UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

GREEN GROUP HOLDINGS, LLC, a Georgia limited liability company and HOWLING COYOTE, LLC, a Georgia limited liability company,

Plaintiffs,

vs.

MARY B. SCHAEFFER, ELLIS B. LONG, BENJAMIN EATON, and ESTHER CALHOUN, as individuals and as members and officers of BLACK BELT CITIZENS FIGHTING FOR HEALTH AND JUSTICE, an unincorporated association,

Defendants.

No. 2:16-cv-00145-CG-N

JUDGE CALLIE V. S. GRANADE

MAGISTRATE JUDGE KATHERINE P. NELSON

ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

Table of Contents

Table of Authorities

Cases

Statutes and Constitutional Provisions

Other Authorities

Introduction

In December 2008, 5.4 million cubic yards of coal ash spilled out of a landfill in Tennessee following a catastrophic dike failure. The widely publicized spill contaminated the land, rivers, reservoirs, and shore areas surrounding the landfill with metals such as arsenic—a known human carcinogen—and lead, and caused the Environmental Protection Agency ("EPA") to conclude that there was a potential "imminent and substantial endangerment to the public health."[1]

In July 2009, the EPA approved a plan to transport the "time critical" coal ash from the defunct Tennessee facility to the Arrowhead Landfill in Uniontown, Alabama. Uniontown is an overwhelmingly Black town—one of Alabama's poorest, and one whose residents can fairly be said to lack the political power to prevent their town from being used as a repository for waste from whiter, more prosperous areas of the State and country. Citizens of Uniontown, understandably outraged, organized to oppose the pervasive racial and environmental injustice their elected officials had failed to prevent. They spoke out against the landfill, expressing concern about risks to their environment and their health, the unfair location of the landfill in their community (and directly across the street from several homes), and the potential for the desecration of one of Uniontown's historic Black cemeteries. In short, they engaged in civic association and political speech at the very core of the First Amendment's protections.

Plaintiffs Green Group Holdings, LLC ("Green Group") and Howling Coyote, LLC ("Howling Coyote") are the owners of Arrowhead Landfill, which has existed in Uniontown since 2007. The landfill has been the subject of intense public criticism since it opened, and

[1] Amended Complaint, Doc. 10 (hereinafter "Complaint" or "Am. Compl."), Ex. B at 8 ¶ 20.f.

especially after it began receiving the coal ash that had destroyed large swaths of the environment in Tennessee. In acquiring this landfill, the plaintiffs voluntarily entered a strictly regulated, high-profile industry rife with existing controversy about environmental safety and racial justice. To put it mildly, they injected themselves into a realm not suited for any entity with thin skin.

And yet they now seek $30 million in damages for "harms" from allegedly defamatory statements made by concerned citizens in Uniontown about the landfill—statements such as, "[The landfill has] affected our everyday life," "[W]e should all have the right to clean air and clean water," and "Its another impact of slavery."[2] The individual defendants accused of causing these "harms" are members of Black Belt Citizens Fighting for Health and Justice ("Black Belt Citizens"), an unincorporated concerned-citizens' group dedicated to fighting for racial and environmental justice in Uniontown.

None of the statements at issue in this lawsuit goes further than expressing outrage at the presence of a massive coal ash landfill in Uniontown and concern about the attendant (and well-documented) risks to health, property, and dignity. The First Amendment does not permit public figure corporations to recover damages for expressions of public opinion with which they disagree, and it therefore does not permit this lawsuit to proceed.

Unfortunately, this is far from the first time that a for-profit corporation has sued Black citizens for having the temerity to organize against businesses that they believe perpetuate racial injustice. The facts here share much in common with a seminal Supreme Court case upholding the First Amendment rights of Black citizens in the face of lawsuits from white-owned

[2] These statements are not just exemplary—they were actually highlighted for special emphasis in the Complaint. Am. Compl. ¶¶ 26, 39.

businesses, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1983). In that case, "[t]he black citizens named as defendants . . . banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect." *Id.* at 907. As the Supreme Court observed:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.
>
> . . . .
>
> [E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values. Speech concerning public affairs is more than self-expression; it is the essence of self-government. There is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.

