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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed February 22, 2023]

No. 22-1198

DON BLANKENSHIP,
Plaintiff – Appellant,

v.

NBCUNIVERSAL, LLC; CNBC, LLC,
Defendants – Appellees,

and,

DOES 1 - 50, inclusive,
Defendant.

No. 22-1207

DON BLANKENSHIP,
Plaintiff – Appellant,

FOX NEWS NETWORK, L.L.C.; CABLE NEWS NETWORK, INCORPORATED; MSNBC CABLE LLC; WP COMPANY LLC, d/b/a The Washington Post; DOES 1-50, inclusive; MEDIAITE, LLC;

FISCALNOTE, INC., d/b/a Roll Call; NEWS AND GUTS, LLC; THE CHARLESTON GAZETTE-MAIL; AMERICAN BROADCASTING COMPANIES, INC.; TAMAR AUBER; GRIFFIN CONNOLLY; ELI LEHRER,)
Defendants – Appellees,)

and,)

HONORABLE ANDREW NAPOLITANO, (Ret.); NATIONAL REPUBLICAN SENATORIAL COMMITTEE; ASSOCIATED PRESS; BOSTON GLOBE MEDIA PARTNERS, LLC; BREITBART NEWS NETWORK, LLC; CLARITY MEDIA GROUP, INC.; THE WASHINGTON TIMES, LLC; TRIBUNE PUBLISHING COMPANY, LLC; LOS ANGELES TIMES COMMUNICATIONS, LLC; NEIL CAVUTO; CHRIS HAYES; SARAH ELIZABETH CUPP; BRADLEY BLAKEMAN; JOHN LAYFIELD; STEPHANIE HAMILL; KEVIN MCLAUGHLIN; LEIGH ANN CALDWELL; MICHAEL PATRICK LEAHY; JOSH DAWSEY; JENNA JOHNSON; BEN WOLFGANG; MICHAEL WARREN; CATHLEEN DECKER; NBCUNIVERSAL, LLC; CNBC, LLC; DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; THE NATIONAL JOURNAL GROUP, LLC; WATAUGA WATCH; DOWN WITH TYRANNY; NATIONAL PUBLIC RADIO, INCORPORATED; THE GUARDIAN NEWS & MEDIA, LLC; DOW JONES & COMPANY, INCORPORATED, d/b/a Market Watch; UNIVISION COMMUNICATIONS, INCORPORATED, d/b/a Splinter News;)

INTERNATIONAL MEDIA INVESTMENTS FZ,)
LLC, d/b/a The National; THE DAILY BEAST)
COMPANY LLC; HEARST MAGAZINE MEDIA,)
INC, d/b/a Esquire Magazine; HAYRIDE MEDIA,)
LLC; NOWTHIS MEDIA, INC.; THE UNION)
LEADER CORPORATION; CAPITOL HILL)
PUBLISHING, INC, d/b/a The Hill; COMMIE)
GIRL INDUSTRIES, INC., d/b/a Wonkette; DAILY)
MAIL AND GENERAL TRUST PLC; VICE)
MEDIA, LLC; THE 74 MEDIA, INC., d/b/a The 74)
Million; BREAKFAST MEDIA, LLC; THE)
MCCLATCHY COMPANY, d/b/a The Sacramento)
Bee; OBSERVER MEDIA GROUP, LLC, d/b/a The)
Observer; GARNETT CO. INC., d/b/a York Daily)
Record; SALEM MEDIA GROUP, INC., d/b/a)
Townhall; VERIZON MEDIA, LLC, d/b/a The)
Huffington Post; JOY ANN LOMENA-REID;)
ZACK COLMAN; LAUREN PASSALACQUA; BEN)
RAY; DAVID BERGSTEIN; COURTNEY RICE;)
JUSTIN LAVOIE; JOHN KRUSHAAR; HOWIE)
KLEIN; SUSAN DAVIS; BEN JACOBS; DAN)
RATHER; HOLLY FIGUEROA O'REILLY; JOE)
LOCKHART; J. W. WILLIAMSON; RACHEL)
KONING BEALS; CHRIS JONES; JIM HEATH;)
NICOLE HENSLEY; PAUL BLEST; RASHMEE)
ROSHAN LALL; GIDEON RESNICK; DANA)
MILBANK; CHARLES PIERCE; MATT)
HOWERTON; ELIZABETH MCDONALD; ROB)
PERSEY; JEN KERNS; DAVID MARTOSKO;)
MARTIN PENGELLY; MATT TAYLOR; KEVIN)
MAHNKEN; ANDREW FEINBERG; JOHN)
RABY; BEN BOYCHUK; AMBER PHILLIPS;)
BRIAN SCHWARTZ; MICHELANGELO)
SIGNORILE; BRUCE BIALOSKY; MIKE)

ARGENTO; DAVIS RICHARDSON;)
MARKETWATCH, INC.; 35TH INC.,)
Defendants.)
)

No. 22-1326

DON BLANKENSHIP,)
Plaintiff – Appellant,)
)
v.)
)
BOSTON GLOBE MEDIA PARTNERS, LLC; d/b/a)
The Boston Globe; DOES 1 - 50, inclusive,)
Defendants – Appellees.)
)

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., Senior District Judge. (2:20-cv-00278; 2:19-cv-00236; 2:19-cv-00589)

Argued: December 7, 2022 Decided: February 22, 2023

Before GREGORY, Chief Judge, NIEMEYER, Circuit Judge, and Patricia Tolliver GILES, District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Niemeyer and Judge Giles joined.

ARGUED: Eric Peter Early, EARLY SULLIVAN WRIGHT GIZER & MCRAE LLP, Los Angeles, California, for Appellant. Kevin Taylor Baine, WILLIAMS & CONNOLLY LLP, Washington, D.C., for Appellee. **ON BRIEF:** Jeremy J.F. Gray, Lisa M. Zepeda, Padideh Zargari, EARLY SULLIVAN WRIGHT GIZER & MCRAE LLP, Los Angeles, California; Jeffrey S. Simpkins, SIMPKINS LAW, Williamson, West Virginia, for Appellant. Stephen J. Fuzesi, Gloria K. Maier, Matthew D. Heins, Katelyn R. Adams, WILLIAMS & CONNOLLY LLP, Washington, D.C., for Appellees American Broadcasting Companies, Inc.; Cable News Network, Inc.; Fox News Network LLC; MSNBC Cable, LLC; WP Company LLC; CNBC, LLC; and NBCUniversal, LLC. Kelli L. Sager, Los Angeles, California, Eric Feder, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., for Appellee American Broadcasting, Inc. Elbert Lin, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Appellee Fox News Network LLC. Jared M. Tully, Mary Claire Davis, Charleston, West Virginia, Ryan W. Goellner, Cincinnati, Ohio, Kevin T. Shook, FROST BROWN TODD LLC, Columbus, Ohio, for Appellees MSNBC Cable, LLC; CNBC, LLC; and NBCUniversal, LLC. Lonnie C. Simmons, DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC, Charleston, West Virginia, for Appellees Mediaite, LLC and Tamar Auber. Robert M. Bastress, III, DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC, Charleston, West Virginia, for Appellee The Charleston Gazette-Mail. Jennifer S. Jackman, WHITEFORD, TAYLOR & PRESTON, LLP, Washington, D.C., for Appellee Eli Lehrer. Allen M. Gardner, LATHAM & WATKINS LLP, Washington, D.C., for Appellees Fiscal Note, Inc.

and Griffin Connolly. Chris Vlahos, Jenna Harris, RITHOLZ LEVY FIELDS, LLP, Nashville, Tennessee; William D. Wilmoth, STEPTOE & JOHNSON, PLC, Wheeling, West Virginia, for Appellee News and Guts, LLC.

ARGUED: Eric Peter Early, EARLY SULLIVAN WRIGHT GIZER & MCRAE LLP, Los Angeles, California, for Appellant. Jonathan M. Albano, MORGAN LEWIS & BOCKIUS, LLP, Boston, Massachusetts, for Appellees. **ON BRIEF:** Jeremy J.F. Gray, Lisa M. Zepeda, Padideh Zargari, EARLY SULLIVAN WRIGHT GIZER & MCRAE LLP, Los Angeles, California; Jeffrey S. Simpkins, SIMPKINS LAW OFFICE PLLC, Williamson, West Virginia, for Appellant. Andrew M. Buttaro, MORGAN, LEWIS & BOCKIUS LLP, Boston, Massachusetts; David K. Henderson, Barbara A. Samples, HENDRICKSON & LONG, PLLC, Charleston, West Virginia, for Appellees.

GREGORY, Chief Judge:

Following an unsuccessful campaign for one of West Virginia's U.S. Senate seats, Don Blankenship sued numerous media organizations and individual journalists, alleging defamation, false light invasion of privacy, and civil conspiracy. Blankenship's claims arise from misstatements of his criminal record: he was convicted and served one year in prison for a federal conspiracy offense that is classified as a misdemeanor, but Defendants made statements describing him as a "felon."

Most of the parties Blankenship initially named as Defendants were dismissed early in the litigation, and the sixteen Defendants who remained moved for summary judgment in their respective cases. The district court granted summary judgment to all sixteen Defendants after concluding they did not make the statements with actual malice. Those cases are now before us via two appeals: a consolidated appeal from the district court's decisions granting summary judgment to fifteen Defendants, and a separate appeal from the district court's grant of summary judgment to the Boston Globe. Although we heard oral argument on the appeals in *seriatim*, we consolidate the cases into this single opinion. Finding no error, we affirm.

I.

A.

Don Blankenship previously served as the CEO of Massey Energy Company, a large coal producer. During his tenure as CEO, a 2010 explosion at one of Massey Energy's mines in West Virginia, the Upper Big Branch Mine, killed twenty-nine miners. Blankenship was indicted on several federal charges in the wake of the Upper Big Branch Mine disaster, including multiple felony counts. A jury ultimately convicted him of conspiracy to violate federal mine safety laws and regulations, a Class A misdemeanor, but acquitted him of the felony charges. *See United States v. Blankenship*, 846 F.3d 663, 666–67 (4th Cir. 2017) (affirming conviction), *cert. denied*, 138 S. Ct. 315 (2017). Blankenship was sentenced to one year in federal prison (the statutory maximum), with another year of supervised release, and was fined $250,000. He

served his sentence at the Taft Correctional Institution in California; of the approximately 2,400 inmates in the prison, Blankenship maintains he was the only one who was not serving a sentence for a felony conviction. Blankenship was released from prison in 2017.

In January 2018, while still on supervised release, Blankenship announced his plans to run for the U.S. Senate in West Virginia. As a candidate in the Republican primary, he attracted public attention for comments he made about Senator Mitch McConnell and then-Secretary of Transportation Elaine Chao. Then-President Trump, Senator McConnell, and other prominent Republicans publicly criticized Blankenship and urged West Virginians to support another candidate in the May 8 primary election. Blankenship ultimately lost the primary election, finishing in third place. He later tried to run in the general election as the Constitution Party candidate but was unable to get on the ballot.

During Blankenship's Senate campaign, numerous media organizations and journalists broadcast or published statements that referred to him as a "felon" or "convicted felon," even though Blankenship's conviction was classified as a misdemeanor. Defendants are sixteen of those organizations and individuals: Fox News, MSNBC, CNN, the Washington Post, ABC, News & Guts, Eli Lehrer, Mediaite, Tamar Auber, Griffin Connolly, FiscalNote, HD Media, NBCUniversal, CNBC, 35th PAC, and the Boston Globe. Although Defendants' references to Blankenship's criminal history closely resemble one

another, we must consider the facts surrounding each individual statement in turn.

1.

Fox News broadcast several statements that referred to Blankenship as a felon or otherwise misstated his criminal record. First, during an April 25, 2018 appearance on Fox News's *Outnumbered* program, Andrew Napolitano, a Senior Judicial Analyst for the network, remarked that Blankenship "went to jail for Manslaughter after people died in a mine accident." J.A. 3878.[1] Later that day, Blankenship's campaign contacted Fox News and demanded a correction because Blankenship had been convicted of conspiracy to violate federal mine safety laws and regulations, not manslaughter. Upon learning of his mistake, Napolitano expressed a desire to appear on the network to set the record straight. On April 30, his producer emailed producers of multiple Fox News programs to ask if Napolitano could discuss the details of Blankenship's conviction, including one specific request to correct the record, but the producers of those shows were interested in different topics and did not grant his requests.

On May 3, Antonia Ferrier—an aide to Senator McConnell—emailed Martha MacCallum, the host of Fox News's *The Story with Martha MacCallum*. Ferrier wrote that McConnell was "pretty ticked" about

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[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in the consolidated appeal. Citations to the "G.J.A." refer to the Joint Appendix filed by the parties in the separate Boston Globe appeal.

Blankenship making public comments attacking Chao, McConnell's wife. J.A. 3928. On May 4, Fox News contributors Karl Rove and Tammy Bruce appeared on *The Story* and criticized Blankenship, but did not mischaracterize his conviction. The next day, McConnell emailed Rove and thanked him for his "comments on Martha's show last night." J.A. 3806.

On May 6, Fox News Chairman Rupert Murdoch emailed two senior executives at the network, writing: "Both Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but Sean and Laura dumping on him hard might save the day."[2] J.A. 4052. Earlier that day, Murdoch had received an email stating that "convicted felon" Don Blankenship was "surging in the GOP primary polling," J.A. 4050, but Murdoch did not repeat the "convicted felon" language in his email to the two executives.

On May 7, anchor Neil Cavuto discussed Blankenship during a telecast of his Fox News show *Cavuto Coast to Coast*. Returning from a commercial break, Cavuto opened: "The president warning Republicans, you know what, we're going to lose West Virginia if Don Blankenship is allowed to win the primary and he does win the primary. Don Blankenship, of course, is arguing that he's the best qualified for this. Of course, he's a convicted felon."

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[2] We understand that Murdoch was referring to Sean Hannity and Laura Ingraham, who anchored evening programs on Fox News at the time. Blankenship does not allege that either Hannity or Ingraham ever defamed him.

J.A. 3466. A couple weeks earlier, on April 25, Fox News correspondent Peter Doocy had appeared alongside Cavuto on the show *Your World with Neil Cavuto* and noted that Blankenship "recently served a year in jail on a misdemeanor conviction tied to his role in a mine collapse that killed 29 people." J.A. 3861–62. In addition, on May 2, Cavuto had received a ten-page briefing packet about the 2018 primary elections that described Blankenship as seeking "vindication for his 2015 conviction on a misdemeanor charge related to the Upper Big Branch Mine explosion that killed 29 miners." J.A. 3867.

Between May 7 and May 9, four other Fox commentators also referred to Blankenship as a "felon" or "convicted felon" on air. During the May 7 broadcast of *The Evening Edit* on Fox Business Network, John Layfield described Blankenship as a "felon who's got a probation officer, who could end up in Congress." J.A. 3567. Bradley Blakeman also called Blankenship a "felon" during that same show. J.A. 3564. On the May 7 broadcast of Fox Business Network's *Making Money*, Stephanie Hamill referred to Blankenship as a "convicted felon." J.A. 3570. And on May 9, the day after the West Virginia Senate primary, Elizabeth MacDonald called Blankenship a "felon" on *The Evening Edit*. J.A. 3573.

On May 22, two weeks after the primary election, Cavuto interviewed Blankenship on air during *Your World*. The interview included the following exchange:

> BLANKENSHIP: And it's very disappointing that the news media and this network as well continues to tell people I'm a felon, which—I've

> never been convicted of a felony. I'm probably less likely to be a felon than anyone, given that I was investigated for four and a half years and they couldn't find anything.
>
> CAVUTO: So what are you if you've served time in jail?
>
> BLANKENSHIP: A misdemeanor [sic]. The only misdemeanor to serve time at a felon prison in California. So I think that should tell us something as well when they're sending misdemeanors to prison so they can't continue to communicate for a year is—is pretty telling.
>
> CAVUTO: You know, there are those who would disagree with that portrayal, sir. Saying that it's a little bit bigger than a misdemeanor when 29 people are killed in a mining accident in 2010 for which you—or your company, more to the point, was held accountable for violating safety standards and the rest. You don't agree with that, and obviously you felt that way afterwards. But that would be a little more than a misdemeanor, right?

J.A. 3552–53, 5671. Immediately after the interview, Napolitano appeared on *Your World*. He told Cavuto: "Let me say first that Don Blankenship is correct. I once inadvertently said on air that he was a convicted felon.[3] He was not. He was acquitted of the charges, the

[3] There is no evidence that Napolitano ever called Blankenship a "convicted felon" on air. The only misstatement by Napolitano in the record is his April 25 remark that Blankenship was convicted

felony charges against him. The only thing he was convicted of was a misdemeanor." J.A. 5669. Cavuto responded, "So, just serving a year in jail doesn't make you a convicted felon?" *Id.* Napolitano replied, "That's correct." J.A. 5670.

2.

The record shows that two MSNBC anchors—Joy Reid and Chris Hayes—referred to Blankenship as a "convicted felon." Reid made such a statement while she was guest-hosting the show *All In with Chris Hayes* on May 4, 2018. For his part, Hayes described Blankenship as a "convicted felon" during the April 23 and May 9, 2018 broadcasts of *All In*. Hayes also posted a tweet to his personal Twitter account on April 16, 2018, that called Blankenship "a felonious coal baron found responsible for dozens of miners' deaths." J.A. 811.

Hayes had some familiarity with Blankenship prior to 2018. He interviewed Blankenship in 2014, and he exchanged emails about Blankenship with members of the *All In* staff in 2015 and 2016. In December 2015, Denis Horgan, *All In*'s executive producer, sent Hayes and other staff members a New York Times article that reported on Blankenship's conviction. Hayes replied: "He only got nailed on the misdemeanor, tho. Probably not a day in jail." J.A. 845. That email exchange predated Blankenship's sentencing. Later, in an April 2016 email to Hayes and other *All In* staff, producer Brendan O'Melia wrote that "[o]ur old friend Don

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of manslaughter. That appears to be the statement Napolitano was referring to when speaking to Cavuto on May 22.

Blankenship [is] going to the cooler for a year." J.A. 903. Hayes also discussed Blankenship during the November 29, 2017 telecast of *All In*. During that show, *All In* displayed as on-screen graphics the headlines of two articles about Blankenship. The bodies of those articles—but not the headlines—briefly noted that he was convicted of a misdemeanor offense. Hayes apparently did not mention Blankenship's criminal record during the November 29 show.

In a recorded off-air conversation on April 23, 2018—hours before Hayes's first on-air statement calling Blankenship a felon—Hayes and *All In* producer Brian Montopoli discussed plans for a segment of that night's show. Montopoli suggested discussing "our old buddy Don Blankenship's ad," in which Blankenship made calls to arrest and imprison Hillary Clinton. J.A. 492. In response, Hayes remarked, "[T]hat is, like, convicted felon . . . Don Blankenship . . . the man who was found, you know, to have criminally violated the law in the mine that he owned that killed, you know, all those miners." *Id.* Montopoli replied, "Yeah." *Id.*

On May 10, 2018, one day after Hayes's second on-air reference to Blankenship as a "convicted felon," an MSNBC viewer emailed Hayes and stated: "You mentioned that Blankenship was a Felon on your [show]. Unfortunately it was a misdemeanor[.] Go figure!" J.A. 847. Hayes replied, "yes! Caught that after the show, but you're r[i]ght." *Id.* There is no evidence in the record that Hayes, Reid, or others at MSNBC publicly corrected the "felon" statements, or that

Blankenship ever contacted the network to request a correction.

3.

Blankenship points to four occasions where CNN commentators made similar statements during television broadcasts. The first occurred during the April 29, 2018 broadcast of *CNN Newsroom*. While discussing the West Virginia Senate primary, host Dana Bash told the audience that Blankenship "reminds us [his conviction] was just a misdemeanor." J.A. 1383. However, a few minutes later, commentator Kevin McLaughlin referred to Blankenship as a "convicted felon." J.A. 1386. Bash did not correct McLaughlin's statement on air.

S.E. Cupp, the host of the CNN show *S.E. Cupp Unfiltered*, called Blankenship a "felon" on two different occasions. First, on May 2, 2018, *Unfiltered* played a clip of Blankenship speaking during a West Virginia debate, which showed him saying, "I've had a little personal experience with the Department of Justice; they lie a lot too." J.A. 1458. After the clip played, Cupp reacted by saying, "that's because you're a convict, you're a felon. Oh my God." *Id.* Then, on the May 8 telecast of *Unfiltered*, Cupp remarked, "In case you missed it, a former coal baron and convicted felon is running for Senate in West Virginia." J.A. 1469. Lastly, CNN commentator Joe Lockhart referred to Blankenship as a "convicted felon" during the May 7 broadcast of *CNN Tonight*. J.A. 1428.

There is no evidence in the record that Blankenship contacted CNN to request corrections for any of these statements, or that CNN issued a correction.

4.

Blankenship takes issue with statements in two stories published by the Washington Post. On July 25, 2018, the Washington Post published an online article about Republican primary candidates, written by reporters Jenna Johnson and Josh Dawsey, which described Blankenship as "a former coal mine owner and felon." J.A. 2051. The same article appeared in the Post's print edition two days later. The record indicates that Dawsey neither wrote nor reviewed the part of the article that contained this language.

A couple weeks later, on August 9, the Washington Post published a blog post by Amber Phillips that identified Blankenship as one of three "convicted felons" who ran for office in 2018. J.A. 2079. In an earlier story published on May 1, 2018, Phillips had reported that Blankenship "just finished a year in prison after an explosion at one of his mines killed 29 people" and that he "was convicted on a misdemeanor for conspiring to violate mine safety laws." J.A. 2298. Between May 2 and May 6, Phillips also received three mass-distribution emails that referred to Blankenship's conviction as a misdemeanor. These emails contained detailed updates and commentary on the West Virginia primary and other political topics, and they made only passing references to Blankenship's conviction. One of the three included the transcript for an entire episode of *Face the Nation*, a weekly political news program on CBS.

There is no record evidence that Blankenship ever contacted the Washington Post to request a correction. The Post issued corrections to both stories after learning of Blankenship's lawsuit in 2019.

5.

Blankenship's claims against ABC revolve around a single story. On July 23, 2018, ABC published an article by reporter John Verhovek that discussed Blankenship's intentions to run for the Senate as a third-party candidate after he lost the Republican primary. The article referred to Blankenship as "the former coal baron and convicted felon" and explained that he "was convicted in 2015 for conspiracy to violate mine safety and health standards in the aftermath of the 2010 Upper Big Branch Mine disaster that resulted in the death of 29 miners." J.A. 2576. ABC posted links to the article on Twitter and Facebook with descriptions that repeated the "convicted felon" language, and it used the same language in a description of the article in a daily politics email newsletter ABC distributed on July 24.

Verhovek had reported on or discussed Blankenship's criminal history on a few earlier occasions. In a March 29, 2018 email to a colleague, Verhovek similarly referred to Blankenship as a "convicted felon." J.A. 2577. However, in early May, Verhovek had authored or co-authored three articles for ABC which noted that Blankenship was convicted of a misdemeanor. Also in early May, Verhovek had received multiple emails from his ABC colleague Meridith McGraw that provided updates on the West Virginia primary campaign. The emails, which

McGraw sent to an internal email distribution list, made passing references to Blankenship's conviction on a misdemeanor offense. The distribution list received dozens of similar political updates each day.

Blankenship's campaign contacted McGraw to request a correction almost immediately after ABC published the July 23 article. In a text to Verhovek, McGraw explained, "Don Blankenship is not a convicted felon. He was found guilty of a misdemeanor charge. . . . It's confusing because he was sent to a federal prison for his misdemeanor charge. We should correct it!" J.A. 2736. Verhovek responded, "Meridith can you send me exact language on this? Blankenship was sent to federal prison but he was not convicted of a felony?" J.A. 2735. Verhovek later apologized to McGraw for the mistake, writing: "Sorry about Blankenship, I thought I had it right on that or [had] seen it in an earlier story, that's my bad." J.A. 2812.

6.

On appeal, Blankenship devotes almost no attention to the remaining ten Defendants in the consolidated action: News & Guts, Eli Lehrer, Mediaite, Tamar Auber, Griffin Connolly, FiscalNote, HD Media, NBCUniversal, CNBC, and 35th PAC. Like the others, these Defendants published articles during the 2018 Senate campaign cycle that described Blankenship as a "felon" or "convicted felon."

7.

Lastly, Blankenship's claims against the Boston Globe focus on a single published article. The Globe had an agreement with the Associated Press ("AP")

that allowed it to republish AP wire stories. On May 21, 2018, the AP distributed a wire story written by John Raby that discussed Blankenship's possible third-party candidacy in the general election. Raby's story referred to Blankenship as a "convicted ex-coal baron" and explained that he "spent a year in federal prison for violating safety regulations in a 2010 mine explosion that killed 29 miners." G.J.A. 356–59.

The Globe published a condensed version of the AP story on May 22. While editing the original story, a Globe copy editor named Daniel Coleman changed the phrase "convicted ex-coal baron" to "convicted felon and former coal baron" and removed the description of Blankenship's prison sentence. G.J.A. 346. The Globe had previously published three articles which correctly reported that Blankenship was convicted of a misdemeanor but acquitted of felony charges. Those articles are dated December 5, 2015, April 7, 2016, and May 8, 2018.

After Blankenship filed this lawsuit, the Globe published a correction clarifying that Blankenship's conviction was a misdemeanor.

B.

1.

In March 2019, Blankenship brought a diversity action in the federal district court against more than 100 media organizations, political action committees, and individuals. He alleged claims for defamation, false light invasion of privacy, and civil conspiracy under West Virginia law, arguing that Defendants' descriptions of him as a felon were false, were made

with actual malice, and caused him injury by damaging his reputation and contributing to his defeat in the 2018 primary. Blankenship voluntarily dismissed several original Defendants. In March 2020, the district court dismissed his claims against many more Defendants (including most individual journalists and commentators) for lack of personal jurisdiction, and dismissed his claims against NBCUniversal and CNBC without prejudice for insufficient service of process. However, the court denied the remaining Defendants' Rule 12(b)(6) motions to dismiss. Shortly thereafter, Blankenship refiled a separate action against NBCUniversal and CNBC. The district court adjudicated both cases in tandem.

The parties conducted extensive discovery, during which Blankenship deposed numerous journalists and other employees affiliated with the organizational Defendants. Nearly all the journalists who made the challenged statements submitted declarations or were deposed, and while the precise contours of their testimony varied, all who provided such testimony asserted that they did not realize their descriptions of Blankenship as a felon were inaccurate at the time. After discovery concluded, the remaining fifteen Defendants moved for summary judgment.

In three different opinions issued in February 2022, the district court granted summary judgment to all fifteen Defendants. As to Blankenship's defamation claims, it first concluded that the Defendants' statements were materially false because they were "based on a provably false assertion of fact," and that they constituted defamation *per se* because they falsely

attributed a felony offense to Blankenship that "carries significantly greater legal consequences than a misdemeanor." J.A. 5640 (cleaned up); *see* J.A. 5689, 5764. But after an extensive analysis of the record, it determined that Blankenship failed to offer sufficient evidence of actual malice to survive summary judgment.

Because Blankenship's false light invasion of privacy and civil conspiracy claims also required him to prove actual malice, the district court granted the Defendants summary judgment on those claims as well. Blankenship timely appealed the decisions, which were consolidated in a single appeal.

2.

Blankenship filed a separate action against the Boston Globe in West Virginia state court, alleging defamation and false light invasion of privacy (but not civil conspiracy). The Globe removed the case to the district court based on diversity of citizenship. Following discovery, the Globe moved for summary judgment. As it did in the related cases, the district court granted summary judgment to the Globe after concluding Blankenship failed to show that the Globe acted with actual malice when publishing the inaccurate statement. Blankenship timely appealed.

II.

This Court reviews de novo a district court's decision to grant summary judgment. *Ballengee v. CBS Broad., Inc.*, 968 F.3d 344, 349 (4th Cir. 2020). At the summary judgment stage, we view all facts and make all reasonable inferences in favor of the nonmoving

party. *Id.* "Summary judgment is warranted 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). "Facts are material when they might affect the outcome of the case, and a genuine issue exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (internal quotation marks omitted). A party is entitled to summary judgment when "the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

III.

A.

We start with Blankenship's defamation claims, which, like his other claims, rely on West Virginia law. To prevail in a defamation action in West Virginia,[4] a public-figure plaintiff like Blankenship must establish that the statements (1) contain a provably false assertion of fact and (2) were published with actual malice. *Pritt v. Republican Nat'l Comm.*, 557 S.E.2d

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[4] Technically, Blankenship's claims involving written statements constitute libel claims, but the relevant elements for both actions are identical. *See Greenfield v. Schmidt Baking Co.*, 485 S.E.2d 391, 393–94 (W. Va. 1997). For simplicity, we follow the parties' approach and use the term "defamation" to refer to all claims.

853, 861–62 (W. Va. 2001).[5] A plaintiff must prove actual malice by clear and convincing evidence. *Id.* at 862.

At the outset, Defendants argue that we can affirm the district court's decisions on the alternative ground that none of the challenged statements were actionably false. The district court, of course, reached the opposite conclusion. But Defendants contend that a "felony" is often understood to refer colloquially to serious crimes, and that there is no question Blankenship's conviction and sentence were serious. *See Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 516–17 (1991) (explaining that falsity turns on "the substance, the gist, the sting" of the words the defendant used). Here, we will simply assume that Defendants' statements satisfy the falsity element because we can instead resolve Blankenship's claims based on the actual malice element.

West Virginia's actual malice standard comports with First Amendment limitations on state defamation law, as articulated by the Supreme Court in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *See Havalunch, Inc. v. Mazza*, 294 S.E.2d 70, 73 (W. Va. 1983). To prove actual malice, Blankenship must show that Defendants made each statement "with

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[5] In defamation cases involving plaintiffs who are candidates for public office, West Virginia law appears to additionally require that the defendant intended to injure the plaintiff by publishing the statement. *See Pritt*, 557 S.E.2d at 861. Defendants argue that Blankenship also failed to present sufficient evidence of an intent to injure. Because we conclude that Blankenship failed to create a jury question that any Defendant acted with actual malice, we do not need to address the intent-to-injure element.

knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times*, 376 U.S. at 279–80. Reckless disregard exists where "the defendant in fact entertained serious doubts as to the truth of its publication" but nonetheless published it. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In other words, the defendant must have had at least "a high degree of awareness of . . . probable falsity." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

On summary judgment, we must apply the clear and convincing evidence standard when determining whether Blankenship has created a genuine issue of actual malice. To this end, we ask "whether the evidence presented is such that a reasonable jury might find that actual malice ha[s] been shown with convincing clarity." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Whether the evidence in the record is sufficient to permit such a finding is a question of law. *Harte-Hanks*, 491 U.S. at 685. We have explained that creating a jury question on actual malice "is no easy task." *Carr v. Forbes, Inc.*, 259 F.3d 273, 282 (4th Cir. 2001). To survive summary judgment, Blankenship must offer "concrete" and "affirmative evidence" of actual malice, *Liberty Lobby*, 477 U.S. at 256–57, and that evidence must produce an "abiding conviction" that actual malice is "highly probable," *Cannon v. Peck*, 36 F.4th 547, 566 (4th Cir. 2022). On appeal, we independently review the entire record to determine whether Blankenship has made this showing. *Harte-Hanks*, 491 U.S. at 688; *Carr*, 259 F.3d at 283.

B.

Blankenship argues that the district court made a few recurring errors in its summary judgment decisions. In his view, the court erred by making improper credibility determinations, drawing inferences in favor of Defendants rather than Blankenship, and failing to consider the entire record when evaluating his defamation claims. However, after independently reviewing the full record, we conclude the district court correctly held that Blankenship has not presented sufficient evidence that any Defendant acted with actual malice.

1.

On appeal, Blankenship devotes the most attention to his defamation claims against Fox News, so we begin there. As an initial matter, Blankenship no longer challenges Andrew Napolitano's statement that Blankenship went to jail for manslaughter. Instead, Blankenship focuses on the inaccurate on-air statements made by Neil Cavuto and four other Fox News commentators in the days leading up to the West Virginia primary. We conclude that the record evidence would not permit a reasonable jury to find, by clear and convincing evidence, that these commentators or any other Fox News employees made these statements with actual malice.

a.

Cavuto referred to Blankenship as a "convicted felon" once, during the May 7, 2018 broadcast of his show *Cavuto Coast to Coast*. In a deposition, Cavuto testified that he did not realize this statement was

inaccurate at the time, explaining: "It was incorrect, but it was inadvertent. I did not know there was a distinction between going to jail over a felony or going to jail over a misdemeanor, just that he went to jail for a year." J.A. 3556. At the summary judgment stage, we do not credit Cavuto's self-serving testimony about his state of mind over contrary evidence. *See Liberty Lobby*, 477 U.S. at 255. At the same time, though, Blankenship cannot avoid summary judgment "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of . . . legal malice." *Id.* at 256. Rather, the question is whether Blankenship has offered enough concrete evidence to permit a jury to find, by clear and convincing evidence, that Cavuto acted with actual malice. He has not.

Blankenship highlights two parts of the record that he claims create a genuine dispute of fact as to actual malice. The first is the April 25, 2018 episode of *Your World with Neil Cavuto*, where Peter Doocy, in Cavuto's presence, noted that Blankenship "recently served a year in jail on a misdemeanor conviction tied to his role in a mine collapse that killed 29 people." J.A. 3861–62. According to Blankenship, this shows Cavuto knew it was false to use the term "convicted felon" roughly two weeks later. The second piece of evidence is the briefing packet Cavuto received on May 2, 2018, which mentioned Blankenship's "2015 conviction on a misdemeanor charge related to the Upper Big Branch Mine explosion that killed 29 miners." J.A. 3867.

Although a jury could infer that Cavuto processed Doocy's remark and committed the detail to memory,

that inference is somewhat tenuous. Doocy's reference to the misdemeanor conviction was a single, brief comment during an hourlong show that covered several different political topics. From that one comment, it would be a stretch to infer that Cavuto, two weeks later, "in fact entertained serious doubts" that Blankenship was a felon. *St. Amant*, 390 U.S. at 731. The note on Blankenship's misdemeanor conviction in the May 2 briefing packet—a single, passing reference in ten pages of material on various 2018 primary campaigns—is even more tenuous evidence of Cavuto's knowledge on May 7. Cavuto testified that he was sure he would have read the packet, but that does not necessarily support an inference that he remembered this one specific detail when speaking on air five days later.

As possible evidence of Cavuto's state of mind, these facts are much less convincing than those in cases where courts have found a genuine issue of actual malice. *See Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071–72 (5th Cir. 1987) (defendant newspaper printed a false story a second time, even though the editors responsible for the second story arguably knew the newspaper had retracted the first one); *Golden Bear Distrib. Sys. of Tex., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (author of allegedly defamatory story had contemporaneous notes that "clearly indicate[d] her awareness" that her story was false).[6] Doocy's remark and the briefing packet

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[6] Blankenship also cites to *Palin v. N.Y. Times Co.*, 940 F.3d 804 (2d Cir. 2019). But that case was decided at the motion-to-dismiss stage and is inapposite here. *See id.* at 816 (holding only that the plaintiff plausibly alleged that the defendant acted with actual malice).

might well permit a finding that a reasonable person in Cavuto's position *should have known* Blankenship was convicted of a misdemeanor, but actual malice requires "much more" than mere negligence. *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 325 (4th Cir. 2008).

And even if a reasonable jury can infer that Cavuto heard and remembered Doocy's "misdemeanor" comment, it still could not find with convincing clarity that Cavuto had serious doubts about the truth of his May 7 statement. Cavuto knew Blankenship was charged with and convicted of a federal conspiracy offense in the wake of a mine disaster that killed twenty-nine people, and that he was sentenced to one year in federal prison—exactly one day less than a felony sentence—and fined a quarter of a million dollars. Blankenship himself admits this was a highly unusual sentence for a misdemeanor offense; he notes that he was the only inmate at his prison who was not serving a sentence for a felony conviction. In light of these facts, no reasonable jury could find by clear and convincing evidence that Cavuto, who is not a lawyer, understood it was inaccurate to describe Blankenship as a "convicted felon." In other words, Blankenship has not presented sufficient evidence disputing Cavuto's belief that it was appropriate to colloquially describe someone who served a one-year prison sentence as a "convicted felon."[7]

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[7] At first glance, this discussion might seem to overlap with the falsity element, but it is a distinct issue. Even assuming that the "felon" description is not substantially true and therefore satisfies the falsity element, the fact that some might use the word "felon" to refer colloquially to any serious crime informs our actual malice

Cavuto's on-air interview with Blankenship on May 22, 2018, reinforces this conclusion. When Blankenship emphasized that he had never been convicted of a felony, Cavuto asked, "So what are you if you've served time in jail?" J.A. 3552, 5671. Cavuto then asked the same question to Napolitano: "So serving a year in jail doesn't make you a convicted felon?" J.A. 3554–55. These exchanges, which took place just two weeks after Cavuto's May 7 statement, indicate that Cavuto had not understood the inaccuracy of his remark. *See Zerangue*, 814 F.2d at 1071 ("The fact that [an editor] had to ask [the plaintiff] what was inaccurate about the story when [the plaintiff] called to protest tends to indicate that [the editor] did not know of the inaccuracy."). This evidence underscores that Cavuto was confused about Blankenship's criminal status because of the one-year prison sentence, and it precludes a finding by clear and convincing evidence that Cavuto seriously doubted the truth of his May 7 statement.

b.

Less analysis is required for the statements made by the four other Fox News commentators: John Layfield, Bradley Blakeman, Stephanie Hamill, and Elizabeth MacDonald. Blankenship points to no direct

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analysis. Specifically, this linguistic issue helps explain why certain journalists might have believed it was acceptable to refer to Blankenship as a felon even if they had heard that his conviction was technically classified as a misdemeanor. Indeed, the record suggests that even Blankenship was confused about how to refer to his criminal status; in the May 22 interview with Cavuto, he repeatedly called himself a "misdemeanor." J.A. 5671.

evidence of knowledge that rebuts the commentators' testimony that they believed their statements were accurate at the time. He cannot avoid summary judgment simply by asserting that the jury could disbelieve their testimony. *Liberty Lobby*, 477 U.S. at 256.

In an attempt to create a jury question, Blankenship claims the record contains sufficient circumstantial evidence of actual malice. "Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence[.]" *Harte-Hanks*, 491 U.S. at 668. Here, Blankenship focuses on (1) the emails from Rupert Murdoch and the McConnell aide that requested negative coverage of his campaign, and (2) Fox News's initial failure to retract Napolitano's misstatement.

From the two emails, it is safe to conclude that Murdoch and McConnell wished to damage Blankenship's Senate candidacy. But "while motive [or animus] can be relevant to the actual malice inquiry, it is not dispositive standing alone." *Cannon*, 36 F.4th at 568 (cleaned up); *see Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560, 573 (W. Va. 1992). As we have explained, "many publications set out to portray a particular viewpoint or even to advance a partisan cause. Defamation judgments do not exist to police their objectivity." *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir. 1991) (en banc).

Here, the two emails do not establish actual malice because Blankenship fails to show a sufficient nexus between those communications and the Fox News

commentators' false statements. Murdoch's May 6 email to the two Fox News senior executives read: "Both Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but Sean and Laura dumping on him hard might save the day." J.A. 4052. This does not suggest that Murdoch instructed anchors to falsely call Blankenship a felon or even implied that they should. The same is true of the McConnell aide's May 3 email to Martha MacCallum, which made a tacit request for negative coverage of Blankenship but did not raise the issue of his criminal history. Karl Rove and Tammy Bruce's comments on MacCallum's show the following day were harshly critical of Blankenship, but they did not mischaracterize his conviction—Blankenship does not allege that Rove or Bruce defamed him. To be sure, the various Fox News statements calling him a felon all occurred shortly after these two emails were sent, but that temporal relationship, without more, is not nearly enough. In defamation cases, "the state of mind required for actual malice [must] be brought home to the persons in the . . . organization having responsibility for the publication," *N.Y. Times*, 367 U.S. at 287, and Blankenship offers no concrete evidence connecting the emails to the challenged statements.

Lastly, Blankenship emphasizes that Fox News producers refused to allow Napolitano to appear on air to correct his misstatement. We have explained that a publisher's failure to retract a statement upon request generally "is not probative of [the speaker's] state of mind at the time of publication." *Fairfax v. CBS Corp.*, 2 F.4th 286, 295 (4th Cir. 2021). Even if the network's

reticent response to Napolitano's requests is relevant, it is far from clear and convincing evidence that Cavuto and the four other commentators later made their statements with actual malice. Put simply, Blankenship offers no non-speculative reason to believe there was any connection between the producers' actions and the allegedly defamatory statements.

For these reasons, we conclude that Blankenship's failure to provide sufficient evidence of actual malice defeats his defamation claims against Fox News.

2.

Next, we proceed to the defamation claims against MSNBC, which focus on Chris Hayes's two on-air statements describing Blankenship as a "convicted felon."[8] In a deposition, Hayes testified that he believed his comments were accurate when he made them, asserting: "I knew [Blankenship] had done a year in

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[8] Blankenship argues in his reply brief that Joy Reid also acted with actual malice when she described him as a convicted felon during a May 4, 2018 telecast. But he failed to make that argument in his opening brief, and "an issue first argued in a reply brief is not properly before a court of appeals." *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996). In any event, there is no evidence in the record disputing Reid's testimony that, at the time she made the statement, she believed Blankenship had been convicted of a felony.

In the district court, Blankenship also alleged that Hayes's April 16, 2018 tweet calling him a "felonious coal baron" was defamatory. The district court held that the tweet "is insufficient to establish MSNBC's liability inasmuch as it was tweeted from Mr. Hayes' personal account." J.A. 5725 n.40. Blankenship does not contest that ruling on appeal, so we do not consider it further.

federal prison, and I just thought that meant he had been convicted of a felony." J.A. 515.

In an attempt to create a genuine dispute as to Hayes's knowledge, Blankenship highlights two events. The first is the November 29, 2017 broadcast of *All In*, during which MSNBC displayed the titles of two news articles about Blankenship as on-screen graphics. The body of each article accurately identified Blankenship's conviction as a misdemeanor, but that detail was not shown on screen or discussed during the November 29 show. Even viewing the facts in the light most favorable to Blankenship, we cannot infer that Hayes read the two articles in their entirety, or that another staffer read them and relayed the information about Blankenship's conviction to Hayes. While Hayes noted that MSNBC had relied on the articles as sources, that does not mean he engaged with the specific references to Blankenship's misdemeanor conviction, particularly because the record does not indicate that Hayes discussed that detail during the November 29 broadcast.

The second event is the December 2015 email exchange between Hayes and *All In* staff members, in which Hayes wrote that Blankenship "only got nailed on the misdemeanor" and "[p]robably [would not spend] a day in jail." J.A. 845. The email certainly shows that Hayes knew about the misdemeanor conviction in late 2015, but we are skeptical that this constitutes clear and convincing proof of his state of mind two and a half years later. Crucially, Hayes's 2015 email came before Blankenship was sentenced to and served a year in prison (and therefore before Hayes learned about the

sentence)—a fact that very well could lead a non-lawyer like Hayes to believe it was accurate to refer to Blankenship as a felon years later.

In the end, Hayes's communications around the time of his 2018 statements cast too much doubt on the notion that he consciously misrepresented Blankenship's criminal status. During the off-air conversation with Brian Montopoli hours before the April 23 broadcast, Hayes referred to Blankenship as a "convicted felon," and Montopoli did not correct him. This strongly suggests that by April 2018, Hayes had either forgotten about the misdemeanor classification or did not understand it would be incorrect to describe Blankenship as a felon. Hayes's response to the viewer's May 10 email that pointed out the inaccuracy provides further contemporaneous evidence that he simply made a mistake. *See* J.A. 847 ("Caught that after the show, but you're r[i]ght.").[9]

Nor does Blankenship present any affirmative evidence that Denis Horgan (*All In*'s Executive Producer) or any other staff member acted with a reckless disregard for the truth. The record shows that some of the challenged MSNBC statements were scripted. But the state of mind required for actual

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[9] Blankenship also contends that the April 2016 email from a staff member to Hayes stating that "our old friend Don Blankenship is going to the cooler for a year" helps his case, but it is hard to see how that supports an inference that Hayes later remembered the conviction was a misdemeanor rather than a felony. If anything, this email helps explain Hayes's later belief that it was accurate to describe Blankenship as a felon in light of the one-year prison sentence.

malice must be "brought home" to the persons responsible for publication, *N.Y. Times*, 367 U.S. at 287, and the record does not identify which staff members actually inserted the "felon" language into the scripts. In their deposition testimony, neither Horgan nor Reid could recall who wrote the scripted language, but Reid testified that she "did not work with Denis Horgan on the scripts for those shows." J.A. 862–83.

Blankenship argues that circumstantial evidence of actual malice gets this issue to the jury. We are unpersuaded. First, Blankenship asks us to find a genuine issue of actual malice because Hayes and the *All In* team exhibited animus towards him. The December 2015 emails from staff members to Hayes—sent after Hayes wrote that Blankenship "[p]robably [would not spend] a day in jail" and before Blankenship's sentencing—expressed frustration with the conviction. J.A. 845 ("A slap on the wrist for a dude who killed 29 people . . . ."); *id.* ("Very disappointing . . . he's killed more people than most terrorists ever do[.]"). As with Fox News, however, this evidence of possible animus carries little weight in the actual malice analysis. *See Cannon*, 36 F.4th at 568. That is particularly true here, where the hostile comments came two years before the allegedly defamatory statements.

Second, Blankenship makes much of Hayes and Reid's failure to issue corrections after learning their statements were inaccurate, but the lack of a retraction has little to no relevance in the actual malice inquiry. *See Fairfax*, 2 F.4th at 295; *see also Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir.

2013) ("[A]ctual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false.").

Third, and finally, Blankenship suggests that MSNBC's conduct violated NBCUniversal's News Group Policies and Guidelines, which state that MSNBC "stands for accuracy," J.A. 5467, and that corrections "should be addressed as soon as reasonably possible," J.A. 5480. But "actual malice cannot be established merely by showing a departure from accepted journalistic or professional practices," *Church of Scientology International v. Daniels*, 992 F.2d 1329, 1334 (4th Cir. 1993), and even an "extreme departure" from such standards is inadequate. *Harte-Hanks*, 491 U.S. at 665. A violation of journalistic standards may be relevant when combined with other proof of actual malice, but even if we assume that MSNBC violated its policies here, the evidence falls short. Because the policy Blankenship cites focuses on corrections, this argument essentially restates his failure-to-correct claim. Once again, a publisher's failure to retract a statement has very little probative value, if any.

Based on the summary judgment record, a reasonable jury could not find that Hayes or any other MSNBC employee made the relevant statements with actual malice.

3.

Turning to CNN, Blankenship alleges that three individuals affiliated with the network made defamatory statements during live broadcasts: Kevin McLaughlin, S.E. Cupp, and Joe Lockhart. Here, too,

the record does not support a finding by clear and convincing evidence that any of the three made the statements with actual malice.

To start, McLaughlin described Blankenship as a "convicted felon" during an unscripted portion of *CNN Newsroom* on April 29, 2018. In a deposition, McLaughlin explained that he believed the "convicted felon" description was accurate at the time—his "understanding was, given what happened in the sentence, that it was obviously a very serious crime." J.A. 1402. McLaughlin also stated that he had "Googled it" prior to his appearance on CNN and from that search "was led to believe [Blankenship] was a convicted felon." J.A. 1403.

To be sure, McLaughlin made the "convicted felon" comment only a few minutes after Dana Bash had remarked that Blankenship "served a year in prison" but "reminds us [his conviction] was just a misdemeanor." J.A. 1383–86. Bash's reference to the misdemeanor conviction is the only evidence that McLaughlin knew it was inaccurate to describe Blankenship as a convicted felon. But, if anything, the fact that McLaughlin called Blankenship a felon so soon after Bash's comment indicates that McLaughlin, a non-lawyer, simply did not understand the legal distinction between a felony and a misdemeanor in this case. Without more, we cannot conclude that a reasonable jury could find with convincing clarity that McLaughlin's statement was a "knowing, calculated

falsehood."[10] *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980).

Moving on, there is no evidence that Lockhart or Cupp knew they were likely making false statements when they called Blankenship a felon. Both testified that they believed their statements were correct when they made them, and Blankenship presents no evidence to rebut that testimony. *Unfiltered* played a short clip from the West Virginia primary debate during the May 2 telecast, and, at one point in that debate, Blankenship stated he "beat all three of the felonies" and was "sent . . . to prison for a misdemeanor." Opening Br. 51. But the transcript of the May 2 *Unfiltered* telecast does not include that portion of the debate, and no facts dispute Cupp's assertion that she did not recall seeing it. Blankenship asks us to infer that Cupp saw that part of the debate, but without any affirmative evidence, that calls for speculation and goes beyond the reasonable inferences we make in his favor at the summary judgment stage.

Blankenship once again tries to shore up his case with circumstantial evidence. He contends that CNN demonstrated animus, violated its internal standards, and failed to investigate his criminal history before broadcasting the statements in question. These facts do not create a genuine issue of actual malice. When he called Blankenship a felon, Lockhart also expressed his

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[10] For her part, Bash's unrebutted testimony is that McLaughlin's on-air comment did not "register[] with [her] at the time." J.A. 1396–97. Regardless, Bash's failure to correct the record does not establish that she acted with actual malice.

view that Blankenship was "crazy" and a "racist," likely referring to comments he had made about Secretary Chao's Chinese heritage. J.A. 1428. But, again, that cannot substitute for the complete lack of direct evidence that Lockhart knew his statement was false. Next, the internal CNN standards Blankenship cites express a general commitment to "accurate, fair, and responsible" reporting and explain what qualifies as defamation. J.A. 1690–91. In essence, Blankenship argues that the statements violated CNN policies because they were inaccurate. But this is not helpful to the actual malice inquiry. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984) ("[T]here is a significant difference between proof of actual malice and mere proof of falsity.").

Blankenship's failure-to-investigate argument also falters. The "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard," *Harte-Hanks*, 491 U.S. at 688; such inaction rises to the level of actual malice only if it amounts to a "purposeful avoidance of the truth," *id.* at 692. This is not such a case. Blankenship's prison sentence placed him as close to felony status as possible; for non-lawyers like McLaughlin, Cupp, and Lockhart, describing Blankenship as a felon was not "inherently improbable," and there were not "obvious reasons to doubt the veracity" of such a statement. *St. Amant*, 390 U.S. at 732.

For these reasons, the cumulative record, viewed in the light most favorable to Blankenship, does not

permit a reasonable jury to find that anyone at CNN acted with actual malice.

4.

Blankenship's defamation claim against the Washington Post focuses on two published statements: a July 25, 2018 article authored by Jenna Johnson and Josh Dawsey that described him as a "felon," and an August 9, 2018 blog post by Amber Phillips that referred to him as "one of three convicted felons" running for office in 2018. We conclude that Blankenship has failed to establish a genuine issue that either was made with actual malice.

Starting with the July 25 article, nothing suggests that Dawsey or Johnson had serious doubts about the accuracy of the "felon" statement. The uncontested record shows that Dawsey neither wrote nor reviewed the relevant part of the article, and even if he had, no evidence suggests that Dawsey knew the statement was incorrect. Nor do any facts rebut Johnson's declaration that she did not realize the term "felon" was inaccurate at the time of publication, that she used the word "because [she] understood [Blankenship] had been convicted of a serious crime and sent to prison," and that she "recall[ed] having seen or heard him referred to as a felon." J.A. 2057.

