped in and so on, you can't determine intent just by looking at the image, right. So ***what we found*** though was people who looked at many of these cases, these are our sources again, believed that it was very unlikely that this couldn't have been sort of a pattern. *In other words, it was part of a pattern.*

(*Id.* at 5:12-23; emphasis added) The meaning of these words is unmistakable. Any ordinary listener to the Glanz radio interview would understand that, based on what Defendants learned from their alleged "forensic" consultants, ***the Defendants, themselves, were "satisfied"*** that ***many scientific images have been manipulated*** in papers "co-authored by Dr. Croce" and that Defendants "found" that "***it was*** part of a pattern." These aren't the words of Glanz reporting someone else's allegation. The clear impact, the general tenor, and the impression conveyed by

Defendant Glanz' words is that Defendants themselves were stating that Dr. Croce had "*used" "duplications of data from unrelated experiments" to "prove a point in another experiment*," and that Defendants had the evidence to prove it.

Finally, Defendants' argument that the radio interviewer's questions converted Glanz' false statements to a "balanced report" is beyond meritless. As discussed above, there is no "balanced reporting privilege" under Ohio law beyond that contained in Revised Code 2317.05, which is inapplicable here. Moreover, the radio interviewer's questions challenged what the interviewer immediately recognized as "damning allegations," and Glanz proceeded to explain exactly why Defendants were "satisfied" that the allegations were true.

There is, likewise, nothing "balanced" about the fact that Glanz misrepresented in the Interview that Defendants were "unable" to confirm that OSU actually spent more to support Dr. Croce's research than he brought in from grants and other outside sources. (*See* Part II.I.) Defendants *could* have confirmed that fact, but did not make any attempt to. (Compl. at ¶185.)

H. Defendants' Arguments Regarding the Glanz Letter Are Also Meritless.

Defendants also argue that the Defamatory Letter cannot be defamatory because it "merely presents its questions and assertions for which the reporter seeks comment without endorsing their accuracy." (MTD at 18.) Defendants are wrong. They do not cite any support, nor is there any, for the proposition that a defamer must "endorse" the accuracy of the defamatory statements he makes in order for them to be actionable.

Moreover, under Ohio Supreme Court jurisprudence, a defendant is not relieved of liability for his defamation merely by phrasing otherwise defamatory statements as questions. The Ohio Supreme Court has stated that "[a] mere insinuation is as actionable as a positive assertion, if the meaning is plain, and it has been held repeatedly that *the putting of words in the form of a question will in no wise reduce the liability of the defendant*." *Schoedler v. Motometer Gauge & Equip.*

Corp., 134 Ohio St. 78, 85 (1938). The question is whether the reasonable reader would understand the speaker to be communicating factual information. *McKimm, supra* at Part III.C.4. The fact that a question may be adjacent to, or a question mark may be appended to, a false statement of fact does not change the presence of that false statement. If the reasonable reader understands a false and defamatory statement to communicate factual information, it is actionable. Defendants cite no authority to the contrary.

Defendants argue that being precluded from publishing defamatory statements of the kind presented in Glanz' letter "would render it nearly impossible for news organizations to report on on-going public controversies." (MTD at 20.) This argument ignores the fundamental fact that, in Ohio, there is no privilege for republishing defamatory statements, much as Defendants would like for there to be one. (As set forth above, there is also no "on-going public controversy" here, short of the controversy created by Defendants.) The fact that there is no such privilege does not seem to have throttled news reporting in the slightest.

Defendants further claim that the "sending of the Letter was a routine practice for Glanz in the course of reporting." (MTD at 20.) Whether that is true is irrelevant for the purpose of Defendants' motion. But, even if Glanz routinely sends false and defamatory statements to the person who is the subject of them, what he did here goes beyond that. Glanz did not just send the Defamatory Letter to Dr. Croce, he sent it to OSU, thereby publishing (and republishing) the false and defamatory statements to *Dr. Croce's employer*. It has been the law of Ohio for more than 130 years that one who republishes to a third party false and defamatory matter that originated with someone else, even where the original defamer is identified, is liable for that republication.

I. The Innocent Construction Rule Does Not Apply.

Defendants next state that the "innocent construction rule" "bars recovery for statements susceptible of two meanings, one innocent and one potentially defamatory." (MTD at 21.)

Defendants argue that "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." (MTD at 22; emphasis added.) As discussed above, there is no defense for a "balanced news report" that would "shield" the Defamatory Article. And, the Defamatory Article was no balanced account. Once again, Defendants' arguments overstate the law and fail on the facts.

1. The Innocent Construction Rule Protects Only Those Statements That Are Reasonably Susceptible Of An Innocent Construction.

The innocent construction rule "protects only those statements that are *reasonably susceptible of an innocent construction*." *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 146, 2000 Ohio 118 (2000) (emphasis added). "To construe a [statement] in an unreasonable manner in order to give it an innocent interpretation is itself incompatible with the rule's requirement that the words be given their 'natural and obvious meaning.'" *Id.*, *citing* 8 Speiser, Krause & Gans, *The American Law of Torts* 436, Section 29:39 (1991). A "court cannot strain to find innocent meanings." 50 American Jurisprudence 2d 433, Libel and Slander, *Section 138* (1995) ("Only reasonably innocent constructions will remove an allegedly defamatory statement from the *per se* category; a court cannot strain to find innocent meanings.").

Ohio courts do not hesitate to reject proposed "innocent constructions" when they attempt to construe words in an unreasonable manner, ignoring the "natural and obvious meaning." The following Ohio cases confirm the point:

- In *McKimm*, the Court ruled that "McKimm's drawing of a hand passing cash under a table is susceptible of but one reasonable interpretation—that Gonzalez accepted money in exchange for his vote to award the unbid contract referred to in the accompanying text." *McKimm*, 90 Ohio St.3d 139, 146. As such, the Court found "the [innocent construction] rule is inapplicable." *Id.*
- In *Murray v. Knight-Ridder, Inc.*, 2004-Ohio-821 (7th Dist. 2004), the Court found that the defamatory statements at issue in that case were likewise "incapable of an innocent construction." *Id.* at ¶32. "The natural and obvious meaning of the words at hand is that appellant Murray is gravely ill, enough so to expect death in the near future.

Because this is the only natural and obvious meaning of the words, they cannot be subject to an innocent construction." *Id*. at ¶33.