Id. at 907, 913 (alteration, citations, and quotation marks omitted).[3]

This case is a classic example of what has become known as a "strategic lawsuit against public participation," or SLAPP suit. A SLAPP suit is one intended to silence, censor, and intimidate critics out of the marketplace of ideas by saddling them with the cost of a lawsuit they can ill afford. Alabama is among the shrinking minority of states without a statute designed specifically to protect the average person exercising his or her right to free speech from an abusive SLAPP suit; for example, the plaintiffs' claims would face a higher bar even in their home state of Georgia.[4] But even where anti-SLAPP legislation is not available, SLAPP suits are meritless and must be dismissed. SLAPP suits in general are an affront to First Amendment values; this case is also an affront to the causes of racial and environmental justice in Alabama, and it should not be countenanced.

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[3] The Court cited for this principle, among other authorities, the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which, in a controversy over political speech and racial justice in Alabama, recognized the core First Amendment protections that bar suits such as this one.

[4] *See* Ga. Code Ann. § 9-11-11.1.

This Court should honor our nation's profound commitment to robust public debate by dismissing all claims in this case with prejudice and without delay, because the Complaint fails to state a viable claim as a matter of law.

Statement of Facts

Arrowhead Landfill is located in Uniontown, Alabama—a town with a median annual household income of less than $14,000, where 47.6% of the population lives below the poverty line and over 90% of the population is Black.[5] All four defendants are individuals who reside in Uniontown, in close proximity to the landfill. They are members of Black Belt Citizens, which is a grassroots community service organization dedicated to addressing concerns about health, environmental issues, and racial justice in Uniontown.

Arrowhead Landfill was opened in October 2007 to operate as a massive solid waste disposal facility pursuant to permits issued by the Alabama Department of Environmental Management ("ADEM") and regulations promulgated by the EPA. Am. Compl. ¶¶ 19–20; 40 C.F.R. Part 258.

On December 22, 2008, a dike failure at the Kingston Fossil Fuel Plant in Roane County, Tennessee caused approximately 5.4 million cubic yards of coal ash to spill into the environment, contaminating the surrounding land, rivers, reservoirs, and shore areas. Am. Compl., Ex. B at 6 ¶ 12.[6] Coal ash has constituents defined as "hazardous substance[s]" under

[5] Based on U.S. Census data available at http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml# by typing "Uniontown, AL" into the search box and selecting the "Income" and "Poverty" tabs, and by selecting the "Race and Hispanic Origin" tab and selecting the "Race and Hispanic or Latino Origin" link under "2010 Census."

[6] Exhibit B to the Complaint, which is incorporated by reference, Am. Compl. ¶ 14 n.6, is an *Administrative Order and Agreement on Consent* in *In re: TVA Kingston Fossil Fuel Plant Release Site, Roane Cty., Tenn.*, Docket No. CERCLA-04-2009-3766, Doc. 10 (U.S. Envt'l Protection Agency Region 4, May 2009).

the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(14); *see also* Am. Compl., Ex. B at 8 ¶ 20.b, and arsenic, one of its constituents, is classified by the EPA as a known human carcinogen and as harmful to wildlife, Am. Compl., Ex. B at 7–8 ¶ 19. After tests, Tennessee and the Tennessee Valley Authority ("TVA") determined that levels of arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, and zinc from coal ash in surface water near the spill "exceeded the National Recommended Ambient Water Quality Criteria . . . for protection of aquatic life," and the EPA found that "if the ash material is not properly managed and remediated, . . . potential exposure from ash on the ground could present unacceptable impacts to human health and/or the environment." Am. Compl., Ex. B at 7–8 ¶¶ 18–19.

Pursuant to an agreement between the EPA and the TVA, Arrowhead Landfill was selected as the disposal location for coal ash from the Tennessee spill. Am. Compl. ¶ 15 & Ex. C at 13.[7] Accordingly, on July 4, 2009 the landfill began receiving coal ash from Tennessee. Am. Compl. ¶ 16. Approximately 4 million tons were ultimately transferred to Uniontown. Dennis Pillion, *Cemetery Dispute the Latest Conflict Between Arrowhead Landfill, Uniontown Residents*, Al.com (Dec. 5, 2015), http://s.al.com/82yPD9Z (hereinafter "Pillion Article"); *see also* Am. Compl. ¶ 37 (incorporating this article by reference into the Complaint). Since then, Arrowhead has been the subject of a flood of public complaints concerning the odors, noises,

[7] Exhibit C to the Complaint, which is incorporated by reference, Am. Compl. ¶ 15 n.7, is an *Off-Site Ash Disposal Options Analysis Work Plan* submitted by the TVA to the EPA on June 29, 2009 pursuant to the *Agreement on Consent* in *In re: TVA Kingston Fossil Fuel Plant Release Site, Roane Cty., Tenn*, Docket No. CERCLA-04-2009-3766 (U.S. Envt'l Protection Agency Region 4, May 2009).

traffic, and health issues it has caused in Uniontown. *Id.*[8] It is also the subject of an EPA civil rights investigation that relates to the ADEM's decision to renew the landfill's permits and expand the disposal area.[9] *Id.*; *see also* Am. Compl. ¶ 26 (indicating the defendants' awareness of complaints made to the ADEM and the EPA).