Blankenship also cannot establish a genuine issue of actual malice as to Phillips's August 9 blog post. In her declaration, Phillips, like all the other journalists thus far, stated she believed her description of Blankenship as a "convicted felon" was correct at the time. She noted that she "knew Mr. Blankenship had

gone to prison for a serious crime," and that her "understanding [was] that the word 'felon' could be used to refer to someone who has been convicted of a crime." J.A. 2079.

In response, Blankenship points out that (1) one of Phillips's earlier blog posts, published on May 1, 2018, referred to Blankenship's conviction "on a misdemeanor for conspiring to violate mine safety laws" (and his one-year prison sentence), J.A. 2298, and (2) Phillips received three mass-distributed emails in early May 2018 that briefly mentioned the same. But these facts do not make it "highly probable" that Phillips demonstrated a reckless disregard for the truth when she wrote the August 9 story. *Cannon*, 36 F.4th at 573. For starters, we doubt it is reasonable to infer that Phillips even read the three mass emails in their entirety, let alone that she remembered this particular detail while writing the August 9 blog post. And it seems tenuous to infer from Phillips's May 1 story that she remembered the details of Blankenship's conviction on August 9, particularly because she wrote more than 100 stories in the intervening three months. But even if we drew that inference, a jury could not find with convincing clarity that Phillips was not simply confused about the meaning of the term "felon."

As with the prior Defendants, circumstantial evidence does not create a genuine issue of actual malice here. Blankenship focuses solely on the Washington's Post's failure to fact-check the articles before publication. The Post's Policies and Standards provide that "reporters have primary responsibility for reporting, writing, and fact-checking their stories," and

that stories "are subject to review by one or more editors." J.A. 2274. However, as previously discussed, inadequate fact-checking cannot by itself establish that Johnson or Dawsey published their article with actual malice. *See Daniels*, 992 F.2d at 1334. Nor does it get Blankenship's challenge to Phillip's story over the summary judgment hurdle. *See Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 126 (2d Cir. 2013) ("Even the failure to review one's own files is inadequate to demonstrate malice by the party responsible for publishing a statement.").

Thus, we conclude there is legally insufficient evidence that the Washington Post published these statements with actual malice.

5.

Blankenship's defamation claim against ABC centers on the July 23, 2018 article by John Verhovek. In the article, Verhovek referred to Blankenship as "the former coal baron and convicted felon" and stated he "was convicted in 2015 for conspiracy to violate mine safety and health standards in the aftermath of the 2010 Upper Big Branch Mine disaster that resulted in the death of 29 miners." J.A. 2633.

Like the authors of the other Defendants' statements, Verhovek asserted that he did not realize the term "convicted felon" was false when he placed it in the article. He explained that he "had always understood and used the term 'felony' to mean 'serious crime,' and the term 'felon' to mean 'someone who committed a serious crime,'" and that he therefore used the term "convicted felon" to "refer to someone who

served significant time in prison after being convicted of a crime." J.A. 2576. Verhovek further stated that he was aware Blankenship "had spent a significant amount of time in federal prison" but "did not know the details about his criminal case" or that "he was acquitted of some charges." J.A. 2573.

While we cannot credit Verhovek's testimony regarding his state of mind over contrary record facts, contemporaneous evidence indicates that he did not realize the "convicted felon" language was false. Most relevant is Verhovek's response when Meridith McGraw contacted him about the error in the article. After McGraw explained that Blankenship was convicted of a misdemeanor, Verhovek responded, "Meridith can you send me exact language on this? Blankenship was sent to federal prison but he was not convicted of a felony?" J.A. 2735. In a later text to McGraw, Verhovek again admitted his confusion, writing: "Sorry about Blankenship, I thought I had it right on that or [had] seen it in an earlier story, that's my bad." J.A. 2812. These exchanges strongly suggest that Verhovek's error was a mistake based on his confusion about how to refer to a person who served a one-year sentence in federal prison. Further, the record shows that Verhovek had previously described Blankenship as a "convicted felon" in a March 2018 email to an editor, and that the editor did not flag the description as inaccurate. J.A. 2577.

Blankenship contends there is a genuine dispute as to Verhovek's knowledge because (1) he had authored or co-authored three earlier articles for ABC that accurately called the conviction a misdemeanor; and

(2) he had received multiple distribution-list emails from McGraw in May 2018 that did the same. But this evidence, viewed in the context of the entire record, does not allow a finding by clear and convincing evidence that Verhovek "entertained serious doubts as to the truth" of the "convicted felon" language in his July 23 article. *St. Amant*, 390 U.S. at 731. In light of the whole record—particularly Verhovek's contemporaneous messages to McGraw—Blankenship cannot establish that the language in the July 23 article was anything more than a careless mistake, caused by Verhovek's confusion about the appropriate use of the word "felon."

Undeterred, Blankenship argues that Verhovek should have consulted his prior reporting or otherwise fact-checked the July 23 article before publishing it. But, as was the case for Phillips's Washington Post story, Verhovek's or another editor's failure to fact-check is not enough to manufacture a genuine issue of actual malice here.

Finally, it is significant that ABC promptly corrected the article after Blankenship's campaign contacted McGraw to request a correction. While the failure to issue a correction cannot establish actual malice, the "readiness to retract tends to negate 'actual malice,'" *Zerangue*, 814 F.2d at 1071, and Verhovek worked with editors to correct the article and social media posts within hours of their publication.

In sum, the district court correctly concluded that the facts related to Verhovek's July 23 article "fail to tip the scales towards clear and convincing evidence of

actual malice when viewed in connection with the entirety of the evidentiary record." J.A. 5714.

6.

The district court also correctly held that there is insufficient proof of actual malice with respect to the ten other Defendants in the consolidated appeal: News & Guts, Eli Lehrer, Mediaite, Tamar Auber, Griffin Connolly,[11] FiscalNote, HD Media, NBCUniversal, CNBC, and 35th PAC.

Nothing in the record suggests that any of these Defendants had the required state of mind when they published statements describing Blankenship as a felon. The authors of these statements all asserted that they were unaware the term "felon" was incorrect at the time of publication. While at least two Defendants, HD Media and NBC, had previously reported that Blankenship's conviction was a misdemeanor, there is no evidence that the authors of the allegedly defamatory statements had seen those earlier publications or any other materials that correctly described Blankenship's conviction. In fact, several said they recalled seeing references to Blankenship as a felon in other stories—which is unsurprising, given that Blankenship initially identified more than 100 publications that included such references. *See Daniels*, 992 F.2d at 1334 (concluding it was "impossible" to find

[11] The district court granted summary judgment to Griffin Connolly based on the uncontested fact that he was not involved in publishing the statement Blankenship had attributed to him. Blankenship does not contest that decision on appeal and therefore forfeits the issue.

actual malice "[g]iven the volume of published commentary" consistent with the author's statements).

Nor is there enough circumstantial evidence of actual malice as to these Defendants. Blankenship repeats his refrain that these Defendants' animus, violation of journalistic standards, and failure to correct the statements produce a genuine issue of actual malice. But his arguments are mostly speculative and do not come close to the quantum of evidence needed to create a jury question.

7.

Finally, we reach Blankenship's defamation claim against the Boston Globe. As we noted above, Blankenship takes issue with a single article, which the Globe repurposed from an AP wire story and published on May 22, 2018. The original AP story described Blankenship as a "convicted ex-coal baron" who had "spent a year in federal prison for violating safety regulations in a 2010 mine explosion that killed 29 miners." G.J.A. 356–59. The Globe copy editor who condensed the story, Daniel Coleman, changed the description to "convicted felon and former coal baron" and removed the reference to Blankenship's prison sentence. G.J.A. 346. Here, too, we hold that the record would not permit a jury to find actual malice by clear and convincing evidence.

There is no evidence that Coleman knew the "convicted felon" language was likely false. Blankenship did not depose Coleman during discovery. David Dahl, the Globe's Deputy Managing Editor for Print and Operations, was deposed as the Globe's

Rule 30(b)(6) corporate representative. Dahl testified that "what happened here was an honest mistake by an editor looking at a story about a very serious incident and editing an incorrect characterization" into the article, and further stated that the Globe "took the mistake seriously and . . . regret[ted] making the error." G.J.A. 416. This explanation makes sense; in the condensed article, Coleman substituted the word "felon" for the longer description of Blankenship's prison sentence, which suggests he believed that an offense punishable by one year in prison could be described as a felony.

Nothing in the record indicates that Coleman's edit was anything more than a simple accident. Blankenship calls our attention to three earlier Globe articles that accurately reported on Blankenship's misdemeanor conviction. But there is no reason to believe that Coleman—or any other Globe employee involved in publishing the May 22 article—was aware of those earlier stories.

Without any evidence of Coleman's subjective knowledge, Blankenship returns to a well-trodden path, arguing that the district court's actual malice analysis did not account for Coleman's failure to fact-check before publishing the article. Standing alone, though, an editor's "failure to investigate before publishing . . . is not sufficient to establish reckless disregard." *Harte-Hanks*, 491 U.S. at 688. That includes the failure to review news stories in the newspaper's own files. *See N.Y. Times*, 376 U.S. at 287. Blankenship claims that Coleman also violated journalistic standards, but those standards relate to

fact-checking, so this contention merely duplicates his failure-to-investigate argument.

A copy editor might well be negligent for publishing a story without confirming the accuracy of certain information in it, but actual malice demands subjective knowledge of likely falsity. On these facts, a reasonable jury could not conclude that Coleman acted with such a state of mind.[12]

* * *

Like the district court in its well-reasoned analysis, we reach these conclusions without crediting Defendants' denials of actual malice over contrary facts, discounting certain evidence, or drawing inferences in Defendants' favor. Rather, the cumulative record simply does not permit a finding, by clear and convincing evidence, that any Defendant "in fact entertained serious doubts as to the truth" of the statements it published. *St. Amant*, 390 U.S. at 731. Some of the statements may have been the product of carelessness and substandard journalistic methods. But at the end of the day, the record does not contain evidence that the commentators and journalists responsible for the statements were anything more

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[12] Blankenship also complains that the Boston Globe's later correction to the May 22 article was defamatory because it stated he "was convicted of a misdemeanor *for his role in connection with a deadly 2010 mine disaster*." G.J.A. 314 (emphasis added). However, in the district court, he did not bring a defamation claim based on the language in the correction. In any event, it is far from clear that this description of Blankenship's conviction is even false, and there certainly is no evidence it was published with actual malice.

than confused about how to describe a person who served a year in prison for a federal offense.[13]

Because there is legally insufficient evidence that any of the Defendants published a statement with actual malice, the district court correctly granted summary judgment to Defendants on Blankenship's defamation claims.

IV.

For the same reasons, the district court also did not err in granting summary judgment to Defendants on Blankenship's false light invasion of privacy and civil conspiracy claims.

West Virginia recognizes false light invasion of privacy as an independent cause of action. *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 88 (W. Va. 1983). The elements of defamation and false light invasion of privacy are not identical, but as with a defamation claim, a public-figure plaintiff alleging false light must prove that the defendant made a false statement with actual malice. *Taylor v. W. Va. Dep't of Health & Human Res.*, 788 S.E.2d 295, 315–16 (W. Va. 2016). For the reasons we have discussed, Blankenship has not established a genuine dispute of material fact that any Defendant acted with actual malice. His false light claims therefore fail.

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[13] In his briefing, Blankenship separately argues that *New York Times v. Sullivan* should be overturned. But, of course, this Court "cannot overrule Supreme Court precedents." *In re Grand Jury Subpoena*, 870 F.3d 312, 319 n.3 (4th Cir. 2017).

Blankenship's civil conspiracy claims meet the same fate. Under West Virginia law, civil conspiracy is defined as "a combination to commit a tort." *Dunn v. Rockwell*, 689 S.E.2d 255, 268 (W. Va. 2009). While West Virginia recognizes a separate cause of action for civil conspiracy, "[t]he cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff." *Id.* at 259. A conspiracy claim enables a plaintiff to recover damages against additional defendants "who did not actually commit a tort themselves," but the claim cannot stand without proof of the underlying tort. *Id.* at 269. As the West Virginia Supreme Court explained, "[a] conspiracy may produce one or more torts. If it does, then every conspirator is liable for that tort, including a conspirator who promoted but did not commit the tort. A conspiracy is not, itself, a tort. *It is the tort, and each tort, not the conspiracy, that is actionable*." *Id.* (quoting *Segall v. Hurwitz*, 339 N.W.2d 333, 338 (Wis. App. 1983)) (emphasis added). This rule makes particular sense in defamation cases; to comply with *New York Times v. Sullivan*, a public-figure plaintiff must show that some defendant actually published a false statement with actual malice.

At this stage, Blankenship's only remaining civil conspiracy claims are against Fox News. Because he has not offered sufficient evidence of actual malice to support his defamation or false light claims against Fox News, he cannot establish an underlying tort, and his conspiracy claims fail as a matter of law. *See, e.g.*, *Long v. M&M Transp., LLC*, 44 F. Supp. 3d 636, 652 (N.D.W. Va. 2014) (holding civil conspiracy claim failed because there was "no underlying tort to support [it]").

V.

For the reasons set forth in this opinion, we affirm the district court's orders granting summary judgment to Defendants and dismissing these actions.

AFFIRMED

APPENDIX B

THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

Civil Action No. 2:20-cv-000278

[Filed February 2, 2022]

DON BLANKENSHIP,	)
Plaintiff,	)
	)
v.	)
	)
NBCUNIVERSAL, LLC, CNBC,	)
LLC, and DOES 1-50 INCLUSIVE,	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

Pending is Defendants NBCUniversal, LLC ("NBC") and CNBC, LLC's ("CNBC") Motion for Summary Judgment (ECF 56), filed May 24, 2021. On June 7, 2021, Plaintiff Don Blankenship responded (ECF 59) in opposition, to which NBC and CNBC replied (ECF 60) on June 14, 2021.

I. Background

Mr. Blankenship instituted a civil action, now styled Blankenship v. Fox News Network, LLC, et al., No. 2:19-cv-00236 (S.D.W. Va.), on March 14, 2019, in

the Circuit Court of Mingo County, asserting defamation and false light invasion of privacy claims against numerous media organizations, reporters, and others. See Fox News, ECF 1. The action was removed to this court based on diversity jurisdiction. See id; 28 U.S.C. § 1332. On April 9, 2019, Mr. Blankenship amended his complaint in the Fox News action. See id., ECF 14. The amended complaint named, for the first time, NBC and CNBC as defendants. See id.

On March 31, 2020, the court dismissed NBC and CNBC from the Fox News action without prejudice based upon insufficient service of process. See id., ECF 398. On April 20, 2020, Mr. Blankenship instituted the current action against NBC, CNBC, and fifty unnamed "Doe" defendants, asserting claims of defamation and false light invasion of privacy.[1] See ECF 1. The complaint alleges the following.

A. General Allegations

After an explosion in a West Virginia mine resulted in the deaths of twenty-nine miners, the United States Government initiated an investigation into the cause of the explosion, focusing on Massey Energy, which operated the mine, and Mr. Blankenship, who was Massey Energy's chief executive officer. See id., ¶¶ 7-8, 33-36. While Mr. Blankenship was not charged with the deaths of the miners, the Government later charged him with three felonies, as well as one misdemeanor for conspiracy to violate federal mine safety laws. See id.,

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[1] The court has today dismissed the fifty "Doe" defendants from this action given Mr. Blankenship's failure to properly identify them after the close of discovery.

¶ 39. On December 3, 2015, a jury acquitted Mr. Blankenship of the felony charges but found him guilty of the misdemeanor offense. See id., ¶ 41. As a result, Mr. Blankenship was sentenced to one year in prison and was released in the spring of 2017. See id., ¶¶ 42-43.

In January 2018, Mr. Blankenship announced his campaign to run as a Republican for a United States Senate seat in West Virginia. See id., ¶ 44. Mr. Blankenship lost his bid for the Republican party's nomination in the primary election on May 8, 2018. See id., ¶ 54. He alleges that media coverage was responsible for his loss due to defamatory statements referring to him as a "felon" or "convicted felon," despite that he was acquitted of the felony charges and was only convicted of the misdemeanor offense. See id., ¶¶ 50-54.

Mr. Blankenship alleges that these defamatory statements injured his reputation, prevented him from pursuing other business opportunities, and caused him to lose the primary election. See id., ¶¶ 21, 54. Additionally, Mr. Blankenship alleges that many of these statements were made in conjunction with reference to the mine disaster and therefore had the additional effect of falsely attributing to him responsibility for murder. See id., ¶ 20.

B. Allegations Against NBC and CNBC

NBC is an international media conglomerate and subsidiary of Comcast Corporation, a national telecommunications and mass-media corporation. See id., ¶ 28. NBC owns numerous entities in the news

field, including CNBC, NBC News, and MSNBC. See id., ¶¶ 27-28. The websites that publish articles under these names are also owned by NBC. See id. Mr. Blankenship contends that, on May 17, 2018, Leigh Ann Caldwell, writing for NBC's website, NBCNews.com, published a defamatory statement describing Mr. Blankenship as an "ex-coal baron and convicted felon." See id., ¶ 55 (emphasis added); see also ECF 56-5. Mr. Blankenship also contends that, on June 25, 2018, CNBC published an article written by Brian Schwartz, containing the defamatory statement "[Donald Trump Jr.] also campaigned with Morrisey in early June (sic) when he was competing in a crowded primary that included coal baron and convicted felon Don Blankenship who is now running as a third party candidate." See id., ¶ 56 (emphasis added); see also ECF 56-6.

Based upon these allegations, Mr. Blankenship has asserted defamation and false light invasion of privacy claims against NBC and CNBC. On May 24, 2021, NBC and CNBC (the "moving defendants") filed the subject motion seeking summary judgment as to the claims asserted against them.

II. Governing Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could

return a verdict for the nonmoving party." Id. In deciding a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650, 651, 657 (2014) (per curiam).

III. Discussion

A. Defamation

Defamation is "[a] false written or oral statement that damages another's reputation." Pritt v. Republican Nat. Comm., 557 S.E.2d 853, n.12 (W. Va. 2001) (quoting Black's Law Dictionary 427 (7th ed. 1999)).

West Virginia law identifies three types of plaintiffs in defamation cases: (1) public officials and candidates for public office, (2) public figures, and (3) private individuals. See Syl. Pt. 10, Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 564 (W. Va. 1992); see generally Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W. Va. 2003) (discussing types of public figures in defamation suits). The first step in assessing a claim for defamation is to determine whether the plaintiff is a private individual or is instead a candidate for public office, a public official, or a public figure. See Zsigray v. Langman, 842 S.E.2d 716, 722 (W. Va. 2020). Mr. Blankenship concedes that he qualifies as both a candidate for public office and a public figure.[2] See

[2] Based upon nearly identical allegations in Mr. Blankenship's complaint in the Fox News action, the court determined that Mr. Blankenship qualifies as a candidate for public office and "may also qualify as a public figure in West Virginia based on his

ECF 59 at 4-5; see also Fox News ECF 953 at 14. While the statements at issue herein were published on May 17, 2018, and June 25, 2018, after the conclusion of the primary election, the court finds that Mr. Blankenship qualified as a candidate for public office through this time given his intention to run as the Constitution Party's candidate for the United States Senate.[3]

As Mr. Blankenship concedes, his notoriety in the state of West Virginia, his pervasive involvement in the national political arena, and the extensive national media attention he has received as set forth in detail in the court's memorandum opinion and order entered this same date in the Fox News action make clear that he also qualifies as a public figure. See Wilson, 588 S.E.2d at 205 (explaining that an individual's "general fame or notoriety in the state and pervasive involvement in the affairs of society" renders that individual an "all-purpose public figure" in a defamation action.). Regardless of whether Mr. Blankenship is referred to as a candidate for public office or public figure, the First Amendment protections are the same for each. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) (noting the test set forth in New York Times v. Sullivan applies to both "criticism

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'prominence and notoriety'". See Fox News ECF 398 at 17 (citing State ex rel. Suriano v. Gaughan, 480 S.E.2d 548, 556 (W. Va. 1996)).

[3] The Supreme Court of Appeals of West Virginia did not reject Mr. Blankenship's attempt to run as the Constitution Party's candidate until August 29, 2018. See State ex rel. Blankenship v. Warner, 825 S.E.2d 309, 312 n.1 (W. Va. 2018). The court later issued its written opinion detailing its decision on October 5, 2018. Id.

of 'public figures' as well as 'public officials.'"); see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) (noting that it "might be preferable to categorize a candidate for [public office] as a 'public figure,'" as opposed to a public official, "if for no other reason than to avoid straining the common meaning of words. But . . . it is abundantly clear that, whichever term is applied, publications concerning candidates [for public office] must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office.").

To recover in a defamation action, a plaintiff who qualifies as a candidate for public office must prove that:

> (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion;[4] (2) the stated or implied facts were

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[4] In its March 31, 2020, memorandum opinion and order in the Fox News case, the court concluded that the challenged statements identified in Mr. Blankenship's complaint are capable of defamatory meaning and may also be considered defamatory per se because they impute a felony conviction. See Fox News ECF 398 at 18-20. To the extent any of the statements could be considered opinions, the court concluded "they are based on a 'provably false assertion of fact' and thus are not absolutely protected under the First Amendment." Id. at 20. The court incorporates its previous findings here and concludes that the challenged statements herein are not only capable of defamatory meaning but constitute defamation per se as a matter of law. The court recognizes that Mr. Blankenship was convicted of a misdemeanor offense, which amounts to a criminal conviction. Nonetheless, inasmuch as "a

> false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

Syl. Pt. 5, Chafin v. Gibson, 578 S.E.2d 361, 363 (W. Va. 2003) (per curiam) (emphasis omitted) (quoting Syl. Pt. 1, Hinerman, 423 S.E.2d at 563); accord Syl. Pt. 7, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (setting forth nearly identical elements in a defamation action involving a limited purpose public figure). Further, the West Virginia Supreme Court of Appeals has also held that, to sustain a defamation action, a plaintiff who qualifies as a candidate for public office must also prove that "the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syl. Pt. 4, Chafin, 578 S.E.2d at 363 (quoting Syl. Pt. 1, Sprouse v. Clay Commc'n Inc., 211 S.E.2d 674, 679 (1975)); accord Syl. Pt. 6, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (noting a limited purpose public figure must also prove a publisher's intent to injure). A plaintiff who qualifies as a candidate for public office must prove each of the elements of his claim by clear and

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felony conviction carries significantly greater legal consequences than a misdemeanor does," the court concludes the per se rule is still applicable. Myers v. The Telegraph, 332 Ill.App.3d 917, 773 N.E.2d 192, 197 (2002) (concluding the defamation per se rule should still apply given the "little, if any, practical difference between falsely accusing a person of committing a crime and falsely attributing a felony conviction to a person who pleaded guilty only to a misdemeanor.").

convincing evidence. See Chafin, 578 S.E.2d at 366-67; Pritt, 557 S.E.2d at 862; Hinerman, 423 S.E.2d at 572-73.

The moving defendants contend that Mr. Blankenship's defamation claims fail inasmuch as Mr. Blankenship has failed to produce clear and convincing evidence demonstrating: (1) actual malice; (2) material falsity of the alleged defamatory statements; and (3) an intent to injure.[5]

1. Actual Malice

To satisfy the essential elements of a defamation cause of action, a plaintiff who qualifies as a candidate for public office must prove "actual malice" on the part of the publisher, that is, that the publisher made the defamatory statement "'with knowledge that the statement was false or with reckless disregard of whether it was false or not.'" Chafin, 578 S.E.2d at 366 (brackets omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

The actual malice standard derives from the United States Supreme Court's decision in Sullivan and its progeny, which, as recognized by the Supreme Court of Appeals of West Virginia, "placed a [F]irst [A]mendment, free speech gloss upon all prior law of defamation." Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 73 (W. Va. 1983); see id. (noting that First Amendment concerns and concomitant protections provided by the actual malice standard, are at their "strongest" when

[5] The moving defendants also contend that Mr. Blankenship has failed to produce evidence of causation or compensable damages.

the statement at issue concerns "a public official or candidate for office because of the need for full, robust, and unfettered public discussion of persons holding or aspiring to offices of public trust."). Thus, "'application of the state law of defamation' is limited . . . by the First Amendment," CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 293 (4th Cir. 2008) (quoting Milkovich v. Loarin Journal Co., 497 U.S. 1, 14 (1990)), and the court applies federal law in assessing the element of actual malice, see Berisha v. Lawson, 973 F.3d 1304, 1314 n.6 (11th Cir. 2020).

"'Actual malice is a subjective standard.'" Fairfax v. CBS Corp., 2 F.4th 286, 293 (4th Cir. 2021) (alteration omitted) (quoting Reuber v. Food Chem. News, Inc., 925 F.2d 703, 714 (4th Cir. 1991) (en banc)). Thus, "[t]he actual malice standard requires that 'the defendant had a particular, subjective state of mind at the time the statements were made.'" Id. at 295 (quoting Horne v. WTVR, LLC, 893 F.3d 201, 211 (4th Cir. 2018)). Accordingly, "[a] plaintiff must prove that the defendant published the statement despite actually knowing it was false or harboring 'a high degree of awareness of probable falsity.'" Id. at 293 (ellipsis omitted) (quoting Reuber, 925 F.2d at 714). To show reckless disregard for the truth, then, "a plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of his publication.'" Id. (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

A plaintiff who is a candidate for public office bears the heavy burden of proving actual malice by clear and convincing evidence. See CACI, 536 F.3d at 293 (citing Carr v. Forbes, Inc., 259 F.3d 273, 282 (4th Cir. 2001);

see also Carr, 259 F.3d at 282 (4th Cir. 2001) ("Establishing actual malice is no easy task . . . ."). At the summary judgment stage, the appropriate inquiry for the court is "whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." Anderson, 477 U.S. at 255-56; see Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.").

The moving defendants first contend that Mr. Blankenship has not and cannot produce sufficient evidence to support a jury finding of actual malice by clear and convincing evidence. Specifically, they assert that Mr. Blankenship has not produced evidence that Ms. Caldwell or Mr. Schwartz -- the authors of the articles at issue -- knew that their references to Mr. Blankenship as a "convicted felon" were false or that they entertained serious doubts regarding the truth of their statements at the time of publication.

The moving defendants rely on the affidavits of Ms. Caldwell and Mr. Schwartz in support of their assertion that they were unaware that their statements regarding Mr. Blankenship's conviction were false and that they did not publish their statements with reckless disregard as to their falsity. Ms. Caldwell states in her affidavit that "at the time [she] wrote the May 17 Article, [she] believed Don Blankenship had been convicted of a felony and had no doubt or reason to doubt that the May 17 Article was accurate." ECF 56-5, ¶ 5. She further states that she

"knew that Don Blankenship had been convicted of a serious crime and went to prison after a fatal mine explosion, and [she] believed that the crime was a felony. [She] did not learn that Mr. Blankenship had been convicted of a misdemeanor, rather than a felony, until sometime after Mr. Blankenship sued NBC." Id. at ¶ 6.

Mr. Schwartz likewise states in his affidavit that "[a]t the time [he] wrote the June 25 Article, [he] believed Don Blankenship had been convicted of a felony and had no doubt or reason to doubt that the June 25 Article was accurate." ECF 56-6, ¶ 5. He further states that he "knew that Don Blankenship had been convicted of a serious crime and went to prison after a fatal mine explosion, which [he] believed that the crime was a felony. [He] did not learn that Mr. Blankenship had been convicted of a misdemeanor, rather than a felony, until sometime after Mr. Blankenship sued CNBC." Id. at ¶ 6. The moving defendants assert that Mr. Blankenship has produced no evidence to refute these affidavits and, in fact, never deposed Ms. Caldwell or Mr. Schwartz.

As to the article written by Ms. Caldwell, the moving defendants note that Mr. Blankenship testified during his deposition that he did not know Ms. Caldwell, how she came to use the words "convicted felon" in the article, or anything about the research she conducted for the same. See ECF 56-2 at 165-66. Mr. Blankenship further testified that he did not recall ever reading Ms. Caldwell's article and did not know whether it was part of his lawsuit. See id. at 164-65.

As to the article written by Mr. Schwartz, Mr. Blankenship made similar statements in his deposition testimony. Specifically, he testified that he did not know Mr. Schwartz, anything about his research process regarding his article, or how he came to use the words "convicted felon" therein. See id. at 170-71.

The moving defendants further contend that the record is devoid of any evidence that the authors' references to Mr. Blankenship as a convicted felon amount to anything more "than the use of an imprecise term to convey that [his] crime was serious." ECF 57 at 12. They aver that the record supports that the authors' use of the imprecise language was understandable under the circumstances as evidenced by Mr. Blankenship's deposition testimony, wherein he stated that roughly 100 different media outlets had referred to him as a felon or convicted felon during this same time. See id.; see also ECF 56-2 at 81-82. Inasmuch as Mr. Blankenship is unable to produce clear and convincing evidence that the authors of the subject articles entertained serious doubts as to the truth of their publications, the moving defendants contend summary judgment is warranted.

Mr. Blankenship responds that the issue of actual malice should not be addressed at the summary judgment stage inasmuch as it involves determinations regarding the authors' state of mind. He also contends that the moving defendants "had a high degree of awareness of the probable falsity" of the defamatory publications given that NBC had previously reported, on or about April 6, 2016, that he had only been

convicted of a misdemeanor.[6] Additionally, Mr. Blankenship asserts that the fact that his conviction was a matter of public record and thus readily available to the authors supports a finding of actual malice. He further contends that the moving defendants' failure to issue corrections to the publications at issue support a finding of actual malice. Lastly, he asserts that the authors' violations of NBCUniversal News Group's Policies and Guidelines regarding accuracy and corrections demonstrate actual malice. The court will address each contention in turn.

First, Mr. Blankenship contends "[a]s a preliminary matter," that "the issue of 'actual malice' is rarely appropriate for summary judgment because it involves determinations with respect to the defendant's state of mind." ECF 59 at 5. He further asserts it is inappropriate for the court to address actual malice at this stage inasmuch as the existence of the same hinges on the credibility of the authors, which is a subjective evaluation for the jury. In support of this contention, Mr. Blankenship cites dicta from a footnote of the Supreme Court's decision in Hutchinson v. Proxmire, 443 U.S. 111 (1979), for the proposition that the issue of actual malice "does not readily lend itself to summary disposition" because it "calls a defendant's state of mind into question." 443 U.S. at 120 n.9. He goes on to cite numerous cases in which courts have

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[6] Mr. Blankenship refers to this April 6, 2016, article in his response brief and in paragraph fifty-five of his complaint. See ECF 59 at 8-9; ECF 1 ¶ 55. The court notes, however, that Mr. Blankenship has not provided a copy of this unidentified April 6, 2016, article into evidence.

denied summary judgment in defamation actions where genuine issues of material fact existed as to whether the defendant acted with actual malice. See e.g., ECF 59 at 5-6.

Mr. Blankenship's contention is unavailing when squared with the controlling precedent on this issue.[7] In Anderson, the Supreme Court held that

> the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. . . . . [W]here the factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. at 255-56. The standard articulated in Anderson clearly contemplates that summary judgment is an appropriate procedure for addressing actual malice. Indeed, the Court in Anderson expressly rejected the argument that a defendant in a public-figure defamation action "should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his

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[7] Mr. Blankenship made this same contention in the related Fox News action in response to many of the defendants' motions for summary judgment, which the court rejected for identical reasons in its memorandum opinion and order entered therein this same date.

witnesses as to this issue." Id. at 256.[8] Instead, the Court explained, if the defendant shows there is no genuine factual dispute as to actual malice, "the plaintiff is not . . . relieved of his own burden of producing in turn evidence that would support a jury verdict." Id. Thus, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment," and "[t]his is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." Id. at 257.

The upshot of Anderson, then, is that the summary judgment procedure is not foreclosed simply because the actual malice inquiry involves evidence pertaining to a defendant's state of mind and that summary disposition on the actual malice issue is neither favored nor disfavored. As a descriptive matter, however, in light of the heightened showing required of public figure plaintiffs, "[s]ummary judgment for the publisher is quite often appropriate," not necessarily because it is favored,[9] but "because of the difficulty a

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[8] The Court in Anderson explained that the Court's "statement in Hutchinson . . . that proof of actual malice 'does not readily lend itself to summary disposition' was simply an acknowledgment of [the Court's] general reluctance to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." 447 U.S. at 256 n.7 (internal citations and quotation marks omitted).

[9] But see Kahl v. Bureau of Nat'l Affairs, Inc., 856 F.3d 106, 108 (D.C. Cir. 2017) (Kavanaugh, J.) ("To preserve First Amendment

public [figure] has in showing 'actual malice.'" St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1318 (3d Cir. 1994); see also CACI, 536 F.3d at 293 (explaining that "establishing actual malice is no easy task" at the summary judgment stage (brackets and quotation marks omitted)). Mr. Blankenship's contention is thus without merit.

Second, Mr. Blankenship asserts that the moving defendants "had a high degree of awareness of the probable falsity" of the defamatory publications given that NBC had previously reported, on or about April 6, 2016, that he had only been convicted of a misdemeanor. ECF 59 at 8. Aside from this bare assertion, however, Mr. Blankenship has failed to provide or specifically identify any such article or publication in the record.

Absent some evidentiary support for such assertion, the court is unable to conclude that Mr. Blankenship has demonstrated any showing of actual malice by clear and convincing evidence. Moreover, even

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freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits."); id. at 116 ("Summary proceedings 'are essential in the First Amendment area because if a suit entails long and expensive litigation, then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.'" (quoting Farrah v. Esquire Mag., 736 F.3d 528, 534 (D.C. Cir. 2013))). The decision in Kahl comes at the summary judgment stage, wherein the appellate court reversed the district court's decision denying the defendant's motion for summary judgment given the lack of evidence that the defendant acted with actual malice. Id. at 118.

assuming the unidentified article or publication existed, Mr. Blankenship has failed to provide evidence that Ms. Caldwell or Mr. Schwartz knew of its existence at the time their articles were written. In fact, Mr. Blankenship never deposed Ms. Caldwell or Mr. Schwartz. As the court previously explained in its opinion in Blankenship v. Napolitano, "the 'mere presence' of previous stories in a [media organization's] files does not establish that the [media organization] knew that the statement was false 'since the state of mind required for actual malice would have to be brought home to the persons in the . . . organization having responsibility for the publication of the [statement].'" 451 F. Supp. 3d 596, 619 (S.D. W. Va. 2020) (quoting Sullivan, 376 U.S. at 287). In other words, absent evidence that Ms. Caldwell or Mr. Schwartz were aware of the unidentified publication that allegedly reported that Mr. Blankenship had been convicted of a misdemeanor, the mere existence of the same is of little moment respecting whether the moving defendants possessed actual malice.

Third, Mr. Blankenship asserts that the fact that his conviction was a matter of public record and thus readily available to the authors at the time their articles were written supports a finding of actual malice. Simply put, Mr. Blankenship contends the authors failed to investigate the nature of his conviction before publishing. The court, however, is unpersuaded by this assertion. Importantly, "recklessness 'is not measured by whether a reasonably prudent man would have published or would have investigated before publishing.'" Fairfax, 2 F.4th at 293 (quoting St. Amant, 390 U.S. at 731). Thus, a

publisher's "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard" without more.[10] Harte-Hanks, 491 U.S. at 688. Accordingly, the authors' mere failure to consult public records regarding Mr. Blankenship's conviction cannot establish actual malice by clear and convincing evidence given that a "failure to investigate is precisely what the Supreme Court has said is insufficient to establish reckless disregard for the truth." Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013).

Fourth, Mr. Blankenship avers that the authors' failure to correct their publications describing him as a "convicted felon" supports a finding of actual malice. This contention, too, is lacking in merit. As the court has previously explained, a publisher's failure to correct or retract a statement once it learns of its falsity does not support a showing of actual malice. See Napolitano, 451 F. Supp. 3d at 619 (noting "[a]ctual malice cannot be inferred from a publisher's failure to

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[10] "[F]ailure to investigate before reporting a third party's allegations can be reckless 'where there were obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" Fairfax, 2 F.4th 286 at 293 (quoting Harte-Hanks, 491 U.S. at 688). Mr. Blankenship has produced no evidence that the authors actually relied on any information or sources that should have provided them with obvious reasons to doubt the accuracy thereof. In fact, he has produced no evidence to refute the authors' sworn statements that they believed he had been convicted of a felony and had no reason to doubt the same at the time the articles were published. See ECF 56-5, ¶ 5; ECF 56-6, ¶ 5. Mr. Blankenship merely contends the authors should have consulted public records before publication, which is insufficient to establish actual malice.

retract . . . a statement once it learns it to be false."); see also Pippen, 734 F.3d at 614 (explaining that the Supreme Court in Sullivan concluded "that actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false."). The authors' sworn statements indicate that they did not learn that Mr. Blankenship's conviction was for a misdemeanor rather than a felony until after Mr. Blankenship sued the moving defendants, and Mr. Blankenship has produced no evidence to the contrary. See ECF 56-5, ¶ 6; ECF 56-6, ¶ 6. Thus, the authors' failure to correct an inaccuracy that was unknown to them at the time of publication fails to establish actual malice.

Lastly, Mr. Blankenship contends that the authors' violations of NBCUniversal News Group's Policies and Guidelines regarding accuracy and corrections demonstrate actual malice. Mr. Blankenship relies upon the following excerpts from the internal policy:

1. "The NBCUniversal Group (News Group) – NBC News, MSNBC, and CNBC – stands for accuracy, fairness, independence, and integrity." ECF 59-1 at 5.

2. "We are responsible for everything we report in any and all media. The correspondent/reporter and the producers/writers (including freelancers) of a specific report are ultimately responsible for its content, including the accuracy of the words . . ." Id. at 7.

3. "Accuracy and fairness are fundamental principles of journalism. . . . Accuracy is about

ensuring all of the facts are correct and presenting them in their proper context. . . . Fairness is keeping an open mind about the nature of a story, making good faith, timely efforts to seek out and present all relevant points of view, and avoiding a rush to judgment." Id. at 11.

4. "If it is determined that a clarification or correction is necessary, it should be addressed as soon as reasonably possible within the same program and/or any other platform where the content has been distributed." Id. at 18.

Mr. Blankenship avers that the authors' deviated from these internal standards when they referred to him as a convicted felon in their publications, which he contends is evidence that the moving defendants recklessly disregarded the truth. This contention, however, fares no better than its predecessors.

Even assuming the authors' conduct amounted to a violation of the journalistic standards set forth in NBCUniversal News Group's Policies and Guidelines, this alone is insufficient to establish a showing of actual malice by clear and convincing evidence. Indeed, as the Supreme Court has made clear, "a public figure plaintiff must prove more than an extreme departure from professional standards" to demonstrate actual malice. Harte-Hanks, 491 U.S. at 665; see also Reuber, 925 F.2d at 711-12 (noting that "the Harte-Hanks Court went to some lengths to reaffirm that a departure from accepted standards alone does not constitute actual malice."); Hinerman, 423 S.E.2d at 573 ("[E]gregious deviation from accepted standards of

journalism standing alone will not carry the day for a public official libel plaintiff . . . ." (emphasis in original)). Inasmuch as Mr. Blankenship has failed to produce any other evidence that would support a finding of actual malice, the mere allegation that the authors' deviated from NBCUniversal News Group's journalistic standards cannot alone save his claim.

In sum, Mr. Blankenship has failed to produce sufficient evidence that would permit a reasonable jury to conclude that the authors published their references to him as a convicted felon with knowledge or reckless disregard of their falsity. Mr. Blankenship has thus failed to meet his burden of establishing actual malice by clear and convincing evidence, which is detrimental to his claim. Accordingly, the moving defendants are entitled to summary judgment on the defamation claims against them.[11]

B. False Light Invasion of Privacy

West Virginia recognizes a legally protected interest in privacy. Tabata v. Charleston Area Med. Ctr., Inc., 759 S.E.2d 459, 464 (W. Va. 2014). "Publicity which unreasonably places another in a false light before the public is an actionable invasion of privacy." Syl. Pt. 12, Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 74 (W. Va. 1983). Although the Supreme Court of Appeals of West Virginia has not definitively set forth elements for the cause of action, it appears that, for a plaintiff

[11] Given that Mr. Blankenship has failed to produce clear and convincing evidence of actual malice, an essential element of his defamation claim, the court need not address the sufficiency of evidence with respect to the remaining elements.

who qualifies as a candidate for public office to establish a case for a false light invasion of privacy, he must prove that: (1) the defendant gave publicity to a matter concerning the plaintiff that places the plaintiff before the public in a false light, (2) the publicity was widespread, (3) the matter of the publicity was false, (4) the false light in which the plaintiff was placed would be "highly offensive to a reasonable person," and (5) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed" (i.e., actual malice). Taylor v. W. Virginia Dep't of Health & Human Res., 788 S.E.2d 295, 315–16 (W. Va. 2016) (citing Restatement (Second) of Torts § 652E (1977)); see Crump, 320 S.E.2d at 87-88.

Although "false light invasion of privacy is a distinct theory of recovery entitled to separate consideration and analysis," claims of false light invasion of privacy are similar to defamation claims, and courts often treat them in essentially the same manner as they treat defamation claims. Crump, 320 S.E.2d at 87. As the Supreme Court of Appeals of West Virginia has recognized, the First Amendment-derived actual malice standard announced in Sullivan applies to claims for false light invasion of privacy brought by plaintiffs who are public officials or public figures. See Crump, 320 S.E.2d at 88-90 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967)).

Thus, to withstand summary judgment on his false light invasion of privacy claim, the plaintiff, as a matter of federal constitutional law, must adduce sufficient evidence that could reasonably support a jury

finding of actual malice by clear and convincing evidence. See Anderson, 477 U.S. at 255-56; see also Howard v. Antilla, 294 F.3d 244, 248-49, 252 (1st Cir. 2002) (requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Solano v. Playgirl, Inc., 292 F.3d 1078, 1084 (9th Cir. 2002) (same); Ashby v. Hustler Mag., Inc., 802 F.2d 856, 860 (6th Cir. 1986) (same); Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1140 (7th Cir. 1985) (same); cf. Parson v. Farley, 800 F. App'x 617, 623 (10th Cir. 2020) (affirming jury instructions requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1067 & n.2 (8th Cir. 1992) (same).

As previously explained in detail above, Mr. Blankenship has failed to produce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. Accordingly, the moving defendants are likewise entitled to summary judgment on Mr. Blankenship's cause of action for false light invasion of privacy.

IV. Conclusion

Based upon the foregoing discussion, it is ORDERED that the moving defendants' motion for summary judgment (ECF 56) is GRANTED and this action is DISMISSED.

The Clerk is directed to transmit copies of this memorandum opinion and order to all counsel of record and any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 2:20-cv-000278

[Filed February 2, 2022]

DON BLANKENSHIP,	)
Plaintiff,	)
	)
v.	)
	)
NBCUNIVERSAL, LLC, CNBC,	)
LLC, and DOES 1-50 INCLUSIVE,	)
Defendants.	)
	)

JUDGMENT ORDER

In accordance with the companion Memorandum Opinion and Order entered this same date, it is ORDERED that judgment be, and hereby is, entered in favor of Defendants NBCUniversal, LLC, and CNBC, LLC, and against Plaintiff Don Blankenship. It is further ORDERED that this civil action is DISMISSED and STRICKEN from the docket.

The Clerk is directed to transmit copies of this Order to all counsel of record and to any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 2:19-cv-00236

[Filed February 2, 2022]

DON BLANKENSHIP,
Plaintiff,

v.

FOX NEWS NETWORK, LLC; CABLE NEWS NETWORK, INC.; MSNBC CABLE, LLC; 35th INC.; WP COMPANY, LLC d/b/a The Washington Post; MEDIAITE, LLC; FISCALNOTE, INC. d/b/a Roll Call; NEWS AND GUTS, LLC; THE CHARLESTON GAZETTE-MAIL; AMERICAN BROADCASTING COMPANIES, INC.; TAMAR AUBER; GRIFFIN CONNOLLY; ELI LEHRER; and DOES 1-50 INCLUSIVE,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending are the motion for summary judgment filed by defendant 35th Inc ("35th PAC"[1]) on May 24, 2021 (ECF No. 892), and the motion to strike some of 35th PAC's evidentiary submission filed by the plaintiff on June 11, 2021 (ECF No. 929).

I. Background

The plaintiff initiated this action on March 14, 2019, in Mingo County Circuit Court, asserting claims of defamation and false light invasion of privacy against numerous media organizations, reporters, and others. See ECF No. 1. The action was removed to this court based on diversity jurisdiction. See id.; 28 U.S.C. § 1332.

The operative amended complaint alleges the following. After an explosion in a West Virginia mine resulted in the death of twenty-nine miners, the United States Government initiated an investigation into the cause of the explosion, focusing on Massey Energy, which operated the mine, and the plaintiff, who was Massey Energy's chief executive officer. See ECF No. 14 ¶¶ 7-8, 136-41. While the plaintiff was not

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[1] In the caption of the operative complaint, the plaintiff identifies the defendant as "35th Inc" but refers to the defendant as "35th PAC" throughout the body of the complaint. ECF No. 14 at 1, 15, 35, 55. In its summary-judgment briefing, the defendant explains that it was originally organized as "35th Inc." but later changed its name to "35th PAC" via a Federal Elections Commission filing. ECF No. 893 at 2 & n.1. Both parties refer to the defendant as "35th PAC" in their summary-judgment briefing, see ECF No. 893; ECF No. 916, and the court does the same herein.

charged with the deaths of the miners, the Government later charged him with three felonies as well as one misdemeanor for conspiracy to violate federal mine safety laws. See id. ¶ 141. On December 3, 2015, a jury acquitted the plaintiff of the felony charges but found him guilty of the misdemeanor offense. See id. ¶ 143. The plaintiff was convicted and sentenced to one year in prison, and he was released in the spring of 2017. See id. ¶¶ 144-45.

In January 2018, the plaintiff announced his campaign to run as a Republican for a United States Senate seat in West Virginia. See id. ¶ 146. The plaintiff lost his bid for the Republican party's nomination in the primary election on May 8, 2018. See id. ¶ 190. The plaintiff alleges that media coverage was responsible for his loss due to defamatory statements about the plaintiff that referred to him as a "felon" or a "convicted felon,"[2] despite the fact that he was cleared of the felony charges and was only convicted of the misdemeanor offense. See id. ¶¶ 152-190. The plaintiff further alleges that there was an organized effort to defeat his campaign, in part through the defamatory media coverage, see id. ¶¶ 150-90, which continued after the primary election, see id. ¶¶ 191-221.

The plaintiff alleges that these defamatory statements injured his reputation, prevented him from pursuing other business opportunities, and caused him to lose in the primary election. See id. ¶¶ 24, 190. In addition, the plaintiff alleges that many of these statements were made in conjunction with reference to

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[2] The exact reference varies among the defendants.

the mine disaster and therefore had the additional effect of falsely attributing to him responsibility for murder. See id. ¶¶ 23, 228, 242.

As for 35th PAC in particular, there is no dispute that it is an "independent expenditure-only political committee" formed in 2017 for the purpose of using independent expenditures to support West Virginia Attorney General Patrick Morrissey's candidacy for the Republican nomination for the same Senate seat that the plaintiff sought in 2018. ECF No. 892-2 at 1; see ECF No. 14 ¶ 37; ECF No. 893 at 2-3; ECF No. 916 at 2. There is also no dispute that, on April 10, 2018, in response to a Tweet authored by the plaintiff, 35th PAC – through its Executive Director, David James Eckert – published a Tweet stating:

> You are a convicted felon hurting West Virginia families. That's why @realDonald Trump administration won't help you #wvsen https://www.wvgazettemail.com/news/trump-doj-urges-court-to-not-hear-blankenship-appeal/article_ee34035c-568a-508f-a2b8-a1f4a1865fa5.html.

ECF No. 892-2 ¶¶ 5, 11; see ECF No. 916 at 2.

The URL[3] provided at the end of the Tweet was to an August 25, 2017 article published on the Charleston Gazette-Mail's website regarding the government's

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[3] A URL, shorthand for "Uniform Resource Locator," is an Internet address of a resource, such as a document or a website. See URL, Miriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/URL (last visited August 16, 2021).

request that the Supreme Court deny the plaintiff's petition for certiorari to appeal his criminal conviction. See ECF No. 929-4 at 2-3. The article discusses the plaintiff's conviction and sentence but does not discuss whether the plaintiff's conviction was for a felony offense. See id. In his motion to strike briefing, the plaintiff asserts that the August 25, 2017 article contains a hyperlink to another Charleston Gazette-Mail article that correctly reports that the plaintiff was convicted of a misdemeanor. See ECF No. 929 at 3. However, the plaintiff does not provide a copy of this second article or any additional information that would allow the court to locate it. See id. (citing ECF No. 929-5); ECF No. 929-5 (containing no article).[4]

In his complaint, the plaintiff alleges that 35th PAC's Tweet is false in that it refers to him as a convicted felon when he is not a convicted felon. See ECF No. 14 ¶ 6, 153. He alleges that 35th PAC knew at

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[4] Notably, 35th PAC has not provided the court a copy of the August 25, 2017 article and instead refers the court to the URL address where the article is purportedly found. See ECF No. 893 at 5 n.1. However, the article is no longer found at that URL address. The plaintiff does provide a copy of the August 25, 2017 article, albeit as part of his briefing on the motion to strike rather than his summary-judgment briefing. See ECF No. 929-4. As noted above, however, the plaintiff has not provided the court with a copy of the other article to which the August 25, 2017 article purportedly links or any additional information that might allow the court to locate it. And, notably, although the copy of the August 25, 2017 article he provides includes numerous underlined words and phrases, suggesting hyperlinks to other sources, the copy itself is in a format that contains no actual hyperlinks. See id. Herein lie several lessons concerning the submission of exhibits to the court.

the time the Tweet was published that it was false and that 35th PAC nonetheless chose to publish the Tweet out of malice toward the plaintiff. See id. ¶ 153. He also alleges that, although he later informed 35th PAC that the Tweet was false, 35th PAC never issued a correction. See id.

The plaintiff further alleges, on information and belief, that 35th PAC, the National Republican Senatorial Committee ("NRSC"),[5] Kevin McLaughlin,[6] whom the complaint identifies as the current director of NRSC and "a longtime Republican Party operative,"

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[5] The plaintiff's complaint named NRSC as a defendant. See ECF No. 14. By a December 17, 2020 order, the court dismissed NRSC following the plaintiff's and NRSC's submission of a stipulation of dismissal. See ECF No. 692; ECF No. 694.