- In *Gupta v. Lima News*, 139 Ohio App.3d 538 (3d Dist. 2000), the Court held that a newspaper article that "mistakenly report[ed] that a named physician has just been 'socked' with a 'nearly $2 million' verdict" in a medical malpractice case was defamatory *per se*. The defendants argued that "the article, when read in its entirety, is subject to the innocent construction that a lawsuit was filed naming the appellant, but that [the hospital] had assumed full responsibility for the verdict and that any negligence on the part of appellant was still alleged and had not yet been determined." *Id*. at 547. The Court flatly rejected defendants' argument, stating "we do not believe that an innocent construction of the entire article is reasonable." *Id*.

- In *Leal v. Holtvogt*, 123 Ohio App.3d 51 (2d Dist. 1998), the trial court found that Mrs. Leal "made disparaging remarks about the integrity and honesty of [Mr. Holtvogt]." *Id*. at 79. After agreeing with the trial court that the statements "were more than mere opinion," the Court of Appeals also agreed that the innocent construction rule did not apply, because "we cannot see how Mrs. Leal's statements could have any meaning other than that Mr. Holtvogt is untrustworthy." *Id*. at 81.

- In *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725 (9th Dist. 2001), the defendants asserted that statements to the effect that the plaintiffs had been arrested for a crime and providing theories on their motivation were subject to an innocent construction. *Id.* at 743. The Court soundly rejected that defense: "Although the statements did not specifically indicate that the Gilberts were guilty of that crime, they did provide numerous theories of motivation, which implied the Gilberts' guilt, and statements to the effect that 'wherever there's smoke, there's fire' were heard." *Id*. Under those circumstances, the Court "cannot find an innocent construction." *Id*. *See also Roe v. Heap*, 2004-Ohio-2504, at P47 (10th Dist. 2004) ("We cannot find an innocent construction to Heap's statements that John Roe is a 'convicted sexual offender' and has been 'convicted of sexual crimes.'")

As in these cases, no reasonable reader would conclude that the Defamatory Statements, read together and in context, "could have any meaning other than" a defamatory one.

2. Defendants' Statements Are Not Susceptible Of An Innocent Construction.

By definition, an "innocent construction" must be non-defamatory, which is to say that the natural and obvious meaning of the words must reasonably be understood to *not* tend to subject Dr. Croce to ridicule or disgrace, or tend to injure him in his business, trade or profession. *McKimm, supra.* Because the natural and obvious meaning of the Defamatory Article and the

Defamatory Statements is, in fact, defamatory, Defendants impermissibly strain to find an "innocent" meaning.

Defendants first assert that the Defamatory Article's "most reasonable construction," is as follows:

> 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.

(MTD at 23.) This is not a reasonable construction of the article as a whole.

First, this fabricated "construction" suggests the article is about a "system" in which "prominent researchers" operate, rather than an article about Dr. Croce. It is clearly not. The Defamatory Article is about one "star cancer researcher" at OSU, as reflected in the headline. The numerous photos that accompany the Defamatory Article are *all* of Dr. Croce (except for one photo of Dr. Sanders, who is an accuser, not another "prominent researcher" "facing questions"). One of the photos shows Dr. Croce in his home, which has nothing to do with a "system" of "prominent researchers." The Defamatory Article also discusses personal facts about Dr. Croce, such as his interest in art, which also serve to demonstrate that this is not a story about a "system" of researchers. It's a story about Dr. Croce. To suggest otherwise is disingenuous.

Second, the overarching message of the Defamatory Article is not that "prominent researchers" are "increasingly facing questions." (MTD at 23.) The overarching message of the Defamatory Article is that Dr. Croce got a pass because of the grant money he attracts to OSU. That the gist of the Defamatory Article is *defamatory*, not innocent, is supported by the reader comments, which reflect that readers understood the natural and obvious meaning of the article to be that Dr. Croce is a fraud, con man and crook, and that he got a pass because of his grant money.

Defendants' bullet-point assertions (MTD at 24-25) that specific statements have an

"innocent" meaning also fail. With respect to three of them (the fourth, fifth and sixth bullets), Defendants' argument is nothing more than an attempt to create a common law balanced/neutral reporting privilege that does not exist under Ohio law. (*See supra* at Part III(F).) Defendants cannot fabricate a neutral reporting privilege contrary to Ohio law by claiming false and defamatory statements "present[] both sides" or are contained in a "balanced Article" or "balanced news report." Such arguments do not provide a cognizable defense under Ohio law.

Similarly, two others of Defendants' bullet points (the first and seventh) depend on an argument—which also fails under Ohio law—that Defendants merely reported the "criticisms of others." Where a defendant republishes the false and defamatory statement made by a third party, he is liable, even though he attributes the statement to another. (*See supra* at Part III(D)(3).)

The remaining bullet points concern False Statements 20 (second bullet), 21 (third bullet), 6-7 (eighth bullet), 13 (ninth bullet), and 14 (tenth bullet). None of the strained "innocent constructions" Defendants propose have merit. False Statements 20 and 21, when read together, falsely denigrate one of Dr. Croce's key early genetic discoveries, the discovery of the FHIT gene. (*See* Compl. at ¶¶54-56.) Glanz, in the Defamatory Letter, stated, contrary to the published research of Dr. Croce and others, that the FHIT gene "is not a trigger for all sorts of human cancers" and referred to it as a "puzzling byproduct of cancer." (*Id*. at ¶54.) Glanz then suggested that Dr. Croce misled "Ohio State officials when he was recruited to the university" by making unsupported claims about FHIT. (*Id*.) Glanz also asked a question conveying the factual premise that Dr. Croce's research on the FHIT gene was an "almost complete failure." (*Id*. at ¶56.) The only reasonable interpretation of these statements is that Dr. Croce's discovery of the FHIT gene is of no consequence, and that he misrepresented its significance to OSU. Defendants' assertion that the words mean merely "that Croce's initial enthusiasm for his discovery has not yet been

fully realized" (MTD at 24) is unreasonable and strained. There is no way to square that proposed meaning with Glanz' assertion that the discovery was an "almost complete failure."

Defendants next argue that False Statements 6-7 can be "innocently construed as reflecting [Dr. Croce's] honestly held belief that he has done nothing wrong." (MTD at 25, eighth bullet.) Read together, no such construction is reasonable. False Statement 6 falsely states that Dr. Croce said he had been accused of wrongdoing "simply because he was a prominent figure." (Compl. at ¶107.) Dr. Croce did not say that. (*Id*. at ¶108.) False Statement 7 falsely states that Dr. Croce "placed the blame" on others. (*Id*. at ¶110.) Read together, these statements falsely portray Dr. Croce negatively, as someone who blames his accusers, his "junior researchers" and his "collaborators." (*Id.*) The "clear impact" of these statements cannot be reasonably construed to merely state Dr. Croce believed he did nothing wrong. These statements expressly and falsely impute to Dr. Croce a blaming of others and a shirking of his own responsibility. That plain and obvious meaning is inconsistent with Defendants' strained and impermissible "innocent" construction.