The plaintiffs entered this fray in December 2011, when, after the previous owners of the landfill filed for bankruptcy, Green Group formed Howling Coyote, a wholly-owned subsidiary, to take over ownership of Arrowhead Landfill pursuant to an order of the U.S. Bankruptcy Court for the Southern District of Alabama. Am. Compl. ¶ 11. The plaintiffs are Georgia companies with their principal places of business in Georgia and with members residing in Florida, Georgia, Missouri, and Tennessee. Am. Compl. ¶¶ 1–2, 8. Green Group, through Perry County Associates, LLC—a separate subsidiary—holds four ADEM permits for activities related to operating the landfill. Am. Compl. ¶ 19. As owners of a municipal solid waste landfill, the plaintiffs must also comply with extensive federal operating, design, monitoring, and financing requirements. *See* 40 C.F.R. Part 258.

The present litigation was commenced on April 5, 2016, when Green Group and Howling Coyote sued Esther Calhoun, Benjamin Eaton, Ellis Long, Mary Schaeffer and various fictitious individuals for libel and slander under Alabama law, alleging that various statements posted to

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[8] The ADEM website indicates that 183 public complaints were filed about Arrowhead Landfill between August 2010 and March 2016. *See* Ala. Dep't of Envt'l Mgmt., *eFile*, http://app.adem.alabama.gov/eFile/ (accessible by entering the facility number for Arrowhead Landfill, 17668, as a Master ID in the "Facility" field, selecting the checkboxes for "air," "land," and "water," and selecting "Complaints" from the "Document Category / Type" field). As an example, a complaint from April 2015 mentions an "ongoing" issue with runoff from the landfill entering neighborhood property. *See* Record of Complaint, Apr. 14, 2016, http://app.adem.alabama.gov/eFile/Download.ashx?lib=Field&docId=004090487.

[9] Civil rights complaint available at http://www.enviro-lawyer.com/ADEM_Title_VI_Complaint_2013.pdf.

the Black Belt Citizens website and Facebook page and spoken during radio interviews had defamed them. *See* Doc. 1. Each plaintiff seeks a total of $5 million in compensatory damages and $10 million in punitive damages. *See* Am. Compl. The allegedly defamatory statements are set forth in paragraphs 22, 24, 26, 37, and 39 of the Complaint, with emphasis added by the plaintiffs indicating the portions they assert to be defamatory. The libel claim is asserted against all four named defendants and based on the theory that these individuals hosted defamatory statements made by anonymous others on the Black Belt Citizens website and Facebook page. *See* Am. Compl. ¶¶ 22, 24, 34. The slander claim is asserted against Calhoun and Eaton for public statements made at a news conference and on a radio show. *See* Am. Compl. ¶¶ 37, 39.

On April 8, the Court issued an order dismissing the fictitious parties, and on April 12, Magistrate Judge Nelson directed the plaintiffs to file an amended complaint addressing various deficiencies in their allegations of federal jurisdiction. *See* Docs. 7 & 8. An amended complaint was filed on April 22, 2016 and served on May 18, 2016. By this motion, the defendants respectfully urge the Court to dismiss the Complaint in its entirety for failure to state a viable claim as a matter of law.

Legal Argument

I. Requirements for pleading a defamation claim

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a plaintiff to present "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of this notice-pleading requirement is to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (alteration omitted). Accordingly, in order to survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (requiring dismissal "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct"). While specific factual allegations must be accepted as true for purposes of evaluating the sufficiency of the pleadings, this "tenet . . . is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

Under Alabama law, a cause of action for defamation consists of "1) a false and defamatory statement concerning the plaintiff; 2) an unprivileged communication of that statement to a third party; 3) fault amounting at least to negligence; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication of the statement." *Drill Parts & Serv. Co. v. Joy Mfg. Co.*, 619 So. 2d 1280, 1289 (Ala. 1993). A defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 389–90 (Ala. Civ. App. 1999). In order to be actionable, a statement must also "contain a provably false factual connotation." *Kelly v. Arrington*, 624 So. 2d 546, 550 (Ala. 1993). "[S]tatement[s] of opinion," "imaginative expression," and "rhetorical hyperbole" therefore do not suffice. *Deutcsh v. Birmingham Post Co.*, 603 So. 2d 910, 912 (Ala. 1992).