[6] The plaintiff's complaint named Mr. McLaughlin as a defendant as well. See ECF No. 14. In a March 31, 2020 memorandum opinion and order, the court dismissed Mr. McLaughlin as a defendant on personal-jurisdiction grounds. See ECF No. 398 at 52, 78. On April 17, 2020, the plaintiff filed a complaint against Mr. McLaughlin in the Eastern District of Virginia, asserting substantially the same allegations and claims that had been asserted against Mr. McLaughlin in this case. See Compl., Blankenship v. McLaughlin, No. 1:20-cv-00429-LMB-IDD (E.D. Va.), ECF No. 1. As has been noted in other filings in this case, on November 13, 2020, Mr. McLaughlin notified the plaintiff that he intended to seek Fed. R. Civ. P. 11 sanctions against the plaintiff, on the ground that the plaintiff's interrogatory responses demonstrated the plaintiff had no factual basis for pursuing his claims against Mr. McLaughlin, unless the plaintiff agreed to dismiss the claims. See ECF No. 802-1 (sealed). On December 11, 2020, the plaintiff and Mr. McLaughlin stipulated to dismissal of the claims against Mr. McLaughlin pending in the Eastern District of Virginia with prejudice. See McLaughlin, ECF No. 91.

as well as other unidentified conspirators shared a common plan to defeat the plaintiff's candidacy. Id. ¶ 82; see id. ¶¶ 233-34, 246-47. He also alleges that 35th PAC, NRSC, Mr. McLaughlin, and the other conspirators shared a common plan to defame him and to cast him in a false light and agreed to publish or cause others to publish claims that he was a convicted felon, despite knowing the claims were false. See id. ¶¶ 234, 247.

Based on these allegations, the plaintiff asserts four causes of action against 35th PAC, though the complaint (somewhat confusingly) lists them in two counts. See id. ¶¶ 222-50. In all, the plaintiff asserts causes of action for (1) defamation, (2) conspiracy to defame, (3) false light invasion of privacy, and (4) conspiracy to commit false light invasion of privacy. See id.

Following discovery, 35th PAC filed its motion for summary judgment. See ECF No. 892. It argues that it is entitled to summary judgment on all four causes of action asserted against it. See ECF No. 893 at 9-20 (arguing expressly for summary judgment on claims of defamation, conspiracy to defame, false light invasion of privacy, and conspiracy to commit false light invasion of privacy). In response,[7] the plaintiff argues

[7] The plaintiff filed a one-page response to 35th PAC's motion for summary judgment and attached thereto an exhibit. See ECF No. 913; ECF No. 913-1. On the same day, he filed a five-page memorandum in opposition to the motion for summary judgment. See ECF No. 916. Although the plaintiff's multiple filings are not in keeping with the Local Rules regarding motions practice, see LR Civ P 7.1(a), the court has considered all the plaintiff's filings.

that the court should deny the motion for summary judgment "as to defamation and false light invasion of privacy contained in Counts One and Three of the Amended Complaint."[8] ECF No. 916 at 5-6. Thus, it appears that the plaintiff concedes that 35th PAC is entitled to summary judgment with respect to the two conspiracy causes of action.[9]

After submitting his response to 35th PAC's motion for summary judgment, the plaintiff filed his motion to strike portions of 35th PAC's evidentiary submission. See ECF No. 929. Specifically, the plaintiff challenges four statements made by Mr. Eckert – 35th PAC's director and the author of the Tweet at issue – in the affidavit Mr. Eckert submitted in support of 35th PAC's motion for summary judgment. See id.; see also ECF No. 892-2.

Briefing on 35th PAC's motion for summary judgment and on the plaintiff's motion to strike have completed, and the motions are ripe for disposition.

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[8] As noted earlier herein, the plaintiff's amended complaint contains only two counts, labeled "Count I" and "Count II."

[9] This view is confirmed by the fact that the plaintiff, although apparently recognizing that there are more than two causes of action asserted in his complaint, note 8, supra, expressly opposes summary judgment as to only two causes of action. The view is further confirmed by the fact that the plaintiff's barebones summary-judgment briefing contains no discussion whatsoever of the facts or law related to the two conspiracy causes of action.

II. Discussion

The court first addresses the plaintiff's motion to strike before turning to 35th PAC's motion for summary judgment.

A. Motion to Strike

1. Legal Standard

"When, at the summary-judgment stage, a party asserts that materials cited by an opposing party to [support] a fact[] . . . would not be admissible at trial, 'a motion to strike is no longer the favored (or authorized) method of challenging the inadmissible nature of the evidentiary submission.'" Hall v. Gestamp, W. Va., LLC, No. 2:20-cv-00146, 2021 WL 1240635, at *8 (S.D.W. Va. Apr. 2, 2021) (brackets omitted) (quoting Propst v. HWS Co., Inc., 148 F. Supp. 3d 506, 511 (W.D.N.C. 2015); see also 11 James Wm. Moore et al., Moore's Federal Practice § 56.91[4] (2021). "Rather, since the 2010 amendments to [Fed. R. Civ. P.] 56, the proper way to raise such a challenge is to 'object that the material cited to support . . . a fact cannot be presented in a form that would be admissible in evidence.'" Courtland Co., Inc. v. Union Carbide Corp., No. 2:18-cv-01230, 2021 WL 2110876, at *2 (S.D.W. Va. May 25, 2021) (emphasis in Courtland) (quoting Fed. R. Civ. P. 56(c)(2); see also Fed. R. Civ. P. 56 advisory committee's note to 2010 amendments (explaining that "[t]here is no need to make a separate motion to strike" and that "[t]he objection functions much as an objection at trial, adjusted for the pretrial setting"). "[T]o merit the court's consideration, objections, at a minimum, must specify the material

being challenged and state the basis for the objection with sufficient particularity and explanation to permit the court to rule." Courtland, 2021 WL 2110876, at *3; see id. (collecting cases).

Upon a proper objection, under Rule 56(c)(2), "the court may consider . . . the content or substance of [the] otherwise inadmissible materials where . . . 'the party submitting the evidence shows that it will be possible to put the information into an admissible form.'" Humphreys & Partners Architects, L.P. v. Lessard Design, Inc., 790 F.3d 532, 538 (4th Cir. 2015) (internal brackets and ellipsis omitted) (quoting 11 James Wm. Moore et al., Moore's Federal Practice § 56.91[2] (3d ed. 2015)). "If [a party] objects to the court's consideration of 'material cited to support . . . a fact,' the [proponent] has the burden 'to . . . explain the admissible form that is anticipated.'" Id. at 538-39 (internal citations omitted) (quoting Fed. R. Civ. P. 56(c)(2) and advisory committee's note to 2010 amendments).

2. Procedural Challenges

35th PAC raises several procedural challenges to the plaintiff's motion to strike. Among other things, 35th PAC argues that the motion is untimely because it should have been filed in conjunction with the applicable summary judgment motion deadline; that the plaintiff waived any challenges to Mr. Eckert's affidavit by citing to it to support his summary judgment arguments; and that, under Rule 56(c)(2), the motion is an improper method of challenging 35th PAC's evidentiary submission in support of summary judgment. See ECF No. 942 at 5-7.

Except in one respect, the court declines to dispose of the motion to strike based on the procedural challenges raised by 35th PAC. As explained in Courtland, the Rules Committee "has left courts and litigants in the lurch" because, although it "made clear in the 2010 amendments to Rule 56 that objecting, rather than filing a motion to strike, is the correct way to challenge the admissibility of submitted materials' content at the summary judgment stage, it did not specify any procedural method for raising such objections," and "[t]his court has not, by Local Rule or otherwise, selected a method for litigants to raise Rule 56(c)(2) objections." Courtland, 2021 WL 2110876, at *3 (citing 11 Moore, supra, § 56.91[5]-[6]). Because of the uncertainty as to the proper method for raising Rule 56(c)(2) objections, the court cannot say that the objections advanced in the plaintiff's motion would be untimely or waived for the reasons offered by 35th PAC.

The court agrees with 35th PAC, however, that the plaintiff's motion to strike is subject to denial on the ground that it is an improper vehicle for challenging the admissibility of 35th PAC's evidentiary submission. See Hall, 2021 WL 1240635, at *8 ("As an initial matter, . . . the . . . motion to strike . . . must be denied because striking evidence is no longer the authorized method for addressing challenges to an evidentiary submission based on inadmissibility." (citing Humphreys, 790 F.3d at 538-39; Propst, 148 F. Supp. 3d at 511)). The changes wrought by the 2010 amendments have been in effect for over a decade now, and, regardless of any uncertainty as to the proper method of raising objections, it is clear that the kind of

challenges raised by the plaintiff here must be raised through objections, not through a motion to strike. It is incumbent on litigants to bring their challenges through objections, and it is appropriate for courts to deny such challenges brought in motions to strike for the simple reason that they do not conform to the requirements of Rule 56(c).

Although the procedural deficiency identified in the preceding paragraph is sufficient to deny the plaintiff's motion, the court also concludes, as explained further herein, that the motion should be denied on the merits.

3. Merits

The plaintiff challenges four statements in Mr. Eckert's affidavit. The court addresses each of these challenges separately.

a. Paragraph 9

The plaintiff first challenges ¶ 9 of Mr. Eckert's affidavit, which states:

> 9) I recall reading news articles describing [the plaintiff] as having been a felon as a result of his criminal conviction. I do not expressly recall which particular articles I read, but they were the types of articles in newspapers and other media sources that I would have found in a Google search or that would have been shared by others across social media.

ECF No. 892-2 ¶ 9. The plaintiff challenges this paragraph on the ground that it contradicts the

Charleston Gazette-Mail's August 25, 2017 article referenced in 35th PAC's Tweet along with other unspecified evidence. See ECF No. 929 ¶ 12; ECF No. 957 ¶ 14.

The plaintiff fails to explain how Mr. Eckert's averment that he recollects reading news articles describing the plaintiff as a felon is (or even can be) contradicted by the August 25, 2017 article describing the government's arguments against the granting of certiorari in the plaintiff's criminal case. Nor does he explain what other evidence contradicts the averment. At best, the plaintiff appears to be relying on his own affidavit, in which he avers that, upon information and belief, there were no news articles describing him as a convicted felon prior to 35th PAC's April 10, 2018 Tweet. See ECF No. 929 ¶ 16; ECF No. 929-1 ¶ 15. As 35th PAC points out, however, the plaintiff expressly admitted in his response to 35th PAC's interrogatories "that he was falsely referred to as a 'felon' on multiple occasions . . . before . . . [35th PAC]'s Tweet on April 10, 2018," ECF No. 942-1 at 4, and the plaintiff's own complaint identifies three articles or social media posts describing him as a felon on or before April 10, 2018, see ECF No. 14 ¶¶ 149, 152, 154.

Beyond being only half-developed and inconsistent with his own pleadings and discovery responses, the court is not persuaded that the plaintiff's challenge is a proper objection to the admissibility of ¶ 9 that merits the court's consideration. The gist of the plaintiff's argument appears to be that the court should not consider Mr. Eckert's averment in ¶ 9 because it is inconsistent with other evidence (though, it does not

appear to be so). But, at the summary judgment stage, the court does not make credibility determinations and generally will not reject an otherwise proper affidavit on the ground that the averments therein are not sufficiently corroborated or are inconsistent with other evidence, unless perhaps the averments are too incredible to be accepted by reasonable minds. See Nnadozie v. Genesis HealthCare Corp., 730 F. App'x 151, 160 (4th Cir. 2018); Horton v. Dobbs, No. 1:09-cv-00114, 2011 WL 1899760, at *3 (N.D.W. Va. May 19, 2011). Here, the plaintiff has not shown that Mr. Eckert's averment in ¶ 9 is so incredible that reasonable minds could not accept it, and thus the plaintiff's challenge to its admissibility appears meritless.

Even if Mr. Eckert's averment in ¶ 9 were susceptible to challenge, the court concludes that 35th PAC has met its burden to show that it will be possible to put the information contained therein into an admissible form at trial. At trial, Mr. Eckert would be able to testify regarding his own recollections, and the plaintiff would be able to attempt impeaching him if he so chooses. Accordingly, the court overrules the objection to ¶ 9.

b. Paragraph 13

The plaintiff next challenges ¶ 13 of Mr. Eckert's affidavit, which states:

> 13) The reference to [the plaintiff] as a "felon" was based on what we believed to have been [his] criminal status following [his] conviction in federal court, and was based

> on our team's research into [his] biography and his criminal conviction. This Tweet and the link to the Charleston Gazette-Mail article was an attempt to accurately highlight [the plaintiff]'s legal status based on how we understood it as of April 10, 2018, as it pertained to [his] qualifications to serve as a U.S. Senator from West Virginia.

ECF No. 892-2 ¶ 13. The plaintiff challenges this paragraph on the ground that it is not based on Mr. Eckert's personal knowledge. See ECF No. 929 at 2-3; ECF No. 957 at 4-5. He argues that Mr. Eckert has not laid a sufficient foundation to make averments regarding what others of 35th PAC's "team" "believed," "researched," or "understood" regarding the nature of the plaintiff's conviction. See ECF No. 929 at 2-3; ECF No. 957 at 4-5. The plaintiff also argues that the averment in ¶ 13 is contradicted by the Charleston Gazette-Mail's August 25, 2017 article. See ECF No. 929 at 3-4.

The court again is not persuaded that the plaintiff's challenges amount to proper objections. First, as 35th PAC notes, Mr. Eckert states in his affidavit that he served as 35th PAC's executive director; that, in that capacity, he "was responsible for the day-to-day operations of . . . 35th [PAC], including operating [its] social media accounts, including its Twitter account"; and that it was 35th PAC's "usual practice and procedure" to have "all of its communications . . . vetted by legal counsel prior to being disseminated." ECF No. 892-2 ¶¶ 2, 5-6, 15. In the court's view, Mr. Eckert's

averments regarding his duties in relation to vetting 35th PAC's communications prior to dissemination provide sufficient foundation for him to testify regarding the status of his "team['s]" research, understanding, and belief prior to publishing the Tweet at issue.

Second, the court again fails to see how the Gazette-Mail's August 25, 2017 article contradicts Mr. Eckert's averment in ¶ 13. More importantly, to the extent the article might be at odds with the averment, it merely calls into question Mr. Eckert's credibility, and, because his averment is not so incredible that it could not reasonably be accepted, the plaintiff's challenge to ¶ 13 based on its purported inconsistency with the August 25, 2017 article is meritless. See Nnadozie, 730 F. App'x at 160; Horton, 2011 WL 1899760, at *3.

Even if the plaintiff's challenges to ¶ 13 were proper objections, 35th PAC has met its burden to show that it will be possible to put the information contained in ¶ 13 into an admissible form at trial. Mr. Eckert will be able to testify at trial as to the foundation for his testimony regarding his team's research, understanding, and belief, and thus he will also be able to testify as to what his team's research, understanding, and belief as to the nature of the plaintiff's conviction was, which testimony the plaintiff may attempt to impeach. Accordingly, the court overrules the plaintiff's objection to ¶ 13.

c. Paragraph 14

The plaintiff next challenges ¶ 14 of Mr. Eckert's affidavit, which states:

> 14) I had no knowledge that [the plaintiff]'s criminal conviction may not have classified [him] as a "felon" for purposes of how that term is defined under federal and West Virginia law.

ECF No. 892-2 ¶ 14. As with ¶ 9, the plaintiff challenges Mr. Eckert's averment in ¶ 14 on the ground that it is inconsistent with the Charleston Gazette-Mail's August 25, 2017 article. See ECF No. 929 at 3-4. He also argues that the averment is "incongruous" with another Charleston Gazette-Mail article correctly identifying him as a misdemeanant, to which he claims the August 25, 2017 article provides a hyperlink. See id. at 4.

The court again concludes that the plaintiff has not advanced a proper objection. On its face, Mr. Eckert's averment in ¶ 14 regarding his knowledge of the nature of the plaintiff's conviction is not inconsistent with the August 25, 2017 article. Nor is his averment incongruous with the possibility that another Charleston Gazette-Mail article – which is not in the record – identified the plaintiff as a misdemeanant. No evidence in the record suggests that Mr. Eckert reviewed this phantom article or was even aware of it. At most, the article might provide a basis for challenging Mr. Eckert's credibility regarding his knowledge of the nature of the plaintiff's conviction. But, even acknowledging this potential challenge, Mr. Eckert's averment in ¶ 14 is not so incredible that it could not be accepted by reasonable minds, and thus the plaintiff's challenge to ¶ 14 is meritless. See

Nnadozie, 730 F. App'x at 160; Horton, 2011 WL 1899760, at *3.

Even assuming the plaintiff's challenge to ¶ 14 were a proper objection, 35th PAC has shown that it will be possible to put the information contained therein into an admissible form at trial. Mr. Eckert would be able to testify at trial as to his own knowledge, and the plaintiff would be able to attempt to impeach him. Accordingly, the court overrules the plaintiff's objection to ¶ 14.

d. Paragraph 16

Lastly, the plaintiff challenges ¶ 16 of Mr. Eckert's affidavit, which states:

> 16) The communication did not knowingly incorrectly refer to [the plaintiff] as a felon, as it is my practice as an experienced communication professional to always seek to make accurate statements in my organization's communications.

ECF No. 892-2 ¶ 16. The plaintiff challenges this paragraph on the ground that portions of it are not based on Mr. Eckert's personal knowledge. See ECF No. 929 at 2-3. He argues that Mr. Eckert has not laid a sufficient foundation to make averments regarding statements in "communications" made by his "organization[]." See id. The plaintiff further argues that Mr. Eckert's averment that the Tweet did not knowingly incorrectly refer to the plaintiff as a felon is "irreconcilable" with the Charleston Gazette-Mail's August 25, 2017 article as well as the other,

hyperlinked Charleston Gazette-Mail article. See id. at 4.

Yet again, the court is not persuaded that the plaintiff's challenge advances a proper objection. With respect to Mr. Eckert's personal knowledge, the court concludes, as it has with regard to the averment in ¶ 13, that Mr. Eckert's averments as to his duties in relation to vetting 35th PAC's communications prior to dissemination provide sufficient foundation for him to testify regarding statements made in 35th PAC's communications. See ECF No. 892-2 ¶¶ 2, 5-6, 15. With respect to the two Charleston Gazette-Mail articles, the court concludes, as it has previously, that Mr. Eckert's averment that the Tweet was not knowingly incorrect regarding the nature of the plaintiff's conviction is not irreconcilable with either article and that, to the extent Mr. Eckert's credibility regarding his knowledge might be challenged based on the articles, his averment is not so incredible that it could not be accepted by reasonable minds. See Nnadozie, 730 F. App'x at 160; Horton, 2011 WL 1899760, at *3. Thus, the court concludes that the plaintiff's challenge to ¶ 16 is meritless.

Even if Mr. Eckert's averment in ¶ 16 were susceptible to an objection, the court concludes that 35th PAC has shown that it will be possible to put the information contained in ¶ 16 into an admissible form at trial. Mr. Eckert will be able to testify at trial as to the foundation for his testimony regarding statements made in 35th PAC's communications. He thus will also be able to testify as to 35th PAC's knowledge at the time the Tweet was published. Accordingly, the court overrules the plaintiff's objection to ¶ 16.

B. Motion for Summary Judgment

1. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In deciding a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650, 651, 657 (2014) (per curiam).

2. Conspiracy claims

As explained earlier, the plaintiff's complaint asserts two conspiracy claims against 35th PAC. Under West Virginia law, "[a] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." Syl. pt. 8, Dunn v. Rockwell, 689 S.E.2d 255, 259 (W. Va. 2009). "A civil conspiracy is not a per se, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s)." Syl. pt. 9, Dunn, 689 S.E.2d at 259.

In its summary judgment briefing, 35th PAC argues that it is entitled to summary judgment on the conspiracy claims because the plaintiff has adduced no evidence that it conspired or even interacted with Mr. McLaughlin, NRSC, or any other person or entity regarding the events giving rise to this lawsuit. 35th PAC further points to evidence that it did not engage in the alleged conspiracy, including its discovery responses stating that it has no records or knowledge of any communications between 35th PAC and NRSC or Mr. McLaughlin, see ECF No. 892-4 at 9-10, as well as affidavits from Mr. Eckert and 35th PAC treasurer Charles Gantt, averring that they did not engage in the alleged conspiracy and that they know of no one else connected with 35th PAC who did so, see ECF No. 892-1 ¶¶ 5-6; ECF No. 892-2 ¶¶ 18-19. The plaintiff does not respond to these arguments and points to no evidence of a conspiracy.

The court concludes that 35th PAC has met its initial burden of demonstrating the absence of a genuine issue of material fact with respect to the conspiracy claims and has shifted the burden to the plaintiff and that the plaintiff has failed to meet his burden to demonstrate the existence of a genuine dispute regarding the claims. See Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986) (describing burdens in summary judgment context). Accordingly, 35th PAC is entitled to summary judgment on the conspiracy claim in Counts I and II of the amended complaint.

3. Defamation

Defamation is "[a] false written or oral statement that damages another's reputation." Pritt v. Republican

Nat. Comm., 557 S.E.2d 853, 861 n.12 (W. Va. 2001) (quoting Black's Law Dictionary 427 (7th ed. 1999)). Defamation published in written form constitutes libel. Syl. Pt. 8, Greenfield v. Schmidt Baking Co., 485 S.E.2d 391, 394 (W. Va. 1997).

West Virginia law identifies three types of plaintiffs in defamation cases: (1) public officials and candidates for public office, (2) public figures, and (3) private individuals. See Syl. Pt. 10, Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 564 (W. Va. 1992); see generally Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W. Va. 2003) (discussing types of public figures in defamation suits). The first step in assessing a claim for defamation is to determine whether the plaintiff is a private individual or is instead a candidate for public office, a public official, or a public figure. See Zsigray v. Langman, 842 S.E.2d 716, 722 (W. Va. 2020). 35th PAC asserts that the plaintiff in this case qualifies as a candidate for public office and may qualify as a public figure, and the plaintiff does not contest these designations.[10] See ECF 916 at 4; see also, ECF 953 at 14. Inasmuch as the statements at issue herein occurred prior to the primary election, it is clear that Mr. Blankenship qualifies as a candidate for public office.

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[10] Indeed, based on the allegations in the complaint, the court previously determined, by its order of March 31, 2020, that the plaintiff qualifies as a candidate for public office and "may also qualify as a public figure in West Virginia based on his 'prominence and notoriety'". See ECF No. 398 at 17 (citing State ex rel. Suriano v. Gaughan, 480 S.E.2d 548, 556 (W. Va. 1996))

Moreover, as Mr. Blankenship concedes, his notoriety in the state of West Virginia, his pervasive involvement in the national political arena, and the extensive national media attention he has received as evidenced by this action make clear that he also qualifies as a public figure. See Wilson, 588 S.E.2d at 205 (explaining that an individual's "general fame or notoriety in the state and pervasive involvement in the affairs of society" renders that individual an "all-purpose public figure" in a defamation action.). Regardless of whether Mr. Blankenship is referred to as a candidate for public office or public figure, the First Amendment protections are the same for each. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) (noting the test set forth in New York Times v. Sullivan applies to both "criticism of 'public figures' as well as 'public officials.'"); see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) (noting that it "might be preferable to categorize a candidate for [public office] as a 'public figure,'" as opposed to a public official, "if for no other reason than to avoid straining the common meaning of words. But . . . it is abundantly clear that, whichever term is applied, publications concerning candidates [for public office] must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office.").

To recover in a defamation action, a plaintiff who qualifies as a candidate for public office must prove that:

> (1) there was the publication of a defamatory statement of fact or a statement in the form of

> an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion;[11] (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

Syl. Pt. 5, Chafin v. Gibson, 578 S.E.2d 361, 363 (W. Va. 2003) (per curiam) (emphasis omitted) (quoting Syl. Pt. 1, Hinerman, 423 S.E.2d at 563); accord Syl. Pt. 7, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (setting forth nearly identical elements in a defamation action involving a

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[11] In its March 31, 2020, memorandum opinion and order, the court concluded that the challenged statements identified in Mr. Blankenship's complaint are capable of defamatory meaning and may also be considered defamatory per se because they impute a felony conviction. See ECF 398 at 18-20. To the extent any of the statements could be considered opinions, the court concluded "they are based on a 'provably false assertion of fact' and thus are not absolutely protected under the First Amendment." Id. at 20. The court incorporates its previous findings herein and concludes that the challenged statement is not only capable of defamatory meaning but constitutes defamation per se as a matter of law. The court recognizes that Mr. Blankenship was convicted of a misdemeanor offense, which amounts to a criminal conviction. Nonetheless, inasmuch as "a felony conviction carries significantly greater legal consequences than a misdemeanor does," the court concludes the per se rule remains applicable. Myers v. The Telegraph, 332 Ill.App.3d 917, 773 N.E.2d 192, 197 (2002) (concluding the defamation per se rule should still apply given the "little, if any, practical difference between falsely accusing a person of committing a crime and falsely attributing a felony conviction to a person who pleaded guilty only to a misdemeanor.")

limited purpose public figure). Further, the Supreme Court of Appeals of West Virginia has also held that, to sustain a defamation action, a plaintiff who qualifies as a candidate for public office must also prove that "the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syl. Pt. 4, Chafin, 578 S.E.2d at 363 (quoting Syl. Pt. 1, Sprouse v. Clay Commc'n Inc., 211 S.E.2d 674, 679 (1975)); accord Syl. Pt. 6, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (noting a limited purpose public figure must also prove a publisher's intent to injure). A plaintiff who qualifies as a candidate for public office must prove each of the elements of his claim by clear and convincing evidence. See Chafin, 578 S.E.2d at 366-67; Pritt, 557 S.E.2d at 862; Hinerman, 423 S.E.2d at 572-73.

Of particular note here, to satisfy the essential elements of a defamation cause of action, a plaintiff who qualifies as a candidate for public office must prove "actual malice" on the part of the publisher, that is, that the publisher made the defamatory statement "'with knowledge that the statement was false or with reckless disregard of whether it was false or not.'" Chafin, 578 S.E.2d at 366 (brackets omitted) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964)). The actual malice standard derives from the United States Supreme Court's decision in Sullivan and its progeny, which, as recognized by the West Viriginia Supreme Court of Appeals, "placed a [F]irst [A]mendment, free speech gloss upon all prior law of defamation." Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 73 (W. Va. 1983); see id. (noting that First Amendment concerns and concomitant protections provided by the actual

malice standard, are at their "strongest" when the statement at issue concerns "a public official or candidate for office because of the need for full, robust, and unfettered public discussion of persons holding or aspiring to offices of public trust."). Thus, "'application of the state law of defamation' is limited . . . by the First Amendment," CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 293 (4th Cir. 2008) (quoting Milkovich v. Loarin Journal Co., 497 U.S. 1, 14 (1990)), and the court applies federal law in assessing the element of actual malice, see Berisha v. Lawson, 973 F.3d 1304, 1314 n.6 (11th Cir. 2020).

A plaintiff who is a candidate for public office bears the heavy burden of proving actual malice by clear and convincing evidence. See CACI, 536 F.3d at 293 (citing Carr v. Forbes, Inc., 259 F.3d 273, 282 (4th Cir. 2001); see also Carr, 259 F.3d at 282 (4th Cir. 2001) ("Establishing actual malice is no easy task . . . ."). At the summary judgment stage, the appropriate inquiry for the court is "whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." Anderson, 477 U.S. at 255-56; see Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.").

Here, 35th PAC argues that the plaintiff has not adduced evidence from which a jury could reasonably find actual malice under a clear and convincing evidence standard. Specifically, 35th PAC argues that the plaintiff has not adduced evidence that Mr. Eckert,

or any other 35th PAC employee, knew at the time Mr. Eckert published his Tweet that its reference to the plaintiff as a felon was false or misleading. Nor, 35th PAC asserts, has the plaintiff adduced sufficient evidence to permit the conclusion that Mr. Eckert or any other 35th PAC employee in fact entertained serious doubts as to the Tweet's truth. See St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (discussing reckless-disregard definition); see also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 n.30 (1984) (defining "reckless disregard" as when the defendant "subjectively entertained serious doubt as to the truth of his statement"); CACI, 536 F.3d at 300 (explaining that reckless disregard requires "sufficient evidence to permit the conclusion that the defamatory statement was 'made with a high degree of awareness of its probable falsity" (brackets omitted) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964))).

35th PAC points to evidence that Mr. Eckert did not know that the Tweet was false when he published it and that he did not publish the Tweet with reckless disregard for its potential falsity. 35th PAC notes that, in his affidavit, Mr. Eckert avers that he had no knowledge that the plaintiff's conviction might not be classified as a felony; that he did not refer to the plaintiff's conviction as a felony knowing that it was not a felony; and that the Tweet's reference to the plaintiff as a felon was based on his recollection of articles referring to the plaintiff as a felon as well as research and vetting performed by 35th PAC's employees and counsel. See ECF No. 892-2 ¶¶ 6, 8-9, 13-16.

In response, the plaintiff argues that evidence of actual malice is demonstrated by the fact that Mr. Eckert "did nothing to investigate the accuracy of his [Tweet]." ECF No. 916 at 5. He also argues that Mr. Eckert's averments that he relied on 35th PAC's vetting process and had read previous articles describing the plaintiff as a felon "appear[] dubious." Id.

The court is not persuaded by the plaintiff's arguments. First, the plaintiff's arguments cannot be squared with the only evidence in the record on these issues, namely, Mr. Eckert's affidavit, in which he avers that 35th PAC did investigate the accuracy of the Tweet by, among other things, monitoring articles about the plaintiff and vetting the Tweet through counsel. See ECF No. 892-2 ¶¶ 6, 8-9, 15. Second, because "[a]ctual malice is a subjective standard," Reuber v. Food Chem. News, Inc., 925 F.2d 703, 714 (4th Cir. 1991) (en banc), a publisher's "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard" on its own. Harte-Hanks Commc'ns, 491 U.S. at 688, 692.[12] Thus, the plaintiff's argument that Mr. Eckert

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[12] More specifically, "'[t]he failure to investigate, where there was no reason to doubt the accuracy of the sources used[,] cannot amount to reckless conduct.'" Horne v. WTVR, LLC, 893 F.3d 201, 211 (4th Cir. 2018) (emphasis added) (internal quotation marks, brackets, and ellipsis omitted) (quoting Church of Scientology Int'l v. Daniels, 992 F.2d 1329, 1334 (4th Cir. 1993); see also Ryan v. Brooks, 634 F.2d 726, 734 (4th Cir. 1980) ("As long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more

failed to investigate the accuracy of his Tweet, even if supported by citation to record evidence, is insufficient to demonstrate actual malice.

The plaintiff also appears to argue that the "personal nastiness" exhibited in the Tweet is evidence of "malice." ECF No. 916 at 5. The court is not persuaded by this argument either. The United States Supreme Court has "emphasiz[ed] that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." Harte-Hanks, 491 U.S. at 666; see also Daniels, 992 F.2d at 1335 ("[E]vidence . . . show[ing] that [the publisher] bore ill will toward [the plaintiff] does not help [the plaintiff's] claim.").[13] Here, because

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thorough investigation might have prevented the admitted error."); id. (collecting cases). However, "[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth" may. Harte-Hanks, 491 U.S. at 692 (internal citation omitted). Thus, "'[r]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" Horne, 893 F.3d at 211 (alteration omitted) (quoting CACI, 536 F.3d at 300). Here, the plaintiff has not argued, let alone adduced evidence supporting the notion, that there were obvious reasons for Mr. Eckert to doubt the accuracy of prior articles or the vetting process 35th PAC employed.

[13] Although, without more, mere evidence of ill will is insufficient to demonstrate actual malice, when accompanied by additional circumstantial evidence, it may still be relevant to the question of whether actual malice exists. See Spirito v. Peninsula Airport Comm'n, 350 F. Supp. 3d 471, 482 (E.D. Va. 2018); see also Harte-Hanks, 491 U.S. at 668 ("[I]t cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.").

the plaintiff relies only on evidence that the Tweet was borne from ill will, he has failed to adduce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. Accordingly, 35th PAC is entitled to summary judgment on the plaintiff's defamation cause of action.

4. False light invasion of privacy

West Virginia recognizes a legally protected interest in privacy. Tabata v. Charleston Area Med. Ctr., Inc., 759 S.E.2d 459, 464 (W. Va. 2014). "Publicity which unreasonably places another in a false light before the public is an actionable invasion of privacy." Syl. Pt. 12, Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 74 (W. Va. 1983). Although the West Virginia Supreme Court of Appeals has not definitively set forth elements for the cause of action, it appears that, for a plaintiff who qualifies as a candidate for public office to establish a case for a false light invasion of privacy, he must prove that: (1) the defendant gave publicity to a matter concerning the plaintiff that places the plaintiff before the public in a false light, (2) the publicity was widespread, (3) the matter of the publicity was false, (4) the false light in which the plaintiff was placed would be "highly offensive to a reasonable person," and (5) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed" (i.e., actual malice). Taylor v. W. Virginia Dep't of Health & Human Res., 788 S.E.2d 295, 315–16 (W. Va. 2016) (citing Restatement (Second) of Torts § 652E (1977)); see Crump, 320 S.E.2d at 87-88.

Although "false light invasion of privacy is a distinct theory of recovery entitled to separate consideration and analysis," claims of false light invasion of privacy are similar to defamation claims, and courts often treat them in essentially the same manner as they treat defamation claims. Crump, 320 S.E.2d at 87. As the West Virginia Supreme Court of Appeals has recognized, the First Amendment-derived actual malice standard announced in Sullivan applies to claims for false light invasion of privacy brought by plaintiffs who are public officials or public figures. See Crump, 320 S.E.2d at 88-89 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967)).

Thus, to withstand summary judgment on his false light invasion of privacy claim, the plaintiff, as a matter of federal constitutional law, must adduce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. See Anderson, 477 U.S. at 255-56; see also Howard v. Antilla, 294 F.3d 244, 248-49, 252 (1st Cir. 2002) (requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Solano v. Playgirl, Inc., 292 F.3d 1078, 1084 (9th Cir. 2002) (same); Ashby v. Hustler Mag., Inc., 802 F.2d 856, 860 (6th Cir. 1986) (same); Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1140 (7th Cir. 1985) (same); cf. Parson v. Farley, 800 F. App'x 617, 623 (10th Cir. 2020) (affirming jury instructions requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1067 & n.2 (8th Cir. 1992) (same).

As explained earlier, the plaintiff has failed to adduce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. Accordingly, 35th PAC is entitled to summary judgment on the plaintiff's cause of action for false light invasion of privacy.

III. Conclusion

For the foregoing reasons, it is ORDERED that the plaintiff's motion to strike (ECF No. 929) be, and hereby is, denied and that 35th PAC's motion for summary judgment (ECF No. 892) be, and hereby is, granted. It is further ORDERED that 35th PAC be, and hereby is, dismissed as a defendant in this action.

The Clerk is directed to transmit copies of this memorandum opinion and order to all counsel of record and to any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 2:19-cv-00236

[Filed February 2, 2022]

DON BLANKENSHIP,
Plaintiff,

v.

FOX NEWS NETWORK, LLC; CABLE NEWS NETWORK, INC.; MSNBC CABLE, LLC; 35th INC.; WP COMPANY, LLC d/b/a The Washington Post; MEDIAITE, LLC; FISCALNOTE, INC. d/b/a Roll Call; NEWS AND GUTS, LLC; THE CHARLESTON GAZETTE-MAIL; AMERICAN BROADCASTING COMPANIES, INC.; TAMAR AUBER; GRIFFIN CONNOLLY; ELI LEHRER; and DOES 1-50 INCLUSIVE,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending are the motions for summary judgment filed by the following defendants on May 24, 2021: News & Guts, LLC ("N&G") (ECF 880); MSNBC Cable, LLC ("MSNBC") (ECF 882); Cable News Network, Inc.

("CNN") (ECF 884); WP Company LLC (the "Washington Post") (ECF 886); American Broadcasting Companies, Inc. ("ABC") (ECF 888). Also pending are the motions for summary judgment filed by defendants Fox News Network, LLC ("Fox News") (ECF 890); Eli Lehrer (ECF 898); Mediaite, LLC ("Mediaite") and Tamar Auber (ECF 900); Griffin Connolly and FiscalNote, Inc. ("FiscalNote") (ECF 903), all on June 7, 2021, and H.D. Media, LLC ("HD Media"), publisher of the Charleston Gazette-Mail[1], on June 21, 2021 (ECF 945).[2]

I. Background

Mr. Blankenship instituted this action on March 14, 2019, in the Circuit Court of Mingo County, asserting defamation and false light invasion of privacy claims against numerous media organizations, reporters, and others. See ECF 1. This action was removed based on diversity jurisdiction. See id.; 28 U.S.C. § 1332. On April 9, 2019, Mr. Blankenship amended his complaint. See ECF 14. The operative amended complaint alleges the following.

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[1] Mr. Blankenship's amended complaint misidentifies the Charleston Gazette-Mail as the owner of the Charleston Gazette and incorrectly names the Charleston Gazette-Mail as a defendant in this action. See ECF 14 71. HD Media is the publisher of the Charleston Gazette-Mail. See ECF 946 at 1 n.1. HD Media states that it has informed Mr. Blankenship of the error but no corrective action has been taken. See id. When necessary, the court will refer to the defendant properly as HD Media throughout this opinion.

[2] The court at times refers to these defendants collectively as the "moving defendants" throughout this opinion.

A. General Allegations

After an explosion in a West Virginia mine resulted in the death of twenty-nine miners, the United States Government initiated an investigation into the cause of the explosion, focusing on Massey Energy, which operated the mine, and Mr. Blankenship, who was Massey Energy's chief executive officer. See id. ¶¶ 7-8, 136-41. While Mr. Blankenship was not charged with the miners' deaths, the Government later charged him with three felonies, as well as one misdemeanor for conspiracy to violate federal mine safety laws. See id. ¶ 141. On December 3, 2015, a jury acquitted Mr. Blankenship of the felony charges but found him guilty of the misdemeanor offense. See id. ¶ 143. As a result, Mr. Blankenship was sentenced to one year in prison and was released in the spring of 2017. See id. ¶¶ 144-45.

In January 2018, Mr. Blankenship announced his campaign to run as a Republican for a United States Senate seat in West Virginia. See id. ¶ 146. Mr. Blankenship lost his bid for the Republican party's nomination in the primary election on May 8, 2018. See id. ¶ 190. Mr. Blankenship alleges that media coverage was responsible for his loss due to defamatory statements referring to him as a "felon" or "convicted felon,"[3] despite that he was acquitted of the felony charges and was only convicted of the misdemeanor offense. See id. ¶¶ 152-190. Mr. Blankenship further alleges that there was an organized effort to defeat his campaign, in part through the defamatory media

[3] The exact reference varies among the defendants.

coverage, see id. ¶¶ 150-90, which continued after the primary election. See id. ¶¶ 191-221.

Mr. Blankenship alleges that these defamatory statements injured his reputation, prevented him from pursuing other business opportunities, and caused him to lose in the primary election. See id. ¶¶ 24, 190. In addition, Mr. Blankenship alleges that many of these statements were made in conjunction with reference to the mine disaster and therefore had the additional effect of falsely attributing to him responsibility for murder. See id. ¶¶ 23, 228, 242.

B. News and Guts, LLC

N&G is "a news, media, and production company created by journalism icon Dan Rather."[4] Id. ¶ 53; see ECF 405 ¶ 53. On May 7, 2018, the day before the Republican primary election, N&G published an article titled "Don Blankenship: A Felon, A Racist and A Possible GOP Senate Nominee." ECF 905-2 at 2 (emphasis added); see also ECF 880-1 ¶ 3. The article generally discusses facets of Mr. Blankenship's campaign prior to the primary election and states that

> Blankenship has also done time; his company, Massey Energy, was responsible for the fatal explosion at the Upper Big Branch coal mine

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[4] Mr. Rather was named as a separate defendant in this action. See ECF 14 at 3, 27. The court dismissed Mr. Rather as a defendant without prejudice on October 7, 2019, after Mr. Blankenship and Mr. Rather filed a joint stipulation of dismissal. See ECF 349; ECF 350.

> that left 29 workers dead. He served one year in prison for the catastrophe.

ECF 905-2 at 2.[5] The byline identifies the author as "News and Guts," id., and the parties do not identify any individual who authored it.

C. MSNBC Cable, LLC

MSNBC is a twenty-four-hour cable news network, owned by NBCUniversal Media, which is a subsidiary of Comcast Corporation, a national telecommunications and mass-media conglomerate. See ECF 14 ¶ 35. On April 16, 2018, Chris Hayes,[6] an MSNBC reporter and host of the program All In With Chris Hayes ("All In"), posted the following on his personal Twitter account @chrislhayes: "The GOP may very well nominate a felonious coal baron found responsible for dozens of miners' deaths to [sic] as their senate nominee in WV." ECF 882-5 at 6 (emphasis added); ECF 14 ¶ 169. The tweet referred to the West Virginia primary and Mr. Blankenship. ECF 883 at 6.

On April 23, 2018, during a live broadcast on his show All In, Mr. Hayes stated the following while

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[5] A caption to a photograph within the article similarly states that Mr. Blankenship "is the former chief executive of the Massey Energy Company where an explosion in the Upper Big Branch coal mine killed 29 men in 2010" and that he "served a one-year sentence for conspiracy to violate mine safety laws." ECF 905-2 at 2.

[6] Mr. Hayes was dismissed as an individual defendant in this matter due to lack of personal jurisdiction in the court's March 31, 2020, memorandum opinion and order. See ECF 398.

discussing Mr. Blankenship's campaign advertisements: "That was a campaign ad in the year of our Lord 2018 for convicted felon Don Blankenship who spent a year in jail for his role in a mine disaster that killed 29 people, calling for Hillary Clinton to be locked up in a campaign ad in 2018." Id. at 23 (emphasis added); ECF 14 ¶ 170.

On May 4, 2018, Joy Reid,[7] served as the substitute-host for Mr. Hayes on the MSNBC program All In. While discussing Mr. Blankenship's comments on Senator Mitch McConnell, Ms. Reid stated:

> Coal baron and convicted felon Don Blankenship who spent a year in federal prison for his role in a 2010 mine explosion that killed 29 people and who's still on probation has been trying to get Republican votes in the West Virginia Senate primary by going after his own party's Senate Leader Mitch McConnell, nicknaming him "Cocaine Mitch" and referring to McConnell's father-in-law as a quote, "China person."

ECF 882-7 at 53-54 (emphasis added); ECF 14 ¶ 172.

During the May 9, 2019, broadcast of All In, Mr. Hayes discussed Mr. Blankenship's loss in the primary election. ECF 882-5 at 40-41. He began the segment on Mr. Blankenship by stating:

> [P]rimary day in America has come and gone, as has the brief and glorious political career of Don

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[7] Ms. Reid was dismissed as an individual defendant in this matter due to lack of personal jurisdiction in the court's March 31, 2020, memorandum opinion and order. See ECF 398.

> Blankenship, at least for now. He is, of course, the former coal company executive who is [sic] released from prison last year after serving a year for mine safety violations connected to an explosion that killed 29 people.

Id. at 40. After discussing Mr. Blankenship's criticisms of Senator Mitch McConnell during the campaign, Mr. Hayes ended the Blankenship segment by stating "But thus endeth the brief and unsuccessful senate bid of convicted felon Don Blankenship." Id. at 41 (emphasis added); see also ECF 14 ¶ 191.

D. Cable News Network, Inc.

CNN is a national twenty-four-hour news network. See ECF 14 ¶ 33. On April 29, 2018, CNN host and chief political correspondent Dana Bash, introduced a segment on the program CNN Newsroom regarding the Republican Primary in West Virginia. See ECF 885 at 7. Bash opened the segment by discussing Mr. Blankenship's conviction and explained that Mr. Blankenship "reminds us" that his conviction "was just a misdemeanor." Id.; see also ECF 884-19 at 2. After playing a video clip of an interview with Mr. Blankenship, Ms. Bash introduced two guests: Alex Isenstadt, a Politico reporter, and Kevin McLaughlin, a Republican Party strategist. See id.; see also ECF 14 ¶ 160. During the live discussion, Mr. McLaughlin made the following comment about Mr. Blankenship: "Well, I mean, pick your poison with this guy, right? He doesn't live in West Virginia, he's a convicted felon." ECF ¶ 160 (emphasis added); see also ECF 884-19 at 5.

Mr. McLaughlin is not an employee of CNN, nor did he work for CNN "in any capacity" or receive any compensation for his guest appearance. ECF 884-20 ¶ 6; see also ECF 884-21 at 6-7. He was invited onto the program by Ms. Bash "for a live, unscripted discussion." Id.; see also ECF 884-21 at 7-8.

On May 2, 2018, political commentator Sarah Elizabeth Cupp hosted a round-table discussion about various political topics, including primary elections in multiple states, on the television program S.E. Cupp Unfiltered on CNN's subsidiary network HLN. See ECF 14 ¶ 171; ECF 885 at 9. When discussing the West Virginia primary election, Ms. Cupp mentioned that Mr. Blankenship had "served a year in prison" and then played a clip of Mr. Blankenship speaking at the May 1, 2018, primary debate where he stated the following about the Justice Department:

> It was clear from the beginning to the end that it was a fake prosecution. I've had a little personal experience with the Department of Justice; they lie a lot, too. So, you know, it's -- it's one of those things where when you know what really goes on in the Department of Justice, you -- you wonder where -- where this country is going. It's really crazy.

ECF 884-27 at 12. Ms. Cupp then responded "You want to talk about the Justice Department, I know something about the Justice Department; that's because you're a convict, you're a felon. Oh, my God." Id. (emphasis added); ECF 14 ¶ 171. Ms. Cupp has never been an employee of CNN. See ECF 884-26 ¶ 2. Instead, her work as a CNN contributor and

commentator has been as an independent contractor. Id. at ¶¶ 1, 2. Her reference to Mr. Blankenship as a felon was an unscripted remark. Id. at ¶ 6.

On May 7, 2018, the host of CNN Tonight, Don Lemon, addressed several topics of national interest. Approximately forty (40) minutes into the show, Mr. Lemon introduced a segment about the West Virginia Republican primary, noting that President Trump opposed Mr. Blankenship's candidacy. See ECF 884-23 at 2. Mr. Lemon then introduced three commentators, including Joe Lockhart, a former White House Press Secretary and CNN political contributor.

During the discussion, Mr. Lockhart commented on President Trump's tweet urging voters to vote against Mr. Blankenship:

> What's striking here is in Trump's tweet this morning, he didn't say anything about Roy Moore and his personal problems. He didn't say don't vote for Blankenship because he went to jail, he's a convicted felon, he's a racist, and he's crazy. He said, vote for the other guys because we don't want to lose the seat.

Id. at 6 (emphasis added); ECF 14 ¶ 179. Like Ms. Cupp, Mr. Lockhart has never been an employee of CNN but instead is an independent contractor. See ECF 884-24 at ¶ 2. His remarks during the discussion were unscripted. Id. at ¶ 5.

On May 8, 2018,[8] Ms. Cupp again covered primary elections across the country on S.E. Cupp Unfiltered. See ECF 884-28. When discussing the West Virginia primary, Ms. Cupp and political analyst David Drucker, discussed Mr. Blankenship's candidacy. Id. Mr. Drucker stated that Mr. Blankenship was "found guilty of conspiracy to avoid mine safety standards in . . . federal court" after a mining accident killed twenty-nine coalminers. Id. at 4. Following a commercial break, Ms. Cupp commented, "[i]n case you missed it, a former coal baron and convicted felon is running for senate in West Virginia." Id. at 8; ECF 14 ¶ 174.

E. The Washington Post

On May 8, 2018, the Washington Post published an op-ed authored by Dana Milbank titled "Trump's election is no aberration." ECF 886-19; ECF 14 ¶ 189. The op-ed discusses Mr. Blankenship's run for Senate and first refers to him as "a disgraced coal baron who spent a year in jail after a mine explosion killed 29 workers." Id. The op-ed goes on to mention numerous Republican politicians, party leaders, and political groups before stating as follows:

> Now we have Blankenship, Roy Moore, Joe Arpaio and a proliferation of name-calling misfits and even felons on Republican ballots. They are monsters created by the GOP, or rather the power vacuum the GOP has become.

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[8] Mr. Blankenship's complaint mistakenly states this broadcast took place on May 7, 2018. See ECF 14 ¶ 174.

Id. (emphasis added). The online version of the op-ed includes a hyperlink on the phrase "even felons," linking to another article titled "Crimes are no longer a disqualification for Republican candidates." ECF 886-21 at 2; ECF 886-22. The hyperlinked article begins by discussing former New York Congressman, Michael Grimm, "a felon . . .". ECF 886-22 at 2. The hyperlinked article goes on to accurately report that Mr. Blankenship was convicted of a "misdemeanor . . . for conspiring to violate mine safety laws, which sent him to prison for a year." Id. at 4.

On July 25, 2018, the Washington Post published an online article authored by Jenna Johnson and Josh Dawsey titled "Republican primary candidates have one goal: Securing Trump's endorsement or denying it to an opponent." ECF 886-24. The same article was subsequently republished in print under the headline "GOP primary candidates joust for Trump's endorsement" on July 27, 2018. ECF 886-25. In the only paragraph about the West Virginia primary, the article states: "A day before West Virginia's Senate primary, Trump urged Republicans to vote for either Rep. Evan Jenkins or Attorney General Patrick Morrisey but not Blankenship, a former coal mine owner and felon." ECF 886-24; ECF 886-25; ECF 14 ¶¶ 218, 221. The Washington Post issued a correction to this article, both online and in print, after the filing of this lawsuit when it was made aware of the error. See ECF Nos. 886-28; 886-29.

On August 9, 2018, the Washington Post published an online blog post authored by Amber Phillips stating that:

> Three convicted felons have run or are running for office this year. Two have lost – in New York, former congressman Michael Grimm vying for his old seat, and in West Virginia, former coal baron Don Blankenship. Former Arizona sheriff, Joe Arpaio[9] is still in the running for Senate in Arizona, and he has been embraced by the White House. Trump even pardoned him.

ECF 886-30 (emphasis added); ECF 14 ¶ 221. Upon becoming aware of the error following the filing of this lawsuit, the Washington Post issued a correction to this story. See ECF 886-32.

F. American Broadcasting Companies, Inc.

On July 23, 2018, ABC News published an online article, authored by former ABC News reporter John Verhovek, titled "Despite 'sore loser' law, Don Blankenship trying third party bid for US Senate in West Virginia." See ECF 888-13. The article's lead sentence provides:

> Don Blankenship, the former coal baron and convicted felon who finished third in the West Virginia Republican Primary in May, is wading back into the state's U.S. Senate race, this time attempting filing paperwork to run as a member of the Constitution Party.

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[9] The court notes that "Mr. Arpaio's contempt of court conviction was only a misdemeanor, [not a felony,] and President Trump pardoned him before he was sentenced." Arpaio v. Zucker, 414 F. Supp. 3d 84, 87 n.1 (D.D.C. 2019).

Id. (emphasis added). The article goes on to explain that Mr. Blankenship "was convicted in 2015 for conspiracy to violate mine safety and health standards in the aftermath of the 2010 Upper Big Branch Mine disaster that resulted in the death of 29 miners."[10] Id.

The following morning, on July 24, 2021, a link to the article was posted from the ABC Politics Twitter account. See ECF 888-5 ¶¶ 13-15. In addition to a link to the article, the tweet also contained a slightly condensed version of the article's lead sentence: "Don Blankenship, the former coal baron and convicted felon, wades back into the state's U.S. Senate race, this time attempting to file paperwork to run as a member of the Constitution party." Id. at ¶ 17 (emphasis added). This same tweet was subsequently re-posted throughout the day on other ABC social media accounts, including the

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[10] In his response, Mr. Blankenship passively asserts that this sentence amounts to a defamatory statement by implication inasmuch as it strongly suggests that his "conviction was related to the deaths of the 29 miners." ECF 917 at 2. First, the court notes that while Mr. Blankenship's complaint generally alleged that "many of the statements were made in conjunction with reference to the mine disaster and this, had the additional effect, through inference, implication, innuendo and/or insinuation, of further defaming [him] by falsely attributing to him responsibility for murder," he never specifically identified this statement or made this assertion in regard to ABC. See ECF 14 ¶¶ 23, 215. Nonetheless, the court concludes that Mr. Blankenship has failed to demonstrate that this statement can be "reasonably read to impart the false innuendo" claimed. Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092-93 (4th Cir. 1993). The statement correctly states the crime of conviction, which occurred following the 2010 Upper Big Branch Mine disaster wherein 29 miners lost their lives.