Defendants' argument regarding False Statement 13 suffers from this same attempt to write words out of their Defamatory Article. Defendants *could have* stated in the article that "federal officials only deemed two allegations worth investigating and were satisfied with the OSU investigation that cleared Croce on those two points." (MTD at 25, bullet 9.) If Defendants had written that, it would have been true and non-actionable. However, that is not what Defendants wrote, and it is not the meaning Defendants conveyed. Instead, Defendants chose to claim that federal officials passed on two of the "most actionable" allegations, the clear impact of which is that those two warranted disciplinary action (which was not true) and that others were also actionable, but less so (which was also not true). Defendants also implied that ORI gave in

reluctantly to OSU's determination, even though it did not agree with it (which was also not true). (*See* Compl. at ¶¶143-147.) Defendants cannot use words that convey an obvious and natural meaning that is defamatory, and then claim a strained "innocent" interpretation.

Finally, there is no reasonable way to interpret False Statement 14, when read in context, to mean, as Defendants suggest, "that the errors in those papers were honest mistakes." (MTD at 25.) As set forth above at Part III(D)(1), the *only* reasonable interpretation of False Statement 14, when read in context, is that "at least 20" papers reporting Dr. Croce's research have been retracted, corrected or subject to editor's notices due to "*falsified data*" or plagiarism "*as a result of complaints by Dr. Sanders and others.*" No non-defamatory meaning is possible when the False Statement claims the corrections and retractions were due to "falsified data."

3. The Innocent Construction Rule Does Not Bar A Claim For Defamation *Per quod*.

Even if the Defamatory Statements asserted in the Complaint were reasonably susceptible of an innocent construction (they are not), Dr. Croce would still be able to proceed with his defamation claim in this case. At most, application of the innocent construction rule would mean that Dr. Croce's defamation claim proceeds as a *per quod* claim, not as a *per se* claim. The innocent construction rule does not apply to or preclude defamation *per quod*. Rather, where the innocent construction rule precludes a claim of defamation *per se*, it then "requires a party to prove the claim under the theory of libel *per quod*, and to plead and prove special damages." *Elwert v. Pilot Life Ins. Co.*, 77 Ohio App.3d 529, 541 (1st Dist. 1991). Statements that are defamatory *per quod* are those that are not defamatory on their face "but become so by the use of an innuendo *rendering the apparently harmless words* into libelous ones *by extrinsic evidence*." *Conway v. Heat and Frost Insulators*, 209 F. Supp. 2d 731, 755-756 (N.D. Ohio 2002) (emphasis added).

Under Ohio law, "[i]f a *per se* libel has an innocent construction, that does *not* mean that

the statement is 'not defamatory' as a matter of law.... Rather, '[i]f a publication can by innuendo be construed to be either nonlibelous or libelous, *the question may be submitted to a jury* provided special damages have been pleaded and proved by the one claiming libel." *Gupta v. The Lima News*, 139 Ohio App.3d 538, 547 (3d Dist. 2000), *quoting Becker v. Toulmin*, 165 Ohio St. 549, 556-57 (1956).

Even if this Court were to conclude that the statements at issue have reasonable innocent meanings (they do not), such a conclusion does not result in dismissal of Dr. Croce's defamation claim, because he has alleged special damages and can proceed *per quod*.

4. The Complaint Alleges The "Special Damages" Necessary To Plead Defamation Per Quod.

In an action for defamation *per quod*, the plaintiff has the burden to plead and prove special damages resulting from the defamatory statements. *See, e.g., Elwert v. Pilot Life Ins. Co.*, 77 Ohio App.3d 529, 541 (1st Dist. 1991). Dr. Croce has pleaded special damages under Ohio law.

The Ohio Supreme Court has held that "special damages" are "of such a nature that they do not follow as a necessary consequence of the injury complained of." *Gennari v. Andres-Tucker Funeral Home*, 21 Ohio St.3d 102, 106 (1986). Special damages may be shown by "any loss or injury actually suffered as a direct consequence of any impaired reputation" resulting "from conduct of a person other than the defamer or the one defamed." *Bigelow v. Brumley*, 138 Ohio St. 574, 594 (1941).

Under Ohio law, "actual injury is not limited to out-of-pocket loss." *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 181, 512 N.E.2d 979, 984 (1987). "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.*

Following the above guidance from the Ohio Supreme Court, appellate courts in Ohio have found special damages to be alleged where, as here, mental anguish follows from the fact that others who hear the alleged defamatory statements make comments. In *Kanjuka v. MetroHealth Med. Ctr.*, 2002-Ohio-6803, 151 Ohio App.3d 183 (8th Dist. 2002) the Court found damages sufficient to sustain a claim of defamation *per quod* where trial testimony established that the plaintiff suffered "much mental anguish" from the fact that her co-workers knew of defamatory statements suggesting plaintiff had a mental illness and made comments to her about her "condition." *Id*. at 196. Kanjuka did not allege any out-of-pocket loss. *Id*. Rather, she asked for, and the jury returned, damages based on "a percentage of the total amount of overall happiness she lost through these events, quantified as a dollar figure." *Id*.

Similarly, in *Stokes v. Meimaris*, 111 Ohio App.3d 176 (8th Dist. 1996), the Court found special damages to be adequately pleaded and proved where the alleged defamatory statements prompted an investigation by a third party, which caused additional embarrassment to the plaintiff. *Id*. at 182. After the jury found for Plaintiff on her defamation claim, the defendant appealed, arguing that the plaintiff failed to allege and prove special and actual damages. *Id*. at 184. The Court of Appeals disagreed. First, the Court noted that "Damages for defamation may include impairment of reputation, personal humiliation, shame, mental anguish and suffering." *Id*. at 184. The Court stated that "special damages are damages that 'result from conduct of a person other than the defamer or the one defamed'" and found that "plaintiff's embarrassment was the result of the investigation conducted by the Salvation Army. *Id*. at 185. Therefore, her humiliation and embarrassment constitute special damages." *Id*.

Dr. Croce's Complaint in this case pleads special damages. For example, as in *Kanjuka*, Dr. Croce was harmed as a result of the reader comments and other third-party online posts that

were prompted by the Defamatory Article:

> The defamation by Defendants further provoked readers of the New York Times and other third parties to write comments, blog entries, social media posts, and other online content subjecting Dr. Croce to public hatred, contempt, ridicule, shame and disgrace, which further caused Dr. Croce to experience humiliation, embarrassment and mental anguish. Defendants knew the Defamatory Article would produce such a reaction. (Compl. at ¶199.)