In addition to pleading actionable defamation, a plaintiff must comply with federal constitutional requirements that protect free speech. *McCaig v. Talladega Publ'g Co.*, 544 So. 2d 875, 877 (Ala. 1989). In order to afford the "breathing space essential" to the "fruitful exercise" of First Amendment rights, the U.S. Supreme Court has prescribed "an extremely powerful antidote" to the "self-censorship" that results from "common-law . . . liability for libel and

slander." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quotation marks omitted). Plaintiffs who "are properly classed as public figures . . . may recover for injury to reputation only on clear and convincing proof that [a] defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Id.* (referring to the "actual malice" standard set forth in *N.Y. Times*, 376 U.S. 254).

When, as here, plaintiffs are public figures (see Parts IV.B and IV.C, below), properly pleaded defamation claims must include a plausible factual predicate for actual malice; a conclusory allegation that a statement was made with the requisite malice does not suffice. *See Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703–04 (11th Cir. 2016) (affirming dismissal of complaint under Rule 12(b)(6) for failure to allege "actual malice" beyond a mere conclusory allegation about the defendant's mind state).

As set forth in more detail below, the plaintiffs have failed to meet the basic pleading standard for defamation claims with regard to every single statement in the Complaint. Each of the statements complained of suffers from at least one fatal flaw: Defendants Long and Schaeffer are not accused of making *any* of the statements at issue, which are conceded to have been made almost exclusively by third parties; the few statements attributed to Defendants Calhoun and Eaton are expressions of opinion and rhetorical hyperbole, and therefore protected under the First Amendment; liability for hosting the unattributed statements online is categorically barred by federal statute; and the plaintiff corporations are public figures and have failed to allege that any of the statements were made with "actual malice"—that is, with knowing falsity.

This last failure underscores the urgency of the present motion. The plaintiffs, as a result of their own actions, are public figures embroiled in a public controversy about racial and environmental justice, and the defendants are their chief critics and adversaries in this public

debate. The statements listed in the Complaint not only fail to support a claim for defamation—they lie at the very core of the First Amendment's protection. No conceivable amendment to the Complaint could change the fact that the First Amendment prevents the plaintiffs, as public figures, from securing monetary judgment against citizen-activists who have spoken out in opposition to a landfill in their community, expressing their beliefs about its risks and harms. And that remains true even if those activists are less than scientifically precise in their public statements about the landfill; indeed, this is precisely the "breathing space" contemplated by the Supreme Court's seminal First Amendment jurisprudence. This Court should decline to permit the plaintiffs to use the judiciary as a forum for a policy dispute, or, worse, for intimidating citizen-activists into silence on matters of immense public concern in their community.

In light of its fatal flaws and improper purpose, the Complaint should be dismissed with prejudice.

II. The vast majority of the statements upon which the libel claims are based are not alleged to have been made by any of the defendants, and are therefore not actionable.

A. Defendants Long and Schaeffer are not alleged to have made any of the statements in the Complaint, and all claims against them must be dismissed.

The statements upon which the plaintiffs base the libel claims against Defendants Long and Schaeffer are set forth in paragraphs 22, 24, and 26 of the Complaint.[10] *See* Am. Compl. ¶¶ 22, 24, 26, 34. These statements are alleged to have been posted to the Black Belt Citizens website and Facebook page. *See id.* ¶¶ 21–26. The plaintiffs do not allege, however, that any of these statements was spoken, written, or posted by Long or Schaeffer. Thus, under fundamental principles of Alabama tort law, neither Long nor Schaeffer has committed any tort. *See, e.g.*, *Ex*

[10] There are no slander claims against these defendants.

parte Windom, 840 So. 2d 885, 888 (Ala. 2002) ("Liability for slander or libel, like liability for any tort, depends on . . . [a] wrongful act *by the defendant* . . . ." (emphasis added)). The claims against these individuals are therefore baseless and must be dismissed.