ABC News Politics and the This Week Facebook pages, the This Week Twitter account, and the ABC World News Tonight Twitter account.[11] See id. ¶¶ 20-21.

Later that evening, Mr. Blankenship's campaign manager sent a screenshot of the ABC World News Tonight tweet via text message to Mr. Verhovek's former colleague, Meridith McGraw,[12] asking "Can you help me get them to correct this tweet?" ECF 888-48. Ms. McGraw immediately emailed Mr. Verhovek to advise him of the error, stating: "Just saw this tweet – Don Blankenship is not a convicted felon. He was found guilty of a misdemeanor charge … It's confusing because he was sent to federal prison for his misdemeanor charge. We should correct it!" ECF 888-22; see also ECF 888-6 ¶ 14.

Less than twenty-four hours after publication, Mr. Verhovek corrected the article to remove the "convicted felon" reference and added the following note:

> *Correction: An earlier version of this story stated that Don Blankenship is a convicted felon, which he is not. Blankenship was convicted of a misdemeanor charge for conspiring to violate federal mine safety laws. He was acquitted of*

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[11] The amended complaint only identifies the tweet posted by the ABC World News Tonight Twitter account. See ECF 14 ¶ 215.

[12] Ms. McGraw was ABC's reporter normally assigned to cover the West Virginia Senate race. See ECF 888-4 ¶ 10; ECF 888-6 ¶ 4, 9. Mr. Verhovek, however, was tasked with authoring the article at issue in Ms. McGraw's absence. See id.

> *felony charges. He served one year in federal prison.*

ECF 888-31; see also ECF 888-4 ¶ 45. Approximately an hour after the article was revised, all the Social Media posts had likewise been corrected, with the hyperlinks to the article accompanying these posts linking to the revised article. See ECF 888-5 ¶¶ 31-33l; ECF 888-4 ¶ 49. An internal memorandum drafted by the social media editor was subsequently circulated to inform others about Mr. Blankenship's conviction in efforts to prevent the error from reoccurring. See ECF 888-5 ¶ 35; ECF 888-44.

G. Fox News, LLC

Fox News operates Fox News Channel and Fox Business Network, which are twenty-four-hour cable news television networks. See ECF 14 ¶ 32. Mr. Blankenship avers in April and May of 2018, Fox News broadcasted six defamatory statements concerning him made by six on-air broadcasters.[13]

On April 25, 2018, Andrew Napolitano, retired judge of the Superior Court of New Jersey and a Senior Judicial Analyst with Fox News, appeared on the Fox News Channel program Outnumbered. See id. ¶ 16. During the broadcast, Judge Napolitano interrupted the host to explain the nature of Mr. Blankenship's conviction:

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[13] Mr. Blankenship named these broadcasters as individual defendants in his complaint. In its March 31, 2021, memorandum opinion and order, the court dismissed these individual defendants on personal jurisdiction grounds. See ECF 398.

> [HOST]: -- [Don Blankenship] has long been a very polarizing figure in West Virginia. He went to jail actually after a really tragic coal mining --
>
> [JUDGE] NAPOLITANO – he went to jail for manslaughter after people died.

ECF 890-8 at 10-11. That evening, Judge Napolitano received an email from a Fox News editor stating that Mr. Blankenship's campaign staff contacted him to inform Judge Napolitano that Mr. Blankenship was not convicted of manslaughter. See ECF 953 at 7; ECF 953-8 at 7.[14]

The next day, on April 26, 2018, Judge Napolitano received an email from his producer informing him that Mr. Blankenship was convicted of a misdemeanor for conspiring to willfully violate mine safety laws and was acquitted of the felony charges. ECF 890-19 at 2. That same date, Mr. Napolitano responded to the Fox News editor's email he received the previous day:

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[14] The court notes that Mr. Blankenship's response to Fox News' motion for summary judgment was due on June 7, 2021. See ECF 444. Mr. Blankenship timely filed his initial response on June 7, 2021. See ECF 912. On June 8, 2021, Mr. Blankenship filed an amended response. See ECF 924. Fox News timely replied on June 14, 2021. See ECF 940. On June 23, 2021, Mr. Blankenship, without explanation, filed a second amended response. See ECF 953. The second amended response appears to be identical to the first and contains the same number of exhibits. The only difference appears to be that some portions of the exhibits attached to the second amended response are highlighted. Fox News has not addressed the issue. The court proceeds by viewing Mr. Blankenship's June 23, 2021, submission as his operative response brief.

> I understand now that yesterday I mistakenly misstated the nature of Mr. Blankenship's lamentable conviction and failed to mention his acquittals. I will be happy to address this thoroughly and accurately [o]n air on Monday. I feel very badly about this; especially since I am fond of him and wish him well in his Senate race.

ECF 890-20 at 2. The Fox News editor then forwarded this response to Mr. Blankenship's campaign manager the same day. See id.

On the morning of the following Monday, April 30, 2018, the senior booking producer for the Fox News Channel program The Story with Martha MacCallum contacted Judge Napolitano's producer, inquiring whether Judge Napolitano had "pitches" for that evening's program. ECF 890-21 at 10. The producer further noted that the program's host, Martha MacCallum, planned on "cover[ing] the candidates" set to appear at the West Virginia Republican primary debate, which Ms. MacCallum later moderated. Id.; see also ECF 953-9 at 10. At Judge Napolitano's direction, his producer responded by pitching, among other things, that Judge Napolitano

> would love to explain the complex legal issues around Don Blankenship, one of the West Virginia senatorial candidates, who was unjustly prosecuted by the Obama DoJ over a coal mine disaster, and served time in federal prison.

ECF 890-21 at 9; see id. at 7. The program's senior booking producer, however, was interested in a

different pitch. See id. at 7, 9. Judge Napolitano's producer offered the same pitch to a producer for another program later the same morning, but he appears to have never received a definitive response. See id. at 11-12. Later that afternoon, Judge Napolitano's producer contacted the executive producer for the program Fox & Friends asking for a "favor":

> The Judge asks if he could correct the record on WV senate candidate Don Blankenship's legal record.
> He was unfairly prosecuted[.]
> He was properly acquitted of his charges[.]
> He never should have gone to jail.
> (The Judge could either do it as a segment or just a throwaway at the end of a segment.)

Id. at 13; see ECF No. 953-8 at 13-14. When the executive producer expressed interest in a different pitch, Judge Napolitano's producer replied, "[o]f course. . . But could you throw him a bone about Blankenship at the very end?" ECF 890-21 at 13. The record contains no response to this request.

On May 22, 2018, after the Republican primary election, Judge Napolitano appeared on the Fox News Channel program Your World with Neil Cavuto, hosted by Neil Cavuto where he explained the error immediately following Mr. Cavuto's interview with Mr. Blankenship. Mr. Napolitano explained:

> JUDGE NAPOLITANO: Let me say first that Don Blankenship is correct. I once inadvertently said on air that he was a convicted felon. He was not. He was acquitted of the charges, the felony

> charges against him. The only thing he was convicted of was a misdemeanor. The definition of a misdemeanor is the maximum penalty is one year or less. Definition [of] a felony is the maximum penalty is one year or more. He was convicted of the least of all the charges against him.
>
> MR. CAVUTO: So, just serving a year in jail doesn't make you a convicted felon?
>
> JUDGE NAPOLITANO: That's correct.

ECF 890-14 at 7-8.

On May 6, 2018, Fox News Chairman and CEO, Rupert Murdoch, sent the following email to Fox News Executives Suzanne Scott and Jay Wallace:

> Both Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but Sean and Laura dumping on him hard might save the day.

ECF 990-1. The following day, Mr. Wallace responded to the email stating "After a tweet free weekend, [President Trump]'s back to tee up WV . . . ". Id. at 9. Mr. Wallace's response was accompanied by a direct quote of President Trump's tweet urging West Virginia voters to vote for "Rep. Jenkins or A.G. Morrisey" and not Mr. Blankenship. Id.

Prior to the May 22, 2018, exchange between Mr. Cavuto and Judge Napolitano discussed above, on May 7, 2018, Mr. Cavuto made the following statement

when discussing the West Virginia Republican senate primary election during a segment of his program Cavuto Coast to Coast:

> The president [is] warning Republicans, you know what, we're going to lose West Virginia if Don Blankenship is allowed to win the primary and he does win the primary. Don Blankenship, of course, is arguing that he's the best qualified for this. Of course, he's a convicted felon.

ECF 890-9 at 18 (emphasis added). As previously mentioned, on May 22, 2018, after the election, Mr. Cavuto interviewed Mr. Blankenship on his program Your World with Neil Cavuto. See ECF 1059-6 at 6-9. The interview includes the following exchange:

> MR. BLANKENSHIP: [. . .] And it's very disappointing that the news media and this network as well continues to tell people I'm a felon, which – I've never been convicted of a felony. I'm probably less likely to be a felon than anyone, given that I was investigated for four and a half years and they couldn't find anything.
>
> MR. CAVUTO: So what are you if you've served time in jail?
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> MR. BLANKENSHIP: A misdemeanor. The only misdemeanor to serve time at a felon prison in California. So I think that should tell us something as well when they're sending misdemeanors to prison so they can't continue to communicate for a year is – is pretty telling.

ECF 1059-6 at 9.

On May 7, 2018, John Layfield, a Fox News commentator, appeared on the Fox Business Network program The Evening Edit as a guest host. See ECF 14 ¶ 168; ECF 890-16 ¶ 2. During a discussion about the West Virginia Senate primary election, Mr. Layfield stated the following about Mr. Blankenship:

> Don Blankenship to those viewers who aren't aware . . . spent a year in prison because of a mine accident where he was accused and convicted of safety violations which 29 people were killed . . . but right now Blankenship is actually leading in the polls by some polls that have come out. Thomas Massie, the congressman, says that it shows that Americans are just going to vote for the craziest SOB out there. Is this Americans who are just voting for the craziest person out there? Can this happen? We got a felon who has got a probation officer who could end up in congress.

ECF 890-10 at 8 (emphasis added); see also ECF 890-16 at ¶ 3.

On May 7, 2018, Bradley Blakeman, a former staff member of President George W. Bush's administration, appeared as a guest on The Evening Edit program guest-hosted by Mr. Layfield discussed above. See ECF 14 ¶ 79; ECF 890-10 at 5-6; ECF 890-15 ¶ 2. In response to Mr. Layfield's comment that President Trump had recently urged West Virginia voters to "reject Don Blankenship," Mr. Blakeman responded:

> I think that's the right thing to do. The president has to stand up for what's right. We

> can't have the standard bearer of our party running for a statewide office and the guy's a felon.

ECF 890-10 at 7 (emphasis added); see also ECF 890-15 ¶ 3.

On May 8, 2018, Stephanie Hamill appeared on the Fox Business Program Making Money.[15] See ECF 14 ¶ 167; ECF 890-17 ¶ 2. When asked to comment on Mr. Blankenship's campaign Ms. Hamill stated:

> Now of course, [Mr. Blankenship's] record is a little bit sketchy and it might be difficult for him to actually win a general election because of his issue with being a convicted felon . . . And, of course, he explains his story saying that it was big government [that] went after him and that this conviction was an indictment on the miners themselves.

ECF 890-11 at 15-16 (emphasis added).

On May 9, 2018, the day after the West Virginia primary election, Elizabeth MacDonald, host of the Fox News Business Network program The Evening Edit, discussed Mr. Blankenship's campaign. See ECF 14 ¶ 16; ECF 890-18 ¶ 2. During a portion of the segment,

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[15] Mr. Blankenship's complaint, Ms. Hamill's affidavit attached to Fox News' motion, and Fox News' briefing all state that the broadcast occurred on May 7, 2018. ECF 14 ¶ 167; ECF 890-17 ¶ 2; ECF 891 at 7. The court notes, however, that the transcript of the broadcast attached to Fox News' motion appears to demonstrate that the segment was aired within about an hour before the polls closed on May 8, 2018. See ECF 890-11 at 15.

Ms. MacDonald quoted a story for her guest commentators that appeared in The Washington Post, which stated that "[j]ust because Blankenship lost does not mean he does not represent the Republicans." ECF 890-12 at 8. Thereafter, Ms. MacDonald commented "the implication here . . . is that a racist felon represents the Republican party." Id. at 8-9 (emphasis added); see also ECF 890-18 ¶ 3.

H. Eli Lehrer

Mr. Lehrer is the president of the R Street Institute, "a nonprofit, nonpartisan, public policy research organization [that he] co-founded." ECF 898-2; see ECF 950 at 13. Mr. Lehrer, who has never been employed by The Charleston Gazette-Mail, wrote an op-ed as a "contributing columnist" that the Gazette-Mail published in its newspaper on May 25, 2018, some two and a half weeks after the Republican primary election. See ECF 950-1 at 2. The op-ed's lead sentence states:

> Former coal executive, convicted felon and self-described "Trumpier-than-Trump" West Virginia candidate Don Blankenship wants to remain in his U.S. Senate race after losing the Republican primary.

Id. (emphasis added). The op-ed goes on to describe West Virginia's so-called "sore-loser" law, which prohibits the name of a candidate who lost in a party's primary election from appearing on the general election ballot as an independent or as another party's nominee for the same office. See id. Mr. Lehrer contends in the op-ed that such laws should be repealed and that Mr.

Blankenship's name should be allowed to appear on the ballot in the general election. See id.

Less than twenty-four-hours after publication, a correction was issued in the Charleston Gazette-Mail's newspaper, which stated:

> A column by Eli Lehrer on the Daily Mail opinion page in Friday's Gazette-Mail incorrectly characterized the criminal conviction of former Massey Energy head Don Blankenship. He was convicted of a misdemeanor.

ECF 898-3 at 3; see ECF 898-2 ¶ 9.

I. H.D. Media, LLC

HD Media is the publisher of the Charleston Gazette-Mail newspaper, "the only daily . . . newspaper in Charleston, West Virginia." See ECF 14 ¶ 71. In March 2018, HD Media began publishing the newspaper after it purchased assets "of the newspaper's former publisher in an auction that was part of a bankruptcy proceeding in the Southern District of West Virginia." ECF 946 at 4; see also ECF 945-3 ¶ 2. Like the previous publisher, HD Media "published two physically and editorially separate opinion pages in the Charleston Gazette-Mail, one leaning left (the Gazette opinion page), and the other leaning right (the Daily Mail opinion page)." Id.

The Daily Mail opinion page "was autonomous and had a separate editor from the Gazette opinion page and the rest of the newspaper." Id. Kelly Merritt was HD Media's editor of the Daily Mail opinion page section at all times relevant herein. Id.; see also

ECF 945-3 ¶ 1. Mr. Merritt was responsible for the review and selection of content published on the Daily Mail opinion page. Id.

Following the May 2018 primary election in West Virginia, Mr. Merritt received an unsolicited opinion column authored by Eli Lehrer, President of the R Street Institute in Washington, DC, containing the alleged defamatory statement as previously discussed. Id.; see also 945-3 at ¶ 3. On May 25, 2018, after Mr. Merritt chose Mr. Lehrer's op-ed for publication, it was published on the Daily Mail opinion page of the Charleston Gazette-Mail newspaper. Id.

On the morning Mr. Lehrer's op-ed was published, the mischaracterization of Mr. Blankenship's conviction was caught by the Gazette-Mail's executive editor who had not previously seen the opinion column. See ECF 945-3 ¶ 10. Corrections on the Gazette-Mail's website, as set forth above, and to the next day's print edition of the paper were promptly made. See id. The Gazette-Mail's executive editor sent an email to Mr. Merritt and other individuals explaining the error and asked that the mistake not be made again. See id. at 3-4.

J. Mediaite and Tamar Auber

Mediaite is a news and opinion website, which covers "politics and entertainment in the media industry." ECF 14 ¶ 49. Tamar Auber, a New York resident, worked as a writer for Mediaite at all times relevant herein. ECF 900-1 ¶¶ 1,2. On May 3, 2018, Mediaite published an article authored by Tamar Auber titled: "WV Senate Candidate Defends

Horrifying Campaign Ad: 'There's No Mention of a Race' Like 'Negro.'" See ECF 948-1. The article discusses Mr. Blankenship's response to backlash received regarding his campaign advertisement aimed at Senator Mitch McConnell and his comments referring to Senator McConnell's wife's family as a "China Family" and Senator McConnell's father-in-law as a "Chinaperson." Id. The article goes on to state that "[t]he convicted felon turned Senate hopeful then tried to defend the whole thing by claiming he was an 'Americanperson' during the Fox News debate on Tuesday, adding there are also 'Koreanpersons' and 'Africanpersons.'" Id. (emphasis added); see also ECF 14 ¶ 164.

K. Griffin Connolly and FiscalNote

FiscalNote is an "information services company" that "connect[s] people and organizations to government." See ECF 903-1 at 2. It owns two news publications, including Roll Call, a newspaper and website published and based in Washington, D.C. See id.; see also ECF 14 ¶ 51; ECF 405 ¶ 51; ECF 947 at 6 n.1. On May 7, 2018, the day before the Republican primary election, Roll Call published an article titled "Blankenship Blames Establishment for 'Misinforming' Trump." ECF 903-4 at 2; see also ECF 947 at 10 (denoting the article found at ECF 903-4 as the article at issue). The lead sentence of the article states:

> West Virginia GOP Senate candidate Don Blankenship suggested that establishment Republicans are "misinforming" President Donald Trump and telling him to oppose his campaign "because they do not want me to be in

> the U.S. Senate and promote the president's agenda," the convicted felon and businessman wrote Monday morning on Facebook.

ECF 903-4 at 3 (emphasis added). The remainder of the article discusses comments made by Mr. Blankenship during his campaign, as well as President Trump's efforts to back Mr. Blankenship's Republican opponents in the primary election. See id. at 3-5. The penultimate sentence of the article states that Mr. Blankenship "was convicted of conspiracy to violate federal mine safety laws after 29 miners were killed in the 2010 Upper Big Branch Mine disaster." Id. at 5.

The article indicates that it was "[p]osted" by Eric Garcia, a staff writer for Roll Call, and that Griffin Connolly, another staff writer, "contributed to th[e] report." Id. at 2, 5; see also ECF 903-3 ¶¶ 2, 6; ECF 14 ¶ 101; ECF 405 ¶ 101. In an affidavit, Mr. Garcia states that he authored the article and that, despite the article's indication to the contrary, Mr. Connolly was not involved in writing or publishing the article. See ECF 903-3 ¶¶ 3, 6; see also ECF 903-5 ¶ 3.

Although the amended complaint alleges that Mr. Connolly authored the article and thus names him as a defendant, see ECF 14 ¶ 175, Mr. Blankenship, in his summary judgment briefing, does not appear to dispute that Mr. Connolly was not involved in the article's publication. See ECF 947 at 6. Instead, he appears to concede that the article was authored by Mr. Garcia and focuses solely on Mr. Garcia's state of mind in assessing the actual malice element of his defamation claim. See id. at 6, 9-11. Inasmuch as Mr. Blankenship does not contest the assertion that Mr. Connolly should

be awarded summary judgment on the ground that he was not involved in publishing the article at issue, the court concludes that Mr. Connolly is entitled to summary judgment on this basis.

L. Causes of Action

Mr. Blankenship's complaint asserts four claims, though, somewhat confusingly, lists them in two counts. See ECF 14 ¶¶ 222-50. In all, Mr. Blankenship asserts claims for (1) defamation, (2) conspiracy to defame, (3) false light invasion of privacy, and (4) conspiracy to commit false light invasion of privacy. See id.

While the complaint's headings suggest that Mr. Blankenship brings all four claims against all named defendants, a closer reading demonstrates that the conspiracy claims are asserted against a subset of the named defendants. These defendants include the following, all of whom are now dismissed: 35th Inc. ("35th PAC"[16]), the National Republican Senatorial Committee (the "NRSC"), and Kevin McLaughlin, as well as unidentified "'Conspiracy Does'",[17] whom,

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[16] Although the caption of the amended complaint identifies this defendant as "35th Inc.," it is later referred to throughout the body of the complaint as "35th PAC." See ECF 14 at 1, 15, 35, 55. By separate memorandum opinion and order, entered this same date, the court granted 35th PAC's motion for summary judgment in its entirety.

[17] By separate order entered this same date, the court has dismissed the claims against the unidentified Doe defendants, including those whom the complaint designates as the Conspiracy Does.

together, the complaint dubs the "'Conspiracy Defendants.'"[18] Id. ¶¶ 233-36, 246-49. As to one other defendant, Fox News, the parties dispute whether the complaint adequately asserts the conspiracy claims against it. Although the complaint fails to include Fox News in its reference to the "Conspiracy Defendants", the court concludes -- in an abundance of caution -- that the complaint sets forth the slimmest of factual allegations sufficiently alleging its involvement in the conspiracy. Indeed, the complaint alleges the following regarding Fox News' alleged participation in the civil conspiracies:

> [Senate Majority Leader Mitch] McConnell, set in motion the wheels of a clandestine campaign – including a 'menu of items' – to destroy Mr. Blankenship and blatantly interfere in a federal election, using among other things, the [NRSC], and his contacts in the establishment media, including Fox News in particular, to do McConnell's (and in turn, the NRSC's) bidding.

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[18] The claims against the NRSC and Mr. McLaughlin have been dismissed. See ECF 694; ECF 398 at 52, 78. Following the court's dismissal of Mr. McLaughlin on personal jurisdiction grounds, Mr. Blankenship instituted a nearly identical action against him in the Eastern District of Virginia. See Blankenship v. McLaughlin, No. 1:20-cv-00429-LMB-IDD (E.D. Va.), ECF 91. On November 13, 2020, Mr. McLaughlin notified Mr. Blankenship of his intent to seek Fed. R. Civ. P. 11 sanctions against him on the ground that Mr. Blankenship's interrogatory responses demonstrated he had no factual basis for pursuing his claims against Mr. McLaughlin, unless Mr. Blankenship agreed to dismiss his claims. See ECF 802-1 (sealed). On December 11, 2020, Mr. Blankenship and Mr. McLaughlin stipulated to dismissal of the claims against Mr. McLaughlin with prejudice. See McLaughlin, ECF No. 91.

ECF 14 ¶ 4 (emphasis added). The complaint goes on to allege that "multiple news personalities, lubricated by their disdain for Mr. Blankenship, and some at the direction of McConnell and other GOP leaders, falsely called Mr. Blankenship a 'felon' and 'convicted felon'" and that "[t]hese statements were made on Fox News and in other venues by conservative commentators." Id. ¶ 21 (emphasis added). Reading these two paragraphs together, it appears Mr. Blankenship has sufficiently alleged that, at the direction of Senator McConnell, Fox News participated in a "clandestine campaign" to defame and place Mr. Blankenship in a false light by falsely referring to him as a "felon" and "convicted felon" on air by its conservative commentators.

Moreover, throughout this litigation, Mr. Blankenship and Fox News have engaged in numerous discovery disputes regarding the relevance of certain document production requests as related to Mr. Blankenship's conspiracy claims. See ECF Nos. 589, 919, 974, 985. The fact that the conspiracy claims, and the discovery related thereto, have been at issue throughout this case demonstrates that Fox News has been on notice of the conspiracy claims and Mr. Blankenship's persistence in pursuing the same. Further, the parties have adequately addressed the conspiracy claims in their respective summary judgment briefings.

While Mr. Blankenship could have and should have taken greater care in his complaint to assert the conspiracy claims against Fox News more clearly, the court finds that these factual allegations are sufficient to provide Fox News fair notice of the conspiracy claims

and the grounds upon which they rest. See Wright v. North Carolina, 787 F.3d 256, 263 (4th Cir. 2015) (noting "while the complaint 'must contain sufficient facts to state a claim that is plausible on its face,' it nevertheless 'need only given the defendant fair notice of what the claim is and the grounds upon which it rests.'") (quoting E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011)). Accordingly, the court concludes that the conspiracy claims are properly asserted against Fox News.

II. Governing Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In deciding a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650, 651, 657 (2014) (per curiam).

III. Defamation

Defamation is "[a] false written or oral statement that damages another's reputation." Pritt v. Republican

Nat. Comm., 557 S.E.2d 853, n.12 (W. Va. 2001) (quoting Black's Law Dictionary 427 (7th ed. 1999)).[19]

West Virginia law identifies three types of plaintiffs in defamation cases: (1) public officials and candidates for public office, (2) public figures, and (3) private individuals. See Syl. Pt. 10, Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 564 (W. Va. 1992); see generally Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W. Va. 2003) (discussing types of public figures in defamation suits). The first step in assessing a claim for defamation is to determine whether the plaintiff is a private individual or is instead a candidate for public office, a public official, or a public figure. See Zsigray v. Langman, 842 S.E.2d 716, 722 (W. Va. 2020). Mr. Blankenship does not dispute that he qualifies as both a candidate for public office and a public figure in this action.[20] See, e.g., ECF 953 at 14. While some of the alleged defamatory statements at issue came after the conclusion of the primary election -- the last of such statements being from the Washington Post on August 9, 2018 -- the court finds that Mr. Blankenship qualified as a candidate for public office through that

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[19] None of the parties dispute that West Virginia law governs this action. See, e.g., ECF 891 at 11 n.1.

[20] Based on the allegations in the complaint, the court previously determined that Mr. Blankenship qualifies as a candidate for public office and "may also qualify as a public figure in West Virginia based on his 'prominence and notoriety'". See ECF 398 at 17 (citing State ex rel. Suriano v. Gaughan, 480 S.E.2d 548, 556 (W. Va. 1996)).

time given his intention to run as the Constitution Party's candidate for the United States Senate.[21]

As Mr. Blankenship concedes, his notoriety in the state of West Virginia, his pervasive involvement in the national political arena, and the extensive national media attention he has received as set forth in detail above make clear that he also qualifies as a public figure. See Wilson, 588 S.E.2d at 205 (explaining that an individual's "general fame or notoriety in the state and pervasive involvement in the affairs of society" renders that individual an "all-purpose public figure" in a defamation action.). Regardless of whether Mr. Blankenship is referred to as a candidate for public office or public figure, the First Amendment protections are the same for each. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) (noting the test set forth in New York Times v. Sullivan applies to both "criticism of 'public figures' as well as 'public officials.'"); see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) (noting that it "might be preferable to categorize a candidate for [public office] as a 'public figure,'" as opposed to a public official, "if for no other reason than to avoid straining the common meaning of words. But . . . it is abundantly clear that, whichever term is applied, publications concerning candidates [for public office] must be accorded at least as much protection

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[21] The Supreme Court of Appeals of West Virginia did not reject Mr. Blankenship's attempt to run as the Constitution Party's candidate until August 29, 2018. See State ex rel. Blankenship v. Warner, 825 S.E.2d 309, 312 n.1 (W. Va. 2018). The court later issued its written opinion detailing its decision on October 5, 2018. Id.

under the First and Fourteenth Amendments as those concerning occupants of public office.").

To recover in a defamation action, a plaintiff who qualifies as a candidate for public office must prove that:

> (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

Syl. Pt. 5, Chafin v. Gibson, 578 S.E.2d 361, 363 (W. Va. 2003) (per curiam) (emphasis omitted) (quoting Syl. Pt. 1, Hinerman, 423 S.E.2d at 563); accord Syl. Pt. 7, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (setting forth nearly identical elements in a defamation action involving a limited purpose public figure). Further, the Supreme Court of Appeals of West Virginia has held that, to sustain a defamation action, a plaintiff who qualifies as a candidate for public office must also prove that "the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syl. Pt. 4, Chafin, 578 S.E.2d at 363 (quoting Syl. Pt. 1, Sprouse v. Clay Commc'n Inc., 211 S.E.2d 674, 679 (1975)); accord Syl. Pt. 6, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (noting a limited purpose public figure must also prove

a publisher's intent to injure). A plaintiff who qualifies as a candidate for public office must prove each of the elements of his claim by clear and convincing evidence. See Chafin, 578 S.E.2d at 366-67; Pritt, 557 S.E.2d at 862; Hinerman, 423 S.E.2d at 572-73.

The defendants contend that Mr. Blankenship's defamation claims fail inasmuch as Mr. Blankenship has failed to produce clear and convincing evidence demonstrating: (1) actual malice (2) material falsity of the alleged defamatory statements; and (3) an intent to injure.[22]

A. Defamatory Statement

"A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syl. Pt. 8, Pritt, 557 S.E.2d at 855 (quoting Syl. Pt. 4, Long v. Egnor, 346 S.E.2d 778 (W. Va. 1986)). In making this determination, the court "must also consider whether the allegedly defamatory statements could be construed as statements of opinion" inasmuch as an opinion "which does not contain a provably false assertion of fact is entitled to full constitutional protection." Id. at 861 (internal citations omitted). A statement may be described as defamatory "if it tends so to harm the reputation of another as to lower him in the estimation

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[22] A majority of the defendants further contend that the defamation claims fail inasmuch as Mr. Blankenship is unable to demonstrate that he suffered damages attributable to the alleged defamatory statements. See, e.g., ECF 885 at 23; ECF 887 at 24; ECF 889 at 25; ECF 891 at 26; ECF 899 at 16; ECF 904 at 11; ECF 946 at 18.

of the community or to deter third persons from associating or dealing with him." Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 77 (W. Va. 1983) (citing Restatement (Second) of Torts § 559 (1977)).

Under West Virginia law, statements falsely charging an individual with the commission of any crime, whether a felony or misdemeanor, are actionable as defamation per se. See Milan v. Long, 88 S.E. 618, 619 (W. Va. 1916); see also Mauck v. City of Martinsburg, 280 S.E.2d 216, 219 n.3 (W. Va. 1981) ("At common law, defamation per se includes . . . imputations of a crime of moral turpitude"); Colorado v. Gazette Pub. Co., 145 S.E. 751, 753 (W. Va. 1928) ("Any printed or written publication imputing to another a crime or moral delinquency is actionable per se, without proof of special damages."); Pritt, 557 S.E.2d at 857 n.4 (recognizing defamation per se means "[a] statement that is defamatory in and of itself and is not capable of an innocent meaning.") (quoting Black's Law Dictionary 427 (7th ed. 1999)).

In its March 31, 2020, memorandum opinion and order, the court concluded that the challenged statements are capable of defamatory meaning "because they reflect shame and disgrace" upon Mr. Blankenship. Blankenship v. Napolitano, 451 F. Supp. 596, 617 (2020); see also ECF 398 at 18-20. The court further concluded that the statements "may also be considered defamatory per se because they impute a felony conviction." Id. To the extent any of the statements could be considered opinions, the court concluded "they are based on a 'provably false assertion of fact' and thus are not absolutely protected under the

First Amendment." Id. The court incorporates these previous findings herein and concludes that the challenged statements are not only capable of defamatory meaning but constitute defamation per se as a matter of law.[23] The first element of Mr. Blankenship's defamation claims is thus satisfied.

B. Actual Malice

To satisfy the essential elements of a defamation cause of action, a plaintiff who qualifies as a candidate for public office must prove "actual malice" on the part of the publisher; that is, that the publisher made the defamatory statement "'with knowledge that the statement was false or with reckless disregard of whether it was false or not.'" Chafin, 578 S.E.2d at 366 (brackets omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

The actual malice standard derives from the United States Supreme Court's decision in Sullivan and its progeny, which, as recognized by the Supreme Court of Appeals of West Virginia, "placed a [F]irst [A]mendment, free speech gloss upon all prior law of defamation." Havalunch, Inc. v. Mazza, 294 S.E.2d 70,

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[23] The court recognizes that Mr. Blankenship was convicted of a misdemeanor offense, which amounts to a criminal conviction. Nonetheless, inasmuch as "a felony conviction carries significantly greater legal consequences than a misdemeanor does," the court concludes the per se rule is applicable. Myers v. The Telegraph, 332 Ill.App.3d 917, 773 N.E.2d 192, 197 (2002) (concluding the defamation per se rule should still apply given the "little, if any, practical difference between falsely accusing a person of committing a crime and falsely attributing a felony conviction to a person who pleaded guilty only to a misdemeanor.")

73 (W. Va. 1983); see id. (noting that First Amendment concerns and concomitant protections provided by the actual malice standard, are at their "strongest" when the statement at issue concerns "a public official or candidate for office because of the need for full, robust, and unfettered public discussion of persons holding or aspiring to offices of public trust."). Thus, "'application of the state law of defamation' is limited . . . by the First Amendment," CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 293 (4th Cir. 2008) (quoting Milkovich v. Loarin Journal Co., 497 U.S. 1, 14 (1990)), and the court applies federal law in assessing the element of actual malice, see Berisha v. Lawson, 973 F.3d 1304, 1314 n.6 (11th Cir. 2020).[24]

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[24] Mr. Blankenship notes that he believes that the court "is not, and should not be[,] bound by the limits of New York Times Co. v. Sullivan in the present circumstances." ECF 905 at 10 n.4; ECF 948 at 6 n.3; ECF 965 at 9 n.5. In support, he cites to a self-signed statement that he attached to his response brief regarding defendant Fox News' motion for summary judgment, wherein he generally asserts that the heightened standards imposed by Sullivan and its progeny on all plaintiffs who qualify as public figures is not in keeping with the First Amendment's free-speech protections. See ECF 953-20. It is unclear whether this statement, which is tantamount to a pro se legal brief signed by a represented party, is properly submitted. See, e.g., McCulloch v. Velez, 364 F.3d 1, 5 (1st Cir. 2004) (discussing hybrid representation). Regardless, although Sullivan has been subject to recent criticism and calls for reconsideration, see Berisha v. Lawson, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from denial of certiorari); id. at 2425 (Gorsuch, J., dissenting from denial of certiorari); Tah v. Global Witness Publ'g, Inc., 991 F.3d 231, 243 (D.C. Cir. 2021) (Silberman, J., dissenting in part), it remains binding precedent that the court is obliged to follow.

"'Actual malice is a subjective standard.'" Fairfax v. CBS Corp., 2 F.4th 286, 293 (4th Cir. 2021) (alteration omitted) (quoting Reuber v. Food Chem. News, Inc., 925 F.2d 703, 714 (4th Cir. 1991) (en banc)). Thus, "[t]he actual malice standard requires that 'the defendant had a particular, subjective state of mind at the time the statements were made.'" Id. at 295 (quoting Horne v. WTVR, LLC, 893 F.3d 201, 211 (4th Cir. 2018)). Accordingly, "[a] plaintiff must prove that the defendant published the statement despite actually knowing it was false or harboring 'a high degree of awareness of probable falsity.'" Id. at 293 (ellipsis omitted) (quoting Reuber, 925 F.2d at 714). To show reckless disregard for the truth, then, "a plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of his publication.'" Id. (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

A plaintiff who is a candidate for public office bears the heavy burden of proving actual malice by clear and convincing evidence. See CACI, 536 F.3d at 293 (citing Carr v. Forbes, Inc., 259 F.3d 273, 282 (4th Cir. 2001)); see also Carr, 259 F.3d at 282 (4th Cir. 2001) ("Establishing actual malice is no easy task . . . ."). At the summary judgment stage, the appropriate inquiry for the court is "whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." Anderson, 477 U.S. at 255-56; see Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.").

As a threshold matter, Mr. Blankenship contends that "the issue of 'actual malice' is rarely appropriate for summary judgment because it involves determinations with respect to the defendant[s'] state of mind." See, e.g., ECF 905 at 11-12. He further asserts it is inappropriate for the court to address actual malice at this stage inasmuch as the existence of the same hinges on the credibility of the authors, which is a subjective evaluation for the jury. See id. In support of this contention, Mr. Blankenship cites dicta from a footnote of the Supreme Court's decision in Hutchison v. Proxmire, 443 U.S. 111 (1979), for the proposition that the issue of actual malice "does not readily lend itself to summary disposition" because it "calls a defendant's state of mind into question." 443 U.S. at 120 n.9. He goes on to cite numerous cases in which courts have denied summary judgment in defamation actions where genuine issues of material fact existed as to whether the defendant acted with actual malice. See, e.g., ECF 905 at 11-12.

Mr. Blankenship's contention is unavailing when squared with the controlling precedent on this issue. In Anderson, the Supreme Court held that

> the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. . . . . [W]here the factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff

> has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. at 255-56. The standard articulated in Anderson clearly contemplates that summary judgment is an appropriate procedure for addressing actual malice. Indeed, the Court in Anderson expressly rejected the argument that a defendant in a public figure defamation action "should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue." Id. at 256.[25] Instead, the Court explained, if the defendant shows there is no genuine factual dispute as to actual malice, "the plaintiff is not . . . relieved of his own burden of producing in turn evidence that would support a jury verdict." Id. Thus, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment," and "[t]his is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." Id. at 257.

The upshot of Anderson, then, is that the summary judgment procedure is not foreclosed simply because

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[25] The Court in Anderson explained that the Court's "statement in Hutchinson . . . that proof of actual malice 'does not readily lend itself to summary disposition' was simply an acknowledgment of [the Court's] general reluctance to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." 447 U.S. at 256 n.7 (internal citations and quotation marks omitted).

the actual malice inquiry involves evidence pertaining to a defendant's state of mind and that summary disposition on the actual malice issue is neither favored nor disfavored. As a descriptive matter, however, given the heightened showing required of public figure plaintiffs, "[s]ummary judgment for the publisher is quite often appropriate," not necessarily because it is favored,[26] but "because of the difficulty a public [figure] has in showing 'actual malice.'" St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1318 (3d Cir. 1994); see also CACI, 536 F.3d at 293 (explaining that "establishing actual malice is no easy task" at the summary judgment stage (brackets and quotation marks omitted)). Accordingly, the court rejects Mr. Blankenship's contention that the issue of actual malice should not be considered at this stage.

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[26] But see Kahl v. Bureau of Nat'l Affairs, Inc., 856 F.3d 106, 108 (D.C. Cir. 2017) (Kavanaugh, J.) ("To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits."); id. at 116 ("Summary proceedings 'are essential in the First Amendment area because if a suit entails long and expensive litigation, then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.'" (quoting Farrah v. Esquire Mag., 736 F.3d 528, 534 (D.C. Cir. 2013))). The decision in Kahl comes at the summary judgment stage, wherein the appellate court reversed the district court's decision denying the defendant's motion for summary judgment given the lack of evidence that the defendant acted with actual malice. Id. at 118.

1. N&G, Eli Lehrer, Mediaite, Tamar Auber, FiscalNote, and HD Media

These six defendants first contend that Mr. Blankenship is unable to produce evidence that the authors of the articles -- or those responsible for their publication -- knew that the references to Mr. Blankenship as a felon were false or were made in reckless disregard for the truth at the time of publication. The defendants rely on various affidavits submitted by the article's authors or publishers in support of this assertion.

For instance, N&G relies on the affidavit of its former executive producer, Wayne Nelson, wherein he avers he was involved in the editorial process and publication of N&G's May 7, 2018, article and that he was unaware that Mr. Blankenship was convicted of a misdemeanor offense at the time of publication. See ECF 880-1 ¶¶ 2, 4-5. FiscalNote points to Mr. Garcia's affidavit, wherein he states that he authored the article at issue and, at the time of publication, was unaware that Mr. Blankenship had been convicted of a misdemeanor rather than a felony nor did he doubt that the felony reference was accurate. See ECF 903-3 ¶¶ 3, 5. Mr. Lehrer and Ms. Auber likewise state in their affidavits that at the time their articles were published, they were unaware that Mr. Blankenship had been convicted of a misdemeanor and did not doubt the accuracy of their references to him as a felon. See ECF 898-2 ¶ 5; ECF 900-1 ¶¶ 4, 7.

HD Media relies on Mr. Merritt's affidavit, the individual responsible for the Gazette-Mail's

publication of Mr. Lehrer's op-ed.[27] Mr. Merritt avers he received the unsolicited op-ed via email and, being aware of the R Street Institute and the publication of other opinion columns authored by Mr. Lehrer, he had no reason to question the accuracy of the content they authored. See ECF 945-5 ¶¶ 3, 5. Mr. Merritt further states he did not realize or believe the op-ed's characterization of Mr. Blankenship's conviction as a felon was inaccurate or false at the time of publication. See id. ¶ 6. These six defendants contend that Mr. Blankenship has produced no evidence to contradict these affidavits.

These six defendants further assert that the authors' beliefs that Mr. Blankenship was a felon were reasonable under the circumstances. FiscalNote

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[27] The court notes that "the state of mind required for actual malice [has] to be brought home to the persons in the [defendant's] organization having responsibility for the publication[.]" Sullivan, 376 U.S. at 287-88. Based on the evidence presented, Mr. Merritt was the sole individual at HD Media responsible for the op-ed's publication. See ECF 945-3, ¶ 4. In his response brief, Mr. Blankenship appears to contend that in addition to Mr. Merritt, other "staff members" of HD Media bear responsibility for the publication of the alleged defamatory statement. Mr. Blankenship asserts that "the persons having responsibility for calling [him] a 'convicted felon' include [HD Media], Charleston Gazette-Mail, and their staff members, including but not limited to, Kelly [Merritt], [Eli] Lehrer (the author of the Statement), as well as any others involved in writing, editing, and/or publication of the Statement." ECF 965 at 6. Mr. Blankenship, however, has provided no evidence identifying these other "staff members." Further, the court notes that the record evidence demonstrates that Mr. Lehrer, the op-ed's author, was never an employee of HD Media nor did he or the R Street Institute receive compensation for the op-ed. See ECF 945-3 ¶ 7.

references Mr. Garcia's affidavit, which states that when drafting the article, he relied on numerous other news publications that referred to Mr. Blankenship as a felon.[28] See ECF 904 at 9, 15 (citing ECF 903-3 ¶ 4). Mr. Lehrer likewise avers that he relied on numerous media reports that Mr. Blankenship was a felon when he drafted his article. See ECF 899 at 5-11, 15 (citing ECF 898-2 ¶ 5). Specifically, Mr. Lehrer notes fifty-six instances, as identified in Mr. Blankenship's own complaint, of media reports referring to Mr. Blankenship as a felon prior to the publication of Mr. Lehrer's May 25, 2018, article. See ECF 899 at 7-10. The defendants also contend that the reasonableness of the authors' beliefs that Mr. Blankenship was a felon is further supported by the serious nature of his crime and the one-year prison sentence imposed upon him. See ECF 881 at 5-6; ECF 899 at 14; ECF 904 at 14-15; ECF 946 at 13-14.

Mr. Blankenship responds that the authors' violations of professional standards and their failure to investigate the nature of his conviction demonstrate actual malice. Regarding the N&G article and the Mediaite article written by Tamar Auber, Mr. Blankenship asserts that the articles' animus towards him also demonstrates actual malice. The court will address each contention in turn.

First, with respect to N&G, FiscalNote, Mediaite and HD Media, Mr. Blankenship contends that the lack

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[28] In his briefing, Mr. Blankenship does not dispute that numerous news publications referred to him as a felon prior to the publication of Mr. Garcia's May 7, 2018, article.

of internal policies regarding verifying publications and reporting on criminal charges amounts to actual malice. See, e.g., ECF 905 at 6, 14; ECF 947 at 14; ECF 948 at 14-16; ECF 965 at 14. Specifically, Mr. Blankenship asserts the failure to maintain such policies is a departure from accepted journalistic standards. As to FiscalNote, Mr. Blankenship points to the "Mission" on Roll Call's website, which states that it has "earned a reputation for delivering comprehensive, accurate, and objective congressional reporting." ECF 947 at 14 (emphasis omitted) (citing https://www.rollcall.com/about).[29] He contends that the FiscalNote article authored by Mr. Garcia referencing him as a felon constitutes a violation of this standard and a finding of actual malice.

With respect to Mr. Lehrer, Mr. Blankenship contends that his position as the president of a research institute subjects him to a higher standard in conducting research. Mr. Blankenship further asserts that Mr. Lehrer's failure to locate and use publications that correctly identified him as a misdemeanant demonstrates "an injudicious research methodology," amounting to "an extreme departure from professional publication standards." ECF 950 at 13-15.

Mr. Blankenship, however, has failed to identify any putative journalistic, research, or other professional standard, nor has he attempted to

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[29] Mr. Blankenship provides no citation to the record for this quotation from Roll Call's website but merely cites the website URL address. While there is reason to question whether this evidence is properly submitted, the court will assume for purposes of this memorandum opinion and order that it may be considered.

substantiate the existence or contours of any such standard with record evidence.[30] At this stage, Mr. Blankenship is obligated to produce affirmative evidence of actual malice. Bare assertions, with no citation to the record, that these defendants violated unspecified standards is insufficient to create a genuine dispute of material fact. See Nunes v. WP Co., LLC, 513 F. Supp. 3d 1, 8 (D.D.C. 2020) (rejecting the contention that the complaint sufficiently alleged actual malice by alleging the defendant violated journalistic standards in part because the "[p]laintiff nowhere identifies the journalistic standards . . . the [defendant] purportedly violated" (quotation marks omitted)).

Even assuming that Mr. Blankenship were able to identify some specific journalistic standard that was allegedly violated, this contention alone would be insufficient to establish a showing of actual malice. Indeed, as the Supreme Court has made clear, "a public figure plaintiff must prove more than an extreme departure from professional standards" to demonstrate actual malice by clear and convincing evidence. Harte-Hanks, 491 U.S. at 665; see also Reuber, 925 F.2d at 711-12 (noting that "the Harte-Hanks Court went to some lengths to reaffirm that a departure from accepted standards alone does not constitute actual malice."); Hinerman, 423 S.E.2d at 573 (noting that

[30] The closest Mr. Blankenship comes to identifying any standard is his citation to the Roll Call website's mission statement. On its face, however, the portion of the statement relied upon is Roll Call's description of its own reputation, not a journalistic standard for its authors to follow.

"egregious deviation from accepted standards of journalism standing alone will not carry the day for a public official libel plaintiff . . . .") (emphasis in original)).

Second, Mr. Blankenship asserts the public availability of his misdemeanor conviction at the time the articles were published supports a finding of actual malice.[31] Simply put, Mr. Blankenship contends the authors failed to adequately investigate the nature of his conviction before publishing. This contention, however, fares no better than the first. Importantly, "recklessness 'is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.'" Fairfax, 2 F.4th at 293 (quoting St. Amant, 390 U.S. at 731). Thus, a publisher's "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." Harte-Hanks, 491 U.S. at 688, 692. Accordingly, the authors' mere failure to consult public records regarding Mr. Blankenship's conviction alone cannot establish actual malice by clear and convincing evidence given that a "failure to investigate is precisely what the Supreme Court has said is insufficient to establish reckless disregard for the truth." Pippen v.

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[31] Mr. Blankenship contends that public records available through a Google search, his own comments regarding his conviction during the nationally televised Republican primary debate, and other news sources that correctly reported his misdemeanor conviction would have apprised the authors that he was convicted of a misdemeanor offense. See, e.g., ECF 905 at 12; ECF 947 at 10-11; ECF 950 at 9-10.

NBCUnivsersal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013).

Nonetheless, "failure to investigate before reporting a third party's allegations can be reckless 'where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" Fairfax, 2.4th at 293 (quoting Harte-Hanks, 491 U.S. at 688). Indeed, [a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." Harte-Hanks, 491 U.S. at 692. As to HD Media, for example, Mr. Blankenship contends the fact that the Charleston-Gazette had accurately reported numerous times that he was convicted of a misdemeanor prior to publishing Mr. Lehrer's article is evidence of its purposeful avoidance of the truth.[32] The record, however, is devoid of any evidence that Mr. Merritt -- the individual responsible for HD Media's publication of Mr. Lehrer's article -- knew of the existence of these accurate reports at the time he published the article.

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[32] In support of this assertion, Mr. Blankenship cites to the following publications by the Charleston Gazette-Mail, which accurately reported his conviction as a misdemeanor: (1) a December 3, 2015, excerpt from a brief publication titled "Blankenship Guilty of One Count, Not Guilty on Two Other" found on the website's "Blankenship Trial Timeline" page; (2) two articles HD Media admitted in its interrogatories to publishing on April 18, 2018 and May 22, 2018 (See ECF 965-1 at ¶ 5); and (3) a May 7, 2018, blog post on the Charleston Gazette-Mail's "Coal Tattoo" blog authored by Ken Ward Jr., titled "The politics of why Don Blankenship isn't a felon." Mr. Blankenship has not attached copies of these articles to his response brief but instead merely cites to the URL addresses where the December 3, 2015, and May 7, 2018, publications can be found.

As the court previously explained in its opinion in Blankenship v. Napolitano, "the 'mere presence' of previous stories in a [media organization's] files does not establish that the [media organization] knew that the statement was false 'since the state of mind required for actual malice would have to be brought home to the persons in the . . . organization having responsibility for the publication of the [statement].'" 451 F. Supp. 3d 596, 619 (quoting Sullivan, 376 U.S. at 287). Absent evidence that Mr. Merritt was aware of the prior publications, the mere existence of the same in HD Media's files is of little moment respecting the actual malice inquiry.

In sum, there is no evidence in the record from which a reasonable jury could find that the authors or publishers of these articles had any doubt as to the accuracy of their publications or as to the news sources they relied upon in characterizing Mr. Blankenship's conviction as a felony. To conclude otherwise based on the mere existence of other accurate sources -- which no evidence indicates the authors or publishers were aware of or reviewed -- would impermissibly allow Mr. Blankenship to defeat summary judgment through conjecture and the stacking of inference upon inference. See Graves v. Lioi, 930 F.3d 307, 324 (4th Cir. 2019). With respect to these defendants, the record evidence, at most, suggests that while they had no reason to doubt the accuracy of the sources relied upon, a more thorough investigation may have correctly revealed that Mr. Blankenship was not a felon. Such evidence, however, is insufficient to demonstrate reckless disregard for the truth. See Horne, 893 F.3d at 211 (explaining "[t]he failure to investigate, where there

was no reason to doubt the accuracy of the sources used cannot amount to reckless conduct." (internal citations omitted)); see also Ryan v. Brooks, 634 F.2d 726, 734 (4th Cir. 1980).

Third, in regard to the N&G article (titled in part "Don Blankenship: A Felon, A Racist") and the Mediaite article (titled "WV Senate Candidate Defends Horrifying Campaign Ad: 'There's No Mention of a Race' Like 'Negro'") written by Tamar Auber, Mr. Blankenship avers the articles' alleged animus towards him demonstrates actual malice. For example, Mr. Blankenship notes the title of N&G's article referring to him as "a racist."[33] See ECF 905-2. He also contends the substance of Ms. Auber's article implies that he is

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[33] In his response brief, Mr. Blankenship also references a video, hosted by Dan Rather titled "Dan Rather: Why Trump is Sabotaging Republican Don Blankenship," which he contends was published on N&G's website on May 7, 2018, the same date the article at issue was published. See ECF 905 at 4, 12-13. Mr. Blankenship asserts that the video further demonstrates N&G's animus towards him and otherwise demonstrates that the article's author knew he was not a felon or acted with reckless disregard as to that fact. See id. Notably, the video is not in the record and Mr. Blankenship only cites to the URL of the webpage where the video can be found. See id. at 4 n.3, 13 n.5 (citing https://www.newsandguts.com/video/dan-rather-trump-sabotaging-republican-don-blankenship/). In its reply brief, N&G objects to the video on the ground that it has not been disclosed in discovery or made part of the record. See ECF 934 at 7 n.2. Mr. Blankenship has not responded to this objection. The court concludes that Mr. Blankenship failed to disclose the video as required under Federal Rules of Civil Procedure 26(a) and (e) and has not shown that the failure was substantially justified or harmless. Accordingly, the court will not consider the video as evidence on N&G's motion for summary judgment. See Fed. R. Civ. P. 37(c).

a racist. See ECF 948 at 11. To this point, the Supreme Court of Appeals of West Virginia has stated:

> [I]ll will towards the subject of a libel, and other 'malicious' motives, may be considered by the jury in their determination of whether a subjective realization that the statement was false or a subjective realization that the statement was being published recklessly existed at the time the statement was published.