While these facts adequately plead special damages under Ohio law, if the Court were to determine that special damages must be pleaded and proven here, and that they are not sufficiently pleaded, then Dr. Croce requests an opportunity to amend the complaint to assert additional facts that demonstrate his special injuries.

J. Defendants' Argument That "Many" of the False Statements are Opinion is Meritless.

Defendants argue that ten of the twenty-one False Statements are non-actionable as "opinion."[18] (MTD at 25-33.) Defendants are wrong.

The dispositive question is "whether a reasonable reader will perceive the statement as a fact or an opinion." *McKimm v. Ohio Elections Comm.*, *supra,* at 144, citing *Vail*, 72 Ohio St.3d at 282-283; and *Scott, supra,* at 251-253. To answer that question, the court must examine "the totality of the circumstances" and consider "at least" the four factors discussed above. "[T]he weight to be given to any one will conceivably vary depending on the circumstances presented." *Vail v. The Plain Dealer Pub'g Co.*, 72 Ohio St.3d 279, 282 (1995). (These factors hereafter referred to as the *Vail* test.)

As Defendants state in their own Motion, "[i]n determining whether a statement is defamatory as a matter of law, the court must consider the entire publication as a whole and in

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[18] Using Defendants numbering system in their Appendix, those statements are 3, 4, 5, 8, 9, 11, 12, 17, 20 and 21. Again using Defendants' numbering system, Defendants do not argue that the following statements are statements of opinion: 1, 2, 6, 7, 10, 13, 14, 15, 16, 18, and 19.

context, including the type of publication and the expectations of the audience." (MTD 15-18.) Indeed, as discussed below, the "entire publication as a whole" works hard (and successfully) to persuade readers that the Defamatory Article is the factual report of an extensive investigation where the "open records closed the case" regarding Dr. Croce's fraudulent research. The "type of publication" is a newspaper that repeatedly declares its "journalists [are] on the ground" and its "stories [are] grounded in facts." Defendants corroborate the "expectations of the audience" that they are getting the facts with the words of their repeated assertions that they report "just facts; no alternatives."

1. The General Context of Defendants' False Statements.

The General Context "involves an analysis of the larger objective and subjective context of the statement. Objective cautionary terms, or 'language of apparency' places a reader on notice that what is being read is the opinion of the writer. Terms such as 'in my opinion' or 'I think' are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse." *Scott v. News-Herald*, 25 Ohio St.3d 243, 252 (1986).

The General Context of the False Statements in this case strongly urges readers to consider the statements to be factual, not opinions. The Defamatory Article uses words clearly indicating that it is purporting to report facts. It uses the words "***investigation***" or "***investigating***" nine times; "***findings***" nine times; and "***evidence***" six times. By contrast, it contains the word "*opinion*" only once, in connection with statements allegedly made by Randy Schekman and Phillip Sharp, which are not part of the False Statements at issue in the Complaint. (*Id.* at ¶170.)

When the Defamatory Article was first published in the NYT's digital edition, it appeared directly below a box containing the tag line "**Journalists on the ground. Stories grounded in facts**." (Compl. at ¶169.) In addition, in both the digital and print versions, the Defamatory Article was accompanied by a companion article under the banner: "**Inside the Times – The Story**

Behind the Story." (Compl. at ¶175.) That companion article's headline is "**Open Records Close the Case**." The digital version of this article is also accompanied by the tagline: "**Journalists on the ground. Stories grounded in facts**." (*Id.*)

The "Open Records Close the Case" article quotes Defendant Glanz as saying that "Ohio is paradise for open documents" and states that "[r]arely do reporters encounter as few obstacles as they did in this case," suggesting that the "investigation" produced evidence to support the facts recited in the Defamatory Article. (*Id.* at ¶176.) Defendant Armendariz, the coauthor of the Defamatory Article, is quoted as saying "**Here, everything just kept adding up.**" (*Id.*)

The headline saying that the open records "close the case" is clearly intended to mean the "case" stated against Dr. Croce in the Defamatory Article is proven fact. (*Id.*) Those statements do not give the reasonable reader the impression that the authors are presenting opinions. (*Id.*) Predictably, reasonable readers would (and in fact did) readily conclude that the Defamatory Article was reporting factual information.

2. The Broader Context of Defendants' False and Defamatory Statements of Fact.

"To evaluate an article's broader context we must examine the type of article and its placement in the newspaper and how those factors would influence the reader's viewpoint on the question of fact or opinion." *Scott, supra,* at 253. "It has been remarked that "… [d]ifferent types of writing have … widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Id*. (citations omitted).

In this case, the broader context communicates to the reasonable reader that the Defamatory Article is reporting facts, not opinions. The New York Times placed the Defamatory Article on the front page of both its digital and print versions of the New York Times. It did not appear on the Editorial, Opinion or Commentary pages. The Defamatory Article was not denoted as an

opinion piece or a commentary. (Compl. at ¶172.)

Defendant Glanz' name as it appears at the top of the digital publication of the Defamatory Article is also hyperlinked to his profile on the New York Times website, where he is described as a "reporter *on the Investigations desk*." Glanz' name as it appears at the bottom of the Defamatory Article is hyperlinked to his Twitter profile, where he is also described as an "*Investigative journalist*." (*Id.* at ¶171.)

In addition, at the exact time that the Defamatory Article was published, The New York Times was in the midst of a massive marketing campaign, rolled out in January of 2017, positioning itself as a warrior of Truth, with such taglines as: "**Truth. It's Hard To Find**" and "**Just Facts. No Alternatives**." (*Id.* at ¶174.) Because the facts are so strongly weighted against Defendants on the Broader Context, Defendants do not even attempt in their motion to argue that this factor weighs in their favor.

Thus, both the general and the broader contexts of the Defamatory Article reveal Defendants going out of their way to persuade reasonable readers that Defendants were reporting actual facts derived by their "investigative reporters" based upon "open records," *where "everything just kept adding up" so clearly that those "open records closed the case" against Dr. Croce*. It is no surprise therefore that reasonable readers of the Defamatory Article in fact understood it to mean that Dr. Croce was a fraud and a criminal, who conducted "dishonest research." The third and fourth factors of the *Vail* test therefore strongly support a finding that the False Statements are statements of fact.

Against this backdrop, Defendants make three arguments in support of their contention that their False Statements are opinions. All three fail.