To the extent there is any discernible theory for liability against Long or Schaeffer on the face of the Complaint, it appears to be based on the allegation that the statements at issue—although not written, spoken, or posted by either of these individuals—were hosted on the website and Facebook page of Black Belt Citizens.[11] But even if the Complaint alleged that Long or Schaeffer had any involvement in maintaining the website or Facebook page—which it never does—this theory is definitively foreclosed by the federal Communications Decency Act ("CDA"), which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and expressly preempts state law—including state libel law—to the contrary. 47 U.S.C. § 230(c)(1), (e)(3); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (individuals accused of publishing defamatory statements are "clearly protected by § 230's immunity"). Facebook and the Black Belt Citizens website are "interactive computer service[s]" under the CDA. *See, e.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011). Since Long and

[11] Paragraph 24 of the Complaint states that the "Defendants allege [the Facebook statements] were written and posted . . . without their prior knowledge or approval," and urges the Court to "[t]ak[e] this allegation to be true." Am. Compl. ¶ 24 & n.9. Accordingly, the plaintiffs have not only failed to attribute any statements to Long or Schaeffer, but they expressly disavow this course of events as their theory of the case, proceeding instead on the theory that anonymous others wrote the statements and the defendants, through Black Belt Citizens, merely *hosted* them online. The plaintiffs have persisted in this theory despite having already had one opportunity to amend their pleadings.

Schaeffer are not alleged to have themselves written or published the statements at issue in the Complaint, the libel claims against them are barred by the CDA. *Cf. Klayman*, 753 F.3d at 1358–60 (affirming dismissal under Rule 12(b)(6) based on a CDA defense).

B. Defendants Calhoun and Eaton are only alleged to have made three of the statements in the Complaint, and the rest of the statements cannot supply a basis for any defamation liability.

Among the statements upon which the defamation claims against Defendants Calhoun and Eaton are based, only three statements are alleged to have been made by either of these individuals. (These statements are addressed specifically below.) For precisely the reasons explained above, the rest of the statements therefore cannot supply a basis for any valid defamation claim: even if they were wrongful acts—and they are not—they are not wrongful acts *by the defendants*, and the CDA bars liability for hosting statements made by others.

III. All claims are predicated on non-actionable statements of opinion and rhetorical hyperbole and must be dismissed.

The three statements alleged to have been made by Calhoun or Eaton —the only "wrongful acts *by the defendants*" at issue in this litigation—consist exclusively of expressions of concern, opinion, outrage, and non-literal rhetoric made by individuals who have never held themselves out to be scientists or lawyers, and who have spoken in the context of a heated public debate about matters of core political concern. These statements are expressive, imaginative, evaluative, and at times hyperbolic, but they do not contain provably false assertions of fact, and they therefore fall squarely outside the domain of defamation law and within the right to free speech.

The three statements are as follows (all emphases in the original):

- I feel like I'm in prison, we're **suffocated by toxic pollution** & extreme poverty. Where are my freedoms? This is an environmental injustice & it's happening in Uniontown & everywhere[.] Am. Compl. ¶ 24.

- Its a landfill, its a tall mountain of coal ash and it has affected us. **It affected our everyday life.** It really has done a lot to our freedom. **Its another impact of slavery.** . . . Cause we are in a black residence, things change? And you can't walk outside. And **you can not breathe. I mean, you are in like prison.** I mean, its like **all your freedom is gone**.

  As a black woman, our voices are not heard. EPA hasn't listened and ADEM has not listened. Whether you are white or black, rich or poor, it should still matter and **we all should have the right to clean air and clean water**. I want to see EPA do their job. Am. Compl. ¶¶ 26, 39 (alteration in original).

- We are tired of being taken advantage of in this community . . . . The living around here can't rest because of the toxic material from the coal ash **leaking into creeks and contaminating the environment**, and the deceased can't rest because of **desecration of their resting place**. Am. Compl. ¶¶ 26, 37.

For the reasons explained below, none of these statements can properly give rise to defamation liability.