Hinerman, 423 S.E.2d at 573. Importantly, however, "animus toward the subject of a libel[] or other 'malicious' motives are not, alone, conclusive evidence of actual malice." Id. Similarly, while the United States Supreme Court has explained that "it cannot be said that evidence concerning motive . . . never bears any relation to the actual malice inquiry," Harte-Hanks, 491 U.S. at 668, it "consistently has held that 'the actual malice standard is not satisfied merely through a showing of ill will or malice in the ordinary sense of the term.'" Reuber, 925 F.2d at 715 (quoting Harte-Hanks, 491 U.S. at 666).

Even assuming the title of N&G's article or the substance of Ms. Auber's article demonstrates animus toward Mr. Blankenship, such evidence alone is insufficient to establish actual malice by clear and convincing evidence. Inasmuch as Mr. Blankenship has failed to produce any other affirmative evidence of actual malice on the part of N&G, Mediaite, or Ms. Auber, the mere allegation of animus cannot alone save his claims against them.

Based on the foregoing, Mr. Blankenship has failed to produce clear and convincing evidence of actual malice regarding defendants N&G, Eli Lehrer, Mediaite, Tamar Auber, FiscalNote, and HD Media. Accordingly, these defendants are entitled to summary judgment on the defamation claims against them.

2. CNN

Mr. Blankenship alleges four defamatory statements were orally stated during live CNN broadcasts by three separate individuals: (1) Kevin McLaughlin; (2) Joe Lockhart; and (3) S.E. Cupp.[34]

Regarding Mr. McLaughlin, Mr. Blankenship contends "it is difficult to believe that Ms. Bash, who personally invited Mr. McLaughlin to appear on the [CNN Newsroom] broadcast," did not inform him that Mr. Blankenship was only convicted of a misdemeanor prior to his appearance on the show. ECF 906 at 18. He also notes Mr. McLaughlin's testimony that his research "led [him] to believe [Mr. Blankenship] was a convicted felon" and contends Mr. McLaughlin's credibility on this point is a question for the jury. ECF 884-21 at 5; ECF 906 at 17. Neither contention amounts to affirmative evidence of actual malice. Indeed, the record evidence demonstrates that Ms. Bash did not discuss Mr. Blankenship's criminal history with Mr. McLaughlin prior to the broadcast. See ECF 935-1 at 6-7. Moreover, Mr. Blankenship

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[34] Although named as individual defendants in Mr. Blankenship's amended complaint, the court dismissed these individuals in its March 31, 2021, memorandum opinion and order on personal jurisdiction grounds. See ECF 398.

cannot create a genuine dispute of material fact on the issue of actual malice by merely asserting that a jury could possibly question the credibility of Mr. McLaughlin or Ms. Bash's testimony. See Anderson, 477 U.S. at 256 (explaining that a plaintiff cannot defeat summary judgment "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of . . . legal malice.").

To the extent Mr. Blankenship avers Mr. McLaughlin's reference to him as a felon "only minutes" after Ms. Bash correctly stated he was convicted of "just a misdemeanor" amounts to clear and convincing evidence of actual malice, the court declines to conclude the same on so slender a reed. ECF 906 at 16. The record evidence is of "insufficient caliber" to permit a reasonable jury to conclude by clear and convincing evidence that Mr. McLaughlin knew his reference to Mr. Blankenship as a felon was false or that he seriously doubted the same to be true at the time he spoke.[35] Anderson, 477 U.S. at 254.

As to Mr. Lockhart, Mr. Blankenship contends Mr. Lockhart's lack of research regarding his conviction and alleged animus towards him by implying he is

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[35] The court notes that CNN avers Mr. McLaughlin's statements cannot impute liability on CNN given that he was not an employee of CNN but merely an unpaid guest. See ECF 885 at 14 n.5. Mr. Blankenship appears to contend Mr. McLaughlin's state of mind can be attributed to CNN under an apparent agency theory. See ECF 906 at 22-24. The court declines to address this issue here because regardless of whether Mr. McLaughlin's state of mind can be imputed to CNN, Mr. Blankenship is unable to demonstrate that he acted with actual malice.

"racist" and "crazy" create genuine disputes of fact on the issue of actual malice. See ECF 906 at 21. As previously mentioned, actual malice is "not measured by whether a reasonably prudent man would have . . . investigated before publishing." St. Amant, 390 U.S. at 731. Nor is "'the actual malice standard . . . satisfied merely through a showing of ill will or malice in the ordinary sense of the term.'" Reuber, 925 F.2d at 715 (quoting Harte-Hanks, 491 U.S. at 666). Mr. Lockhart testified during his deposition -- and likewise stated in his affidavit -- that he believed Mr. Blankenship was a felon as he understood that term and was not aware that his conviction was for a misdemeanor when he uttered the statement. See ECF 884-24 at 67-68; ECF 884-24 ¶¶ 6-7. Mr. Blankenship has failed to produce clear and convincing evidence that would permit a reasonable jury to conclude otherwise.

As to Ms. Cupp, Mr. Blankenship contends the fact that she admitted to watching "portions of the debate where Mr. Blankenship made clear that he was never convicted of a felony" prior to calling him a felon on two subsequent occasions amounts to clear and convincing evidence of actual malice. ECF 906 at 19. This assertion, however, is a plain misrepresentation of Ms. Cupp's deposition testimony. Ms. Cupp testified that she watched certain clips and portions of the debate but had no memory of hearing or seeing the portion wherein Mr. Blankenship referred to his conviction as a misdemeanor. See ECF 884-29 at 10; see also ECF 906-3 at 5. Mr. Blankenship has offered no affirmative evidence contradicting this testimony.

Instead, Mr. Blankenship avers that "as a matter of logic" an unidentified "staff member" must have watched that portion of the debate and "intentionally chose" to omit the same from the clips provided to Ms. Cupp. ECF 906 at 20. Such contention is no more than pure speculation. Nonetheless, the court fails to see how the same would be relevant in determining whether Ms. Cupp uttered the statements with actual malice. To the extent Mr. Blankenship contends Ms. Cupp's testimony[36] that she viewed some of the comments made by Mr. Blankenship during his campaign to be "offensive" and "racist" demonstrates actual malice, this contention fails for the same reasons explained above respecting Mr. Lockhart.[37]

Lastly, Mr. Blankenship asserts that the speakers violated CNN's commitment to "accurate, fair and responsible reporting" as set forth in its internal News Standards and Practices when they falsely referred to him as a felon or convicted felon. ECF 906 at 1. He contends this alleged violation of CNN's standards is evidence of actual malice. Id. at 5. The court does not

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[36] During her deposition, Ms. Cupp was asked about Mr. Blankenship's "comments about China" and whether she believed "in May of 2018 that Mr. Blankenship's comments were racist," to which she responded that she "found them offensive and believed they sounded racist." ECF 906-3 at 134.

[37] The parties dispute whether Ms. Cupp's and Mr. Lockhart's statements can impute liability on CNN given that they are independent contractors and not employees. See ECF 885 at 14 n.5; ECF 906 at 22. Again, the court need not address this issue because regardless of whether CNN can be held vicariously liable for their statements, Mr. Blankenship has failed to produce clear and convincing evidence that they acted with actual malice.

agree. To assert that an entity's generalized commitment or mission to ensure "accurate, fair, and responsible" reporting amounts to an internal "standard" that is violated and actionable anytime an inaccurate statement is made is unfounded. Moreover, "there is a significant difference between proof of actual malice and mere proof of falsity." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984). Simply put, merely contending the authors' statements were false, as Mr. Blankenship does here, fails to establish actual malice. In sum, the court concludes that Mr. Blankenship has failed to demonstrate by clear and convincing evidence that any of these three individuals subjectively doubted what they stated on air to be true or knew their statements to be false at the time they were made. Accordingly, he has failed to produce sufficient evidence that CNN acted with actual malice.

3. ABC

John Verhovek authored the ABC online article at issue referencing Mr. Blankenship as a "convicted felon." The article was subsequently linked and posted on various ABC social media sites, accompanied by paraphrased language of the article's lead sentence, including the convicted felon reference. Mr. Blankenship avers that ample evidence, including Mr. Verhovek's own statements in his affidavit, amounts to irrefutable proof that he acted with actual malice at the time of publication.

Mr. Blankenship primarily relies on the portions of Mr. Verhovek's affidavit wherein he admits to authoring or co-authoring three prior articles that

passively reference Mr. Blankenship's conviction as a misdemeanor and receiving internal emails providing updates on the West Virginia Senate race or article previews that, in some instances, made the misdemeanor reference.[38] See ECF 888-4 ¶¶ 23, 24, 29. In the court's view, however, such admissions fail to tip the scales towards clear and convincing evidence of actual malice when viewed in connection with the entirety of the evidentiary record.

Mr. Verhovek's affidavit states that when he authored the article, he believed the reference to Mr. Blankenship as a convicted felon was accurate, nor did he "have any doubt about the language [he] was using." ECF 888-4 ¶ 34. Mr. Verhovek explains that at the time of publication, he "understood and used the term 'felony' to mean 'serious crime,' and the term 'felon' to mean 'someone who committed a serious crime.'" Id. ¶ 19. He further states that "[g]iven his understanding of the term 'convicted felon,' [he] would not have thought it was inaccurate to use in referring to an individual who was convicted of a crime serious enough to result in a full year in federal prison." Id. While acknowledging the existence of the three previous articles referencing Mr. Blankenship's misdemeanor conviction, Mr. Verhovek states that when he authored

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[38] ABC attached these prior articles to its motion. See ECF Nos. 888-17; 888-18; 888-19. It also attached an internal email received by all ABC news campaign digital reporters, including Mr. Verhovek, containing a preview of an article authored by Meridith McGraw that references Mr. Blankenship's misdemeanor conviction. See ECF 888-21.

the article at issue roughly two months later, he did not recall the prior articles. Id. ¶ 26.

Mr. Verhovek goes on to state that even if he had referenced his prior articles before authoring the article at issue, he "still would have thought the term 'convicted felon' was an accurate way to refer to Mr. Blankenship because [he] understood (and was using) the term in a colloquial way of referring to someone who had been convicted of a serious crime, not as a legal technical term." Id. ¶ 32. He avers the seriousness of Mr. Blankenship's crime "was reflected in both the lengthy federal prison sentence and the nature of the crime itself" and "[s]eeing the term 'misdemeanor' would not have made an impression on [him], because [he] was focused on the fact that [Mr. Blankenship] had been convicted of a serious crime, rather than the formal classification of the crime in the relevant statute." Id.

Importantly, Mr. Verhovek's asserted misunderstanding as set forth in his affidavit is supported by his contemporaneous communications with his former colleague Meridith McGraw upon being notified of his error. Indeed, Mr. Verhovek's confusion is readily apparent from his eventual response to Ms. McGraw's email notifying him of the error, which states "Meridith can you send me exact language on this? Blankenship was sent to federal prison[,] but he was not convicted of a felony?" ECF 888-24. Mr. Verhovek then sent a series of text messages to Ms. McGraw, wherein he pertinently states, "Sorry about Blankenship, I thought I had it right on that or seen it in an earlier story, that's my bad [. . .] I just wish I'd

been more careful." ECF 888-49. His error was quickly corrected.

"[C]hoice of . . . language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." Bose Corp., 466 U.S. at 513. Mr. Verhovek's contemporaneous communications with Ms. McGraw indicate his reference to Mr. Blankenship as a convicted felon amounts to little more than a genuine misconception or mistake, and not a knowing falsity or a reckless disregard for the truth. Mr. Blankenship has failed to produce clear and convincing evidence to the contrary and instead resorts to the same assertions that the court has already dispelled throughout this opinion in efforts to save his claim.

Mr. Blankenship's bald assertions that it is hard to believe a well-educated individual would not know the legal definition of a felony, a more thorough investigation may have correctly revealed the truth, and the sheer fact that other news sources had correctly reported his conviction all fail to establish clear and convincing evidence of actual malice on the part of ABC. Nor does his assertion -- that Mr. Verhovek's failure to reach out to him for comment prior to the article's publication is indicative of actual malice -- fare any better. Simply put, the entirety of the evidentiary record lacks the convincing clarity necessary for a reasonable jury to conclude that ABC had actual knowledge of falsity or serious doubts as to the article's truth at the time of publication. ABC is thus entitled to summary judgment on these grounds.

4. The Washington Post

Mr. Blankenship alleges the Washington Post published three publications referencing him as a felon authored by four separate individuals: (1) Dana Milbank; (2) Jenna Johnson and Josh Dawsey; and (3) Amber Phillips. The court will address each article in turn.

As a threshold matter, the parties dispute whether the "even felons" reference in Mr. Milbank's article stating, "[n]ow we have Blankenship, Roy Moore, Joe Arpaio and a proliferation of name-calling misfits and even felons on Republican ballots" was about Mr. Blankenship. ECF Nos. 886-19; 886-21. The Washington Post contends the reference could only be logically read as referring to persons other than Mr. Blankenship. ECF 887 at 12. It further emphasizes that the online version of the article contained a hyperlink on the "even felons" text, linking to another article discussing former New York Congressman Michael Grimm's felony conviction, which accurately referenced Mr. Blankenship's conviction as a misdemeanor. Id.

Mr. Blankenship, on the other hand, asserts that any "reasonable reader" could read the reference as concerning him given that, in a preceding paragraph of the article, Mr. Milbank notes that Mr. Blankenship spent a year in prison. ECF 910 at 16. Mr. Blankenship also notes that the print version of the article obviously contained no hyperlink to the other article regarding Michael Grimm. Id. at 11. Regardless of whether the statement can be read as concerning Mr. Blankenship, he has failed to produce any evidence whatsoever that

would support his bare assertion that Mr. Milbank authored the article with actual malice. Mr. Milbank stated in his affidavit that he "was not aware that anything [he] wrote about Mr. Blankenship was inaccurate – nor did [he] have any doubts about the truth of anything [he] wrote" in his May 8, 2018, article. ECF 886-20 ¶ 5. Mr. Blankenship has not produced a scintilla of evidence that would permit a reasonable juror to conclude otherwise, let alone by clear and convincing evidence. Accordingly, Mr. Milbank's statements fail to demonstrate that the Washington Post acted with actual malice. See Sullivan, 376 U.S. at 287-88 (noting that "the state of mind required for actual malice [has] to be brought home to the persons in the [defendant's] organization having responsibility for the publication[.]"; see also Mimms v. CVS Pharmacy, Inc., 889 F.3d 865, 866 (7th Cir. 2018) (noting that under Sullivan "[i]t is the state of mind of the speaker that is relevant" to the actual malice inquiry.).

The court reaches the same conclusion regarding the July 25, 2018, article authored by Jenna Johnson and Josh Dawsey, which was subsequently republished in print on July 27, 2018. While both authors are listed on the by-line of the article, the uncontradicted evidentiary record establishes that it was Ms. Johnson who wrote the statement referring to Mr. Blankenship as a "felon." Indeed, both Ms. Johnson and Mr. Dawsey state as much in their affidavits. See ECF Nos. 886-26 ¶ 4; 886-27 ¶¶ 2-4.[39] Additionally, Ms. Johnson sent an

[39] To the extent Mr. Blankenship contends Mr. Dawsey was also responsible for the "felon" reference inasmuch as he participated

email to Mr. Dawsey prior to the article's publication wherein she boldfaced the text of the draft article where his reporting was used, which did not include the coverage of the West Virginia primary or the felon reference. See ECF 886-27. Mr. Blankenship has again produced no affirmative evidence that would permit a finding that Ms. Johnson authored the statement with actual malice. Instead, he contends that Ms. Johnson's assertion that she believed what she wrote to be true creates a credibility issue for the jury and that her failure to conduct a proper investigation amounts to actual malice. Neither contention, however, holds any merit. See Anderson, 477 U.S. at 256 (explaining that a plaintiff cannot defeat summary judgment "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of . . . legal malice."); see also St. Amant, 390 U.S. at 731 (actual malice is "not measured by whether a reasonably prudent man would have . . . investigated before publishing.").

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in reviewing the article, such contention is unsupported by the evidentiary record. Mr. Dawsey testified during his deposition that he only reviewed the portions of the story wherein his reporting was used, which were boldfaced for his review in the email sent to him from Ms. Johnson prior to the article's publication. See ECF 886-35 at 4-5. Regardless, the record does not support a finding of actual malice on the part of Mr. Dawsey by clear and convincing evidence. Mr. Blankenship points to an April 19, 2018, article authored in part by Mr. Dawsey and three emails he received, wherein Mr. Blankenship's conviction is accurately referenced as a misdemeanor. ECF 910-8. Mr. Dawsey testified, however, that he had no role in authoring the portion of the article containing the misdemeanor reference nor did he ever recall reading and/or receiving the emails. ECF 886-35 at 6-13. Mr. Blankenship has offered no evidence demonstrating otherwise.

As to the August 9, 2018, online blog post authored by Ms. Phillips, in which she refers to Mr. Blankenship as one of three convicted felons who have run or are running for office in 2018, Mr. Blankenship first asserts that three mass emails received by Ms. Phillips -- prior to the article's publication -- that passively reference Mr. Blankenship's misdemeanor conviction amount to clear and convincing evidence of actual malice. The court does not agree. Ms. Phillips states in her affidavit that she does not recall reading these three emails -- let alone focusing" on the misdemeanor references. ECF 886-31 ¶ 5. She also notes that during the time the piece was written, she "received thousands of emails and wrote more than one hundred other pieces." Id. Mr. Blankenship has produced no evidence to the contrary.

Even assuming Ms. Phillips had read the three mass emails at issue -- a political newsletter, a blast from a political group, and a mass circulation of a CBS "Face the Nation" transcript -- the fleeting references to Mr. Blankenship's misdemeanor conviction contained therein would not give rise to clear and convincing evidence of actual malice when she used the convicted felon reference on August 9, 2018. Simply put, the court is unconvinced that one-word references to Mr. Blankenship's misdemeanor conviction embedded within the text of these mass emails serve to demonstrate that Ms. Phillips subjectively disbelieved her statement or knew it to be false at the time of the August 9, 2018, publication by clear and convincing evidence.

Mr. Blankenship next contends that a blog post written by Ms. Phillips three months prior to August 9, 2018, wherein she accurately referenced Mr. Blankenship's conviction as a misdemeanor, is clear and convincing evidence of actual malice. For similar reasons as explained <u>supra</u> regarding Mr. Verhovek and ABC, the court is unpersuaded by this contention. In her affidavit, Ms. Phillips explains that when she wrote the phrase "convicted felons" in her blog post, "it was [her] understanding that the word 'felon' could be used to refer to someone who has been convicted of a crime and that it was used that way in common usage." ECF 886-31 ¶ 4.

At the time the blog post was drafted, Ms. Phillips "was aware that Mr. Blankenship had been convicted of a crime and served a year in federal prison" and "was using 'felon' in the colloquial sense." <u>Id.</u> She further states that she "did not appreciate or focus in writing this [reference] on any technical meaning that 'felon' may have." <u>Id.</u> In sum, she states that it never occurred to her that the term "'felon' was a word that required further fact checking" given her knowledge that Mr. Blankenship had spent time in prison for a serious crime. <u>Id.</u>

The fact that Ms. Phillips wrote a single article correctly describing Mr. Blankenship's conviction as a misdemeanor does not amount to clear and convincing evidence that she subjectively understood the legal denotation of the word felon at the time she published the blog post at issue approximately three months later. The evidentiary record, at best, demonstrates that Ms. Phillips failed to recognize the technical

inaccuracy associated with passively referring to Mr. Blankenship as a convicted felon. While an unfortunate choice of words, the court declines to permit the actual malice issue to reach the jury on what appears from the evidentiary record to be an innocent mistake in legal terminology. See Nelson Auto Ctr., Inc. v. Multimedia Holdings Corp., 951 F.3d 952, 958 (8th Cir. 2020) (concluding the "[f]ailure to recognize a mistake or ambiguity and its potential consequences is not evidence of reckless disregard for the truth.").

When viewed in its entirety, the record fails to demonstrate with convincing clarity that Ms. Phillips knew her statement to be false or that her conduct "approach[ed] the level of publishing a knowing, calculated falsehood." Ryan, 634 F.2d at 733. Importantly, "the First Amendment does not require perfection from the news media." Carr v. Forbes, Inc., 259 F.3d 273, 283 (4th Cir. 2001). This is so because, "[w]ere the press subject to suit every time it erred," much of news reporting would be severely chilled. Id. The Constitution thus "provides the press with a shield whereby it may be wrong when commenting on acts of a public figure, as long as it is not intentionally or recklessly so." Id. In other words, a mere mistake cannot constitute actual malice, and the court is unpersuaded that Mr. Blankenship has produced clear and convincing evidence demonstrating that Ms. Phillip's error amounts to more than a genuine misconception.

To the extent Mr. Blankenship points to the Washington Post's internal standards regarding a commitment to truthful reporting and its general policy

noting that reporters are primarily responsible for fact checking their stories, this does not equate to clear and convincing evidence of actual malice. As reiterated throughout this opinion, even an "extreme departure from professional standards" is constitutionally insufficient to establish clear and convincing evidence of actual malice. Harte-Hanks, 491 at 665. Based on the foregoing, the Washington Post is entitled to summary judgment inasmuch as Mr. Blankenship has failed to produce clear and convincing evidence of actual malice.

5. MSNBC

Mr. Blankenship contends that he was defamed during three separate broadcasts of the MSNBC program All In, once by guest-host Joy Reid and twice by host Chris Hayes.[40] As previously stated herein, "the

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[40] In his complaint, Mr. Blankenship also alleges Mr. Hayes defamed him in an April 16, 2018, tweet posted on Mr. Hayes personal twitter account, wherein Mr. Hayes referred to Mr. Blankenship as a "felonious coal baron." ECF 14 ¶ 169. In its opening brief, MSNBC contends the tweet cannot form the basis for MSNBC's corporate liability inasmuch as it was made on Mr. Hayes' personal account, "which is not sponsored, overseen, or operated by MSNBC." ECF 883 at 12. Mr. Blankenship appears to concede as much given that he does not address this contention in his response brief and instead only focuses on the three statements made during the live broadcasts of the All In program. See ECF 911 at 4 ("All of MSNBC's defamatory statements were made on the All In television program."). The only references to the tweet in Mr. Blankenship's response brief appear in passing, once in a footnote (stating "Hayes also tweeted that Mr. Blankenship was a 'felonious coal baron found responsible for dozens of miners' deaths'") and once in a single sentence (stating "MSNBC concedes, as it must, that Hayes called Mr. Blankenship 'felonious' in a tweet

state of mind required for actual malice [has] to be brought home to the persons in the [defendant's] organization having responsibility for the publication[.]" Sullivan, 376 U.S. at 287-88. In his briefing, Mr. Blankenship contends the individuals responsible at MSNBC for falsely referring to him as a convicted felon include Mr. Hayes, All In Executive Producer Denis Horgan, and "the 22 member staff of the All In television program."[41] ECF 911 at 5.

As to Mr. Horgan, Mr. Blankenship contends he bears responsibility for the challenged statements inasmuch as he "has the responsibility for overseeing and approving all scripts" for the show. Id. Aside from this bare assertion, the record is devoid of any evidence that Mr. Horgan wrote or worked on the scripts containing the convicted felon references. When Ms. Reid was asked in her deposition if she had worked with Mr. Horgan on the scripts when she guest-hosted, she responded:

> I did not work with Denis Horgan on the scripts for those shows, you know, because he is, as the executive producer, he is not writing the scripts. He is assigning the producers who write the scripts, and he's overseeing the process overall. So, I worked with him overall on the show.

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and a 'convicted felon' twice on All In . . ."). ECF 911 at 8 n.3, 14. The court thus concludes the April 16, 2018, tweet is insufficient to establish MSNBC's liability inasmuch as it was tweeted from Mr. Hayes' personal account.

[41] Presumably, Ms. Reid would be included.

ECF 911-5 at 16. Merely being responsible for the "overall process" of the show does not equate to Mr. Horgan being responsible for the challenged statements at issue. When Mr. Horgan was asked during his deposition whether he had "ever approved a script in which a misdemeanor was referenced as a convicted felon during [his] tenure as executive producer" Mr. Horgan testified during his deposition that he did not know. ECF 911-6 at 24. Mr. Blankenship has presented no evidence that would call this testimony into question.

As to the twenty-two member staff of the All In program, Mr. Blankenship has failed to identify any of the staff members who may have been involved in the drafting of the scripts at issue. The court is thus unable to assess each staff member's state of mind without knowing who those individuals are or if they were even involved in the drafting process. Accordingly, in assessing actual malice, the court will focus on the states of mind of the individuals who spoke the challenged statements -- Ms. Reid and Mr. Hayes -- during the broadcasts at issue. See Mimms, 889 F.3d at 866 (noting that under Sullivan, "[i]t is the state of mind of the speaker that is relevant" to the actual malice inquiry.).

Mr. Blankenship first avers that Ms. Reid and Mr. Hayes' departure from MSNBC's standards and practices amounts to evidence of actual malice. He relies on MSNBC's internal policies and guidelines, which provide that MSNBC "stands for accuracy, fairness, independence and integrity," and contends Ms. Reid and Mr. Hayes violated this provision by

falsely referring to him as a convicted felon. ECF 911 at 14. The court is yet again unpersuaded by this assertion for the same reasons as discussed regarding CNN. To assert that a generalized commitment to accuracy, fairness, and integrity as set forth in the "Forward" section of NBCUinversal's News Group Policies and Guidelines amounts to a set standard that is violated and actionable anytime an inaccurate statement is made is untenable. See ECF 934-4 at 13. Moreover, "there is a significant difference between proof of actual malice and mere proof of falsity." Bose, 466 U.S. at 511. Simply contending that Ms. Reid's and Mr. Hayes' statements were untrue does little to prove that they subjectively disbelieved their statements at the time they were made.

Regarding Ms. Reid, the uncontradicted evidence in the record demonstrates that she believed Mr. Blankenship was a convicted felon at the time she referenced him as such. See ECF 882-8 ¶¶ 7-8; see also 882-7 at 10-11. Mr. Blankenship has failed to produce a scintilla of evidence that would permit a reasonable jury to conclude otherwise. Instead, Mr. Blankenship contends Ms. Reid's discussion on a January 8, 2018, episode of All In, during which she referred to Mr. Blankenship's conviction but did not call him a felon, serves as evidence that she acted with actual malice when she subsequently called him a convicted felon during the May 4, 2018, episode at issue. This contention is without merit. Although Ms. Reid may have referenced Mr. Blankenship's conviction on the January 8, 2018, episode, the transcript of the episode demonstrates that she did not refer to the conviction as a misdemeanor. See ECF 938-3 at 22. The record is

devoid of any evidence demonstrating that Ms. Reid acted with actual malice at the time her statement was made.

The record is more extensive as to whether Mr. Blankenship has adduced evidence of convincing clarity demonstrating that Mr. Hayes uttered his statements with actual malice when he referred to Mr. Blankenship as a convicted felon during the April 23, 2018, and May 9, 2018, broadcasts of All In. As evidence of actual malice, Mr. Blankenship first points to a November 29, 2017, broadcast of All In hosted by Mr. Hayes, during which two articles -- a wchstv.com article and an article from The New Yorker, both of which accurately reported Mr. Blankenship's conviction -- were used as sources for the graphics of their headlines displayed during that segment. This contention, however, is unavailing inasmuch as neither of the articles' displayed headlines made reference to Mr. Blankenship's conviction nor is it alleged that the segment discussed the legal classification of Mr. Blankenship's conviction at any point.[42] The images of the headlines displayed during the broadcast read: "Former Massey Energy CEO Don Blankenship to Run for Senate" and "Don Blankenship, West Virginia's King of Coal is Guilty."[43] See ECF 938-2 at 6, 9; see also

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[42] The court notes that neither the video segment nor a transcript of the November 29, 2017, broadcast wherein the article headlines were purportedly displayed appear to be in the record.

[43] As to The New Yorker article titled "Don Blankenship, West Virginia's King of Coal is Guilty," the court notes that Mr. Horgan testified during his deposition that the article's headline and "a quote from it" were displayed as graphics during the November 29,

ECF 911-6 at 13, 16, 30. While the bodies of the articles accurately referenced Mr. Blankenship's conviction as a misdemeanor, see ECF 911-6 at 17, 31, Mr. Blankenship has produced no evidence that Mr. Hayes read either of the articles, nor did Mr. Blankenship even ask Mr. Hayes about these articles at any point during Mr. Hayes' deposition. The articles are thus of no significance in the effort to demonstrate that Mr. Hayes acted with actual malice.

Mr. Blankenship next points to an April 6, 2016, email sent from an All In staff member, Brendan O'Melia, to Mr. Hayes and other staff members with the subject line "our old friend Don Blankenship going to the cooler for a year." ECF 911-6 at 28. The body of the email contains, what appears to be, an article headline stating: "Former Massey Energy CEO Don Blankenship receives maximum sentence."[44] Id. The email, however, is of little significance given that it does not mention the nature of Mr. Blankenship's conviction.

Lastly, Mr. Blankenship relies on a December 2015, email chain between All In's executive producer Denis Horgan, Mr. Hayes, and other staff members of the All In program. The email thread begins with Mr. Horgan emailing Mr. Hayes and other staff members a link to

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2017, broadcast. ECF 911-6 at 17. Neither party, however, has identified what quote from the article appeared as a graphic.

[44] The email also appears to contain a link to a news article, however, neither party has furnished a copy of this article in the record, nor does either party discuss the contents of the article in their briefing.

a New York Times article on December 3, 2015, which reported that Mr. Blankenship had been found guilty of the misdemeanor offense that same date. See ECF 911-4 at 64. Mr. Hayes responded to the email "He only got nailed on the misdemeanor, tho[ugh]. Probably not a day in jail." Id. at 63.[45] Mr. Blankenship contends Mr. Hayes' response amounts to clear and convincing evidence that Mr. Hayes knew his references to Mr. Blankenship as a convicted felon over two years later were false and thus were made with actual malice. Mr. Hayes' response, however, cannot be viewed in isolation, and when viewed in connection with the entirety of the evidentiary record, the court finds the email to be of attenuated effect.

Mr. Hayes stated in his affidavit that when he referred to Mr. Blankenship as a convicted felon during the April 23, 2018, and May 9, 2018, broadcasts, and purportedly in his personal tweet on April 16, 2018, he

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[45] Two All In staff members, Todd Cole and Gregg Cockrell, replied to the email. Mr. Cole replied "A slap on the wrist for a dude who killed 29 people. Maybe if he used an assault rifle, he would have been convicted of murder." ECF 911-4 at 63. Mr. Cockrell replied, "Very disappointing . . . he's killed more people than most terrorists ever do." To the extent Mr. Blankenship avers their replies amount to clear and convincing evidence that the staff members of the All In show acted with actual malice, the court is unpersuaded inasmuch as Mr. Blankenship has provided no evidence that these individuals were involved in the drafting of the scripts wherein Mr. Blankenship was referred to as a convicted felon over two years later. Their responses are thus of little evidentiary value regarding the actual malice inquiry and are certainly of little to no relevance in assessing whether Ms. Reid or Mr. Hayes -- the speakers of the challenged statements -- acted with actual malice at the time the statements were made.

knew that Mr. Blankenship "had been convicted of a serious crime and spent a year in prison after a fatal mine explosion, and [that he] believed that crime was a felony." ECF 882-5 at ¶¶ 8-10. Similarly, Mr. Hayes testified during his deposition that when he uttered the challenged statements, he "knew [Mr. Blankenship] had done a year in federal prison and . . . thought that meant he had been convicted of a felony" and that he "was trying to convey the seriousness of the crime" when he made the convicted felon reference. ECF 882-6 at 40, 41.

Importantly, Mr. Hayes' asserted belief appears to be supported by a contemporaneous, pre-show recorded discussion between Mr. Hayes and his segment producer Brian Montopoli before the first challenged statement was made. This discussion took place on April 23, 2018, while the two were preparing for what would be discussed on that evening's All In broadcast.[46]

During the discussion, Mr. Montopoli suggests that they play a portion of their "old buddy Don Blankenship's ad"[47] during the segment wherein

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[46] Mr. Hayes explained in his deposition that sometimes his segment producers will record meetings to later assist them in "transcrib[ing] [his] words . . . dictated in the meeting." ECF 882-6 at 21. He further explained that these recordings are "completely confidential" as they are "internal editorial deliberation[s] for . . . the generation of a script." Id.

[47] Mr. Blankenship contends Mr. Montopoli's reference to him as "old buddy" is indicative of actual malice inasmuch as it "reinforces that a jury could readily find that Hayes and his Staff's familiarity with [him] is strong evidence that Hayes and his Staff knew the truth about [his] conviction." ECF 911 at 16. The court, however,

Mr. Blankenship states "We don't need to investigate our president. We need to arrest Hillary. Lock her up." ECF 882-6 at 17. In response, Mr. Hayes replies "Holy . . . shit, Dude. [T]hat is, like, convicted felon . . . Don Blankenship . . . the man who was found, you know, to have criminally violated the law in the mine that he owned that killed, you know, all those miners," to which Mr. Montopoli replied "Yeah." Id. This candid, off-air discussion between Mr. Hayes and Mr. Montopoli appears to reinforce Mr. Hayes' contention that he genuinely believed Mr. Blankenship was a convicted felon when he stated as much on air later that same evening, not that he intentionally and knowingly uttered a calculated falsehood. When asked about this private discussion during his deposition, Mr. Hayes testified "I called him a convicted felon in the conversation because I thought he was a convicted felon, clearly." ECF 938-1 at 20.

Mr. Hayes' assertion that he believed Mr. Blankenship was a convicted felon at the time he referred to him as such on the April 23, 2018, and May 9, 2018, broadcasts of All In is further supported by an email communication with a viewer of the show on May 10, 2018. Mr. Hayes received an email from the viewer on the evening of May 10, 2018, stating: "You mentioned that Blankenship was a Felon on your Thing ½ Segment. Unfortunately it was a misdemeanor[.] Go figure!" ECF 938-1 at 36. In response, Mr. Hayes stated "yes! Caught that after the

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fails to see how the term "old buddy" is indicative of what Mr. Hayes knew about Mr. Blankenship's conviction at the time the statement was made.

show, but you're r[i]ght." Id. (emphasis added). This email -- sent the day after the last challenged statement was made -- further supports Mr. Hayes' contention that he believed his references to Mr. Blankenship as a convicted felon to be true at that time and did not realize his error until afterwards. To the extent Mr. Blankenship avers this email demonstrates MSNBC's failure to correct its misrepresentations about him, which, he says, "further bolsters that it acted with actual malice," such contention is lacking in merit. Indeed, "[a]ctual malice cannot be inferred from a failure to retract . . . a statement once the publisher learns that the statement is false." Blankenship, 451 F. Supp. at 618 (quoting Sullivan, 376 U.S. at 286); see also Pippen, 734 F.3d at 614 (noting that "[t]he Supreme Court . . . has said that actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false.").

In light of these contemporaneous communications, the court concludes that Mr. Hayes' response ("He only got nailed on the misdemeanor") to Mr. Horgan's December 3, 2015, email fails to demonstrate with convincing clarity that Mr. Hayes' challenged statements -- made over two years later -- amount to more than the mistaken, imprecise use of legal terminology. Again, "[t]he Constitution provides the press with a shield whereby it may be wrong when commenting on acts of a publics figure, as long as it is not intentionally or recklessly so." Carr, 259 F.3d at 283. The court concludes that Mr. Blankenship has failed to "forecast evidence sufficient to prove actual malice by clear and convincing evidence" on the part of

Mr. Hayes. Carr, 259 F.3d at 282. Accordingly, MSNBC is entitled to summary judgment on this basis.

6. Fox News

Mr. Blankenship contends that in April and May of 2018, Fox News broadcasted six defamatory statements concerning him made by six on-air broadcasters: (1) John Layfield; (2) Bradley Blakeman; (3) Stephanie Hamill; (4) Elizabeth MacDonald; (5) Judge Andrew Napolitano; and (6) Neil Cavuto.[48]

Mr. Blankenship devotes much of his briefing and supplemental briefing discussing alleged evidence of actual malice that is of little relevance in regard to what the speakers of the challenged statements subjectively knew at the time their statements were made. For example, Mr. Blankenship appears to assert that some of the most telling evidence of actual malice stems from the following May 6, 2018, email sent from Fox News Chairman and CEO Rupert Murdoch to Fox News Executives Suzanne Scott and Jay Wallace:

> Both Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but

[48] The challenged statements are as follows: (1) John Layfield ("Don Blankenship was . . . convicted of safety violations which 29 people were killed . . . a felon"); (2) Bradley Blakeman ("the guy's a felon"); (3) Stephanie Hamill ("it might be difficult for him to actually win because of his issues with being a convicted felon"); (4) Elizabeth MacDonald ("the implication here . . . is that a racist felon represents the Republican party"); (5) Judge Andrew Napolitano ("he went to jail for manslaughter after people died"); and (6) Neil Cavuto: ("he's a convicted felon").

> Sean and Laura dumping on him hard might save the day.

ECF 990-1.[49] He contends the Murdoch email amounts to a "tactic instruction to negatively shape the content of [the Fox News] programming to defeat Mr. Blankenship's candidacy" and "[i]t is neither accidental nor coincidental" that five of the six Fox News speakers identified above referenced him as a felon or convicted felon succeeding the email.[50] ECF 1503 at 2. To the extent Mr. Blankenship contends that the email can be interpreted as an explicit instruction from Mr. Murdoch to others at Fox News to defame Mr. Blankenship by falsely referring to him as a felon, the court is unpersuaded.

The plain text of the email lacks any instruction to defame Mr. Blankenship by inaccurately referencing his conviction. At no point are the words "felon" or "convicted felon" used in the email. At most, the email amounts to a call for heavy criticism of Mr. Blankenship as a candidate for public office, not an instruction to knowingly mischaracterize his conviction. Moreover, the court fails to see how the

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[49] The only response to the email was from Mr. Wallace the following day, in which he replied: "After a tweet free weekend, [President Trump]'s back to tee up WV . . .", followed by a direct quote of President Trump's tweet urging West Virginia voters to vote for "Rep. Jenkins or A.G. Morrisey" and not Mr. Blankenship. ECF 990-1 at 9.

[50] Judge Napolitano did not refer to Mr. Blankenship as a felon or convicted felon but incorrectly stated he was convicted of manslaughter.

content of the Murdoch email relates to what the speakers of the challenged statements knew at the time the alleged defamatory references were made.

As reiterated throughout this opinion, "it is the state of mind of the speaker that is relevant" in assessing actual malice. Mimms, 889 F.3d at 868 (citing Sullivan, 376 U.S. at 287). The record evidence demonstrates that the content of the Murdoch email was never shared or discussed with any of the individuals who uttered the statements at issue or with any other individual at Fox News. Indeed, Mr. Murdoch, Mr. Wallace, and Ms. Scott all confirmed as much in their affidavits, and Mr. Blankenship has produced no affirmative evidence to the contrary. See ECF Nos. 990-1; 990-2; 990-3. In fact, Mr. Blankenship conceded at his deposition that he did not have any evidence that Mr. Cavuto was instructed by anyone to mischaracterize his conviction and that he was unaware whether Judge Napolitano had received any such instruction. See ECF 890-2 at 39, 42-43. The Murdoch email is thus of little evidentiary value in assessing whether the speakers acted with actual malice. For these same reasons, Mr. Blankenship's assertions that Mr. Murdoch's alleged violation of "journalism ethics standards" and his "partisanship animus" demonstrate actual malice are without merit.

As to the statement made by Mr. Cavuto, Mr. Blankenship conceded during his deposition that he had no evidence that Mr. Cavuto knew his convicted felon reference was false at the time it was made. See ECF 890-2 at 42. Instead, Mr. Blankenship contends Mr. Cavuto purposefully avoided the truth when he

"disregarded" information alerting him that Mr. Blankenship was only convicted of a misdemeanor. Mr. Blankenship avers this information consists of (1) a one-word reference to his conviction as a misdemeanor by Peter Doocy made on Mr. Cavuto's show in April 2018, and (2) a packet received by Mr. Cavuto on May 2, 2018, regarding the West Virginia senatorial race, which embedded therein, contains a passive reference to Mr. Blankenship's conviction as a misdemeanor. Neither Mr. Doocy's statement nor the packet, however, "provide clear and convincing evidence that Mr. Cavuto's alleged defamatory statement was '"made with [a] high degree of awareness of [its] probable falsity."' Horne, 893 F.3d at 212 (quoting CACI, 536 F.3d at 300). To conclude that these meager references -- of which Mr. Blankenship has failed to establish Mr. Cavuto was even cognizant -- caused Mr. Cavuto to seriously doubt the accuracy of his statement or purposefully avoid the truth is to ignore the bulk of the uncontradicted evidentiary record.

Mr. Cavuto explained during his deposition that at the time he called Mr. Blankenship a convicted felon he "did not draw the distinction with the misdemeanor" and "[w]hat stood out to [him] was the time he'd served in federal prison[.]" ECF 890-14 at 4. He further explained if he had understood Mr. Blankenship was not a convicted felon, he "by all means would not have said that" given that he "had no horse in the race to do otherwise" and "want[s] to be accurate." Id. Mr. Cavuto's asserted misunderstanding is supported by his statements upon learning that Mr. Blankenship was not convicted of a felony. For instance, after

Mr. Blankenship explained he was not a felon to Mr. Cavuto on air, Mr. Cavuto responded "[s]o what are you if you've spent time in jail?" Id. at 5. Similarly, after Judge Napolitano undertook to explain the legal definitions of a felony and misdemeanor on Mr. Cavuto's show, Mr. Cavuto clarified "[s]o just serving a year in jail doesn't make you a convicted felon?" Id. at 8. Mr. Cavuto's reference to Mr. Blankenship as a convicted felon, made on May 7, 2018, preceded these explanations.

On May 2, 2018, Mr. Cavuto received the packet, entitled "May 8th, 2018 Primary Races," which summarized information regarding the West Virginia, Ohio, and Indiana primaries.[51] See ECF 890-30. Regarding the West Virginia primary, the packet provided information on both the Democrat and Republican candidates running for office, including bulleted lists of "fast facts" about each individual candidate and their "campaign themes" and "platforms." Id. The packet also included a two-page, single-spaced "overview" of the West Virginia senate race. Id. On the page regarding Mr. Blankenship, the packet sets forth bulleted information -- labeled "Blankenship Fast Facts" in boldfaced font -- which provides, inter alia, that Mr. Blankenship "[r]esigned

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[51] The court notes that it is unclear from the record how Mr. Cavuto received the packet. It appears that the packet was put together by Natalie Aspell, an individual whom Mr. Cavuto testified "coordinated a lot of research for [him]." ECF 953-7 at 15. The packet was emailed from Ms. Aspell to two other individuals -- who presumably worked with Mr. Cavuto -- on May 2, 2018 and was then provided to Mr. Cavuto at some point that same date. See ECF 890-30 at 2.

following the Upper Big Branch mine explosion in April 2010 that killed 29 miners" and that he was "[c]onvicted of conspiring to willfully violate safety standards and served one year in prison." ECF 890-30 at 9. The page also notes some of Mr. Blankenship's "campaign themes" and explains why he is running and his plans if elected. The individual page on Mr. Blankenship does not provide the legal classification of his conviction. The misdemeanor reference is not made until a few pages later in the senate race "overview" section of the packet, embedded within the following single-spaced paragraphs of information taken from the actual packet of information and inserted as an image herein, exactly as it appears in the packet:

On the one hand, U.S. Sen. Joe Manchin should be the most vulnerable incumbent up this cycle given that he is a Democrat representing a state that President Donald Trump carried by 42 points. On the other, Manchin has accumulated a very moderate voting record and seems in sync with voters, and thus has solid job approval and favorable ratings.

Manchin was elected to the Senate in a special election in 2010 with 54 percent, and then won a full term in 2012 with 61 percent.

Republicans have two first-tier candidates seeking the GOP nomination: U.S. Rep. Evan Jenkins and Attorney General Patrick Morrisey, who has an endorsement from former White House senior adviser Steve Bannon. Former coal industry worker Bo Copley is also running, as is former coal company CEO Don Blankenship. Blankenship, who can put personal resources into the race, seems to be running in search of vindication for his 2015 conviction on a misdemeanor charge related to the Upper Big Branch Mine explosion that killed 29 miners. Either Morrisey or Jenkins will give Manchin a competitive general election, but early indications are that it will be a very contentious primary.

Id. at 11. Mr. Cavuto testified that it was "standard procedure" to receive a packet like this towards the end of the primary season to "generally bring you up to speed" and that the packet could be "quite voluminous" and have "a lot of pieces to it." ECF 953-7 at 13-14. While Mr. Cavuto further testified that he "would have no doubt that [he] would have gone through" the primary packet, id. at 17, what he focused on were the "big bullet-point issues" regarding Mr. Blankenship's candidacy contained therein. Id. at 16; see also

ECF 890-14 at 3. At best, the record evidence demonstrates Mr. Cavuto's failure to be more careful in his review of the information he was provided, but it does not establish that he purposefully avoided the truth by clear and convincing evidence.

Mr. Blankenship next contends that Mr. Cavuto violated Fox News' "journalism ethics standards requiring impartiality by suggesting to viewers that the Republican Party would 'lose West Virginia' if Mr. Blankenship won the Primary," which, he says, is evidence of actual malice. ECF 1053 at 18. He further avers that such statement demonstrates Mr. Cavuto's "partisanship animus" towards him. Id. at 19. In support of this contention, Mr. Blankenship relies on Fox News Executive Jay Wallace's deposition testimony wherein he responded "no" to the question of whether he believed it would have been appropriate for the host of a Fox News show "to take sides in a political race and shape the stories that they covered to either help or harm a particular candidate." ECF 1503-1 at 14.

The court is unpersuaded that Mr. Wallace's testimony amounts to evidence that Fox News maintained journalism ethics standards related to impartiality for its hosts like Mr. Cavuto to follow. In fact, when asked whether Fox News maintains "any written standards or guidelines regarding ethical journalism," Mr. Wallace responded that it did not. Id. at 19. Even assuming Fox News maintained such a standard, however, aside from Mr. Blankenship's bare assertion, he has failed to demonstrate that Mr. Cavuto's statement would have amounted to an "extreme departure" therefrom. Harte-Hanks, 491 U.S.

at 665 ("a public figure plaintiff must prove more than an extreme departure from professional standards."). Moreover, the court notes that the full statement made by Mr. Cavuto was: "The president [is] warning Republicans, you know what, we're going to lose West Virginia if Don Blankenship is allowed to win the primary and he does win the primary." ECF 890-9 at 18 (emphasis added). When viewed in its entirety, it thus appears Mr. Cavuto was reporting on a statement made by President Trump, not making the suggestion himself.

Furthermore, assuming arguendo, that Mr. Cavuto's statement could demonstrate "partisanship animus" towards Mr. Blankenship, mere political bias alone is insufficient to establish actual malice by clear and convincing evidence. See Hinerman, 423 S.E.2d at 573. Indeed, "the motivations behind defendants' communications -- inspired by political differences or otherwise -- do not impact whether defendants acted with actual malice as a matter of law." Arpaio, 414 F. Supp. 3d at 92 (citing Harte-Hanks, 491 U.S. at 665 ("[A defendant's] motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice.")); see also Palin v. New York Times Co., 940 F.3d 804, 814 (2d Cir. 2019) (noting "political opposition" and "sheer political bias" alone do[ ] not constitute actual malice"); Lohrenz v. Donnelley, 223 F. Supp. 2d 25, 46 (D.D.C. 2002), aff'd, 350 F.3d 1272 (D.C. Cir. 2003) (noting "a media defendant's 'adversarial stance' may be 'fully consistent with professional, investigative reporting' and is not 'indicative of actual malice.'").

As to the statements made by Mr. Layfield, Mr. Blakeman, Ms. Hamill, and Ms. MacDonald, Mr. Blankenship has failed to produce a shred of evidence demonstrating they knew their statements to be false or acted in reckless disregard for the truth at the time they were uttered. Aside from merely reciting the statements spoken by these individuals, Mr. Blankenship's briefing lacks any substantive discussion whatsoever regarding their particular states of mind at the time their challenged statements were made. Moreover, Mr. Blankenship conceded during his deposition that he lacked any evidence that Mr. Layfield, Mr. Blakeman, Ms. Hamill, or Ms. MacDonald personally knew their references to him as a felon were incorrect at the time they were made. See ECF 890-2 at 44-52. The only evidence existing in the record regarding these individuals is that they believed their statements to be correct and had no serious doubts about their beliefs. See ECF Nos. 890-15; 890-16; 890-17; 890-18.

As to Judge Napolitano, Mr. Blankenship has likewise failed to present clear and convincing evidence that would contradict Judge Napolitano's testimony that he made an "honest mistake" when he stated Mr. Blankenship had been convicted of manslaughter "because he believed it was true at the time." ECF 890-13 at 4. Indeed, Mr. Blankenship conceded during his deposition that he had "no evidence that [Judge Napolitano] knew" his statement was false when it was made. ECF 890-2 at 38. In fact, Mr. Blankenship further testified that "he thought [Judge Napolitano] was pretty convincing that he made a mistake." Id. at 39. To the extent Mr. Blankenship avers Judge

Napolitano, or any of the other individual speakers, "turned a deaf ear to [his] explicit remarks about his misdemeanor conviction during the Fox [News] debate," his assertion is meritless as he has presented no evidence that any of these individuals watched the debate or the portion he references.

Mr. Blankenship's remaining alleged evidence of actual malice is equally without merit. He first points to the fact that several "Fox producers" declined Mr. Napolitano's initial requests for airtime in efforts to immediately "correct the record." ECF 953 at 18. Even so, "[a]ctual malice cannot be inferred from a failure to retract . . . a statement once the publisher learns that the statement is false." Blankenship, 451 F. Supp. at 618 (quoting Sullivan, 376 U.S. at 286); see also Pippen, 734 F.3d at 614 (noting that "[t]he Supreme Court . . . has said that actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false.").

Lastly, it appears Mr. Blankenship alludes to a May 4, 2018, Fox News telecast of The Story with Martha MacCallum, on which Fox News political contributors Karl Rove and Tammy Bruce appeared as guests, as evidence of actual malice. Mr. Blankenship contends during this show, Ms. MacCallum "orchestrated a nationally televised character assassination of [him] . . . less than a day after [Senator] McConnell's staffer informed MacCallum that [Senator] McConnell was 'pretty ticked' at

Mr. Blankenship."[52] ECF 953 at 17. He notes that during the show, Mr. Rove "callously called [him] a 'bigot,' 'moron,' and 'crook while Ms. Bruce dubbed [him] an 'embarrassment' and remarked: 'The good news is, Blankenship will be rejected . . ." Id.[53] Mr. Blankenship further contends that "[a]lthough there technically may have been no defamatory statements during MacCallum's beatdown of [him], it served as a foundation for the false narrative that Fox would persistently endorse on the eve of the primary election." Id. He contends "Ms. MacCallum's coordination with Senator McConnell and Mr. Rove to malign [him] on Ms. MacCallum's show was unquestionably indicative of actual malice." ECF 1053 at 19.