3. Defendants' "scientific value or impact" argument fails.

Defendants argue first that False Statements 3, 4 and 20 "are non-actionable opinion

because they are value judgments regarding the scientific importance or impact of Croce's work." This argument is without merit.

a) False Statements 3 and 4 (Complaint ¶¶89-95, 98-101).

In the Defamatory Article, Defendants state as fact that "Some scientists argue that Dr. Croce has overstated his expansive claims for the therapeutic promise of his work" (False Statement 3) and that "Some scientists argue that … [Dr. Croce's] laboratory is focused more on churning out papers than on carefully assessing its experimental data" (False Statement 4). Both of these statements would be reasonably read by ordinary readers to communicate factual information, for two reasons.

First, both statements purport to represent the "arguments" made by "some scientists." That is a statement of fact. "Some scientists" either argued that or they did not, and whether they did or did not is a fact. Because the Defamatory Article does not identify those "some scientists," Dr. Croce cannot yet know whether "some scientists" actually said what the Defamatory Article says they said. Nor can Dr. Croce know whether Defendants twisted, distorted, or took statements out of context to support the false and defamatory theme of their entire Defamatory Article. Defendants are not entitled on a Motion to Dismiss to an assumption that the Defamatory Article accurately reported what those unidentified "scientists" allegedly said or "argued."

Second, even if these False Statements contained some element of opinion, "[i]f the defendant expresses a derogatory opinion without disclosing the facts upon which it is based, he is subject to liability <u>if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts</u>." *Natl. Rifle Assn. v. Dayton Newspapers. Inc.*, 555 F. Supp. 1299, 1312 (S.D. Ohio 1983), *citing* Restatement (Second) of Torts § 566, cmt. C. The Court in *Plough v. Schneider*, No. 10496, 1982 BL 148 (Ohio App. 9th Dist. April 28, 1982), held similarly, based on the same Restatement section:

> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. **But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.** The difference lies in the effect upon the recipient of the communication.

Id. at *2 (emphasis added). *See also Harris v. Bornhorst*, 513 F.3d 503, 522 (6th Cir. 2008) (applying Ohio law and stating court may determine that an expression of opinion "may reasonably be understood to imply the assertion of undisclosed facts" and thus bear a defamatory meaning).

Here, Defendants' False Statements 3 and 4 purport to rely on the "arguments" of "some scientists." One undisclosed but implied fact the reasonable reader will understand is that these unnamed "scientists" are experts in cancer research and knowledgeable about how Dr. Croce's laboratory works. This creates the impression that their "opinion is justified" and "implies that there are undisclosed facts on which [any such] opinion is based." In short, the specific language of False Statements 3 and 4 implies to readers that the False Statements are (using Defendants' words) "grounded in facts" that are undisclosed but known by the "scientists" with whom Defendants purport to have consulted. As evidenced by the readers' comments, the natural "effect upon the recipient of the communication" is that the statements are based on facts.[19] Therefore, the statements are actionable. *See also, Scott, supra*, at 251 ("[I]f an author represents that he has firsthand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact."); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) ("expressions of 'opinion' may often imply an assertion of

[19] For example, one reader states that Dr. Croce is a "blowhard sales person who has created a lab culture which rewards positive data at the expense of scientific method" because "high profile publications and grant money are the only thing that matters." (Compl. at ¶79.) These comments reveal this reader reasonably understood it to be fact that Dr. Croce "has overstated" his "claims for the therapeutic promise of his work" (False Statements 3), and that Dr. Croce is "focused more on churning out papers than on carefully assessing its experimental data" (False Statements 4).

objective fact").

Accordingly, even if False Statements 3 and 4 contained opinions, because the statements purport to be based on unexpressed facts, Defendants are subject to liability.

b) False Statement 20 (Complaint ¶¶54-55).

To the extent there are any opinions in False Statement 20, the very same rationale renders that statement actionable. That Statement is contained in the Defamatory Letter (at ¶22), and states: [20]

> **As Dr. Croce is almost surely aware**, almost 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. Why had Dr. Croce not renounced those initial claims, both in the published scientific literature and within Ohio State?

(Compl. at ¶54, Ex. A, ¶22; emphasis added). This paragraph conveys to the reader that Glanz has some undisclosed facts to support that Dr. Croce's claims regarding FHIT were not accurate, that FHIT is not a trigger for cancers, and that FHIT is not promising therapeutically. Glanz implies he has such facts in his very first phrase: "As Dr. Croce is almost surely aware…." These words signal factual assertions, not opinions.

False Statement 20 also asserts verifiable facts. At its heart, False Statement 20 states this: Dr. Croce and his team made claims about the FHIT gene that are not true; FHIT mutation is not a trigger for human cancers, it is a byproduct; and Dr. Croce made misrepresentations to OSU about the therapeutic promise of the FHIT gene when he was being recruited. This is the plain and obvious meaning of False Statement 20, and it is both verifiable and false.

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[20] In their argument, Defendants only recite part of False Statement 20 (MTD at 27). However, the entire statement read in context is what must be considered.

Whether Dr. Croce and his team made claims about the FHIT gene, and what claims they made, is absolutely verifiable. Whether those claims are true or have been proven untrue (whether they have "stood the test of time") is also verifiable, by comparing the claims Dr. Croce made with the scientific research papers regarding the FHIT gene that either confirm or refute those claims.

Likewise, whether FHIT gene mutation "triggers" human cancers or, rather, is simply a byproduct of cancer is also factually verifiable. The Complaint alleges that FHIT is a trigger, with regard to "a wide range of human cancers, including lung, esophagus, colon, kidney, ovarian, cervical and breast cancers." (Compl. at ¶55.)

Whether Dr. Croce misrepresented the therapeutic promise of FHIT is also a verifiable fact. If the FHIT gene were not a promising route for therapeutics, there would be few scientists studying it and few papers reporting those scientists' research about it. But the facts are exactly the opposite. As the Complaint alleges, "The FHIT gene continues to be an important focus in cancer research, as evidenced by the fact that, in the last eighteen months alone, at least twenty-one new papers involving FHIT have appeared on www.pubmed.gov, an online repository of medical research and review papers maintained by the U.S. National Library of Medicine, National Institutes of Health. Research involving the FHIT gene is conducted around the world, with recent papers from researchers in nations around the world, including, among others, the United States, China, Korea, Italy, Poland and Turkey." (*Id.*) The therapeutic promise of the FHIT gene is therefore still significant. (*Id.*)

4. Defendants' "motivation or state of mind" argument fails.

Defendants next argue that Dr. Croce "asserts that the Article makes a number of false, defamatory statements regarding his priorities, motivations, or state of mind," that "each of these statements is speculation or characterization … regarding Croce's mindset or motives" and is therefore non-actionable opinion. (MTD at 29.) This argument is wrong, factually and legally.