A. Statements of opinion and rhetorical hyperbole cannot give rise to defamation liability.

In a defamation case, in order for a statement to be facially actionable it must be "sufficiently factual to be susceptible of being proved true or false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990); *see also Kelly*, 624 So. 2d at 550–51 (noting that the same limit on liability exists as a matter of Alabama law). Accordingly, if "the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Marshall v. Planz*, 13 F. Supp. 2d 1246, 1257 (M.D. Ala. 1998) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993)). The purpose of this principle is to preserve the "conventional give-and-take in our economic and political controversies" between persons with conflicting ideas. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974); *see also Gertz*, 418 U.S. at 339–40 ("However pernicious an opinion may seem, we depend for

its correction not on the conscience of judges and juries but on the competition of other ideas."). It also "provides assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation," and "reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (quotation marks omitted).

In assessing whether a statement contains a provably false assertion of fact, context is crucial. As the Eleventh Circuit has admonished: when a person "engage[s] in an emotional debate on a highly sensitive topic[,] . . . a reasonable [reader or listener] would infer that [the] statement was more an expression of outrage than an accusation of fact." *Id.* at 702. Similarly, courts have repeatedly observed that "Internet message boards and . . . communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam v. Does*, 845 N.W.2d 128, 144 (Mich. Ct. App. 2014); *see also Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 247 (Ct. App. 2008) ("When a defamation action arises from debate or criticism that has become heated and caustic, as often occurs when speakers use Internet chat rooms or message boards, a key issue before the court is whether the statements constitute fact or opinion."); *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) ("[Social media postings] lack the formality and polish typically found in documents in which a reader would expect to find fact."); *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 959 N.Y.S.2d 92, at *2 (Sup. Ct. 2012) (mem.) ("Within the broader social context, the [statement] on the internet, where debate is often caustic and free-wheeling, is reasonably understood as expressing the opinion of the writer.").

B. The statements made by Defendant Calhoun contain no provably false assertions of fact.

The first statement in the Complaint attributed to Esther Calhoun was posted to the Black Belt Citizens Facebook page on November 18, 2015: "I feel like I'm in prison, we're **suffocated by toxic pollution** & extreme poverty. Where are my freedoms? This is an environmental injustice & it's happening in Uniontown & everywhere[.]" Am. Compl. ¶ 24 (emphasis in original).

This is precisely the sort of expression of political outrage—made in the context of a heated public debate—that as a matter of law is insulated from defamation liability. No reasonable reader or listener would conclude that the phrases, "I feel like I'm in prison," and "we're suffocated by toxic pollution," were meant to be taken literally—that is, that Calhoun is actually in prison or suffocating. Indeed, Calhoun begins the statement with the words, "I feel," thus indicating that she is expressing a subjective reaction. Nor can it reasonably be inferred that by using the word "toxic," Calhoun was making a scientific or legal assertion. Calhoun has not held herself out as an environmental scientist or implied the existence of any undisclosed scientific facts. As is plain from the context of the statement—which was posted to the social media webpage of a concerned-citizens' group—she was engaging in hyperbolic rhetoric. When, as here, assertions that might otherwise have a provable basis in fact are made in the context of a heated political debate, courts have routinely found them to be non-actionable. *See, e.g.*, *Old Dominion*, 418 U.S. at 284 (calling plaintiff a "traitor"); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (accusing plaintiff of "blackmail"); *Horsley*, 292 F.3d at 702 (calling plaintiff an "accomplice to homicide"); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1294 (11th Cir. 2001) (comparing plaintiff to a mass murderer).

The second statement attributed to Calhoun, alleged to have been made during a radio interview and also reproduced verbatim in a February 25, 2016 post to the Black Belt Citizens Facebook page, is as follows:

> Its a landfill, its a tall mountain of coal ash and it has affected us. **It affected our everyday life.** It really has done a lot to our freedom. **Its another impact of slavery.** . . . Cause we are in a black residence, things change? And you can't walk outside. And **you can not breathe. I mean, you are in like prison.** I mean, its like **all your freedom is gone**.
>
> As a black woman, our voices are not heard. EPA hasn't listened and ADEM has not listened. Whether you are white or black, rich or poor, it should still matter and **we all should have the right to clean air and clean water**. I want to see EPA do their job.

Am. Compl. ¶¶ 26, 39 (alteration and emphasis in original).

This statement, like the previous one, consists of opinion and hyperbole that cannot support a viable defamation claim. When Calhoun asserts that the presence of a landfill in her town "affected [the] everyday life" of the people in the town, or that it "has done a lot to [their] freedom," she is simply expressing her opinion that she and others have been emotionally affected by the presence of a large landfill in town. These subjective statements are not capable of being confirmed or refuted, and are therefore not actionable. *See Milkovich*, 497 U.S. at 22 (drawing a distinction, for defamation purposes, between "a subjective assertion" and "an articulation of an objectively verifiable event"); *Marshall*, 13 F. Supp. 2d at 1258 (finding an assertion of the use of poor medical judgment to be a non-actionable "subjective opinion concerning the quality of care with which [the plaintiff] treated his patients"); *Kelly*, 624 So. 2d at 550–51 (finding that questioning the plaintiff's ethics was a non-actionable expression of opinion).