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[52] In a May 3 and 4, 2018, email exchange Ms. MacCallum and a member of Senator McConnell's staff discussed a news report detailing, among other things, Mr. Blankenship's criticisms of Senator McConnell and his wife and her family's purported ties to China. See ECF 953-15. During this exchange, Ms. MacCallum stated "[t]here are so many issues with [Mr. Blankenship], never enough time to hit them all." Id. at 2. In response to the staffer's comment that Senator McConnell was "pretty ticked" at Mr. Blankenship's criticisms, Ms. MacCallum replied, "I don't blame [Senator McConnell] at all. It's all about [Mr. Blankenship], he thinks he's more of a victim than the miners." Id. She also stated that she planned to report one of Mr. Blankenship's criticisms of Senator McConnell as "4 pinnochios." ECF 954-16 at 2.

[53] In support of this contention, Mr. Blankenship cites to a link to a video, which, though currently available on a website, is not available in the evidentiary record. See ECF 953 at 17 n.34. The day after the broadcast, Senator McConnell emailed Mr. Rove and thanked him for his comments on the program. See ECF 953-18 at 8. Mr. Rove replied, "Happy to help. W[ha]t a sick, twisted moron." Id. at 9-10.

Neither Ms. MacCallum nor Mr. Rove are alleged in Mr. Blankenship's complaint to have defamed him. Thus, similar to the Murdoch email addressed above, the court fails to see how Ms. MacCallum and Mr. Rove's conduct relates to what the speakers of the challenged statements knew at the time the alleged defamatory references were made. Indeed, Mr. Blankenship has provided no evidence demonstrating that Ms. MacCallum or Mr. Rove somehow impacted or influenced the speakers of the challenged statements in any way.

To the extent Mr. Blankenship avers the email communications between Ms. MacCallum and Senator McConnell's staff member and Mr. Rove and Senator McConnell before and after the program demonstrate a concerted effort to defame Mr. Blankenship, the court is unconvinced. The email communications at no point even mention Mr. Blankenship's conviction. Furthermore, neither Ms. MacCallum nor Mr. Rove mischaracterized Mr. Blankenship's conviction at any point during the broadcast. The discussion of Mr. Blankenship during the program amounts to nothing more than harsh criticism of a candidate for political office and "it can hardly be doubted that the constitutional guarantee [provided by the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). While Mr. Blankenship may have found the discussion on Ms. MacCallum's program offensive, pronounced criticism and disapproval by others is a natural consequence of stepping into the modern-day political arena. And it certainly fails to

establish that the actual speakers of the alleged defamatory statements at issue acted with actual malice. Ultimately, the evidence upon which Mr. Blankenship relies "is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." Anderson, 477 U.S. at 254. Accordingly, Fox News is entitled to summary judgment.

7. Summary

In sum, the court has concluded that Mr. Blankenship has failed to present clear and convincing evidence of actual malice as to each of the moving defendants. Accordingly, they are entitled to summary judgment on Mr. Blankenship's defamation claims against them on this ground.[54] The court notes that its ultimate conclusion on this point should not be taken as an endorsement of the moving defendants' errors. As explained in Apraio, "[t]he media is entrusted with the important responsibility of reporting on issues of great public importance so that the American people can make informed decisions at the ballot box and elsewhere" and even honest mistakes are capable of harming public figures and "diminish[ing] voters' abilities to impartially weigh the issues that affect them." 414 F. Supp. 3d at 93. Nonetheless, "erroneous statements are inevitable in free debate" and, in the absence of evidence of actual malice, "must be protected

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[54] Inasmuch as Mr. Blankenship has failed to produce clear and convincing evidence of actual malice, an essential element of his defamation claims, the court need not address the sufficiency of evidence with respect to the remaining elements.

if the freedoms of expression are to have the breathing space that they need to survive." Sullivan, 376 U.S. at 271-72.

IV. False Light Invasion of Privacy

West Virginia recognizes a legally protected interest in privacy. Tabata v. Charleston Area Med. Ctr., Inc., 759 S.E.2d 459, 464 (W. Va. 2014). "Publicity which unreasonably places another in a false light before the public is an actionable invasion of privacy." Syl. Pt. 12, Crump, 320 S.E.2d at 74. While the Supreme Court of Appeals of West Virginia has not definitively set forth elements for this claim, it appears a plaintiff who qualifies as a candidate for public office must prove that: (1) the defendant gave publicity to a matter concerning the plaintiff that places the plaintiff before the public in a false light, (2) the publicity was widespread, (3) the matter of the publicity was false, (4) the false light in which the plaintiff was placed would be "highly offensive to a reasonable person," and (5) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed" (i.e., actual malice). Taylor v. W. Virginia Dep't of Health & Human Res., 788 S.E.2d 295, 315–16 (W. Va. 2016) (citing Restatement (Second) of Torts § 652E (1977)); see Crump, 320 S.E.2d at 87-88.

Although "false light invasion of privacy is a distinct theory of recovery entitled to separate consideration and analysis," such claims are similar to defamation claims and courts often treat them in essentially the same manner. Crump, 320 S.E.2d at 87. As the Supreme Court of Appeals of West Virginia has

recognized, the First Amendment-derived actual malice standard announced in Sullivan applies to claims for false light invasion of privacy brought by plaintiffs who are public officials or public figures. See Crump, 320 S.E.2d at 88-89 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967)).

Thus, to withstand summary judgment on his false light invasion of privacy claim, Mr. Blankenship, as a matter of federal constitutional law, must adduce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. See Anderson, 477 U.S. at 255-56; see also Howard v. Antilla, 294 F.3d 244, 248-49, 252 (1st Cir. 2002) (requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Solano v. Playgirl, Inc., 292 F.3d 1078, 1084 (9th Cir. 2002) (same); Ashby v. Hustler Mag., Inc., 802 F.2d 856, 860 (6th Cir. 1986) (same); Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1140 (7th Cir. 1985) (same); cf. Parson v. Farley, 800 F. App'x 617, 623 (10th Cir. 2020) (affirming jury instructions requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1067 & n.2 (8th Cir. 1992) (same).

As explained in detail above, Mr. Blankenship has failed to produce clear and convincing evidence that could reasonably support a jury finding that the moving defendants acted with actual malice. Accordingly, the moving defendants are likewise

entitled to summary judgment on Mr. Blankenship's claims against them for false light invasion of privacy.

V. Civil Conspiracy Claims

In addition to his defamation and false light invasion of privacy claims, Mr. Blankenship's complaint contains sufficient factual allegations alleging that Fox News participated in a "shared . . . common plan for the commission of the tort[s] of defamation" and "false light invasion of privacy." ECF 14 ¶¶ 233, 246.

West Virginia recognizes the tort of civil conspiracy as a cause of action. Jane Doe-1 v. Corp. of President of The Church of Jesus Christ Latter-day Saints, 801 S.E.2d 443, 458 (2017). "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." Syl. Pt. 8, Dunn v. Rockwell, 689 S.E.2d 255, 259 (2009). A claim for civil conspiracy is not created by the conspiracy itself "but by the wrongful acts done by the defendants to the injury of the plaintiff." Id. A civil conspiracy therefore "is not a per se, stand-alone cause of action." Syl Pt. 9, Dunn, 689 S.E.2d at 259. Instead, it is "a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s)." Id. Simply put, "[a] conspiracy is not, itself, a tort. It is the tort, and each tort, not the conspiracy, that is actionable." Id. at 269 (quoting Segall v. Hurwitz, 114 Wis.2d 471, 481, 339 N.W.2d 333, 338 (Wis.App.1983)).

Inasmuch as Mr. Blankenship's defamation and false light invasion of privacy claims against Fox News fail, so too does his civil conspiracy claims premised on these underlying torts. Indeed, in the absence of a viable claim for defamation or false light invasion of privacy, Mr. Blankenship's alleged conspiracy claims against Fox News to commit the same fail as a matter of law. See Long v. M & M Transp., LLC, 44 F. Supp. 3d 636, 652 (N.D.W. Va. 2014) (concluding because there was "no underlying tort to support the [plaintiff's] civil conspiracy claim" it failed as a matter of law); see also Wittenberg v. Wells Fargo Bank, N.A., 852 F. Supp. 2d 731, 754 (N.D.W. Va. 2012) (concluding inasmuch as "no viable tort claim remains in this action . . . , any claim of civil conspiracy fails as a matter of law.").

VI. Conclusion

Based upon the foregoing discussion it is ORDERED that the following motions for summary judgment are GRANTED: News & Guts, LLC (ECF 880); MSNBC Cable, LLC (ECF 882); Cable News Network, Inc. (ECF 884); WP Company LLC (ECF 886); American Broadcasting Companies, Inc. (ECF 888); Fox News Network, LLC (ECF 890); Eli Lehrer (ECF 898); Mediaite, LLC and Tamar Auber (ECF 900); Griffin Connolly and FiscalNote, Inc. (ECF 903), and H.D. Media, LLC (ECF 945). It is further ORDERED that these defendants are DISMISSED from this action.

The Clerk is directed to transmit copies of this memorandum opinion and order to all counsel of record and any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 2:19-cv-00236

[Filed February 2, 2022]

DON BLANKENSHIP,
Plaintiff,

v.

FOX NEWS NETWORK, LLC; CABLE NEWS NETWORK, INC.; MSNBC CABLE, LLC; 35th INC.; WP COMPANY, LLC d/b/a The Washington Post; MEDIAITE, LLC; FISCALNOTE, INC. d/b/a Roll Call; NEWS AND GUTS, LLC; THE CHARLESTON GAZETTE-MAIL; AMERICAN BROADCASTING COMPANIES, INC.; TAMAR AUBER; GRIFFIN CONNOLLY; ELI LEHRER; and DOES 1-50 INCLUSIVE,
Defendants.

JUDGMENT ORDER

In accordance with the two companion Memorandum Opinion and Orders entered this same date, it is ORDERED that judgment be, and hereby is, entered in favor of Defendants 35th Inc.; Fox News

Network, LLC; Cable News Network, Inc.; MSNBC Cable, LLC; WP Company, LLC; Mediaite, LLC; FiscalNote, Inc.; News and Guts, LLC; The Charleston Gazette-Mail; American Broadcasting Companies, Inc.; Tamar Auber; Griffin Connolly; and Eli Lehrer, and against Plaintiff Don Blankenship. It is further ORDERED that this civil action is DISMISSED and STRICKEN from the docket.

The Clerk is directed to transmit copies of this Order to all counsel of record and to any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

Civil Action No. 2:19-cv-00589

[Filed February 2, 2022]

DON BLANKENSHIP,	)
Plaintiff,	)
	)
v.	)
	)
BOSTON GLOBE MEDIA PARTNERS, LLC	)
(d/b/a THE BOSTON GLOBE), and	)
DOES 1-50 INCLUSIVE,	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

Pending are Defendant Boston Globe Media Partners, LLC's (the "Boston Globe") objections and motion to strike Plaintiff Don Blankenship's supplemental disclosures (ECF 72), filed May 24, 2021, and the Boston Globe's motion for summary judgment (ECF 76), filed July 13, 2021. On July 27, 2021, Mr. Blankenship responded in opposition (ECF 78) to the motion for summary judgment, to which the Boston Globe replied (ECF 79) on August 3, 2021.

I. Background

On May 20, 2019, Mr. Blankenship instituted this action against the Boston Globe and fifty unnamed "Doe" defendants[1] in the Circuit Court of Mingo County, asserting claims of defamation and false light invasion of privacy.[2] See ECF 1-1. On August 12, 2019, the action was removed to this court based on diversity jurisdiction. See ECF 1; 28 U.S.C. § 1332. The complaint alleges the following.

A. General Allegations

After an explosion in a West Virginia mine resulted in the deaths of twenty-nine miners, the United States Government initiated an investigation into the cause of the explosion, focusing on Massey Energy, which operated the mine, and Mr. Blankenship, who was Massey's chief executive officer. See ECF 1-1 ¶¶ 7-8, 35-38. While Mr. Blankenship was not charged with the miners' deaths, the Government later charged him with three felonies, as well as one misdemeanor for

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[1] The court has dismissed the fifty "Doe" defendants from this action this same date given Mr. Blankenship's failure to properly identify them after the close of discovery.

[2] The claims asserted herein are nearly identical to those Mr. Blankenship brings in two related actions pending before the court: Blankenship v. Fox News Network, LLC, et al., No. 2:19- cv-00236 (S.D.W. Va.) and Blankenship v. NBCUniversal, LLC, et al., No. 2:20-cv-00278 (S.D.W. Va.). The Boston Globe was initially named as a defendant in the Fox News action. See ECF 77 at 9 n.6; see also Fox News ECF 1-1. It was dropped as a defendant therein, however, when Mr. Blankenship amended his complaint. See Fox News ECF 14.

conspiracy to violate federal mine safety laws. See id. ¶ 41. On December 3, 2015, a jury acquitted Mr. Blankenship of the felony charges but found him guilty of the misdemeanor offense. See id. ¶ 43. As a result, Mr. Blankenship was sentenced to one year in prison and was released in the spring of 2017. See id. ¶ 44.

In January 2018, Mr. Blankenship announced his campaign to run as a Republican for a United States Senate seat in West Virginia. See id. ¶ 46. Mr. Blankenship lost his bid for the Republican party's nomination in the primary election on May 8, 2018. See id. ¶ 62. Mr. Blankenship alleges that media coverage was responsible for his loss due to defamatory statements referring to him as a "felon" or "convicted felon," despite that he was acquitted of the felony charges and was only convicted of the misdemeanor offense. See id. ¶¶ 52-59. Mr. Blankenship alleges that these defamatory statements injured his reputation, prevented him from pursuing other business opportunities, and caused him to lose the primary election. See id. ¶¶ 25, 62.

B. Allegations Against the Boston Globe

The Boston Globe, a Delaware limited liability company, is the publisher of The Boston Globe newspaper. See id. ¶ 32; see also ECF 77 at 5. The Boston Globe newspaper "is a regional newspaper published in the Boston, Massachusetts area." ECF 77 at 5; ECF 77-1 ¶ 2. "For several years, page two of the [Boston] Globe newspaper has been published under the banner 'The Nation,' usually with the subheading of 'Daily Briefing' over some of the articles on the page." ECF 77-1 ¶ 4. The Nation page of the newspaper

consists of news from other parts of the country populated by wire service articles from the Associated Press, The New York Times, and the Washington Post for Boston Globe readers who primarily reside in the New England states. Id.

On May 22, 2018, two weeks after the primary election, the Boston Globe published an edited version of an Associated Press ("AP")[3] article under the headline "W.Va. primary loser makes bid to try again." See ECF 77-2 at 3. The original, unedited version of the AP article, authored by John Ruby, described Mr. Blankenship as a "convicted ex-coal baron" who had "spent a year in federal prison for violating safety regulations in a 2010 mine explosion that killed 29 miners." ECF 77-4 at 2, 4. Before the AP article was republished by the Boston Globe, the article was edited by Daniel Coleman, a layout and copy editor for the Boston Globe, to change "convicted ex-coal baron" to "convicted felon and former coal baron."[4] See ECF 77-9 at 71. The first paragraph of the edited article published in the May 22, 2018, edition of the Boston Globe newspaper thus read:

> Despite losing the Republican primary in a distant third place, convicted felon and former

[3] The Boston Globe and the AP had an agreement providing the Boston Globe with the right to access, edit, and publish AP articles in its newspaper and online operation. See ECF 77-9 at 24-25.

[4] Although the Boston Globe's IT staff found that three individuals had "touched the story" as it progressed through the editing process, the IT staff was able to specifically identify that it was Mr. Coleman who made the change at issue. See ECF 77-9 at 70-71.

> coal baron Don Blankenship announced Monday that he will continue his bid for U.S. Senate as a third-party candidate, though it's unclear if the move violates West Virginia's 'sore loser' law.

ECF 77-2 at 3 (emphasis added); see also ECF 1-1 ¶ 24. On June 14, 2019, after this case was filed in state court on May 20, 2019, the Boston Globe published the following correction to the article:

> Because of an editing error, a May 22, 2018, story about former coal executive Don Blankenship of West Virginia referred incorrectly to his criminal case. He was convicted of a misdemeanor for his role in connection with a deadly 2010 mine disaster. The Globe regrets the error.[5]

ECF 77-12.[6] The convicted felon reference in the May 22, 2018, article forms the basis of Mr. Blankenship's claims against the Boston Globe for defamation and false light invasion of privacy.

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[5] Mr. Blankenship contends in his briefing, albeit not in his complaint, that this correction was also defamatory and "considerably more offensive than referring to [him] as a 'convicted felon'". ECF 78 at 11. As noted by the court in a prior opinion, Mr. Blankenship "asserts no cause of action based on the alleged falsity of the correction." ECF 73 at 2 n.1. Accordingly, the court declines to entertain this contention herein.

[6] In its briefing, the Boston Globe appears to note that it was unaware of its error prior to March of 2019, when Mr. Blankenship filed his complaint in the Fox News action, in which the Boston Globe was initially named as a defendant. See ECF 77 at 9.

On May 24, 2021, the Boston Globe moved to strike Mr. Blankenship's supplemental Rule 26(a)(1) disclosures as untimely.[7] See ECF 72. Thereafter, on July 13, 2021, the Boston Globe moved for summary judgment. See ECF 76. The court will first address the motion for summary judgment before turning to the motion to strike.

II. Governing Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In deciding a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650, 651, 657 (2014) (per curiam).

III. Discussion

The Boston Globe contends summary judgment is warranted inasmuch as (1) the court lacks personal jurisdiction over it, and (2) Mr. Blankenship has failed to produce clear and convincing evidence supporting his claims. Mr. Blankenship responds that the Boston Globe waived its personal jurisdiction defense given its

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[7] Mr. Blankenship did not respond to the motion to strike.

failure to seasonably assert the same and that he has produced sufficient evidence supporting his claims. The court will address these contentions in turn.

A. Personal Jurisdiction and Waiver

Pursuant to Federal Rule of Civil Procedure 12(b)(2), a personal jurisdiction challenge is an affirmative defense that must be raised by the defendant. See Grayson v. Anderson, 816 F.3d 262, 267 (4th Cir. 2016). The personal jurisdiction defense can be waived, however, if it is not timely asserted. Fed. R. Civ. P. 12(h)(1). Indeed, a party waives the defense if it fails to raise the same at the time it files a Rule 12 motion or in its answer, whichever is first. Id.; see also Convergence Techs. (USA), LLC v. Microloops Corp., 711 F. Supp. 2d 626, 632 (E.D. Va. 2010) (explaining "it is well-established that objections to personal jurisdiction must be raised at the time the first significant defensive move is made – whether it be by way of a Rule 12 motion or in a responsive pleading.") (internal citations omitted).

"Rule 12(h), however, 'sets only the outer limits of waiver; it does not preclude waiver by implication.'" Hager v. Graham, No. 5:05-CV-129, 2010 WL 753242, *1 (N.D. W.Va. March 2, 2010) (quoting Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990)). In some circumstances a defendant's conduct "may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." ABC Phones of N. Carolina, Inc. v. Yahyavi, No. 5:20-CV-0090-BR, 2020 WL 4208923, *3 (E.D.N.C. July 22, 2020) (internal citations omitted). For instance, "a party can be held to have waived a defense listed in Rule 12(h)(1) through

conduct, such as extensive participation in the discovery process or other aspects of the litigation of the case even if the literal requirements of Rule 12(h)(1) have been met." 5C Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1391 (3d ed.) (updated Apr. 2020)); see also Hager, 2010 WL 753242 at *1 (noting "[a]s a privilege, the personal jurisdiction defense may be waived 'by failure [to] assert [it] seasonably, by formal submission in a cause, or by submission through conduct.'") (quoting Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939)); U.S. to Use of Combustion Sys. Sales, Inc. v. Eastern Metal Prod. & Fabricators, Inc., 112 F.R.D. 685, 687 (M.D.N.C. 1986) (noting that waiver of the personal jurisdiction defense "has been inferred in a wide variety of situations, even when the defense has been formally raised in an answer, by conduct and inaction, such as entering an appearance, filing motions and requesting relief, or participating in hearings or discovery."); Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993) (concluding that the defendants' active participation in the litigation for two-and-a-half years by participating in discovery and motions practice constituted a waiver of the personal jurisdiction defense.).

With that being said, "[t]here is no bright line rule when determining whether waiver by conduct is appropriate; indeed, it is 'more [an] art than a science.'" Edwards v. Clinical Solutions, No. 9:19-cv-02872-HMH-MHC, 2020 WL 7249906, *3 (D.S.C. Oct. 16, 2020) (quoting Boulger v. Woods, 917 F.3d 471, 477 (6th Cir. 2019)). In determining whether a party has waived a defense by conduct, courts "consider the degree of

participation in the litigation, such as 'entering an appearance, filing motions and requesting relief, or participating in hearings or discovery.'" Id. (quoting ABC Phones of N. Carolina, Inc., 2020 WL 42089323 at *3).

The Boston Globe timely raised the defense of personal jurisdiction in its answer, filed August 15, 2019. See ECF 3 at 12 ¶ 2.[8] Nonetheless, the court agrees with Mr. Blankenship that the Boston Globe's extensive participation in this litigation for over two years amounts to a waiver of the personal jurisdiction defense. This is so despite the Boston Globe's literal compliance with Rule 12(h) by raising the defense in its answer inasmuch as the same does "not preserve the defense in perpetuity." Yeldell, 913 F.2d at 539 (internal citations omitted). Since first raising the defense over two years ago, the Boston Globe has vigorously partaken in this litigation by (1) participating in the Rule 26(f) planning meeting, (2) jointly submitting a Rule 26(f) report, (3) participating in numerous scheduling conferences with the court, (4) entering into multiple stipulations with Mr. Blankenship, (3) filing two[9] motions to compel certain discovery responses and document production, one of which was fully briefed, ruled upon by the Magistrate Judge, objected to by Mr. Blankenship, and addressed by the court in a nineteen page

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[8] The Boston Globe also raised the defense in its notice of removal, filed August 12, 2019. See ECF 1 at 7 ¶ 19.

[9] The Boston Globe's second motion to compel was later withdrawn after it was fully briefed. See ECF Nos. 59, 60, 62, 65.

memorandum opinion, (4) attending two depositions, and (5) engaging in other motions practice, such as filing a motion to strike, all before raising the merits of the defense in its summary judgment motion filed July 13, 2021.

Contrary to the Boston Globe's contention, the court concludes this conduct amounts to an active and extensive participation in this litigation, demonstrating a manifest intent to submit to the court's jurisdiction. Where, as here, "a party foregoes a Rule 12(b) motion in favor of asserting a jurisdictional defect in its (timely) answer [it] must promptly present that defense for the [c]ourt's consideration." Branson v. American International Industries, No. 1:15-cv-73, 2016 WL 3190222, *3 (M.D.N.C. June 7, 2016). Given its over two-year delay, the Boston Globe has failed to promptly present the merits of the defense for the court's consideration. It has thus forfeited the defense by failing to press the same during the last two years of this litigation. Again, while the Boston Globe may have complied with the literal requirements of Rule 12(h), it "did not comply with the spirit of the rule, which is 'to expedite and simplify proceedings in the Federal Courts.'" Continental Bank, 10 F.3d at 1297 (quoting Yeldell, 913 F.2d at 539). Accordingly, the court deems the Boston Globe's personal jurisdiction defense waived and will proceed to the merits of Mr. Blankenship's claims.

B. Defamation

Defamation is "[a] false written or oral statement that damages another's reputation." Pritt v. Republican

Nat. Comm., 557 S.E.2d 853, n.12 (W. Va. 2001) (quoting Black's Law Dictionary 427 (7th ed. 1999)).

West Virginia law identifies three types of plaintiffs in defamation cases: (1) public officials and candidates for public office, (2) public figures, and (3) private individuals. See Syl. Pt. 10, Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 564 (W. Va. 1992); see generally Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W. Va. 2003) (discussing types of public figures in defamation suits). The first step in assessing a claim for defamation is to determine whether the plaintiff is a private individual or is instead a candidate for public office, a public official, or a public figure. See Zsigray v. Langman, 842 S.E.2d 716, 722 (W. Va. 2020). Mr. Blankenship concedes that he qualifies as both a candidate for public office and a public figure.[10] See ECF 78 at 8; see also Fox News ECF 953 at 14. While the statement at issue herein was published on May 22, 2018, two weeks after the conclusion of the primary election, the court finds that Mr. Blankenship qualified as a candidate for public office through this time given his intention to run as the Constitution Party's candidate for the United States Senate.[11]

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[10] Based upon nearly identical allegations in Mr. Blankenship's complaint in the Fox News action, the court determined that he qualifies as a candidate for public office and "may also qualify as a public figure in West Virginia based on his 'prominence and notoriety'". See Fox News, ECF 398 at 17 (citing State ex rel. Suriano v. Gaughan, 480 S.E.2d 548, 556 (W. Va. 1996)).

[11] The Supreme Court of Appeals of West Virginia did not reject Mr. Blankenship's attempt to run as the Constitution Party's candidate until August 29, 2018. See State ex rel. Blankenship v.

As Mr. Blankenship concedes, his notoriety in the state of West Virginia, his pervasive involvement in the national political arena, and the extensive national media attention he has received as set forth in detail in the court's memorandum opinion and order entered this same date in the Fox News action make clear that he also qualifies as a public figure. See Wilson, 588 S.E.2d at 205 (explaining that an individual's "general fame or notoriety in the state and pervasive involvement in the affairs of society" renders that individual an "all-purpose public figure" in a defamation action.). Regardless of whether Mr. Blankenship is referred to as a candidate for public office or public figure, the First Amendment protections are the same for each. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) (noting the test set forth in New York Times v. Sullivan applies to both "criticism of 'public figures' as well as 'public officials.'"); see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) (noting that it "might be preferable to categorize a candidate for [public office] as a 'public figure,'" as opposed to a public official, "if for no other reason than to avoid straining the common meaning of words. But . . . it is abundantly clear that, whichever term is applied, publications concerning candidates [for public office] must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office.").

Warner, 825 S.E.2d 309, 312 n.1 (W. Va. 2018). The court later issued its written opinion detailing its decision on October 5, 2018. Id.

To recover in a defamation action, a plaintiff who qualifies as a candidate for public office must prove that:

> (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion;[12] (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

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[12] In its March 31, 2020, memorandum opinion and order in the Fox News case, the court concluded that the challenged statements identified in Mr. Blankenship's complaint are capable of defamatory meaning and may also be considered defamatory per se because they impute a felony conviction. See Fox News ECF 398 at 18-20. To the extent any of the statements could be considered opinions, the court concluded "they are based on a 'provably false assertion of fact' and thus are not absolutely protected under the First Amendment." Id. at 20. The court incorporates its previous findings here and concludes that the challenged statement herein is not only capable of defamatory meaning but constitutes defamation per se as a matter of law. The court recognizes that Mr. Blankenship was convicted of a misdemeanor offense, which amounts to a criminal conviction. Nonetheless, inasmuch as "a felony conviction carries significantly greater legal consequences than a misdemeanor does," the court concludes the per se rule is applicable. Myers v. The Telegraph, 332 Ill.App.3d 917, 773 N.E.2d 192, 197 (2002) (concluding the defamation per se rule should still apply given the "little, if any, practical difference between falsely accusing a person of committing a crime and falsely attributing a felony conviction to a person who pleaded guilty only to a misdemeanor.").

Syl. Pt. 5, Chafin v. Gibson, 578 S.E.2d 361, 363 (W. Va. 2003) (per curiam) (emphasis omitted) (quoting Syl. Pt. 1, Hinerman, 423 S.E.2d at 563); accord Syl. Pt. 7, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (setting forth nearly identical elements in a defamation action involving a limited purpose public figure). Further, the West Virginia Supreme Court of Appeals has also held that, to sustain a defamation action, a plaintiff who qualifies as a candidate for public office must prove that "the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syl. Pt. 4, Chafin, 578 S.E.2d at 363 (quoting Syl. Pt. 1, Sprouse v. Clay Commc'n Inc., 211 S.E.2d 674, 679 (1975)); accord Syl. Pt. 6, Pritt, 557 S.E.2d at 855; see also State ex rel. Suriano, 480 S.E.2d at 561 (noting a limited purpose public figure must also prove a publisher's intent to injure). A plaintiff who qualifies as a candidate for public office must prove each of the elements of his claim by clear and convincing evidence. See Chafin, 578 S.E.2d at 366-67; Pritt, 557 S.E.2d at 862; Hinerman, 423 S.E.2d at 572-73.

The Boston Globe contends Mr. Blankenship's defamation claim fails inasmuch as Mr. Blankenship has failed to produce clear and convincing evidence demonstrating: (1) actual malice; (2) material falsity of the alleged defamatory statements; and (3) an intent to injure.[13]

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[13] The Boston Globe also contends that Mr. Blankenship has failed to produce evidence of compensable damages.

1. Actual Malice

To satisfy the essential elements of a defamation cause of action, a plaintiff who qualifies as a candidate for public office must prove "actual malice" on the part of the publisher, that is, that the publisher made the defamatory statement "'with knowledge that the statement was false or with reckless disregard of whether it was false or not.'" Chafin, 578 S.E.2d at 366 (brackets omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

The actual malice standard derives from the United States Supreme Court's decision in Sullivan and its progeny, which, as recognized by the Supreme Court of Appeals of West Virginia, "placed a [F]irst [A]mendment, free speech gloss upon all prior law of defamation." Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 73 (W. Va. 1983); see id. (noting that First Amendment concerns and concomitant protections provided by the actual malice standard, are at their "strongest" when the statement at issue concerns "a public official or candidate for office because of the need for full, robust, and unfettered public discussion of persons holding or aspiring to offices of public trust."). Thus, "'application of the state law of defamation' is limited . . . by the First Amendment," CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 293 (4th Cir. 2008) (quoting Milkovich v. Loarin Journal Co., 497 U.S. 1, 14 (1990)), and the court applies federal law in assessing the element of actual malice, see Berisha v. Lawson, 973 F.3d 1304, 1314 n.6 (11th Cir. 2020).

"'Actual malice is a subjective standard.'" Fairfax v. CBS Corp., 2 F.4th 286, 293 (4th Cir. 2021) (alteration

omitted) (quoting Reuber v. Food Chem. News, Inc., 925 F.2d 703, 714 (4th Cir. 1991) (en banc)). Thus, "[t]he actual malice standard requires that 'the defendant had a particular, subjective state of mind at the time the statements were made.'" Id. at 295 (quoting Horne v. WTVR, LLC, 893 F.3d 201, 211 (4th Cir. 2018)). Accordingly, "[a] plaintiff must prove that the defendant published the statement despite actually knowing it was false or harboring 'a high degree of awareness of probable falsity.'" Id. at 293 (ellipsis omitted) (quoting Reuber, 925 F.2d at 714). To show reckless disregard for the truth, then, "a plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of his publication.'" Id. (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

A plaintiff who is a candidate for public office bears the heavy burden of proving actual malice by clear and convincing evidence. See CACI, 536 F.3d at 293 (citing Carr v. Forbes, Inc., 259 F.3d 273, 282 (4th Cir. 2001); see also Carr, 259 F.3d at 282 (4th Cir. 2001) ("Establishing actual malice is no easy task . . . ."). At the summary judgment stage, the appropriate inquiry for the court is "whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." Anderson, 477 U.S. at 255-56; see Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.").

Mr. Blankenship avers that the Boston Globe acted with actual malice in publishing the article containing

the convicted felon reference inasmuch as it "had a high degree of awareness of the probable falsity" of the challenged statement. ECF 78 at 11. In support of this assertion, he first points to three articles wherein the Boston Globe had "previously reported that [he] was convicted of a misdemeanor." ECF 78 at 3 (citing ECF Nos. 78-5; 78-6; 78-7). Mr. Blankenship further contends that because "[t]here was no legitimate reason whatsoever for [the] Boston Globe to change the text of the AP article from 'convicted ex-coal baron' to 'convicted felon and former coal baron[,]' . . . [a] reasonable inference could be drawn that the article was changed to generate controversy and readership." Id. Additionally, Mr. Blankenship has provided a bulleted list, without any elaboration or citation to the record, by which he contends that the following quoted "actions and omissions" of the Boston Globe serve as "cumulative evidence" that it acted in reckless disregard for the truth by publishing the edited article:

- accurate text changed to inaccurate text to maximize impact;
- peripherality of the defamatory text in context of the story;
- absence of investigation before publishing the defamatory statement;
- [the] editor's purported lack of memory and credibility;
- extreme departure from professional standards; and
- failure to supervise [the] editor's preparation for the story.

Id. The court does not agree. At this stage of the litigation, Mr. Blankenship is obligated to produce affirmative evidence of convincing clarity that the Boston Globe acted with actual malice. Bare assertions, with no citation to the record, do little to satisfy this heavy burden. Even assuming Mr. Coleman -- the editor responsible for the challenged statement -- failed to investigate prior to publishing or that his preparation was not adequately supervised, neither allegation constitutes sufficient proof of actual malice. Indeed, "recklessness 'is not measured by whether a reasonably prudent man would have published or would have investigated before publishing.'" Fairfax, 2 F.4th at 293 (quoting St. Amant, 390 U.S. at 731). Thus, an editor's "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." Harte-Hanks, 491 U.S. at 688.[14]

Mr. Blankenship's reliance on the three previous Boston Globe articles accurately reporting his conviction is misplaced inasmuch as Mr. Blankenship has failed to present any evidence that Mr. Coleman was aware of or involved in the publication of these articles. As the court previously explained in its opinion in Blankenship v. Napolitano, "the 'mere presence' of previous stories in a [media organization's]

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[14] "[F]ailure to investigate before reporting a third party's allegations can be reckless 'where there were obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" Fairfax, 2 F.4th 286 at 293 (quoting Harte-Hanks, 491 U.S. at 688). Mr. Blankenship has produced no evidence that Mr. Coleman actually relied on any information or sources that should have provided him with obvious reasons to doubt the accuracy thereof.

files does not establish that the [media organization] knew that the statement was false 'since the state of mind required for actual malice would have to be brought home to the persons in the . . . organization having responsibility for the publication of the [statement].'" 451 F. Supp. 3d 596, 619 (S.D. W. Va. 2020) (quoting Sullivan, 376 U.S. at 287). Furthermore, Mr. Blankenship's assertion that the "convicted ex-coal baron" language was changed to "convicted felon" to "maximize impact" and "generate controversy and readership" is nothing more than sheer speculation and unsupported by the evidentiary record. David Dahl -- the Boston Globe's corporate representative, its Deputy Managing Editor for Print and Operations, and the only Boston Globe individual Mr. Blankenship deposed in this matter[15] -- testified that he believed "what happened here was an honest mistake by an editor

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[15] Mr. Blankenship did not depose Mr. Coleman after learning from Mr. Dahl that it had been determined by the Boston Globe's IT staff that Mr. Coleman was the individual who had made the edit to the article at issue. After Mr. Dahl learned that Mr. Coleman was responsible for the error, Mr. Dahl testified that he spoke with Mr. Coleman, who stated that "he did not recall making the change and did not recall the story." ECF 77-9 at 72. Mr. Dahl further testified layout editors, such as Mr. Coleman, "on a given night . . . would edit personally five to ten stories for maybe 20 wire stories[,]" which "[o]ver the course of a year . . . might add up to literally hundreds, if not a thousand or more stories." Id. To the extent Mr. Blankenship avers Mr. Coleman's "lapse of memory" calls his credibility into question, such assertion is insufficient to create a genuine dispute of material fact on the issue of actual malice. See Anderson, 477 U.S. at 256 (explaining that a plaintiff cannot defeat summary judgment "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of . . . legal malice.").

looking at a story about a very serious incident and editing an incorrect characterization" into the article. ECF 77-9 at 78. He further testified that he believed "an honest mistake" had been made "in the course of editing the story" and that the Boston Globe "took the mistake seriously and . . . regret[ted] making the error." Id. at 73, 76. Mr. Blankenship has presented no evidence that would call Mr. Dahl's testimony into question. The court also fails to see how Mr. Blankenship's reliance on the alleged "peripherality of the defamatory text in context of the story" bears any relevance to whether Mr. Coleman published the statement in reckless disregard of the truth.

Finally, Mr. Blankenship's bare assertion that the Boston Globe's "extreme departure from professional standards" amounts to evidence of actual malice fares no better than his previous contentions. Indeed, Mr. Blankenship has failed to identify any "professional standard" that was allegedly violated. Nonetheless, even an "extreme deviation from professional standards" is constitutionally insufficient to establish clear and convincing evidence of actual malice. Harte-Hanks, 491 at 665. In sum, Mr. Blankenship has failed to demonstrate that the Boston Globe, through the actions of Mr. Coleman, acted with actual malice in publishing the article at issue. Accordingly, the Boston Globe is entitled to summary judgment on this basis.[16]

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[16] Inasmuch as Mr. Blankenship has failed to produce clear and convincing evidence of actual malice, an essential element of his defamation claim, the court need not address the sufficiency of evidence with respect to the remaining elements.

C. False Light Invasion of Privacy

West Virginia recognizes a legally protected interest in privacy. Tabata v. Charleston Area Med. Ctr., Inc., 759 S.E.2d 459, 464 (W. Va. 2014). "Publicity which unreasonably places another in a false light before the public is an actionable invasion of privacy." Syl. Pt. 12, Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 74 (W. Va. 1983). Although the Supreme Court of Appeals of West Virginia has not definitively set forth elements for the cause of action, it appears that, for a plaintiff who qualifies as a candidate for public office to establish a case for a false light invasion of privacy, he must prove that: (1) the defendant gave publicity to a matter concerning the plaintiff that places the plaintiff before the public in a false light, (2) the publicity was widespread, (3) the matter of the publicity was false, (4) the false light in which the plaintiff was placed would be "highly offensive to a reasonable person," and (5) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed" (i.e., actual malice). Taylor v. W. Virginia Dep't of Health & Human Res., 788 S.E.2d 295, 315–16 (W. Va. 2016) (citing Restatement (Second) of Torts § 652E (1977)); see Crump, 320 S.E.2d at 87-88.

Although "false light invasion of privacy is a distinct theory of recovery entitled to separate consideration and analysis," claims of false light invasion of privacy are similar to defamation claims, and courts often treat them in essentially the same manner as they treat defamation claims. Crump, 320 S.E.2d at 87. As the Supreme Court of Appeals of West Virginia has

recognized, the First Amendment-derived actual malice standard announced in Sullivan applies to claims for false light invasion of privacy brought by plaintiffs who are public officials or public figures. See Crump, 320 S.E.2d at 88-89 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967)).

Thus, to withstand summary judgment on his false light invasion of privacy claim, the plaintiff, as a matter of federal constitutional law, must adduce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. See Anderson, 477 U.S. at 255-56; see also Howard v. Antilla, 294 F.3d 244, 248-49, 252 (1st Cir. 2002) (requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Solano v. Playgirl, Inc., 292 F.3d 1078, 1084 (9th Cir. 2002) (same); Ashby v. Hustler Mag., Inc., 802 F.2d 856, 860 (6th Cir. 1986) (same); Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1140 (7th Cir. 1985) (same); cf. Parson v. Farley, 800 F. App'x 617, 623 (10th Cir. 2020) (affirming jury instructions requiring actual malice to be proved by clear and convincing evidence for false light invasion of privacy claim); Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1067 & n.2 (8th Cir. 1992) (same).

As previously explained in detail above, Mr. Blankenship has failed to produce sufficient evidence that could reasonably support a jury finding of actual malice by clear and convincing evidence. Accordingly, the Boston Globe is likewise entitled to summary

judgment on Mr. Blankenship's cause of action for false light invasion of privacy.[17]

IV. Conclusion

Based upon the foregoing discussion, it is ORDERED that the Boston Globe's motion for summary judgment (ECF 76) is GRANTED, the Boston Globe's motion to strike (ECF 72) is DENIED AS MOOT, and this action is DISMISSED.

The Clerk is directed to transmit copies of this memorandum opinion and order to all counsel of record and any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

[17] Inasmuch as the Boston Globe is entitled to summary judgment on all of Mr. Blankenship's claims, the court need not address the merits of its pending motion to strike.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 2:19-cv-00589

[Filed February 2, 2022]

DON BLANKENSHIP,
Plaintiff,

v.

BOSTON GLOBE MEDIA PARTNERS, LLC
(d/b/a THE BOSTON GLOBE), and
DOES 1-50 INCLUSIVE,
Defendants.

JUDGMENT ORDER

In accordance with the companion Memorandum Opinion and Order entered this same date, it is ORDERED that judgment be, and hereby is, entered in favor of Defendant Boston Globe Media Partners, LLC, and against Plaintiff Don Blankenship. It is further ORDERED that this civil action is DISMISSED and STRICKEN from the docket.

The Clerk is directed to transmit copies of this Order to all counsel of record and to any unrepresented parties.

ENTER: February 2, 2022

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
Senior United States District Judge

APPENDIX I

FOX News

Irena Briganti
Senior EVP, Communications
Phone: (212) 301-3608
Email: irena.briganti@fox.com

FOX News Media operates the FOX News Channel (FNC), FOX Business Network (FBN), FOX News Digital, FOX News Audio, FOX News Books, the direct-to-consumer streaming services FOX Nation and FOX News International and the free ad-supported television service FOX Weather. Currently the number one network in all of cable, FNC has also been the most watched television news channel for 20 consecutive years, while FBN ranks among the top business channels on cable. Owned by Fox Corporation, FOX News Media reaches 200 million people each month.

McConnell urged Trump to speak out against Blankenship: report

Getty

President Trump's plea for West Virginia Republicans to reject the Senate candidacy of former mining CEO Don Blankenship came at the urging of Senate Majority Leader Mitch McConnell (R-Ky.), The New York Times reports.

McConnell urged the president in a phone call to speak out against Blankenship, a Republican official familiar with the call told the Times.

A White House official said Trump and McConnell spoke about Blankenship and the West Virginia Senate race, but added that the president was already planning to weigh in with a tweet days before the conversation.

Trump on Monday tweeted that Blankenship – who spent a year in prison for a mine safety violation after a fatal mine explosion – can't win in the general election. He also suggested he does not want a repeat of the Alabama special Senate election, which saw

Democrat Doug Jones defeat Republican Roy Moore in the deep-red state.

> To the great people of West Virginia we have, together, a really great chance to keep making a big difference. Problem is, Don Blankenship, currently running for Senate, can't win the General Election in your State...No way! Remember Alabama. Vote Rep. Jenkins or A.G. Morrisey!
> – Donald J. Trump (@realDonaldTrump) May 7, 2018

Blankenship responded by saying that he is "Trumpier than Trump" and that the president doesn't know him or understand how flawed his primary opponents are.

Internal Republican Rolls have Blankenship in the lead just one day before the West Virginia Senate primary, spurring national Republicans to make an eleventh-hour push against him.

An internal poll from one of Blankenship's rivals had the ex-coal CEO slightly ahead, with 31 percent of the vote. Rep. Evan Jenkins (R-W.Va.) had 28 percent of the vote and state Attorney General Patrick Morrisey was in third place with 27 percent of the vote.

On Monday, Blankenship touted his own internal poll that gave him 37 percent of the vote to Morrisey's 20 percent and Jenkins's 15 percent.

{mosads}

Blankenship attacked the Washington establishment and McConnell in particular to argue that to "drain the

swamp" West Virginia should elect him, "the most anti-establishment candidate in America."

"You should know me by my enemies. [Former President] Barack Obama, [Sen.] Joe Manchin [D-W.Va.] and Mitch McConnell. They are the enemies of Making West Virginia Great Again" he said.

Blankenship has also dubbed McConnell "cocaine Mitch" and in one TV ad targeted the senator's "China family."

The family of McConnell's wife, Transportation Secretary Elaine Chao, emigrated from China and founded an international shipping company.

– *Jordan Fabian contributed.*

In the Matter Of:

Don Blankenship vs
Fox News Network

KARL ROVE

April 09, 2021

LEXITAS™

[p. 2]

Don Blankenship vs
Fox News Network

Karl Rove
April 09, 2021

Confidential

ORAL DEPOSITION OF KARL CHRISTIAN ROVE, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above styled and numbered cause on April 9, 2021, from 8:58 a.m. to 11:22 a.m., before KATERI A. FLOT-DAVIS, CSR, CCR, reported by machine shorthand, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record herein.

* * *

[p. 103]

***

[p. 106]

The email message is, in part -- I'm only going to ask you for part of the -- about part of the email.

It says, "Happy to help. Wait a sick, twisted moron."

Do you see that?

A. Yes.

Q. Did you mean "What a sick, twisted

[p. 107]

moron"?

A. I'm sure I did,

***

Message

From: Murdoch, Rupert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DD1AC40C95B646E8B7559FB323E48096-MURDOCH, RU]
Sent: 5/6/2018 9:04:55 PM
To: Scott, Suzanne (FoxNews) [suzanne.scott@foxnews.com]
CC: Wallace, Jay (FoxNews) Qay.wallace@foxnews.com]
Subject: West Virginia

Both Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but Sean and Laura dumping on him hard might save the day.

Sent from my iPhone

CONFIDENTIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Case No. 2:19-cv-00236

DON BLANKENSHIP,)
Plaintiff,)
)
vs.)
)
FOX NEWS NETWORK LLC et al.,)
Defendants.)
)

****CONFIDENTIAL****
REMOTE VIDEOTAPED DEPOSITION OF
K. RUPERT MURDOCH
Thursday, November 18, 2021
Volume I

Reported by:
NADIA NEWHART
CSR No. 8714
Job No. 4890949
PAGES 1 - 73

Volume I Veritext Legal Solutions
866 299-5127

[p. 2]

CONFIDENTIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Case No. 2:19-cv-00236

DON BLANKENSHIP,	)
Plaintiff,	)
	)
vs.	)
	)
FOX NEWS NETWORK LLC et al.,	)
Defendants.	)
	)

Page 1 CONFIDENTIAL UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION DON BLANKENSHIP, Plaintiff, vs. Case No . 2:19-cv-00236 FOX NEWS NETWORK LLC et al., Defendants.

Remote videotaped deposition of K. RUPERT MURDOCH, Volume I, taken on behalf of Plaintiff, with all participants appearing remotely via videoconference and the witness testifying from Los Angeles, California beginning at 9:36 a.m. and ending at 11:36 a.m. on Thursday, November 18, 2021, before NADIA NEWHART, Certified Shorthand Reporter No. 8714.

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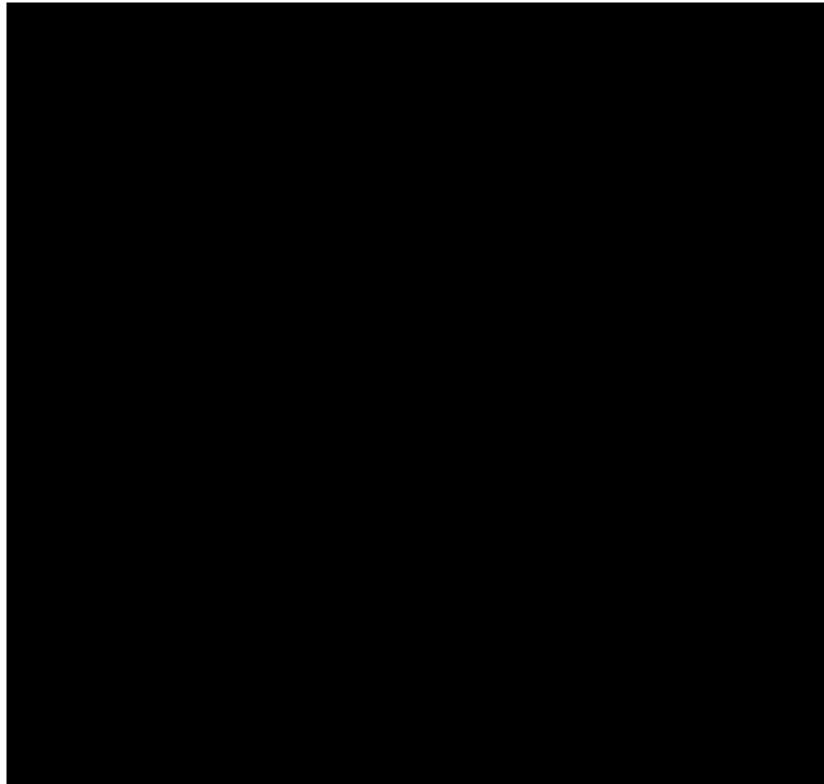
[p. 32]



BY MR. GRAY:

Q Sure. If you read -- if you read the email, the word “helpful” that appears in th second sentence

10:08:57

when you use the word “helpful” there, you mean it would help to beat Mr. Blankenship?

MR. GEORGE: Same objection.

Mr. Muraoch, answer in your own words.

THE WITNESS: Yes. I mean, it would be

10:09:16

helpful to the Republican leadership.

BY MR. GRAY:

Q. By having Mr. Blankenship lose, true?

A. That's --

MR. GEORGE: Same objections.

10:09:26

[p. 33]

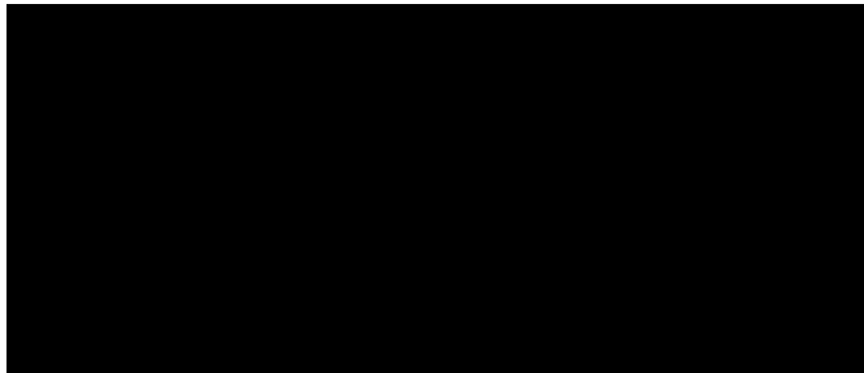
Go ahead.

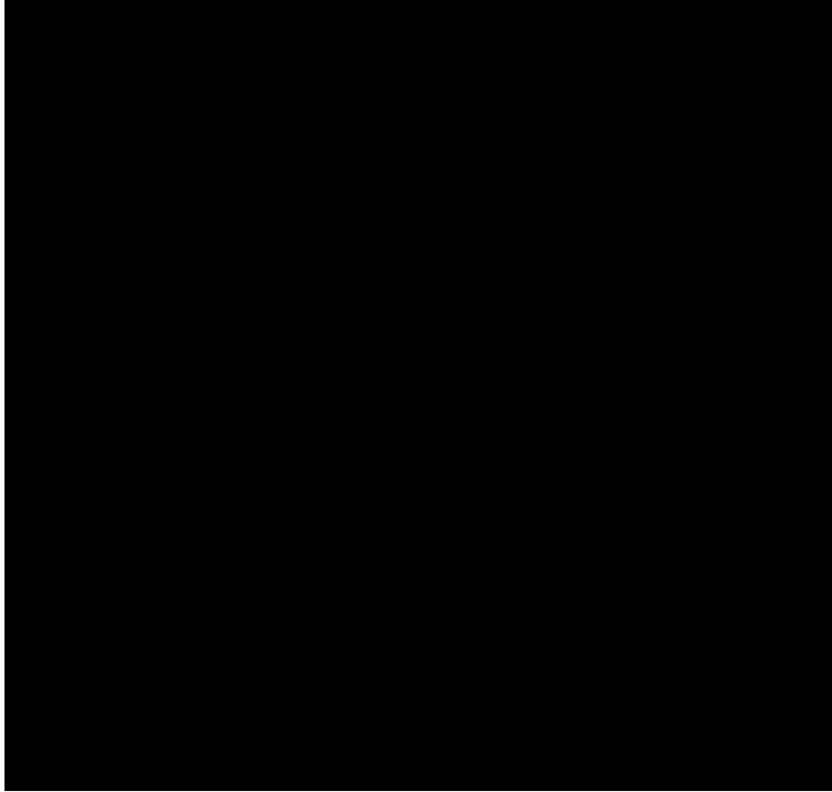
BY MR. GRAY:

Q. I'm sorry.

A That's what -- that's what they were campaigning for, at least what President Trump said.