First, the five False Statements (4, 5, 9, 11, and 17) with respect to which Defendants make this argument are all actionable because they suggest the existence of unexpressed defamatory facts. *See Natl. Rifle Assn., supra.* In their own Motion, Defendants describe Statement 4 as relying on "[s]ome scientists" arguments; Statement 5 as relying on the "charges" of "one critic"; Statement 9 as claiming the existence of a "scientific consensus"; Statement 11 as relying on "another researcher"; and Statement 17 as relying on facts purportedly known by Sanders. The False Statements give the impression that undisclosed facts held by these "sources" and Defendants support the defamatory propositions that Dr. Croce fails to accurately assess scientific data, commits data falsification and plagiarism, disregards scientific truth, and goes against the "scientific consensus" to help the tobacco industry. These False Statements are actionable, even if they are skillfully written by Defendants so they can argue they are "opinions." The reasonable reader understood them to be facts, and to have a factual basis, even if that basis was undisclosed. *Natl. Rifle Assn., supra.*

Second, while Defendants claim these are non-actionable "motives," the False Statements are not statements about Dr. Croce's "motives" at all. A "motive" is "something that causes a person to act." (https://www.merriam-webster.com/dictionary/motive). Nothing in those five False Statements says anything about why Dr. Croce did anything or what caused him to act or not act.

Perhaps understanding that the False Statements in question do not concern "motives," Defendants pretend that the cases they cite apply the same reasoning to statements regarding "states of mind." The problem for Defendants, however, is that not one of the cases they cite holds that false statements about someone's "state of mind" or "mindset" constitute non-actionable opinions, nor do they even address that issue.

In fact, Ohio law is just the opposite. Ohio Supreme Court precedent makes clear that false and defamatory statements about one's state of mind are actionable where, under the four-part *Vail* test, the context is such (as is the case here) that the ordinary reader would understand the statement to be one of fact, rather than opinion.

In *Scott v. News-Herald*, 25 Ohio St.3d 243 (1986), the Court applied the *Vail* test to statements "the clear impact" of which was that the plaintiff had committed perjury, *i.e.*, "lied at the hearing after … having given his solemn oath to tell the truth." *Id.* at 251. Under Ohio law, perjury occurs when someone "knowingly make[s] a false statement under oath." O.R.C. 2921.11. Applying the four-part *Vail* test, the Court first found that, based solely on the "specific language" prong of the test, the statement would state a valid cause of action. *Id*. Turning to "whether the statement is verifiable," the Court found that it was, stating "Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action…" The Court thus rejected the argument that the statement was so subjective that a reasonable reader would not believe it had specific factual content, stating instead that it was "objectively verifiable." *Id*. at 251-52.

The False Statement that Dr. Croce "is knowingly engaging in scientific misconduct and fraud" is every bit as verifiable as a statement that someone knowingly makes a false statement under oath. Under *Scott*, the fact that the statement imputes certain knowledge to the plaintiff does not render the statement "opinion."

In *Scott*, the Court ultimately determined that a reasonable reader would understand the statements at issue in that case to offer opinion, rather than fact. However, that conclusion was based solely on the third and fourth prongs of the *Vail* test—the internal and broader contexts of the statements. With respect to the internal context, the Court found that "[a] review of the context of the statements in question demonstrates that [the author] is not making an attempt to be impartial

and no secret is made of the bias." *Id*. at 253. The Court observed based on other language in the article that "the average reader viewing the words in their internal context would be hard pressed to accept [the author's] statements as an impartial reporting of perjury." *Id.*

In evaluating the broader context, the Court found that, because the article was placed on the sports page—"a traditional haven for cajoling, invective, and hyperbole"—and the fact that "a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury," a reasonable reader would probably construe the statements as the writer's opinion. *Id*. at 253-54. Thus, in *Scott,* it was not a lack of verifiability or a quality of speculation that would cause the reasonable reader to conclude the statements constituted opinion, it was the context. *See also Vail*, 72 Ohio St.3d at 186 ("veiled characterization of Vail as a liar could be construed as an objective statement," but in the context of the "sarcastic" "commentary" column at issue in that case, it would be viewed as opinion).

The contextual facts that rendered the statements in *Scott* and *Veil* non-actionable are not present in this case. In fact, Defendants took pains to create the perception that the Defamatory Article was "impartial" investigative reporting. (*See supra*, Part III.J.1-2.)

Defendants contend that "courts applying Ohio law repeatedly have held that negative aspersions regarding an individual's mindset or motives are not actionable." (MTD at 30.) The cases they cite are inapposite. The False Statements at issue here do not involve motives. The cases that Defendants do not concern "mindset." And, those cases involve contextual facts that make obvious to a reasonable reader that the speakers were expressing opinions.

In *Cadle Co. v. Schlichtmann*, 123 F. App'x 675 (6th Cir. 2005), the parties had "been entangled in legal battles" with each other for "the past ten years." *Id*. at 676. During their decade-long feud, defendant established a website about plaintiff, and plaintiff sued defendant multiple

times. *Id*. During this brouhaha, Defendant told a reporter: "There's no pity, there's no humanity, there's no nothing, there's just, you know, destroying people's lives in order to squeeze money." *Id*. at 680. Plaintiff 's response? Schlichtman is "nothing but a scumbag." *Id*. And on it went. The Court threw out the Cadle's defamation case, stating, "While Schlichtmann's statements conveyed that he does not like Cadle, they did not convey any factual allegations." *Id*. at 681. *Cadle* is not remotely close to the case at bar.

Next, Defendants cite *Wampler v. Higgins*, 93 Ohio St.3d 111 (2001). The allegedly defamatory statement in *Wampler* was in a letter to the editor, "a common forum for citizens of the community to express viewpoints on a wide variety of subjects." *Id*. at 131. As in *Cadle*, the Ohio Supreme Court concluded that, in this context, reasonable readers were placed "on notice that [the speaker] sought to 'ventilate' his personal frustrations." *Id*. at 130. The court said that while not all letters to the editor will be insulated from liability, "it is commonly known that the authors of letters to the editor are normally not engaged in the business of factual reporting or news dissemination." *Id*. at 132.

All of the remaining Ohio cases cited by Defendants likewise involve contexts that commonly involve opinions and would alert readers that the statements are not factual reporting. *See Vail v. the Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995) (column appearing in the "Forum" page of the newspaper and titled "Commentary"); *Ferreri v. Plain Dealer Publishing Co.*, 142 Ohio App.3d 629 (8th Dist. 2001) (involving editorials and a political cartoon); *Tri-Cty. Concrete Co. v. Uffman-Kirsch*, No. 76866, 2000 WL 1513696 (8th Dist. 2000) (concerned resident who sent statements to a Planning Commission following a public meeting expressed opinions regarding the Plaintiff's compliance record); and *Condit v. Clermont Cty. Review*, 110 Ohio App.3d 755 (12th Dist. 1996) (statements published in "editorials, not news stories" and "in the

midst of ongoing political campaigns"). Defendants find no shelter from exposure to liability in any of these cases.

5. Defendants' "norms" or "bounds" argument fails.

Next, Defendants assert that False Statements 8, 9 and 12 are not actionable because of the "impossibility of precisely defining the[] terms" "norms" and "bounds." (MTD at 31.) Defendants argue that the "norms,' 'bounds,' and 'consensus' mentioned in the Article are undefined." (*Id*. at 32.) This argument is meritless.

In False Statement No. 8, Defendants state:

> "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."

(Emphasis added.) False Statement 8 asserts *as fact* that there are "generally expected bounds of cancer research," referring to them as "***the*** generally expected bounds of cancer research," and asserts that Dr. Croce violated those bounds by joining the Scientific Advisory Board ("SAB") of the Council for Tobacco Research ("CTR"). This is factually and verifiably false. There are no such "generally expected bounds of cancer research." Defendants cannot assert the factual existence of "generally expected bounds of cancer research" when no such bounds exist and then claim the assertion is non-actionable "opinion." The reasonable reader will understand False Statement 8 to assert as a factual matter that "the generally expected bounds of cancer research" exist and that Dr. Croce violated them. Dr. Croce is entitled to prove that there was no such "generally expected bound" that he violated by joining the SAB.

Defendants' assertion that False Statement 9 is an "opinion" because the word "consensus may refer to "a general agreement" and is "not precise" is spurious. (MTD at 32.) Defendants'

argument would vitiate the requirement that the Court determine the natural and obvious meaning of the statement and to read the statement in the context of the entire article.

In False Statement 9, Defendants state:

> "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."

(Emphasis added.) Even using Defendants' definition, the import of this statement is that Dr. Croce acted contrary to general agreement in the scientific community by joining the SAB. Whether there was any consensus or agreement within the scientific community against joining the SAB is a verifiable fact. The facts are that Dr. Croce served on the SAB with other very distinguished scientists, and esteemed academic institutions and cancer researchers applied for and received grants from the SAB throughout Dr. Croce's service. (Compl. at ¶¶115-16.)

Further, any suggestion that Dr. Croce supported an effort to cover up the fact that smoking causes cancer is outrageously false. In 1995, shortly after Dr. Croce joining the SAB, Dr. Croce (and his collaborator Dr. Huebner) discovered that the FHIT gene is the target of *carcinogens including tobacco smoke*. In April 1996, while on the SAB, Drs. Croce and Huebner published a research paper in the journal Cell, stating:

> "Owing to its etiology, ***lung cancer is likely to be strongly and directly associated with the effects of agents that interfere with DNA replication, such as agents in tobacco smoke.***"

(Compl. at ¶125; emphasis added.) In 1997, while Dr. Croce was still on the SAB, his paper entitled "Association between Cigarette Smoking and FHIT Gene Alterations in Lung Cancer" (Cancer Research 57, 2121-2123, June 1, 1997) was published. (*Id*. at ¶126.)

In False Statement 12, Defendants state:

> 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."

(Compl. at ¶136.) The false statement that Dr. Croce's lab is "violating scientific norms" is a factual statement, and would be understood by readers to be communicating factual information, not opinion. In addition, the introductory phrase ("After receiving several tips on Dr. Croce's work") communicates to the reader that the statement is based on undisclosed facts. As such, this statement, even if viewed as opinion, is actionable because it "creates the reasonable inference that [any] opinion is justified by the existence of unexpressed defamatory facts." *Natl. Rifle Assn., supra.*

Defendants cite two cases applying Ohio law in support of its claim that "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 proof." (MTD at 32.) The first case, *Roberts v. Murawski*, 2007-Ohio-3555 (1st Dist. 2007), does not support dismissal of Dr. Croce's claims. *Roberts* was brought by a terminated employee against his former employer. The sum total of the statements claimed to be defamatory were the very general statements that Roberts was "unethical," and "was not doing [his] job." *Id.* at ¶19. These generalized statements, without more, in that context, were not actionable. *Id.*

Roberts does not hold that the kind of specific allegations of unprofessional conduct falsely asserted by Defendants against Dr. Croce aren't actionable, and that is not the law in Ohio. Quite the contrary, numerous Ohio courts have specifically stated that "[a]n allegation that one has acted unprofessionally constitutes defamation *per se*." *Sygula v. Regency Hosp. of Cleveland E.*, 64 N.E.3d 458, 466 (8th Dist. 2016), *quoting Kanjuka v. MetroHealth Medical Ctr.*, 2002-Ohio-6803, P17, 151 Ohio App. 3d 183 (8th Dist. 2002) (same). *See also, e.g., Gosden v. Louis*, 116 Ohio App. 3d 195, 207 (App. 9th Dist. 1996) (letter was defamatory *per se* where it "contained the accusation that plaintiffs had acted 'unprofessionally'").

The second case, *Adams v. Coughlin*, 2015 WL 300465 (S.D. Ohio 2015), also does not support Defendants' position. In *Adams*, the "Plaintiff's own brief conced[ed] that [Defendant's] statements represented his opinion." *Id*. at *3. In addition, because those statements were made by the Ohio Bar Disciplinary Counsel in the discharge of his legal duty to "provide 'a statement of the reasons' underlying [his] determination" not to file a complaint, they were privileged. *Id*. at *2. Finally, this Court concluded that, *in that context*, phrases such as "warrants our concern," and "reflected poorly" would be understood as "expressing [the Disciplinary Counsel's] opinion regarding Adams's conduct." *Id*. at *3. None of those circumstances exist in this case.

K. Defendants' Motion To Dismiss Counts II and III Is Without Merit.

Defendants make two arguments for dismissing Counts II (False Light) and III (Intentional Infliction of Emotional Distress) of the Complaint. Both arguments are without merit.