10:09:30





10:10:41

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In the Matter Of:

Blankenship vs
Fox News Network LLC

NEIL CAVUTO

April 07, 2021

LEXITAS™

[p. 2]

Confidential Neil Cavuto - April 07, 2021

REMOTE VIDEOCONFERENCE DEPOSITION OF NEIL PATRICK CAVUTO, produced as a witness at the instance of the Plaintiff, and remotely duly sworn by agreement of all counsel, was taken in the above-styled and numbered cause on March 2, 2021, from 8:06 a.m. to 1:58 p.m., before Karen L. D. Schoeve, RDR, CRR, reported remotely by computerized machine shorthand, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

This deposition is being conducted remotely in accordance with the current Emergency Order regarding the COVID-19 State of Disaster of the World.

REPORTER'S NOTES: Please be advised that an UNCERTIFIED ROUGH DRAFT version of this transcript exists. If you are in possession of said rough draft, please replace it immediately with this CERTIFIED FINAL TRANSCRIPT.

Please note that the quality of a Zoom videoconference and transmission of data and overspeaking causes audio distortion which disrupts the process of preparing a videoconference transcript.

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[p. 98]

MR. CAVUTO: Morning, Republicans. You know what? We're gonna lose West Virginia if Don Blankenship is allowed to win the Primary and he does win the Primary outright. Blankenship, of course, is arguing that he -- he's the best qualified for this.

Of course, he's a convicted felon. You know the whole background on him, and the party is just eschewing the guy.

***

[p.89]

that it's likely that you read this packet of information?

A. I probably did, along with many other pieces and other things. A lot of information comes my way, and I would have no doubt that I would have gone through this.

Q. Take a look at the -- page 6717. It's got the "West Virginia Senate Race Overview" page.

A. (Examined exhibit.)

Q. Do you have that page in front of you, sir?

MR. REGAN: We do.

Q. (BY MR. GRAY) The third paragraph begins, "Republicans have . . ."

Do you see that?

A. (Examined exhibit.)

Q. Are you with me?

A. Yes.

Q. Okay. Sorry. I didn't hear you, I apologize.

If you look, there's a sentence in there that begins, "Blankenship, who can put personal resources . . ."

Do you see that?

A. I do.

[p. 90]

Q. Could you read that sentence into the record for us.

A. "Blankenship, who can put personal resources into the race, seems to be running in search of vindication for his 2015 conviction on a misdemeanor charge related to the Upper Big Branch Mine explosion that killed 29 miners. Either Morris or Jenkins" --

Q. Oh. You can -- I'm sorry. You can stop there, sir.

A. Okay. I'm sorry.

Q. You can stop.

Have you ever had occasion since you received this packet of information to believe that any of the information supplied therein was inaccurate in any way?

MR. REGAN: Objection.

You can answer.

A. No.

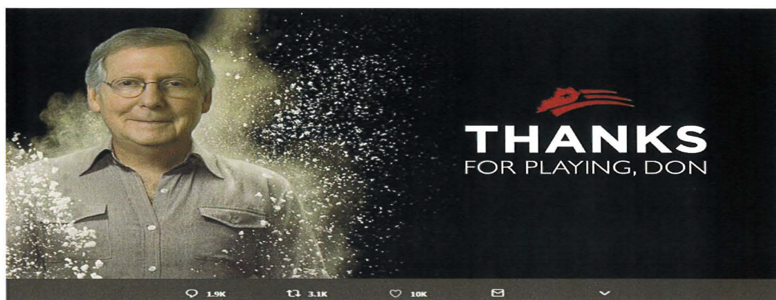
MR. REGAN: Jeremy and Karen, the transcript in that last question is showing the word "accurate." And I -- I will state, Mr. Cavuto, that I think the question was "inaccurate."

"Have you ever had any occasion," so on and so forth, "to believe that any of the

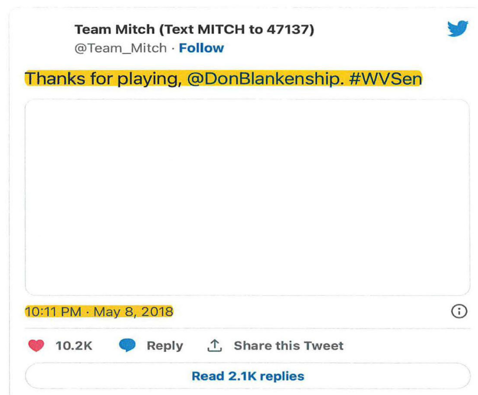
***

Blankenship taunted by Mitch McConnell's campaign

May 9, 2018 / 11:58 AM



Senate Majority Leader Mitch McConnell's campaign tweeted a taunt at Don Blankenship after the coal magnate and ex-convict lost his bid for the Senate Tuesday night. "Thanks for playing, Don," Team Mitch tweeted after the results came in.



The tweet features a photo of McConnell, superimposed into a promo for the Netflix series "Narcos," which follows the life of cocaine kingpin Pable Escobar. The tweet jabbed at Blankenship's nickname for McConnell, "Cocaine Mitch"

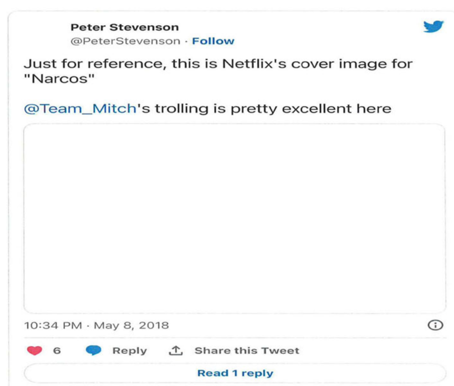
• West Virginia, Ohio, North Carolina, Indiana Primary results

During the primary campaign, Blankenship released a web ad that had a mystifying kicker about ridding the Senate of "Cocaine Mitch."

"One of my goals as U.S. senator will be to ditch 'Cocaine Mitch,'" Blankenship said in the ad. "When you're voting for me, you're voting for the sake of the kids." He later explained the aspersion as a reference to the fact that McConnell's father-in-law, who owns a Chinese shipping company, "was implicated recently in smuggling cocaine from Colombia to Europe, hidden aboard a company ship carrying foreign coal," Blankenship said in a statement.

Blankenship came in third, behind Rep. Evan Jenkins and the winner of the GOP primary, West Virginia Attorney General Patrick Morrisey.

Here's what the pre-photoshopped promo looks like:



Peter Stevenson
@PeterStevenson · Follow

Just for reference, this is Netflix's cover image for "Narcos"

@Team_Mitch's trolling is pretty excellent here

10:34 PM · May 8, 2018

6 Reply Share this Tweet

Read 1 reply

Narcos quipped in a tweet, "Low blow, Mitch."

Trending News

In:
- West Virginia
- Mitch McConnell

From: Cockrell, Greg NBCUniversal, MSNBC)
Send: Thus 12/02/2015 2:28 PM (GMT-05:00)
To: “Cole, Todd (NBCUniversal)” <Todd.Cole@ubcuni.com>, “Christopher Hayes” <clhprivate@gmail.com>, “Horgan, Denis (NBCUniversal)” <Denis.Horgan@nbcuni.com>, “allin_everyone@nbcuni.com” <@NBC UNI All In Everyone>
Cc:
Bcc:
Subject: RE: Shared from Twitter: Former Massey Energy C.E.O. Guilty in Deadly Coal Mine Blast - NYTimes.com

Very disappointing ... he’s killed more people than most terrorists ever do

From: Cole, Todd (NBCUniversal)
Sent: Thursday, December 03, 2015 2:27 PM
To: Christopher Hayes; Horgan, Denis (NBCUniversal); @NBC UNI All In Everyone
Subject: RE: Shared from Twitter: Former Massey Energy C.E.O. Guilty in Deadly Coal Mine Blast - NYTimes.com

A slap on the wrist for a dude who 29 people. Maybe if he used an assault rifle he would have been convicated of murder.

http://www.wvgazettemail.com/article/20141113/GZ01/141119629/1104

Two government and two independent investigations blamed the Upper Big Branch deaths on a pattern by

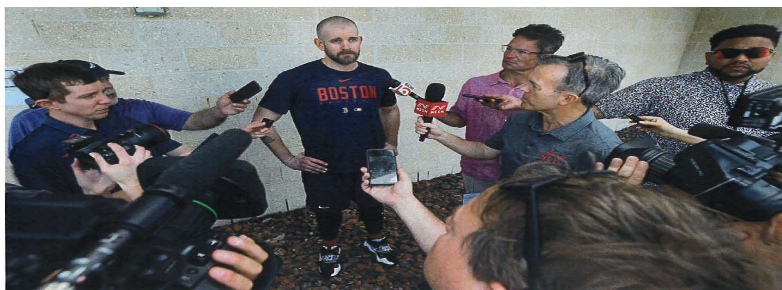
Massey of violating federal standards concerning mine ventilation and the control of highly explosive coal dust, both of which set the stage for a small methane ignition to turn into a huge coal-dust-fueled explosion.

Those investigations all generally agreed that the explosion erupted when the mine's longwall-machine shearer cut into a piece of sandstone. The resulting spark, investigators said, ignited a pocket of methane gas. Investigators concluded that wornout bits on the cutting shearer contributed to the explosion, while missing water sprays allowed the ignition to spread. Illegal levels of coal dust had not been cleaned up, providing fuel that sent the blast ricocheting in multiple directions throughout more than two miles of underground tunnels, investigators said.

From: Christopher Hayes [mailto:dhprivate@gmail.com]
Sent: Thursday, December 03, 2015 1:21 PM
To: Horgan, Denis (NBCUniversal); @NBC UNI All In Everyone
Subject: RE: Shared from Twitter: Former Massey Energy C.E.O. Guilty in Deadly Coal Mine Blast - NYTimes.com

He only got nailed on the misdemeanor tho. Probably not a day in jail.

U.S. journalists' beats vary widelv by gender and other factors



Reporters interview Boston Red Sox pitcher James Paxton at Fenway South in Fort Myers, Florida, on Feb. 16, 2023. (Jim Davis/The Boston Globe via Getty Images)

The beats American journalists cover vary widely by gender and other factors, according to a new analysis of a Pew Research Center survey of nearly 12,000 working U.S.-based journalists conducted in 2022. The analysis comes amid continued discussion about the demographic composition of U.S. newsrooms.

The survey asked reporting journalists to identify up to three topic areas or beats that they cover regularly, 11 of which had large enough sample sizes to study. Men are far more likely than women to cover certain beats – especially sports – while journalists who are women are more likely than men to cover news about social issues, education and health.

Men account for 83% of the surveyed journalists who indicated that they cover sports, far higher than the 15% who are women. Men also account for majorities of

those who cover political news (60%) and news about science and technology (58%).

By comparison, women are more likely than men to cover three of the 11 news beats studied: health, education and families, and social issues and policy. For instance, women account for nearly two-thirds (64%) of surveyed journalists who cover news about health, while only about a third (34%) are men.

The remaining five beats studied – economy, crime and law, local and state, environment and energy, and entertainment and travel – are more evenly split between men and women journalists.

Overall, 51% of the reporting journalists surveyed are men and 46% are women. In the survey, reporting journalists are those who indicated that they have one of the following job titles: reporter, columnist, writer, correspondent, photojournalist, video journalist, data visualization journalist, host, anchor, commentator or blogger. About three-quarters of all journalists surveyed (76%) are reporting journalists.

Majority of journalists who cover entertainment, travel are freelancers or self-employed

Journalists' beats also vary by their employment status - that is, whether they are freelance or self-employed journalists, or full- or part-time journalists at a news organization.

Entertainment and travel stands out as the only topic area in which a majority of those who cover it (57%) are freelance or self-employed journalists. Nearly half of

journalists who cover science and technology (46%) are also freelancers or self-employed.

On the other hand, some beats are overwhelmingly covered by either full- or part-time employees of news organizations. For instance, 87% of reporting journalists who cover crime and law fall into this category.

Overall, about a third of the reporting journalists surveyed (34%) indicated that they are freelance or self-employed, compared with about two-thirds (65%) who are full- or part-time employees of a news organization.

Journalists' beats vary somewhat by race, ethnicity

Journalists' beats also differ modestly by other demographic factors, including race and ethnicity.

One reporting area particularly stands out by the race and ethnicity of the journalists who cover it: social issues and policy. Hispanic and Black journalists make up a greater portion of those who cover this beat {20% and 15%, respectively) than any other studied.

Malice Toward All, Defamation for None?

Carson Holloway

The New York Times. (Mario Tama / Getty Images)

Right after Thanksgiving, a federal judge for the Southern District of New York ruled that former Congressman Devin Nunes's lawsuit against NBCUniversal Media may proceed. Nunes is suing NBC-Universal for defamation, and the media giant responded by making a motion to dismiss. Judge Kevin Castel's ruling is not a definitive resolution of the case (it only holds that it has sufficient merit to move forward for now). Nevertheless, we can learn a lot from his order and opinion about the state of American defamation law—both what it is and, perhaps, how it could be improved.

The ruling is a partial victory (and hence a partial setback) for both sides. Nunes's original complaint was based on three statements made by Rachel Maddow on her MSNBC show of March 18, 2021. The judge held that two of the statements are not actionable, but that a third is. Thus, the case can go forward in a stripped-down form, focused on Maddow's one potentially defamatory remark.

In her broadcast, Maddow, while commenting on a newly declassified report from the Director of National Intelligence, claimed, in the first place, that Nunes had "accepted a package" from Andriy Derkach, a man "sanctioned by the U.S. Government as a Russian agent:' In the second place, Maddow asserted that Nunes had "refused to hand" the package "over to the FBI, which is what you should do if you get something from somebody who is sanctioned by the U.S. as a Russian agent:' Finally, she noted that the "Republicans" had nevertheless "kept Mr. Nunes on as the top Republican on the intelligence committee, and then asked, rhetorically, "How does that stand? How does that stay a thing?"

Judge Castel found that Maddow's first and third statements were not defamatory. Although the first was technically inaccurate (because the package had been handled not by Nunes but by his staff), it was nevertheless "substantially true:' Here the judge's opinion nicely brings to light the moral principles that inform defamation law. The point of such law is not to guarantee the absolute accuracy of everything that is said about every person. It is rather to protect individuals from a specific kind of injury: the harm to reputation that comes from false and seriously derogatory claims. If a statement is somehow incorrect, but still close enough to the absolute truth that it would not make any difference to the typical viewer's judgment about the plaintiff's reputation, then it cannot be defamatory.

The judge found that Maddow's third statement was not defamatory because it was merely an expression of

opinion that Nunes was not fit to remain on the House Intelligence Committee. Generally, remarks that reflect negatively on a person's professional fitness are capable of being defamatory. Nevertheless, as Judge Castel explains, a statement, to be a proper matter of a defamation claim, must be a false statement of *fact*. The aim of defamation law is to protect the reputations of individuals not from negative opinions (which are unavoidable in life, especially in a free society) but from harmful and false statements of fact.

This brings us to Maddow's second statement, which is, according to Judge Castel, the surviving basis for Nunes's suit-and for NBC-Universal's potential liability. Maddow's claim that Nunes had refused to hand the package over to the FBI is potentially defamatory because it is both a statement of fact and reflects badly on Nunes's professional conduct. It is also substantially untrue. In fact, the package had been promptly forwarded to the FBI and had thus been handled appropriately. Maddow, then, said something factually false that was injurious to Nunes's reputation.

It would seem, then, that Nunes has, based on this remaining complaint, a strong defamation case against NBC-Universal. But not so fast. As Judge Castel's opinion reminds us, Nunes, as a then-member of the House of Representatives, is a "public figure" for the purposes of this case. As such, it is not enough for him to show-as it would be for an ordinary litigant-that he was the victim of a defamatory falsehood. He must also show that the defamation was done with "actual malice"-that is, that Maddow knew the statement was

false at the time that she made it, or that she at least acted with reckless disregard for its truth or falsity. The judge denied NBCUniversal's motion to dismiss because it is plausible that, once the case is more fully litigated, Nunes could bring evidence that Maddow acted with the necessary "actual malice!' Nevertheless, past experience of similar suits by public figures shows that it is very difficult if not near-impossible to demonstrate actual malice. Accordingly, Nunes's suit will probably fail in the end, even though the judge has let it move forward for now.

In truth, the "actual malice" standard is a problem not only for Devin Nunes but, more generally, for American law and American democracy. To be clear, the problem here is not with Judge Castel's opinion. It is a faithful and able exposition of the prevailing legal standards, which are binding on him as a district court judge. Nevertheless, the requirement that public figures demonstrate actual malice in defamation cases is an unconstitutional and harmful novelty that the courts should reconsider.

> *The long-term tendency of the actual malice standard is to undermine the quality of democratic deliberation by eroding the factual reliability of the public discourse.*

The standard is a novelty because it is not rooted in the longstanding tradition of American defamation law. It is rather the fruit of the innovating spirit of the 1960s. It was only in 1964, in *New York Times* v. *Sullivan,* that the Supreme Court held that the First Amendment requires that public figures, unlike ordinary litigants, have to show not only that they were

injured by defamatory falsehood, but also that the defamation was done as the result of actual malice. The standard is a fairly typical product of the Warren Court, which was short on respect for America's legal traditions and long on the desire to devise new principles that the justices believed were somehow more enlightened and progressive.

The "actual malice" standard is unconstitutional because it is not really required by the original understanding of the First Amendment. As has been observed by Justice Clarence Thomas (and as I have argued at length here), the Founding generation-those responsible for writing and ratifying the First Amendment-did not hold that the Constitution requires that libel actions be judged under different standards for public figures. They held instead to a simpler principle: namely, that libel or defamation is not part of the freedom of the press, and that therefore legal actions against libel raise no constitutional problems. This Founding-era understanding, moreover, prevailed in much of America—and was reiterated by the Supreme Court—up until the *New York* Times Court changed course in 1964.

Finally, the "actual malice" standard is harmful because it introduces an indefensible inequality into our law of defamation and undermines our capacity for self-government. One of the great promises of the American regime is equality before the law. That principle requires that the law protect the rights of all equally. The *New York Times* doctrine instead sets up a kind of class system in which the right to reputation of the famous or prominent" public figures"-is less

protected than that of ordinary people. This is no more consistent with America's best traditions than if we were to declare that henceforth the property rights of the rich would be less protected than those of the poor and middle class.

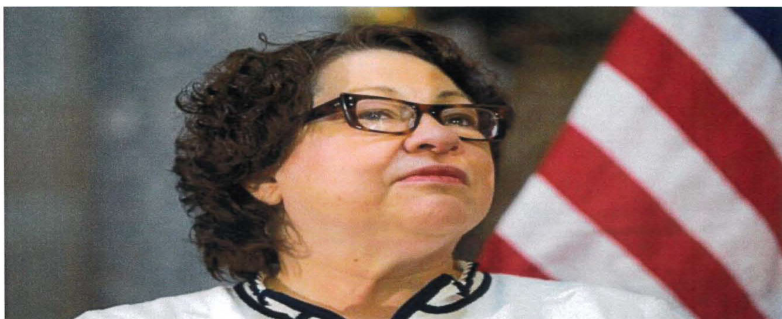
The *New York Times* court tried to justify the "actual malice" standard by appealing to the requirements of self-government. A healthy democracy, the Court contended, requires vigorous public debate—debate that the Court feared might be chilled by excessive libel actions in the absence of the actual malice standard. Whatever threats to freedom of the press may have concerned the Court in 1964, we can see today that the long-term tendency of the actual malice standard is to undermine the quality of democratic deliberation by eroding the factual reliability of the public discourse. The debate necessary for a healthy democracy must be not only vigorous but also accurate. For the people to govern truly, the information on the basis of which they make their political choices must be true. But the actual malice standard, by making it so difficult for a public figure to sue successfully for libel, perversely ensures that journalists have little legal incentive to ensure that their reporting and commentary are factually accurate.

Moreover, Nunes's suit itself reminds us of who really benefits from the "actual malice" requirement. Nunes is not suing Rachel Maddow. He is suing her employer, NBC-Universal. We often think of reporting as being done by independent journalists. Under the spell of this vision, we may imagine that the "actual malice" standard protects such journalists from abusive

lawsuits brought by powerful public figures. In reality, most journalists today-at least most of the really influential ones—are employees of massive media corporations. The actual malice standard, then, does not protect journalists so much as it protects those corporations. Viewed in this light, the privilege that the actual malice standard creates for journalism savors more of oligarchy than of democracy.

The *New York* Times doctrine, then, has not been the pure boon to democracy and the Constitution that its defenders claim.

Justices Sonia Sotomayor and Neil Gorsuch agree: Misinformation is threat to America
ABC News



They are ideological opposites on the U.S. Supreme Court, but Wednesday Justices Sonia Sotomayor and Neil Gorsuch united in a rare, joint public appearance to declare the spread of misinformation on social media an urgent threat to national security'.

"I'm less concerned in some ways about foreign enemies," Gorsuch said in virtual remarks during an event hosted by the nonpartisan National Security Institute and Center for Strategic and International Studies. "The topic we're talking about is internal ... if we don't tend to the garden of democracy and the conditions that make it right, it's not an automatic thing."

Sotomayor cited a recent study from MIT which found false news stories are 70% more likely to be retweeted than true stories are. "That's frightening, isn't it," she said, "that people don't learn about truthful statements as much as false statements through social media. That is a true threat to our national security."

Neither Gorsuch nor Sotomayor explicitly mentioned former President Donald Trump, the Jan. 6 Capitol insurrection or Russian meddling in the last two U.S. elections. But recent events clearly appeared to be on their minds as both justices directly spoke of the need to combat intolerance, hate and divisiveness.

Justice Neil Gorsuch arrives at the U.S. Capitol ahead of the inauguration of President Joe Biden, Jan. 20, 2021. Justice Sonia Sotomayor attends The 2018 DVF Awards at United Nations, April 13, 2 ... Getty Images

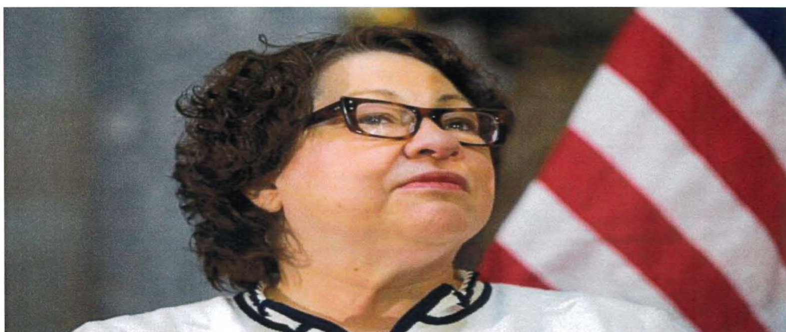
"Democracies fall apart from within," Gorsuch noted. "They crumble because (one faction) seeks to impose its will on others rather than to work together to resolve our differences through lawful processes."

"Manners, listening, tolerance," he continued. "Those have become bad words. I am very concerned."

As Justice Stephen Breyer did in an impassioned two-hour address last week, Sotomayor sought to directly refute the narrative that the Supreme Court is a partisan institution.

"We all fundamentally respect each other," she said of her peers, which now include a six-member

conservative majority. "They're as passionate as I am about upholding all of those things. We disagree about how to get there. But I don't start with impugning their motives. And I think a lot of misinformation today starts that way."



Supreme Court Justice Sonia Sotomayor participates in an annual Women's History Month reception on Capitol Hill in Washington, March 18, 201 5. Allison Shelley/Getty Images, FILE

Gorsuch added, "Everybody focuses on the few cases where Justice Sotomayor and I tend to disagree this year, OK. It happens. We do it respectfully -- even lovingly sometimes."

"And passionately," Sotomayor interjected.

"And passionately," Gorsuch agreed. "It's part of the love. Part of the love."

The justices did not discuss recent partisan 12ro12osals to ex12and the court or overhaul its terms of membership. Both Sotomayor and Gorsuch have made advocacy for expanded civics education a key part of their tenure on the bench.

The court reconvenes on Monday for the final two weeks of oral arguments of the current term.

Rupert Murdoch admits some Fox News hosts endorsed false notion of 2020 election fraud
Updated on: February 28, 2023 / 3:23 PM

Dover, Del — Fox Corp. chairman Rupert Murdoch acknowledged that some Fox News commentators endorsed the false allegations by former President Donald Trump and his allies that the 2020 presidential election was stolen and that he didn't step in to stop them from promoting the claims, according to excerpts of a deposition unsealed Monday.

The claims and the company's handling of them are at the heart of a $1.6 billion defamation lawsuit against the cable news giant by Dominion Voting Systems.

The recently unsealed documents include excerpts from a deposition in which Murdoch was asked about whether he was aware that some of the network's commentators — Lou Dobbs, Maria Bartiromo, Jeanine Pirro and Sean Hannity — at times endorsed the false election claims. Murdoch replied, "Yes. They endorsed."

The Murdoch deposition is the latest filing in the defamation case to reveal concerns at the top-rated network over how it was handling Trump's claims as its ratings plummeted after the network called Arizona for Joe Biden, angering Trump and his supporters.

An earlier filing showed a gulf between the stolen election narrative the network was airing in primetime and doubts about the claims raised by its stars behind the scenes. In one text, from Nov. 16, 2020, Fox News host Tucker Carlson said "Sidney Powell is lying" about having evidence for election fraud, referring to one of Trump's lawyers.

The Dominion case is the latest example showing that those who were spreading false information about the 2020 election knew there was no evidence to support it. The now-disbanded House committee investigating the Jan. 6, 2021, attack on the Capitol disclosed that many of Trump's top advisers repeatedly warned him that the allegations he was making about fraud were false - and yet the president continued making the claims.

Murdoch urged in September 2020, weeks before the election, that Dobbs be fired because he was "an extremist," according to Dominion's court filing. Murdoch also said he thought it was "really bad" for former New York City Mayor Rudy Giuliani to be advising Trump because Giuliani's "judgment was bad" and he was "an extreme partisan," according to a deposition excerpt.

Murdoch was asked whether he could have requested that Powell and Giuliani not be put on the air: "I could have. But I didn't," he replied.

After the Jan. 6 rioting at the Capitol, former House Speaker Paul Ryan, who sits on the board of Fox News Corporation, had an email exchange with Murdoch. He told the Fox News chairman he believed that "some high percentage of Americans" thought the election was stolen "because they got a diet of information telling them the election was stolen from what they believe were credible sources." Murdoch responded to Ryan's email with a note saying, "Thanks Paul. Wake-up call for Hannity, who has been privately disgusted by Trump for weeks, but was scared to lose viewers."

Denver-based Dominion Voting Systems, which sells electronic voting hardware and software, is suing both Fox News Network and parent company Fox Corp. for defamation. Dominion contends that some Fox News employees deliberately amplified false claims by supporters of Trump that Dominion machines had changed votes in the 2020 election, and that Fox provided a platform for guests to make false and defamatory statements about the company.

Dominion attorneys contend that executives in the "chain of command" at both Fox News and Fox Corp. knew the network was broadcasting "known lies, had the power to stop it, but chose to let it continue. That was wrong, and for that, FC and FNN are both liable."

Attorneys for Fox Corp. note in their filing that Murdoch also testified that he never discussed Dominion or voter fraud with any of the accused Fox News hosts. They say Dominion has produced "zero evidentiary support" for the claim that high-level executives at Fox Corp. had any role in creating or publishing the statements at issue.

Dominion's contention that the company should be held liable because Murdoch might have had the power to step in and prevent the challenged statements from being aired, they said, "has no basis in defamation law, would obliterate the distinction between corporate parents and subsidiaries, and finds no support in the evidence."

The "handful of selective quotes" cited by Dominion have nothing to do with the statements that Dominion has challenged as defamatory, according to Fox Corp.

attorneys. "Dominion repeatedly asked Fox News executives, hosts, and staff whether Fox Corporation employees played a role in the publication of the statements it challenges," they wrote. "The answer - every single time, for every single witness - was no."

Meanwhile, Fox News attorneys note that when voting-technology companies denied the allegations being made by Trump and his surrogates, Fox News aired those denials, while some Fox News hosts offered protected opinion commentary about Trump's allegations.

In a statement about the lawsuit, Fox News said: "Dominion's lawsuit has always been more about what will generate headlines than what can withstand legal and factual scrutiny, as illustrated by them now being forced to slash their fanciful damages demand by more than half a billion dollars after their own expert debunked its implausible claims. Their summary judgment motion took an extreme, unsupported view of defamation law that would prevent journalists from basic reporting and their efforts to publicly smear FOX for covering and commenting on allegations by a sitting President of the United States should be recognized for what it is: a blatant violation of the First Amendment."

Trending News

In:
- Fox News
- Dominion Voting Systems

DON BLANKENSHIP
PO BOX 717
MATEWAN WV 25678

10 July 2020

Rupert Murdoch, Chairman
Fox Corporation Board of Directors
1211 Avenue of the Americas
New York, NY 10036

Re: Don Blankenship

Dear Mr. Murdoch:

Fox News is a defendant in a defamation lawsuit in which I, Don Blankenship, am the plaintiff. The purpose of this letter is to make certain that the Fox Corporation Board of Directors ("Fox Board") is aware of the circumstances leading up to the lawsuit. The lawsuit alleges that Fox News defamed me with the intent of altering the outcome of the 2018 West Virginia Republican primary election for the US Senate. The lawsuit further alleges that Fox News did so because leaders of the Republican Party, including Senate Majority Leader Mitch McConnell, wanted to defeat my candidacy for the US Senate.

The malicious purpose behind Fox News' scandalous conduct, in my view, strikes at the very heart of American democracy.

If the Fox Board does not hold Fox News accountable for violating Fox Corporation's standards of ethical conduct, then the Fox Board will be neglecting its key

responsibility of maintaining the reputation and well-being of Fox Corporation.

Most of us who have served on corporate boards are aware of the significant loss of reputation and market capitalization that can result from a single event. For example, the BP Deepwater Horizon oil spill, the Enron scandal, and the recent Wells Fargo account fraud fiasco all did significant damage to company status and shareholder value.

My experience serving as Chairman of the Massey Energy Company ("Massey") Board of Directors and as a board member of Fluor Corporation, Witco Chemical Corporation, and several other smaller companies, resulted in many situations in which the board was required to take charge, investigate, and to take mitigating actions. These tasks were difficult, as were the perpetual obligations of fulfilling shareholder commitments and meeting public expectations. Therefore, I am sympathetic to the challenges of corporate governance and oversight.

The Fox Board now faces what may become a damaging crisis for Fox Corporation. Clearly, the Fox Board has failed to meet the corporate governance standards set forth in Fox Corporation's 2019 Proxy Statement. This failure violates the Securities Exchange Act of 1934.

The Fox Board is not in compliance with Fox Corporation's *Corporate Governance and Compliance Commitment*

> The Company is committed to maintaining robust governing practices and a strong ethical

> culture that benefit the longterm interests of our stockholders.

The Fox Board is also non-compliant with Fox Corporation's *Standards of Business Conduct*

> The Board has adopted a code of ethics, the Standards of Business Conduct. The Standards of Business Conduct confirm the Company's policy to conduct its affairs **in** compliance with all applicable laws and regulations and observe the highest standards of business ethics. The Standards of Business Conduct also apply to ensure compliance.

Corporate governance standards are typically a non-issue. But perceived violations of corporate governance standards can be serious matters. My experiences make this abundantly clear.

The US Department of Justice ("DOJ") prosecuted me on the basis of a letter sent by Massey's Investor Relations Department to the US Securities and Exchange Commission. Specifically, a thirteen-word sentence in the letter was distorted by the DOJ to manufacture felony charges (securities fraud and making false statements) against me. Remarkably, federal prosecutors deemed the following sentence to be felonious:

> We always strive to comply with all mine safety laws at all times.

If convicted, I would have been effectively exposed to a life sentence in federal prison for a letter I did not write

nor edit. Fortunately, I was acquitted of both felony charges.

Nevertheless, I was convicted of the misdemeanor charge of conspiring to willfully violate mine safety standards. It is important to note that I was never personally involved in the violation of a mine safety standard and never directed any employee to violate a mine safety standard. My conviction was primarily based upon employee conduct that no corporate officer or director in the mining industry considered to unlawful. Accused Americans quickly learn that the DOJ is granted broad prosecutorial discretion, and the DOJ seldom fails to convict those who are indicted.

There are striking similarities between Fox Corporation's Standards of Business Conduct statement and Massey's Investor Relations Department letter. The Fox Board pledges to "conduct its affairs in compliance with all applicable laws and regulations and observe the highest standards of business ethics." Correspondingly, the thirteen-word sentence that the DOJ exploited to wrongfully prosecute me was: "We always strive to comply with all safety laws at all times."

I learned the hard way from the injustices I experienced that it is highly difficult for corporate officers and directors to exercise enough oversight to ensure that the company "conduct[s] its affairs in compliance with al/applicable laws and regulations" as the Fox Board pledges and its members certify to do. Under my leadership, Massey did "always strive to comply with all safety laws at all times" by having a board safety committee and reviewing company safety

performance at every board meeting. Still, my extensive efforts to promote compliance with safety laws did not save me from a politically ambitious US Attorney who prosecuted me to advance his goal of becoming the governor of West Virginia.

It is questionable whether Fox Corporation's current operational structure and committees are sufficient to enable the Fox Board to fulfill its fundamental responsibilities of providing oversight and accountability for Fox Corporation. Consequently, it may be unwise for the Fox Board to certify its commitment to the rigorous governing, legal compliance, and ethical standards of Fox Corporation's *Corporate Governance and Compliance Commitment* and *Standards of Business Conduct.*

The Fox Board is not exercising appropriate oversight of Fox News to assure that Fox News is meeting the following principles of Fox Corporation's *Standards of Business Conduct*

> Through it all we remain steadfast and focused on our core values in building a culture of trust, integrity and ethical behavior.
>
> Foremost among those values are the accuracy of information ...

The presiding judge in the lawsuit, Senior US District Judge John T. Copenhaver Jr., has ruled that Fox News commentators made multiple defamatory statements about me when I was a US Senate candidate in 2018.

The Fox Board should find it very troublesome that these defamatory statements were made after Senate Majority Leader McConnell, who appears regularly on Fox News, publicly expressed that he did not want me to become the Republican nominee for the contested US Senate seat. Other reputable media outlets, including Politico, have reported that Senate Majority Leader McConnell met with Republican Party operatives to discuss how to intervene against me. These media reports indicate that the National Republican Senatorial Committee (NRSC) was asked to develop a "menu of options" to stop me from winning the primary election. I have more than a plausible reason to believe that the scheme to falsely call me a "felon" and a "convicted felon" was on this "menu." *See https.//www.politico.com/story/2018/03/20/west-virginia-senate-republicans-blankenship-412050.*

Following the above events, Fox News' senior judicial analyst, Judge Andrew Napolitano, was the first Fox News commentator to defame me. Judge Napolitano falsely stated that I had gone to prison for "manslaughter." Shortly thereafter, Judge Napolitano privately admitted that he knew he was wrong but did not publicly apologize until after the election. Even then, Judge Napolitano only admitted that I was not a felon. Judge Napolitano has still not specifically addressed his unfounded accusation that I had gone to prison for manslaughter.

With respect to Judge Napolitano's deceitful statement, Judge Copenhaver held:

> The accusation of manslaughter is clearly false.

One week before the primary election, I participated in a nationally televised debate broadcast by Fox News. The race was too close to call prior to the debate. However, my debate performance resonated with West Virginia voters. Post-debate polling numbers indicated that I had surged ahead of my opponents.

It is not mere coincidence that Fox News accelerated its misrepresentations of me as a "felon" and "convicted felon" in the following days leading up to the election. For example, Fox News political commentator, Stephanie Hamill, stated that: "[I]t might be difficult for [me] to actually win a general election because of [my] issue being a convicted felon." This was in contrast to prior accurate reporting by Fox News, as well as my own statements during the Fox News debate. This is what I said:

> I faced thirty years in prison for a fake charge, and I beat all three of the felonies.
> *See http://www.youtube.com/watch?v =XBxu541cxGo.*
>
> It's incredible. They sent me to prison for a misdemeanor. I was the only prisoner there that was a misdemeanor. It was clear from the beginning to end that it was a fake prosecution.
> *See https://www.youtube.com/watch ?v=X8xu541cxGo.*

Less than 72 hours after the debate, Fox News political contributor, Karl Rove, resorted to calling me derogatory names such as "bigot," "moron," and "crook." *See https://www.youtube.comlwatch?v=r19s8Dtao/*.

Regarding Fox News' deceptive commentary, Judge Copenhaver held:

> All the defendants' statements identifying the plaintiff as a felon are materially false. The term "felon" is an objective label with a clear legal meaning.

Based upon the timing and circumstances, it is more than plausible to believe that Fox News, in collusion with Senator McConnell and the Republican Party, interfered in the 2018 West Virginia US Senate primary election by falsely stating I had gone to prison for "manslaughter" and by falsely branding me as a "felon" and "convicted felon." This "wrap-up smear" scheme was a gross violation of Fox Corporation's *Standards of Business Conduct.*

The unethical behavior of Fox News has not yet been properly addressed by the Fox Board. Accordingly, the Fox Board has failed to maintain "robust governing practices and a strong ethical culture" in accordance with Fox Corporation's *Corporate Governance and Compliance Commitment.*

The critical questions to be answered are:

(1) What does the Fox Board know?

(2) When did the Fox Board know it?

The Fox Board has a fiduciary duty to ensure that Fox News engages in ethical journalism. The facts demonstrate that Fox News falls short of the mark. A federal judge has essentially ruled so.

The defamatory statements aired by Fox News will impact the upcoming US presidential election if not corrected. As the Constitution Party's nominee for US President, I harbor no illusions that I will win the general election. Even so, I am confident that I can get enough votes to influence the outcome. Therefore, inaction is not an option.

It is time for Fox Corporation to rise above the fray, conform to your own *Standards of Business Conduct,* and genuinely build "a culture of trust, integrity, and ethical behavior." Requiring Fox News to stop the pervasive "trolling" would certainly be a good start. Rectifying the "fake news" that sabotaged my US Senate candidacy would be another positive step forward. America deserves the truth.

Sincerely,
Don Blankenship
Don Blankenship

PS: Enclosed is a copy of my book. I am certain you will find it very informative.

DON BLANKENSHIP
PO BOX
717 MATEWAN WV 25678

October 4, 2021

Rupert Murdoch, Chairman
Fox Corporation Board of Directors
1211 Avenue of the Americas
New York, NY 10036

Re: Don Blankenship

Dear Chairman Murdoch:

My apologies for writing to you so soon following my prior letter. My prior letter expressed my suspicion that Fox News attorneys were illicitly withholding discoverable Fox text messages and other discoverable documents. It turns out that I was more than right to be suspicious.

But even I did not expect that the President of the United States and the US Senate Majority Leader had appealed to the Chairman Murdoch for Fox News's help in defeating my candidacy for a Senate seat. Nor could I have envisioned that Chairman Murdoch would send an email to Fox News executives stating with specificity what could be done to comply with that appeal. Nor could I have ever dreamed that Chairman Murdoch would now claim he did not intend for action to be taken regarding his directive to Fox News executives to "dump on" me as it might "save the day."

In one of my prior letters to you I had said that the key questions will ultimately become "what did the Fox

Board know" and "when did they know it." The Chairman Murdoch email has moved us to the point that shareholders and regulators need the answers to those questions

Chairman Murdoch, acting CEO of Fox News at the time, advised Fox News executives as to what could be done to defeat my candidacy. He did so in response to an appeal from arguably the two highest ranking officials of the United States Government. Chairman Murdoch's email was followed the next day with illegal acts by Fox News telecasters that were clearly intended to defeat my candidacy. One Fox News telecaster even said: "It will be difficult for him to win given he is a convicted felon."

Even though this matter does not involve a candidacy for the job of President like Watergate did, this matter is in some ways worse than Watergate. This was not a breakin by a few burglars to steal a political party's documents which might be helpful to Nixon. This was a collective effort which included Fox News, the President of the United States, the US Senate Majority Leader, other Republican Senators, the Fox Board Chairman, the President's son, the former Executive Director of the National Republican Senatorial Committee, other Republican Party operatives, and who knows who else to illicitly and illegally control which candidate would become West Virginia's US Senator.

But the main purpose of this letter is to say to you again that as members of the Fox Board you should not allow your counsel and your executives to continue this coverup. The continuing Fox cover-up is reminiscent of

the Watergate cover-up, which turned out to be more damning to Nixon and others than did the burglary act itself.

This matter could do great damage to Fox Corporation, to its shareholders, to its executives, and to its board members. The Fox Corporation Board of Directors now knows much of what was purposely done to interfere in a federal election. Furthermore, the Fox Board knows that no corrective action has been taken to mitigate the damage that was done--damage that could impact the outcome of the 2022 mid-term elections and any 2024 Trump election bid should he decide to run. As the scandalous facts of this matter continue to come to light, Fox Corporation faces the growing potential of incurring substantial reputation damage.

Especially surprising to me is that your counsel and executives are willing to fall on their sword for Fox Corporation. Fox executives have made declarations to the court that are implausible. Fox counsel has even represented that Fox has no responsibility to correct Judge Napolitano's false defamatory statement about a leading US Senate candidate, i.e., the false statement that I had gone to prison for manslaughter.

Furthermore, Karl Rove testified that he has no obligation to tell the truth when he appears on Fox News programs. I think your shareholders, particularly your major ones, will disagree with your counsel and Chairman Murdoch. Surely, Fox stockholders and the Fox Board believe that Fox telecasters have a responsibility to tell the truth about candidates for the United States Senate.

Instead of Fox attorneys digging a deeper hole, Chairman Murdoch or Governance Chair Paul Ryan should go on the air and personally admit what was done. One of them should then apologize to the shareholders and to all American voters, and in particular West Virginia voters, for Fox's participation in this scheme. Chairman Murdoch should then resign his Fox Corporation chairmanship. After all, Fox News has fired many employees for far less serious misbehavior. The remaining Fox board should then immediately put someone in the Chairman position who was fully independent of Fox News decision-making in 2018.

Fox Corporation stakeholders deserve a chairman who understands the importance of ESG today and who does not view himself as the arbiter of American elections, nor view Fox News as solely his baby, nor encourages Fox News to act as an extension of the Republican Party.

It is never too late to do the right thing.

Sincerely,

Don Blankenship

Americans are losing faith in an objective media. A new Gallup/Knight study explores why.

John Sands August 4, 2020

Update: On Nov. 9, 2020, Gallup updated the report "American Views 2020: Trust, Media and Democracy," to correct a methodological error. The changes do not alter the underlying integrity of the data nor the conclusions. However, specific numbers have changed for a range of results, *and have been updated in this post. Learn more.*

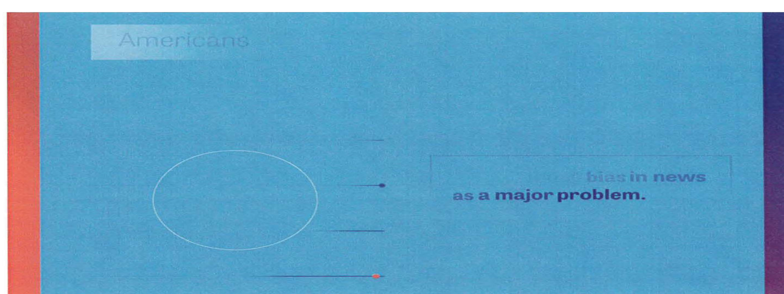
Americans have high aspirations for the news media to be a trusted, independent watchdog that holds the powerful to account. But in a new GalluP-/Knight study, we've found the gap is growing between what Americans expect from the news and what they think they are getting. Perceptions of bias are increasing too, which further erodes the media's ability to deliver on its promise to our democracy.

The landmark ROIi of 20,000 ReORle found that Americans' hope for an objective media is all but lost. Instead, they see an increasing partisan slant in the news, and a media eager to push an agenda. As a result, the media's ability to hold leaders accountable is diminished in the public's eye.

The study also explores the connections between political affiliation and attitudes toward the media, as well the public's view on diversity in newsrooms and the connection between local news consumption, civic engagement and community attachment.

A hallmark of Knight Foundation's Trust, Media and Democracy initiative, "American Views 2020: Trust, Media and Democracy" is a biennial report based on a poll that took place over last winter. It is one of the most comprehensive surveys of public opinion on the media, and holds important implications for the future of journalism and our democracy. You can read more below, or join a discussion of the finding~ in partnership with the Paley Center at 2 p.m. Thursday, Aug. 6.

Here are 10 findings that stood out to us:



1) Americans see increasing bias in the news media: One of the primary reasons Americans don't think the media works for them is because of the bias they perceive in coverage. Many feel the media's traditional roles, such as holding leaders accountable, is compromised by bias, with nearly 7 in 10 Americans (68%) who say they see too much bias in the reporting of news that is supposed to be objective as "a major problem," up from 65% in the 2017 Knight/Gallup study. They see it in their own news sources (57%), and more than 6 in 10 are concerned about bias in the news other people are getting, the survey finds. Some 7 in 10

Americans worry that owners of media companies are influencing coverage.

2) Americans think the media is pushing an agenda. Eight in 10 Americans say that when they suspect an inaccuracy in a story, they worry it was intentional — because the reporter was misrepresenting the facts (52%) or making them up (28%). Only 18% say they think the inaccuracies were innocent mistakes. And when it comes to news sources they distrust, nearly three-quarters of Americans (or 74%) say those outlets are trying to persuade people to adopt a certain opinion.

3) Distrust in the media cuts along partisan lines: Views on the media vary widely by party, though overall, Americans view the media more negatively than positively. The breakdown: Nearly 7 in 10 Republicans (67%) have a very or somewhat unfavorable opinion of the news media, versus 1 in 5 Democrats (20%) and about half of independents (48%).

4) A majority of Americans say the media are under political attack but are divided by party on whether it's warranted: While people from all political persuasions agree that the media is being politically attacked, 66% of Democrats say those attacks are not justified, while 58% of Republicans say they are.

5) Opinions on the media also vary widely by age. Young Americans, for example, tend to have more negative views on the media. One in 5 American adults under 30 (20%) say they have a "very" or

"somewhat" favorable opinion of the news media, versus almost half of those aged 65 and older (43%).

6) Americans blame the media for political divisions, but they also see the potential for the media to heal these divides. Forty-seven percent of Americans say the media bears "a great deal" of blame for political division in this country, and 36% say they bear "a moderate amount!' At the same time, 8 in 10 Americans believe the media can bring people together and heal the nation's political divides.

7) Americans want more newsroom diversity, but they differ on what kind. This breakdown is along party and racial lines. Democrats (47%) and Blacks (56%) prioritize racial/ethnic diversity in hiring, while Republicans (48%) and Whites (34%) prioritize ideological diversity in journalists' political views.

8) Americans feel overwhelmed by the volume and speed of news, and the internet is making it worse. The most cited reason for information overload? The mix of news interspersed with non-news on the web, including social media (61%). How Americans cope varies. Some people (39%) turn to one or two trusted news sources, others (30%) consult a variety, and 18% stop paying attention all together.

9) Local news is closely linked to civic engagement. Here's one of the reasons why the future of journalism matters to our democracy: People who read and watch local news are more likely to take part in important community issues, and 73% are more likely to participate in local elections.

10) Despite the findings, Americans think the media is vital for democracy. The vast majority of Americans (81%) say that the news media is "critical" (42%) or "very important" (39%) to democracy.

Read the full report at kf.org/usviews20.

John Sands is *director for learning and impact at Knight Foundation. Follow him on Twitter at @johnsands.*

Bill O'Reilly drops Tucker Carlson bombshell [Video]
April 25, 2023

As of Monday morning, Fox News Channel was still advertising *Tucker Carlson Tonight*. A few hours later, the network released a statement announcing Carlson's sudden ouster.

One former star at Fox News has something to say about the sudden turnaround ... and he's citing firsthand experience.

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Bill O'Reilly was fired by Fox News in 2017, with the network citing allegations of sexual harassment. In fact, O'Reilly used to host the timeslot later occupied by Carlson.

"The decision was made Sunday evening," O'Reilly alleged, rejecting theories about an earlier timeline. "And there are two reasons why."

"Fox News did not *want* to remove Tucker Carlson, because - as you pointed out - he was the second-highest rated program on the network, next to *The Five,* and he was the most well-known individual host. So, they didn't want to move him out, but there are lawsuits coming on the wake of Dominion," O'Reilly said Monday on NewsNation, referring to Fox's $785.5 million settlement with Dominion Voting Systems.

"They lost $800+ million on the wake of Dominion, and now you have Smartmatic coming up. And you have

two individual lawsuits, actually: one filed and one that may be filed. And that was the key."

O'Reilly then explained the second reason.

"Second thing was last night on *60 Minutes,"* O'Reilly continued.

"[Capitol rioter Ray Epps] said to the audience, 'Tucker Carlson ruined my life and my family's life by accusing me of having some kind of provocative role in the Jan. 6 riots at the Capitol.' That was setting Epps up for a massive lawsuit against Fox News and Tucker Carlson. So, that's three lawsuits we know about. And there will be more by shareholders, who are angry about the $800 million settlement."

Then O'Reilly connected the dots. "Faced with that, the board of directors said, *'We've* got to start cleaning this up.' So, Dan Bongino was the first domino to fall, even though he wasn't involved in the Dominion thing. They couldn't get to a contract settlement with him. He's gone, and Carlson - because of the impending litigation - was harpooned," O'Reilly said. "Same thing with Lemon at CNN."

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O'Reilly made the remarks to NewsNation's Chris Cuomo.

Cuomo disputed some of O'Reilly's remarks about television news at large. "I believe that the timing of the CNN move and the Fox move are purely coincidental. I don't think they had anything to do with

one another," Cuomo said. Cuomo himself was fired from CNN in 2021 for moonlighting as a P.R. representative for his brother, the disgraced former *Gov.* Andrew Cuomo.

O'Reilly hit back.

"That's the nature of television news, the most wicked industry in the United States of America," O'Reilly said. "It's all about money at Fox News, as it is for every other corporate media organization. There was just a purge at ABC News. They whacked about five of their executives. There will be a purge at CBS News soon, I'm told. It's an about money."

O'Reilly made similar remarks on his own program, *No Spin News.*

"Tammy Wynette is not part of television news," O'Reilly joked. "None of those operations are going to stand by their man. When the going gets rough you're going to get thrown right overboard, no matter who you are. That's the way American corporations work:'

However, O'Reilly also acknowledged Carlson's responsibility. He described Carlson as a loose cannon, a liability for his employer.