First, Defendants claim that these claims should be dismissed "to the extent the Court concludes that Count I for defamation must be dismissed." (MTD at 34.) Because Count I should not be dismissed, that argument fails. In addition, with respect to the false light claim, it is not an accurate statement of the law that a false light claim is "equally barred" where a defamation claim fails. Rather, false light and defamation claims protect different interests and have different elements, and the failure of one does not automatically result in failure of the other.

The Ohio Supreme Court has held that "[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Welling v. Weinfeld*, 113 Ohio St.3d 464, syllabus (2007). *Welling* adopted Section 652E of the Second Restatement of the Law of Torts, which provides that it is not necessary that a plaintiff be defamed

in order to recover for a false light invasion of privacy: "It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position." Restat. of the Law 2d, Torts, Section 652E, Comment b (1977).

In adopting the tort, the Supreme Court recognized that, "[w]ithout false light, the right to privacy is not whole, as it is not fully protected by defamation laws." *Id*. at ¶49. "False light therefore provides a viable, and we believe necessary, action for relief apart from defamation." *Id*. at ¶48, quoting *West v. Media Gen. Convegence, Inc.*, 53 S.W.3d 640, 646 (Tenn. 2001). *See also Murray v. The HuffingtonPost.com, Inc.*, 21 F. Supp.3d 879, 889 (S.D. Ohio 2014) ("Under Ohio law a defendant can be liable for false light invasion of privacy even if not liable for defamation."), *citing Sturdevant v. Likley*, 2013-Ohio-987, at *5 (9th Dist. 2013).

For example, the "innocent construction rule" does not apply to false light claims. In *Mann v. Cincinnati Enquirer*, 2010-Ohio-3963 (1st Dist. 2010), the Court of Appeals disagreed with the trial court's dismissal of the false light claim on the basis of the innocent construction rule, stating "While the law of defamation and false-light invasion of privacy overlap in some ways, they are two separate torts that vindicate different interests. We have found no cases that take the innocent-construction rule, a defamation concept, and apply it in a false-light-invasion-of-privacy case." *Id*. at ¶21. Therefore, Defendants' assertion that the false light claim rises or falls with the defamation claim is without merit.

Defendants' claim that Dr. Croce failed to sufficiently plead his claims in Counts II and III is likewise without merit. Defendants' sole argument in this regard is that Dr. Croce did not plead conduct that would be "highly offensive to a reasonable person" or sufficiently outrageous as to go beyond the "bounds of decency." Defendants are wrong. This is not a case in which the

Defendants' actions are "[m]erely annoying" or "obnoxious." (MTD at 34.) The Defamatory Article, Defendants' follow-on social media posts and Glanz' interview on WOSU portrayed Dr. Croce as a "research fraud" and a "crook" (as readers of the Defamatory Article referred to him) *to millions of readers around the world.* This is a man who has devoted his life and his life's work to finding the causes of cancer, and Defendants make him out to be a "con man" (as another reader referred to him) on an international scale. If there is ever a case where a person would be justified in feeling seriously offended and aggrieved, this is it. Anyone who had such an article written about him or her would feel anger and resentment, and would consider the conduct to be outrageous and intolerable.

The intentional infliction of emotional distress cases Defendants cite, claiming that courts routinely grant motions to dismiss "these types of claims" (MTD at 35), are not remotely factually similar to this case. Every one of those cases involves, at most, an isolated insult, threat or use of rough language, communicated to an individual or small group of people. *See, e.g., Curry v. Village of Blanchester*, 2010-Ohio-3368, ¶55 (crude language); *Lombardo v. Mahoney*, 2009-Ohio-5826, ¶¶10-11 (crude cell phone voicemail message); *In re Palmer*, 555 B.R. 611, 627 (Bankr. N.D. Ohio 2016) (statements made at a Zoning Board hearing that Plaintiff "tried to run my wife and my son over"); *Wilson v. Wilson*, 2007-Ohio-178 (2d Dist. 2007) (single statement by wife to couple's priest that husband was a pedophile and viewed pornography); and *Roe ex rel. Roe v. Heap*, 2004-Ohio-2504 (10th Dist. 2004) (e-mail of the parent of an athlete to leaders of a diving organization, expressing concern that another diver had been convicted of "sexual crimes" and questioning daughter's safety). These cases simply have no bearing on the kind of worldwide and repeated pummeling Dr. Croce received at the hands of the Defendants, who repeatedly pushed the Defamatory Article out through social media and online, encouraging the widespread public

ridicule of Dr. Croce through various commenting platforms.

Nor do *Murray v. Chagrin Valley Publ'g Co.* and *Mann v. Cincinnati Enquirer* (MTD, p. 36) support dismissal of Dr. Croce's false light claim. *Murray* involved a motion for summary judgment, not a 12(b)(6) motion. The Court held that "there is no showing [the comments] were made with reckless disregard as to the falsity of the statements or that they painted appellants in a false light." *Murray v. Chagrin Valley Publ'g Co.*, 2014-Ohio-5442, at *39 (8th Dist. 2014). Here, Dr. Croce has pleaded both reckless disregard and falsity. (*See* Compl. at ¶¶211-218.)

In *Mann*, the Court held that "one misstatement toward the end of the article" did not change that, "as a whole" the "gist of the article … is that Mann was fired because he had refused to engage in sexual activities with his clients." *Mann v. Cincinnati Enquirer*, 2010-Ohio-3963, at ¶23 (1st Dist. 2010). That gist did not cast Mann in a false light and a reasonable person would not feel seriously offended by the gist of the article. *Id.*

By contrast to *Mann*, the gist of the Defendants' statements—as reflected in the many comments of actual readers—is that Dr. Croce is a "research fraud," a "con man" and a "crook." Any reasonable person would feel seriously offended by that portrayal.

Because Dr. Croce has pleaded all the necessary elements of his distinct false light and IIED claims, Defendants' motion to dismiss should be denied.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff Dr. Croce respectfully requests that the Court deny Defendants' Motion to Dismiss in all respects.

Respectfully submitted,

/s/ Thomas W. Hill
Thomas W. Hill (0012182)
Loriann E. Fuhrer (0068037)
KEGLER, BROWN, HILL & RITTER
A Legal Professional Association
65 E. State Street, Suite 1800
Columbus, Ohio 43215
(614) 462-5400 Phone
(614) 464-2634 Fax
thill@keglerbrown.com
lfuhrer@keglerbrown.com
Attorneys for Plaintiff, Carlo M. Croce, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed this 31st day of August, 2017, using the Court's CM/ECF system which will send electronic notification to all counsel of record in this action.

/s/ Thomas W. Hill
Thomas W. Hill