"Destructive Tucker Carlson is the lightning rod," O'Reilly reportedly said, calling Carlson's remarks "conspiratorial."

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According to TMZ, NewsNation is scouting both Tucker and Don, but it's TMZ so take this news with a grain of salt.

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Bill O'Reilly on Tucker Carlson and Fox parting ways

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9:02 PM · Apr 24, 2023

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The Horn editorial team

Rethinking Libel, Defamation, and Press Accountability
September 21, 2022

Provocations #4

> *Click here to view a PDF version. The Provocations series is available in hard copy and e-book formats on Amazon.*

> ***Summary:*** *With its ruling in New York Times v. Sullivan (1964), the Supreme Court severely limited the ability of public figures to sue for libel. The Court thus departed from a traditional understanding that had regarded libel as unprotected by the First Amendment and that had therefore imposed a salutary restrains on the press by holding journalists legally liable for publishing defamatory falsehoods. Today the press faced practically no legal consequences for defaming public figures. The Supreme Court should correct its error, restore the original and traditional meaning of the First Amendment, and thereby protect our democracy from the outsized, underserved, and destructive power that a mendacious press now exercises over the public mind and our politics.*

In 1964, the Supreme Court imposed a new regime of press freedom on the country. Before *New York Times v. Sullivan,* all Americans, even those active in public life, could sue and recover damages from anyone, including journalists, who had libeled them. Under the traditional standards, the truth of a statement was a defense against a claim of libel. Accordingly, the press

was free to publish even scathing criticism of politicians, provided that the criticism was truthful. But when journalists published falsehoods, whether willfully or carelessly, they opened themselves up to lawsuits from those whose reputations they had harmed.

New York Times v. Sullivan and subsequent cases, however, swept away these traditional standards and the wholesome legal restraint they had imposed on the power of the press. From now on, the Court announced, the press would be held to a different and much more lenient standard when it falsely maligned public figures. Public figures could sue successfully for libel only if they could demonstrate that their defamers had acted with "actual malice"-that is, that they had knowingly published a falsehood or had acted with reckless disregard for the truth. Unsurprisingly, this standard proved almost impossible to meet in practice, with the result that the press has become almost completely free to defame prominent Americans with legal impunity.

The consequences of *New York Times v. Sullivan* have been baleful for our nation. The ruling has undermined self-government by giving the press immense power over the public mind. Today, a partisan press routinely attempts to shape political outcomes by using defamation to make some people and some positions odious to the public. The more successful a leader on the Right becomes, the more likely that person is to be labeled a racist or a Nazi. Critics of America's foreign policy establishment are frequently accused-without evidence-of being "puppets" of foreign leaders or in the

pay of foreign governments. These smears-retailed so freely today-would have required much more caution in pre-1964 America, when they might well have landed their purveyors in court, with a real chance of having to pay damages.

The *New York Times* doctrine has also undermined our nation's commitment to equality. It creates unjustifiable inequalities-between ordinary citizens and public figures (whose reputations are less protected), between journalists and all other professionals (who, unlike reporters, must face the consequences of their negligence), and between the press and public figures (most of whom have little power to resist a corporate media determined to assail their reputations). Finally, *New York Times v. Sullivan* runs counter to one of the basic aims of American government: to secure the natural rights of all. Reputation, as the American Founders teach us, is a right as fundamental and as precious, anc:f as deserving of the government's protection, as life, liberty, and property.

Moreover, these grave evils by no means result from a necessary fidelity to the Constitution. On the contrary, they arise from constitutional infidelity. With its opinion in *New York Times v. Sullivan,* the Supreme Court of 1964 was not discovering and adhering to the original meaning of the First Amendment. It was, rather, departing from that meaning and imposing its own novel standards on our nation's First Amendment jurisprudence. The key elements of the *New York Times* doctrine—the distinction between public figures and all other Americans, and the burden on the former

to demonstrate "actual malice" in order to prevail in a libel action—are not rooted in the original understanding of the First Amendment. The original understanding instead held that libel-false, defamatory publication- is outside the freedom of the press and not protected by that venerable principle. Accordingly, today's Supreme Court should, at the earliest suitable opportunity, reverse *New York Times v. Sullivan* and return our nation to its traditional, and more wholesome and reasonable, standards of libel.

***New York Times v. Sullivan:* A Revolution in Libel Law**

New York Times v. Sullivan arose in the context of the civil rights movement. In 1960, the Committee to Defend Martin Luther King and the Struggle for Freedom in the South took out a full-page political advertisement in the *New York Times*. Titled "Heed Their Rising Voices," the ad condemned Southern leaders who were resisting desegregation, and in particular criticized the public officials in Montgomery, Alabama, for trying to suppress civil rights protests. Contending that he had been defamed by the ad, L. B. Sullivan, one of Montgomery's elected city commissioners, sued the *New York Times,* as well as four black Alabama clergymen who were signatories to the ad. The Alabama trial court ruled for Sullivan and awarded him $500,000 dollars in damages, a verdict upheld by the Alabama Supreme Court. The Supreme Court of the United States, however, reversed this judgment, holding that Sullivan could not demonstrate that he had been defamed-even though "Heed Their

Rising Voices" admittedly contained several false statements.

The problem with *New York Times v. Sullivan* is not the ruling that it announced but the new doctrine that it introduced into American constitutional law. The justices had good grounds for finding against Sullivan. There was reason to think that he and other official litigants were using Alabama libel law to silence criticism from Northern newspapers.1 Moreover, "Heed Their Rising Voices" did not mention Sullivan by name or even identify the office he occupied. The ad was more of a general condemnation of Southern official intransigence and intimidation, so that Sullivan had to argue that he had been defamed by implication. His libel claim, then, was weak and did not deserve to prevail.

As Justice Clarence Thomas has observed, the Supreme Court could have rested its ruling on these considerations alone. 2 The justices instead took an important further step, which has distorted American politics ever since. Writing for a unanimous Court, Justice William Brennan used the *New York Times* ruling to revise the country's constitutional jurisprudence regarding libel and freedom of speech and of the press. The First Amendment, he wrote, requires that "public officials" who are suing for libel in relation to claims made about their "official conduct" have to be treated differently than all other litigants. To succeed, they must show not only that they were defamed by the publication of false allegations. They must also meet the high standard of demonstrating that the publisher of the defamatory material acted

with “actual malice!’ That is, public officials must now prove the publisher acted either with knowledge that the allegations were false, or with a “reckless disregard” for whether those allegations were false or true.3 Subsequent cases further developed this doctrine. Not only “public officials” but even 11public figures:’ who, as such, fall into a broader and vaguer category, now have to demonstrate “actual malice” to prevail in a defamation case.4

New York Times v. Sullivan thus created a revolution in libel law, one that has done great harm to our politics. Prior to this ruling, public figures (like anyone else) could sue and recover damages from those who had libeled them. The truth of a claim was considered a defense against libel. Journalists were therefore free to publish even biting criticism of public figures, so long as the criticism was based on accurate information. Those who went beyond the truth, however, placed themselves in legal jeopardy. Thus the pre-New *York Times* libel standards provided for freedom of the press while at the same time placing in the hands of public figures a legal check on the abuses of press freedom-a check that worked both to protect the reputations of individuals and to promote the truthfulness of public discourse.

The *New York Times* doctrine, however, effectively put an end to this wholesome legal check on the power of the press. Truth remains a defense against a charge of libel. For public figures, however, defamatory untruths are no longer sufficient to establish libel. To bring a successful libel action, public figures must now demonstrate both that the published material was

defamatory and false, and that it was published with 11actual malice"-that is, again, with knowledge of its falsehood or reckless disregard for its truth or falsehood.

Obviously, it is much easier to demonstrate that a claim is false and defamatory than to demonstrate anything about the state of mind of the person who made the claim. In practice, it is nearly impossible to prove actual malice, and the standard simply invites journalists to be careless, or to feign carelessness, about the truth, since mere carelessness does not rise to the level of actual malice. As David A. Logan observes, the *New York Times* standard creates a 11perverse incentive" for journalistic institutions to lower their editorial standards, since, to recover damages, 11the plaintiff must prove that the defendant knew the statement was false or was subjectively certain of its falsity:' In these legal circumstances, "publishing without verification is the safest legal route, as an attempt to verify that turns up contrary information before publication can constitute reckless disregard for the truth and support liability. As a result, publishers are incentivized to do little or no fact-checking, confident that the more slipshod their investigation, the less likely they are to be guilty of 'actual malice.'"5 The public figure's difficulty in prevailing is reflected in the small and diminishing number of cases brought against the media in the post-New *York Times v. Sullivan* era.6 Journalists today thus have no serious legal obligation to publish only the truth. The *New York* Times standard has consequently made much American journalism a threat to the reputations of blameless public figures and given the

press an enormous and destructive power over the public discourse and the public mind.

Several examples drawn from our history illustrate the magnitude of the change. In the early nineteenth century, the *New York American* published a story falsely claiming that the New York state attorney general had drunkenly presided over the legislature. When the attorney general sued, the editors attempted a defense that anticipated the later *New York* Times standard, holding that they could not be found liable if they had not known that the story was false. The trial judge, however, rejected this standard and permitted the jury to award damages-an outcome that was affirmed on appeal.7

As the nineteenth century drew to a close, substantially the same libel standard was upheld by William Howard Taft, future president of the United States and chief justice of the Supreme Court, then serving as a judge of the United States Court of Appeals for the Sixth Circuit. In the case in question, Theodore Hallam, a failed congressional candidate, sued the *Cincinnati Post* for publishing an article falsely claiming that Hallam had been bribed to support another candidate. Hallam won his case, and when the Post Publishing Company appealed, Taft affirmed the verdict—and rejected the company's argument that the article, though false, should not be actionable if published in good faith.8

This standard was still being applied in the middle of the twentieth century. In 1941, prior to America's entry into the Second World War, journalist John O'Donnell published an article claiming that the Roosevelt

administration was secretly shipping war supplies to Great Britain. President Roosevelt promptly condemned the story as a "deliberate lie:' Shortly thereafter, the pro-Roosevelt Philadelphia Record published an editorial labelling O'Donnell as an open "Naziphile"—a supporter of "most of Hitler's aims," including the "liquidation of Jews:' O'Donnell sued for libel and won. On appeal, the Record contended that the judgment violated its constitutional right to freedom of the press and that its liability should have been judged on whether it had published the editorial "solely for the purpose of causing harm to the plaintiff:' In 1947, the appeals court rejected this argument, holding instead that "want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue publication: properly exposes a publisher to a libel claim.9

In all these cases, public figures used libel law to protect their reputations and to hold the press accountable for spreading defamatory misinformation. In none of the cases was it possible for the publishers to defend themselves merely by claiming that they had not deliberately lied or acted with a reckless disregard for the truth. Rather, the standards followed by the courts presupposed that libel was not protected by freedom of the press, and that libel had occurred-and was actionable-even when the publisher had propagated falsehood through carelessness or negligence. Put another way, the standards then prevailing assumed that the publisher had a duty to exercise some diligence in ascertaining the truth before publishing.

The nation that lived under these reasonable and decent limitations nevertheless understood itself to be committed to the freedom of the press. In fact, that nation sought to support a press that was both free and restrained by a duty to tell the truth, instead of one that was licentious, abusive, and dishonestly inflammatory. Soon, however, those salutary standards were to be swept away by the Supreme Court's ruling in *New York Times v. Sullivan,* thus laying the foundations for the corrosive press culture from which America suffers today.

A most striking example of the change wrought by the *New York Times* ruling is provided by the experience of Washington state legislator John Goldmark. Goldmark was defeated for reelection in 1961 after a number of critics had publicly condemned him as a communist. He then brought a libel suit against several individuals and organizations, including a newspaper, that had been responsible for promoting these damaging claims. Goldmark prevailed: in early 1964, the jury in his case awarded him $40,000 in damages. Nevertheless, while post-trial motions were still pending in his case, the Supreme Court announced its ruling in *New York Times v. Sullivan.* Accordingly, Goldmark's trial judge, while admitting that the evidence showed the man was not a communist, nevertheless set aside the jury's verdict, since nothing in the record showed that Goldmark's libelers had known their claims were false or had acted with reckless disregard for the truth.10

The *New York Times* case thus ushered in a new era in American libel law in which public figures often cannot succeed in suing for libel even when they have been the

victims of press defamation-an era, that is, in which there is no effective legal check by which to hold the press accountable for failing to publish the truth. In 1983, for example, *Time* magazine published a story claiming that Ariel Sharon had, while serving as Israel's defense minister, encouraged the massacre of hundreds of Palestinians by a Lebanese Christian militia. When Sharon sued in the courts of the United States, the jury found that *Time's* story was false and defamatory; but they ruled for *Time* nonetheless, since there was no evidence that the magazine had acted with actual malice.11

In 2012, *NBC News* selectively edited the audio of the 911 call that George Zimmerman made prior to fatally shooting Trayvon Martin. The edit made it appear that Zimmerman was preoccupied with the fact that Martin was black, when in fact he had mentioned Martin's race in response to questioning by the emergency dispatcher. Zimmerman sued NBC for defamation and lost. Even though NBC apologized and admitted that the edit was an error, the judge in the case found that Zimmerman had no right to damages, since he was a public figure and had not proved that NBC had acted with malice.12

Most recently, former Republican vice-presidential candidate Sarah Palin brought a defamation suit against the *New York Times* for an editorial falsely linking Pali n's political rhetoric to a 2011 mass shooting in Arizona. The *Times* admitted that its claim was erroneous. Nevertheless, Palin's suit failed because she was a public figure and could not show actual malice on the part of the Times.13

These cases demonstrate the important change in our legal and political culture caused by *New York Times v. Sullivan.* Prior to this ruling, public figures possessed in American libel standards a legal tool by which to vindicate their reputations and hold journalists to account for publishing defamatory falsehoods. Since *New York Times v. Sullivan,* however, the wholesome restraint imposed on the press by the law of libel has practically vanished. Now, even those public figures who have admittedly been victimized by falsehood cannot sue successfully, since it is so hard to prove the recklessness and deliberate mendacity that characterize actual malice.

How the *New York Times* Doctrine Undermines Democracy and Equality

Our circumstances tend to blind us to the tremendous damage the *New York Times* ruling has done to our nation. Accustomed to and formed by the unrestrained public culture that the "actual malice" standard has spawned, many Americans have come to believe that freedom includes an unlimited license to abuse the nation's elected leaders and other public figures at will. For such Americans, a reversal of *New York Times v. Sullivan* appears as a threat to democracy itself. This view is entirely incorrect. In truth, the *New York Times* doctrine undermines democracy by eroding our country's capacity for genuine self-government and its commitment to equality.

Justice Brennan's opinion in *New York Times v. Sullivan* defended the 1'actual malice" standard as necessary to preserving the vigorous public discussion on which successful self-government depends. The

principle he chose to embed in American law, however, is in fact hostile to the end he was trying to achieve. Successful self-government depends on a public discourse that is not only vigorous but also accurate and enlightening. Under the "actual malice" standard the media have little incentive to sustain such a discourse, for they effectively have no legal obligation to tell the truth about public figures. The result is a public discourse that diminishes the quality of democratic representation and undermines the quality of democratic deliberation.

The system of representative self-government does not necessarily result in good and enlightened government. Under such a system, the quality of government will necessarily depend on the quality of the people elected to public office. The flourishing of our democracy requires that those elected to positions of public responsibility are, to the extent possible, people of ability and integrity. Human conditions are such that there is a limited number of such people available. A prudently constructed constitutional system, therefore, will not disincentivize their political participation. But this is precisely what the *New York Times* doctrine does. It necessarily diminishes the number of people who will be willing to serve in public life by making public figures bear a heightened risk to their reputations. We would certainly diminish the willingness of citizens to hold public office if they had to pay an additional tax for doing so. The same pernicious effect results from telling citizens that they must submit to defamation, without effective redress, if they choose to enter public life.

Diminishing the size of the pool of people willing to serve necessarily harms the public's ability to choose those who will govern. Worse, the *New York Times* standard must also diminish the quality of the pool of people willing to serve. If the price of admission to public life is submission to defamation, then those citizens who are most solicitous of reputation, who care most about what their fellow citizens think of them, will be most deterred from public service. But those who are protective of their reputation are often the people of highest integrity. In any case, it is a poor policy that deters the honorable but not the shameless from entering public life.

The *New York Times* libel standard also erodes the quality of democratic deliberation. In a representative democracy, the people are to set the basic direction of public policy by electing public officials with whom they agree on the major issues confronting the country and whom they can trust to conduct their offices with ability and integrity. To perform this task well, the public needs accurate information about the candidates for public office. In a healthy democracy, the press would strive conscientiously to provide such information. It will, however, always be in the narrow interest of partisans—including a partisan press-to influence the outcomes of elections by misrepresenting the positions of candidates on controversial issues and by rendering the character of some candidates odious through defamation.

This, for example, is what the Hillary Clinton campaign and its supporters in the media intended to achieve by propagating the claim that Donald Trump

was “colluding” with Russia. They thought that, in the absence of that false claim, Trump’s platform might prove to be attractive to enough voters for him to win. Similarly, the enemies of Trump’s presidency sought to politically marginalize him, to destroy his reputation, and to prevent his reelection by assailing him as a racist, including by propagating the demonstrably false claim that he had said that some neo-Nazis were “fine people!’[14] Again, these false and defamatory claims were made so vigorously precisely because the people making them feared that, without them, Trump’s actual priorities and actions as president might prove attractive to a majority of Americans.

New York Times v. Sullivan in fact encourages such behavior. The result is to diminish the quality of democratic government and even to reduce it to a sham. The quality is reduced because if the voters are not choosing candidates based on accurate information they might as well be choosing at random. More gravely, however, this situation tends to reduce our democracy to a sham because it deprives the voters of the opportunity to cast their ballots on the basis of genuine, informed consent. The political promise of the American regime is government by consent. Consent, however, can be denied not only by force but also by fraud. Where voters are manipulated into rejecting a candidate by political attacks resting on falsehoods, democracy itself has been in some measure defeated.

American democracy is committed not only to popular self-government but also to equality of rights. *New York Times v. Sullivan,* however, sets up an inequality of rights among different classes of citizens. Ordinary

Americans enjoy the full protection of the law's traditional libel standards. In contrast, public figures-an expansive category that includes not only public officials and political candidates but also celebrities and practically anyone who has achieved any public prominence—are burdened with the "actual malice" standard, and accordingly have diminished reputational rights. But it is no more consistent with American principles to hold that the reputations of the famous should receive less protection than those of ordinary people than it would be to hold that the property of the rich should receive less protection than that of the middle class or the poor. The proper aim of the law is equally to protect the rights of all. Under such a principle, it makes no sense to hold that those who have succeeded in life-in many cases through their own efforts-should have to endure a higher risk of damage to reputation or to property. No sensibly governed democracy would tolerate such an arrangement. Furthermore, the *New York* Times standard effectively makes journalism a privileged profession. Unlike all other professionals, journalists carry practically no liability for their negligence. If a physician carelessly prescribes an improper treatment and thus injures the health of a patient, he can be sued for his negligence. It will not be necessary to prove that he prescribed the treatment knowing it was wrong, or that he acted with reckless indifference to its harmfulness. Similarly, if a contractor carelessly damages a client's property, the client can recover damages because of the contractor's negligence-again, without having to show that the contractor acted with knowledge of the damage he would cause or reckless indifference to it. It is a violation of the principle of

equality that all Americans are answerable for their negligence except for journalists. There is no reason to tolerate this inequality, especially when the deceptive reporting of journalists is so often damaging to the nation as a whole, while the damage caused by the negligence of other professionals is usually limited to unfortunate individuals.

Finally, the *New York* Times standard creates an unacceptable inequality between the media and ordinary citizens. Most national "reporting" in America is done not by independent journalists but by the employees of massive media corporations. These corporations make large sums of money by conveying information or alleged information. Thanks to our current libel standards, such corporations can make money by selling defamatory falsehoods about Americans, all the while being free from any real danger of having to pay damages to those whose right to reputation they have assailed for profit. Here it is especially helpful to recall that the kind of "public figure" to whom the *New York Times* standard applies may include any public official-a category that includes small town mayors and school board members, as well as anyone seeking such offices. The power of such people is negligible when compared to that of the corporations that might choose to make profitable "news" out of their lives, truthfully or not. Indeed, even most members of Congress have nothing like the megaphone possessed by the large corporations who report on their careers. The consequences of *New York Times v. Sullivan* thus savor more of oligarchy than democracy.

Libel, the Natural Right to Reputation, and the Original Meaning of the First Amendment

There is another way in which contemporary Americans tend to be blind to the damage caused by the "actual malice" standard. We are inclined to think that the *New York Times* ruling strikes a prudent balance between the key competing claims. After all, it seems reasonable to sacrifice the reputational interests of public figures the better to protect the right to freedom of the press. Such thinking, however, obscures the real nature of the costs imposed by the *New York Times* doctrine. Libel is not just an imposition on someone else's interests but rather an attack on the rights of another personspecifically, on the right to one's reputation.

This is the understanding that informed the principle of freedom of the press embodied in the First Amendment. This understanding was shaped in the first instance by the English tradition of common law, a tradition famously summarized by William Blackstone in his celebrated and influential *Commentaries on the Laws of England.* According to Blackstone, the "security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right!'15

It is worth emphasizing here that Blackstone presents security of reputation not only as a customary but a natural right. This view persisted in the political and legal culture of the Founding generation. Thus, for

example, James Kent, in his *Commentaries on American Law,* treated libel in his lecture on “the Absolute Rights of Persons,” and observed that “the preservation of every person’s good name from the vile arts of detraction is justly included” as “a part of the right of personal security!’16 Similarly, James Wilson, in his *Lectures on Law,* referred to libel as “a crime against the right of reputation.” He then went on to class libel with theft-a violation of the natural right to property-in its gravity: “robbery itself does not flow from a fountain more rankly poisoned, than that which throws out the waters of calumny and defamation.”17

Justice Joseph Story, writing as a circuit judge in a federal district court in the case *Dexter v. Spear* (1825), likewise presented security of reputation as a right equally important as other rights commonly understood to be natural and fundamental by the Founders:

The case of libels stands upon the same general grounds as other rights of action for wrongs. The general rule of law is, that whoever does an injury to another is liable in damages to the extent of that injury. It matters not, whether the injury is to the property, or the person, or the rights, or the reputation, of another. The law has declared all these entitled to its protection; and whoever wantonly assails them must answer in damages for; the consequences. Civil society could not exist upon any other terms. Injuries to the regulation, by gross slanders and degrading libels, are oftentimes more extensive in mischief, and more fatal to the public peace and to private happiness, than any which can affect mere corporeal property. Indeed, the

dearest property, which a man nas, is often his gooa name an character.18

It is evident that the Founders' understanding is correct: security of reputation deserves to be classed as a natural right. This right is as deeply rooted in human nature as the right to personal safety or the right to security in one's property. Human beings are by nature sociable animals. They are made to live together not only in families but in a larger society. Accordingly, they have natural feelings of concern for what others think of them. Anyone with experience of human life knows that to be publicly defamed is just as unpleasant and harmful as to be robbed or assaulted-and often more so. Because human beings are naturally sociable, they require each other's help to exercise their rights fruitfully. Damage to reputation therefore harms one's ability to enjoy other rights. If the community believes that you are guilty of some vile transgression, it will be hard to have friends, hard to get married, hard to earn a living, and perhaps even hard to remain safe.

This account of reputation as a natural and fundamental right in turn informed the Founders' understanding of the scope of the freedom of the press. According to that understanding, libelous or defamatory publication is outside the freedom of the press, properly understood, and therefore is simply not protected by the First Amendment. This understanding was held, moreover, as applying across the board to all cases, without reference to any distinction between public figures and ordinary citizens. The heightened, "actual malice" standard that the *New York Times* Court imposed was accordingly a judicial invention not

rooted in the original meaning of the First Amendment.19

The Founding-era idea of freedom of the press did not originate with the First Amendment. Americans of that period considered this freedom to be part of the inheritance of English liberty, which Blackstone had affirmed in his *Commentaries on the Laws of England.* Blackstone and the Americans of the Founding generation, however, also appreciated what contemporary Americans have often forgotten: that the "liberty" of the press must be distinguished from its "licentiousness:' Libel belonged in the latter category - outside the scope of the proper liberty of the press-and was accordingly subject to legal punishment. According to Blackstone, the "liberty of the press, properly understood, is by no means infringed or violated" where "libels are punished under English law"120

American legal theory and practice at the time of the Founding did not perfectly mirror Blackstone's views and were more liberal in some respects. 21 Nevertheless, the Founding generation held to Blackstone's fundamental point that libel or defamation is not part of the liberty of the press. For example, James Kent's *Commentaries on American Law* affirmed that "the liberty of speech, and of the press, should be duly preserved" because the "liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of these United States." At

the same time, however, Kent also acknowledged the traditional view that a libel is a legal "grievance" and that 11the law has accordingly considered it in the light of a public as well as a private injury." 22 Similarly, James Wilson's *Lectures on Law* observed that the "citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning public men, public bodies, and public measures."23

Justice Joseph Story gave a similar account of the relevant principles in the aforementioned *Dexter v. Spear*. There he explained that "no man has a right to state of another that which is false and injurious to him;' and that consequently "no man has a right to give it wider and more mischievous range by publishing it in a newspaper!' "The liberty of speech, or of the press,"' he continued, "has nothing to do with this subject"—namely, libel. These liberties "are not endangered by the punishment of libelous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no right in printers, any more than in other persons, to do wrong."24

As these passages indicate, the Founders understood that truthful criticism of public figures is a necessary component of republican self-government. They equally indicate, however, that the Founders placed false and defamatory claims in an entirely different category. Such claims, they held, make no positive contribution to self-government, are a violation of the right to reputation, and are accordingly not protected by freedom of the press.

Viewing the question superficially, it may seem that *New York Times v. Sullivan* adheres to the original meaning of the First Amendment by holding that a defamed person, including a public figure, may sue for libel and collect damages. But this is incorrect. The doctrine of *New York* Times *v. Sullivan* retains the shell of the traditional principle that libel is not protected by the First Amendment, but then makes it practically impossible for a public figure to sue for libel successfully—even when that public figure has in fact been the object of false and defamatory publication—by imposing the "actual malice" standard.

Justice Brennan's opinion in the *New York* Times case incorporates distinctions and standards into American libel law that are alien to the original meaning of the First Amendment.25 Neither Blackstone, Kent, Wilson, nor Story suggest that some libel cases are to be adjudicated under separate standards that make it especially difficult for public figures to prevail. They say nothing of "actual malice" in the sense that the *New York Times* Court uses the term, but instead hold that a publication is libelous and actionable if it meets the simple test of being defamatory and false. 26

Conclusion: Securing Liberty While Preventing License

The "actual malice" standard of *New York* Times *v. Sullivan* is bad in theory and bad in practice. It is inconsistent with the original meaning of the First Amendment, and it undermines key American principles such as individual rights, equality, and democratic self-government. This doctrine should be

repudiated by the Supreme Court at the earliest opportunity.

Nevertheless, there is a danger in doing so. The danger arises from the increasingly illiberal character of the American Left. The Left has considerable institutional power, and it has revealed itself as more and more willing to suppress speech with which it disagrees. A common slogan of the Left holds that "hate speech is not free speech"—with the tacit understanding that "hate speech" often includes speech that asks questions that the Left would rather not have to answer. If the *New York Times* doctrine is rejected by the Court, it is not hard to imagine some on the Left seizing on the opportunity to contend that what they label as "hate speech" should be treated as actionable defamation. In order to avert this danger, it is necessary to clarify two crucial distinctions: between opinion and fact, in the first place, and between individual rights and group identity, in the second place.

The traditional understanding of libel-that which prevailed at the time of the Founding and for many generations afterward—always included the privilege of freely sharing one's opinions on public questions. As Blackstone observed, "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press."27 Accordingly, even with effective standards against libel, citizens and media organizations will have considerable liberty to share whatever opinions they like about politicians, parties, and proposals. They may denounce their political opponents as fools, may inquire into and critique their motives, may label whole

political parties as crazy or corrupt. What they cannot do, however, is use false facts to defame their opponents. Traditional libel standards do not even require participants to stick to the facts when they are engaged in political debate. They may opine with as much freedom and as much passion as they can muster. These standards only require them not to resort to defamatory falsehood. Such standards surely preserve the possibility of vigorous public debate while still averting the dangers of uncontrolled defamation.

Any reconsideration of *New York Times v. Sullivan* must also bear in mind that the core purpose of libel laws is to protect the individual right to reputation. On this view, while individuals can be injured by defamation and must have an effective right to seek justice, the same is not true of social groups. Nor may individuals seek damages because of alleged defamation of the group to which they belong. We live in an age in which group identity is celebrated and in which, accordingly, many people feel a sense of grievance if the group to which they belong is criticized. We should of course strive to maintain a due civility, but the purpose of libel laws is not to shield people's feelings from being hurt on the basis of the negative opinions that often accompany group differences but to protect the individual's right to his own reputation. Even with a restoration of traditional libel standards, the First Amendment will still offer a robust protection for freedom of debate, including the long-standing protection for ideas and utterances that many will find uncivil and even offensive.

Restoration of the pre-New *York Times v. Sullivan* libel standards will, however, establish a wholesome discipline for the American media. If the media attempt to make money and to influence politics by retailing false and defamatory materials about American citizens, they will have to contemplate the very real possibility of successful libel lawsuits. Reporters and editors will also have to consider the possibility that they might lose their jobs by getting their employer sued, along with the danger of the reputational damage to the media institution that will accompany a libel suit. And the CEOs of big media corporations will have to consider the financial harm that comes from paying out damages to litigants who successfully sue for libel. None of this would do anything to "chill" the robust exchange of information and ideas. To avoid these dangers, media institutions would need to do no more than make sure of the truth of what they publish, especially when the matter damages a person's reputation. There is nothing to lose and much to gain by insisting on such discipline-a discipline that would restore the original meaning of the First Amendment and would enhance rather than undermine our country's commitment to rights, equality, and democracy.

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Endnotes

[1] See David A. Logan, "Rescuing Our Democracy by Rethinking *New York Times* Co. *v. Sullivan:' Ohio State Law Journal* 81 (2020): 759.

[2] Justice Clarence Thomas, concurring opinion in *Kathrine Mae McKee v. William H.* CosbY, *Jr*. (2019), 586 U.S. __ (2019).

[3] *New York Times* Co. *v. Sullivan,* 376 U.S. 254 (1964), at 254.

[4] *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), at 323.

[5] Logan, "Rescuing Our Democracy by Rethinking *New York Times* Co. *v. Sullivan,"* 778.

[6] Logan, "Rescuing Our Democracy by Rethinking *New York Times* Co. *v. Sullivan:'* 809.

[7] Alfred H. Kelly, "Constitutional Liberty and the Law of Libel: A Historians View:' *The American Historical Review* 74 (December 1968): 439.

[8] Ibid., 439-40.

[9] See *O'Donnell v. Philadelphia Record Company* (1947), https://casetext.com/case/odonnell-v-phila-record-co.

[10] See William L. Dwyer, *The Goldmark Case: An American Libel Trial* (Seattle: University of Washington Press, 1984).

[11] Peter Garner, *"Time* vs. *Sharon:* A Question of Intent;' *Chicago Tribune,* April 15, 1987, https://www.chicagotribune.com/news/ct-xpm-1987-04-15- 8701280653-story.html.

[12] Noelle Swan, "George Zimmerman Loses Defamation Case Against NBC: Why?:• *Christian Science Monitor,* June 30, 2014, https://www.csmonitor.com/USA/USA-Update/2014/06 30/GeorgeZimmerman- loses-defamation-suit-against-NBC.-Why.

[13] Jeremy W. Peters, "Sarah Palin's Libel Claim Against the *Times* is Rejected by a Jury," *The New York Times,* February 15, 2022, https:f/www.nytimes.com/2022/02/15/business/media/ new-york-times.html.

[14] President Trump had in fact said that there were "fine people" on both sides in the Charlottesville protest of 2017, while going on a moment later to add: "and I'm not talking about the neo-Nazis and the white nationalists, because they should be condemned totally:' See "Full Text: Trump's Comments on White Supremacists, Alt-Left in Charlottesville;' *Politico,* August 15, 2007, https:f/www.politico.com/story/2017/ 08/15/full-text-trumpcomments-white-supremacists-alt-left-transcript-241662.

[15] William Blackstone, *Commentaries on the Laws of England,* a facsimile of the first edition of 1765-1769, ed. Thomas A. Green, vol. 1 (Chicago: University of Chicago Press, 1979), 130.

[16] James Kent, *Commentaries on American Law,* vol. 2 (New York: 0. Halsted, 1827), 12.

[17] James Wilson, "Lectures on Law," in *Collected Works of* James *Wilson,* ed. Kermit L. Hall and Mark David Hall, vol. 2 (Carmel, IN: Liberty Fund, 2007), 1136.

[18] *Dexter v. Spear,* 7 F. Cas. 624 (No. 3,867), Circuit Court of Rhode Island (1825).

[19] As James Stoner observes, Brennan and his colleagues did not pull the actual malice standard out of "thin air:' Rather, they found it in use as a "common-law rule developed in several jurisdictions" and decided to adopt it as a "national standard:' See Stoner's *Common-Law Liberty: Rethinking American Constitutionalism* (Lawrence: University Press of Kansas, 2003), 44. Nevertheless, the development of such a standard by some state courts did not and could not turn the rule into a requirement of the First Amendment. Accordingly, *New York* Times *v. Sullivan* remains an act of unconstitutional judicial activism-even if the justices did not themselves invent the actual malice standard in the course of deciding the case.

[20] Blackstone, *Commentaries on the Laws of England,* vol. 1, at 150-52.

[21] Blackstone, for example, held that the truth of a defamatory statement was not a defense against a criminal libel. This view would probably have been controversial to Founding-era Americans and was in any case discarded by the early nineteenth century. Moreover, it is doubtful that the more democratic Americans would have agreed with the rather aristocratic English view expressed by Blackstone that

libel is especially bad when directed against a magistrate.

[22] James Kent, *Commentaries on American Law,* 13-14.

[23] James Wilson, "Lectures on Law," in *Collected Works of James Wilson,* vol. 2, 1046. Emphasis added.

[24] *Dexter v. Spear,* 7 F. Cas. 624 (No. 3,867), Circuit Court of Rhode Island (1825). For Story's similar account of the original meaning of the First Amendment itself, see his *Commentaries on the Constitution of the United States,* vol. 3 (Boston: Hilliard, Gray, 1833), 731-33.

[25] Although the standards devised in *New York Times v. Sullivan* are not rooted in the original meaning of the First Amendment, the Court tried to create an illusion of originalist legitimacy for its decision by invoking the Founding-era debate over the Sedition Act. That act was condemned by many prominent Americans despite the fact that it explicitly acknowledged truth as a defense against a charge of seditious libel. On this basis, Brennan claimed that the Sedition Act had been found constitutionally invalid "in the court of history"-and he thus sought support in the Founding for his claim that even factually erroneous and defamatory publications are protected by the First Amendment. Brennan's account here is, to say the least, tendentious. It is of course true that the Sedition Act was condemned as unconstitutional by weighty figures such as Thomas Jefferson and James Madison. It is also true, however, that it was held to be constitutional by figures of no less consequence and

legal sagacity, such as Alexander Hamilton and John Adams. One congress, in 1840, declared the Act to be unconstitutional; but another, in 1798, had affirmed its constitutionality by enacting it in the first place. President Jefferson acted officially on his belief in the act's unconstitutionality; but President Adams had expressed his official approval of it by signing it into law in the first place. No impartial judge could draw from these conflicting opinions a firm conclusion that the Sedition Act had been found unconstitutional "in the court of history."

[26] Some of these commentators say that "malice" is necessary to a libel. This is not a reference to the modern "actual malice" standard, however. Traditionally, malice was assumed as a matter of law when the publication itself was libelous. See Herman Belz, Winfred Harbison, and Alfred H. Kelly, *The American Constitution: Its Origins and Development,* 7th ed., vol. 2 (New York: W.W. Norton, 1991), 624.

[27] Blackstone, *Commentaries,* vol. 4, 150.

DON BLANKENSHIP
PO BOX 717
MATEWAN WV 25678

13 July 2021

Rupert Murdoch
Chairman
Fox Corporation Board of Directors
1211 Avenue of the Americas
New York, NY 10036

Re: Don Blankenship

Dear Mr. Murdoch:

It has been a year since my last letter to you concerning my lawsuit. We are now less than 100 days from the scheduled trial date. Although your attorneys have done a stellar job of hiding relevant information, I am confident that we have more than enough evidence to prove that Fox purposefully defamed me and conspired to interfere in the 2018 West Virginia Republican US Senate primary election ("primary").

Persons who have committed wrongful acts often do not realize the significance of their wrongdoing. As highly successful, well-meaning individuals, some Fox board members may even have this mindset. Your attorneys appear to be solely focused on defending a lawsuit instead of promoting the broader best interests of Fox. I submit that you should be focused on righting a wrong versus committing another wrong.

My specific purpose in writing to you now involves an order that was issued by the court on Thursday, July 8.

This is the third order the court has issued requiring that Fox produce its board member and executive communications and documents related to the issues raised in my case. For several months your attorneys have successfully delayed production of the subject materials via appeals. However, continuing to do so will amount to improper and unethical conduct.

I encourage you to strictly comply with the court's directives immediately and include any and all cellphone text messages that are relevant to the lawsuit in the board member productions. I have reason to believe that your attorneys have not complied with Fox's obligation to produce cellphone text messages as directed by the court, despite having stipulated that they have done so. If the Fox board itself were to fail to disclose all relevant electronically stored information (ESI), including text messages, then it would create even more serious issues.

FYI, election interference is a serious matter in West Virginia. In fact, what Fox did during the primary was a crime under West Virginia Code § 3-8-11(c): "Any person who shall, knowingly, make or publish or cause to be made or published, any false statement in regard to any candidate, which statement is intended or tends to affect any voting at any election whatever ... shall be fined not more than $10,000, or confined in jail for not more than one year, or, ... shall be subject to both such fine and imprisonment." I am not implying that anyone at Fox is going to be prosecuted for violating this law but rather emphasizing that this statute makes it clear how iniquitous Fox was to interfere in the primary.

It is beyond question that Fox's judicial and political analysts, as well as others at Fox, knew that I was not a "convicted felon" well before the primary. Yet, Fox commentators were permitted to call me a "felon" and "convicted felon" even after I threatened to file a lawsuit if Fox did not stop.

It is bad enough that Fox falsely and repeatedly telecast that I, a leading candidate for a US Senate seat, was sent to prison for manslaughter and that I am a "convicted felon" who is also a moron, bigot, and crook. The Fox board needs to avoid becoming directly involved in the coverup of this truth. When evidence at trial proves that Fox interfered in a US Senate election, it will most likely become a shareholder matter. This is particularly so if Fox is found by a jury to have conspired with government officials to sabotage a federal election.

The Fox board misrepresented to its shareholders that it had ethical policies and business practices in place to avoid this type of illicit activity. Now that Fox board members are aware of the matters at issue in this lawsuit, any further misconduct such as failing to follow court directives will inevitably expose the Fox board itself to potential shareholder action. Therefore, you should confirm whether your attorneys have duly complied with all discovery obligations.

This letter is intended to provide needed perspective that the Fox board may not otherwise garner from internal sources. Hopefully, this letter will be received in the spirit it is offered. I have been subjected to distasteful shareholder actions in the past and do not wish that on any Fox board member.

Sincerely,

Don Blankenship

Don Blankenship

Delaware judge sanctions Fox News lawyers in Dominion lawsuit
Updated on: April 13, 2023 / 8:56 AM

By Melissa Qui.on, Clare Hymes

Washington—The Delaware judge overseeing the aefamation case involving Dominion Voting Systems and Fox News sanctioned lawyers for the network Wednesday after learning they, may have withheld evidence showing that its hosts and executives knew there was no support for baseless claims made about Dominion's voting equipment and software and the 2020 presidential election.

The evidence pertains in part to recordings former Fox News producer Abby Grossberg said she has of conversations between host Maria Bartiromo, for whom she worked, and attorneys Rudy Giuliani and Sidney Powell. The two conservative lawyers made unfounded allegations on the network's broadcasts that Dominion rigged the 2020 presidential election against former President Donald Trump.

During a pre-trial proceeding Wednesday, Davida Brook, a Dominion attorney, played parts of two recordings of conversations Bartiromo had with Giuliani and Powell before broadcasts on Nov. 8, 2020, and Nov. 15, 2020, both of which Dominion argues contained false and defamatory claims against it.

"We keep on learning about more relevant information from individuals other than Fox," she said.

The revelation prompted the judge overseeing the case, Delaware Superior Court Judge Eric Davis, to reopen

discovery, including to allow Dominion to take new depositions at the expense of Fox. He also said he will "probably" appoint a special master, or an independent third party, to investigate Fox News's attorneys. Davis ordered them to preserve all communications.

"Very uncomfortable right now," Davis said during the proceedings. "It may not show, but I'm very uncomfortable right now."

The judge said he is "very concerned" that there have been misrepresentations made to him, 11 and this is very serious."

The special master may also be asked to look into whether Fox's legal team withheld evidence relating to Rupert Murdoch, chairman of Fox Corporation. In court Tuesday, Fox lawyers disclosed that Murdoch is also an officer of Fox News. Knowing this earlier would have entitled Dominion to broaden its search of relevant records related to Murdoch. In response to the confusion over his role with the news network, a spokesperson for Fox said, 11 Rupert Murdoch has been listed as executive chairman of FOX News in our SEC filings for several years and this filing was referenced by Dominion's own attorney during his deposition."

"This is a problem," Davis said in court Tuesday, according to The New York Times. "I need to feel comfortable that when you represent something to me that it's true," Davis added.

A spokesperson for Fox News said in response to the developments about the sanctions from Davis, "As counsel explained to the Court, FOX produced the

supplemental information from Ms. Grossberg when we first learned it." It's not clear from the statement when Fox learned of the additional recordings from Grossberg and what the company turned over, but an attorney for Fox told the court that it produced three recordings to Dominion last week after learning of their existence.

A fourth, of a call that occurred in December 2020, was said to be off-the-record and therefore not given to Dominion, attorney Michael Skokna said.

"We did not understand that those existed until recently," he said.

Grossberg filed a lawsuit against the network, its executives and lawyers last month, and in an amended filing Tuesday alleged Fox had access to the recordings and transcripts, but did not provide them to Dominion during the discovery process in its defamation lawsuit against the cable news network and its parent company.

In one of the recordings, from about Nov. 15, 2020, Giuliani admitted to Bartiromo that the Trump campaign could not prove some of the allegations regarding Dominion and the 2020 presidential election, according to a filing from Grossberg in a separate lawsuit against the network.

When Bartiromo asked Giuliani what evidence he had implicating Dominion, Giuliani replied, "That's a little harder," according to the latest filing.

Grossberg's attorneys said the recordings were made through the app Otter, which also transcribes the conversations and is popular with reporters.

"Each time Fox News accessed Ms. Grossberg's cell phones, the Fox News Attorneys, and in turn, Fox News and Defendant [Suzanne] Scott, gained access to Ms. Grossberg's Otter account and – through that account – to audio recordings of conversations of Ms. Bartiromo with Rudolph Giuliani, Sidney Powell, and other high-ranking members of the Trump presidential campaign," they wrote in her amended complaint filed Tuesday. Grossberg is a former employee of CBS News.

Suzanne Scott is chief executive officer of Fox News, and Grossberg has alleged Fox's lawyers misleadingly coached and manipulated her to deliver incomplete answers during a deposition taken as part of Dominion's lawsuit against Fox.

Her lawyers also noted in court papers that many of the conversations transcribed through the Otter app by Grossberg were "sent to and/or discussed with other Fox News' executives and employees, including through Fox News's email server."

Because Fox News' attorneys, and by extension the network and Scott, had access to Grossberg's cell phones and copies of her phones and emails, they "had access to the audio recordings and transcripts of telling off-air and pre-tape interviews of Mr. Giuliani, Sidney Powell, and other high-ranking government officials that Ms. Grossberg had made that established allegations of voter fraud repeatedly touted on the network, including those against Dominion, were

woefully unsupported," her lawyers Gerry Filippatos and Tanvir Rahman wrote.

Fox and its attorneys failed to turn over copies of the documents to Dominion during its defamation lawsuit, they alleged.

In response to Grossberg's second amended complaint, a spokesperson for Fox told CBS, "Fox has complied with its discovery obligations in the Dominion case."

The events centering on Fox's attorneys come one day before jury selection is set to begin, and it's unclear whether they will have any impact on the trial, scheduled to start on Monday. Dominion sued Fox News and their parent company, Fox Corporation, for $1.6 billion claiming the network fueled baseless conspiracy theories about their voting machines after the 2020 election, despite knowing the claims were false. Fox has said it was simply covering newsworthy allegations made by a sitting president claiming his reelection had been stolen from him.

Both parties tried to resolve the case by filing for summary judgment but Davis declined to declare a winner in the case before it heads to trial. A jury is expected to decide whether Fox acted with actual malice in broadcasting the unfounded allegations about Dominion and will determine whether the company is entitled to damages, and if awarded, how much.

In an 80-page opinion, the judge ruled last month that the evidence demonstrated it is "CRYSTAL clear that none of the statements relating to Dominion about the 2020 election are true,11 and the statements from Fox

News that are challenged by Dominion constitute defamation "per se."

Dominion has alleged 20 statements broadcast on Fox's shows or posted by their hosts between Nov. 8, 2020, and Jan. 26, 2021, were false and defamatory.

In the Nov. 8, 2020, broadcast of "Sunday Morning Futures," Bartiromo asked Powell about Dominion's voting software, and Powell, without offering any proof, claimed that Dominion had used an algorithm to change votes cast for Trump to President Biden.

Giuliani then appeared on Lou Dobbs' show, "Lou Dobbs Tonight," on Nov. 12, 2020, and leveled unfounded accusations about Dominion's ownership.

Nicole Sganga and Scott *MacFarlane contributed to this report.*

Trending News

In:

- Fox News
- Dominion Voting Systems

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Fox News producer alleges network "coerced" her into giving misleading testimony in Dominion suit

March 21, 2023/11:20 AM

By Melissa Quinn

Washington — A Fox News producer who worked for hosts Maria Bartiromo and Tucker Carlson filed a pair of lawsuits against the network Monday, alleging its lega earn "coerced" her. into giving misleading testimony in the ongoing defamation case brought by Dominion Voting Systems and accusing the company of fostering a "toxic" work environment.

Abby Grossberg, who joined Fox in 2019 as a senior booking producer on Bartiromo's Sunday morning show and eventually became head of booking on Carlson's primetime program, claimed that Fox's lawyers "coerced, intimidated, and misinformed" her while they were preparing her for deposition testimony in the $1.6 billion lawsuit filed by Dominion against Fox News.

Before joining the network, Grossberg worked for several other news outlets, including CBS News.

In one complaint filed in federal district court in New York, Grossberg alleges that Fox's legal team indicated she should respond with a generic "I do not recall" to as many questions as possible during a September 2022 depositio , which she claimed was an effort to shift responsibility for the alleged defamation against Dominion onto her and Bartiromo "rather than the mostly male higher ups at Fox News who endorsed the repeated coverage of the lies against the Dominion."

Dominion has accused Fox News executives and its hosts of knowingly airing false claims about the company after the 2020 presidential election in an effort to boost its ratings. Revelations from Dominion's ongoing dispute with Fox News and the claims in Grossberg's lawsuits further have shed light on what was taking place behind the scenes after the presidential contest and the atmosphere surrounding the network's most popular hosts.

In response to Grossberg's lawsuit, a Fox News spokesperson said the network "engaged an independent outside counsel to immediately investigate the concerns raised by Ms. Grossberg, which were made following a critical performance review. Her allegations in connection with the Dominion case are baseless and we will vigorously defend Fox against all of her claims."

Grossberg's attorney, Gerry Filippatos, said the network placed her on forced administrative leave after she informed them of the forthcoming lawsuits. Fox has also filed a request for a temporary restraining order in New York state court in an attempt to keep Grossberg from disclosing privileged conversations with its attorneys.

"Ms. Grossberg has threatened to disclose Fox's attorney-client privileged information and we filed a temporary restraining order to protect our rights," the network's spokesperson said.

Grossberg filed a second complaint in superior court in Delaware, in which she claims Fox attorneys acted at the behest of the network to "misleadingly coach,

manipulate, and coerce Ms. Grossberg to deliver shaded and/or incomplete answers during her sworn deposition testimony, which answers were clearly to her reputational detriment but greatly benefitted Fox News."

Her filing came on the eve of a hearing in Dominion's defamation case against Fox, which is set to go to trial next month.

"Ms. Grossberg was isolated, overworked, undervalued, denied opportunities for promotion, and generally treated significantly worse than her male counterparts, even when those men were less qualified than her," the lawsuit in federal court alleges.

Grossberg claims that while working on Carlson's show, she endured an environment that "subjugates women based on vile sexist stereotypes, typecasts religious minorities and belittles their traditions, and demonstrates little to no regard for those suffering from mental illness."

With regards to her testimony in the Dominion case, Grossberg claims that Fox News attorneys were "displeased" that she was being "too candid and forthcoming" during preparation sessions, and she was under the impression that she should downplay the importance of ratings to the network.

Grossberg alleged that Bartiromo's show was understaffed and lacked resources, which left her struggling to keep up with email warnings Dominion sent to Fox News about its post- election coverage. She also claimed that Fox Business Network's vice president of news coverage, Ralph Giordano, said

Dominion's lawsuit was the result of Grossberg's "inability to manage a diva," a reference to Bartiromo.

In addition to the allegations related to Fox News' legal fight with Dominion, Grossberg's complaints also detail what she said is a "misogynistic environment that permeates Fox News and fosters a toxic workplace where truth remains a fugitive while female workers are verbally violated on almost a daily basis by a poisonous and entrenched patriarchy."

While working on Bartiromo's show, Grossberg claimed male colleagues called Bartiromo a "crazy b***h," "menopausal," "hysterical" and a "diva," and alleged she was passed over for more senior positions because of her gender.

Grossberg eventually moved on from Bartiromo's show and began working in September 2022 as head of booking for Carlson's primetime program, "Tucker Carlson Tonight." On her first full day on Carlson's team, Grossberg said enlarged photographs of the-Democratic leader Nancy Pelosi wearing a "plunging bathing suit revealing her cleavage" were plastered to her computer and throughout the office, according to her lawsuit.

She also recalled being asked by Justin Wells, a top producer for Carlson, whether House GOP leader Kevin McCarthy was having sexual relations with Bartiromo. Grossberg alleged in her suit that during one discussion in the newsroom, Carlson's staff debated whether they would prefer to have sex Tudor Dixon, a Republican running for governor of Michigan, or Gov. Gretchen Whitmer, Dixon's Democratic opponent. The

discussion allegedly took place around mid-October 2022, before Dixon was scheduled to appear on Carlson's show and discuss her gubernatorial campaign, according to Grossberg's filing.

In addition to disparaging comments about women, including calling them a vulgar name, Grossberg also claims members of Carlson's staff made negative comments about Jewish people. After she voiced complaints to human resources about what Grossberg said was hostility and sexism from two of Carlson's top producers, she was warned that "immediate improvement" would be required to fulfill the standards of her job.

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- Tucker Carlson
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- Maria Bartiromo
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- Politics
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