Calhoun also asserted that she "can't walk outside" and "can not breathe," that she is "like in prison," and that "all [her] freedom is gone." As explained above, however, no

reasonable listener would conclude that comparisons to being in prison and to suffocating are literally true. This is hyperbolic speech of precisely the sort that, according to the Eleventh Circuit, "add[s] much to the discourse of our Nation" and "ha[s] become an integral part of social discourse," and is therefore protected under the First Amendment. *Horsley*, 292 F.3d at 701.[12]

C. The statement made by Defendant Eaton contains no provably false assertions of fact.

The statement attributed to Benjamin Eaton was allegedly uttered at a press conference held on December 4, 2015 and then posted verbatim on the Black Belt Citizens Facebook page on December 5, 2015: "We are tired of being taken advantage of in this community . . . . The living around here can't rest because of the toxic material from the coal ash **leaking into creeks and contaminating the environment**, and the deceased can't rest because of **desecration of their resting place**." Am. Compl. ¶¶ 26, 37 (emphasis in original).

This statement, like those attributed to Calhoun, consists exclusively of opinion and rhetoric, and therefore cannot as a matter of law give rise to defamation liability. As explained above, statements that may otherwise be provably false often assume a mantle of non-literal rhetoric when made about sensitive topics in the context of a heated political debate. *See Horsley*, 292 F.3d at 702. Eaton is a member of a political activist group who has engaged in

[12] The remainder of Calhoun's second statement consists of (a) innocuous assertions that are neither defamatory nor factually false, and (b) statements about the EPA or the ADEM that do not refer to the plaintiffs. It cannot be disputed that Arrowhead Landfill is, in effect, a "mountain of coal ash," and this statement does no reputational harm to the plaintiffs because it is an accurate description of the landfill that they operate. Calhoun's assertion that the "EPA hasn't listened and ADEM has not listened," and that she "want[s] to see EPA do their job," are not actionable because they do not "concern[] the plaintiff[s]." *Drill Parts*, 619 So. 2d at 1289; *see also Lloyd v. Cmty. Hosp. of Andalusia, Inc.*, 421 So. 2d 112, 113 (Ala. 1982) (affirming dismissal of defamation claim because the statement at issue did not refer to the plaintiff).

core political speech; he is not a scientist or a lawyer, and the statement is not based on any undisclosed facts. He therefore cannot reasonably be understood to be making scientific or legal claims about contamination or toxicity. Much as the Supreme Court has recognized that accusations of treason or blackmail—although capable of defamatory meaning in certain contexts—are not actionable when used in a non-literal, non-legal sense, *see Old Dominion*, 418 U.S. at 284 (treason); *Greenbelt*, 398 U.S. at 14 (blackmail), so too is Eaton's use of the words "toxic" and "contaminating" not reasonably to be construed in context as a literal assertion of scientific or legal fact. To conclude otherwise would be to stifle Eaton's ability to engage in the political rhetoric that is at the core of the First Amendment's protections.

The same is true of Eaton's statement that "the deceased can't rest because of desecration of their resting place." To begin this phrase with an assertion about the dead in their resting places is to establish at the outset a non-literal, rhetorical tone. And the word "desecrate"—which means "[t]o divest (a thing) of its sacred character," *Desecrate*, Black's Law Dictionary (10th ed. 2014)—has an inherently subjective connotation. This phrase, in other words, contains no actionable assertions of fact.

Finally, to the extent the plaintiffs base their claims against Eaton on his statement that he and others "are tired of being taken advantage of," this phrase is not actionable because it expresses a subjective reaction of frustration and emotional fatigue, and therefore cannot be proven to be false. *See Milkovich*, 497 U.S. at 22; *Marshall*, 13 F. Supp. 2d at 1258; *Kelly*, 624 So. 2d at 550–51.

Because none of the three statements in the Complaint that are attributed to either Calhoun or Eaton is facially actionable, the claims against these defendants must be dismissed.

See, e.g., *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981) (noting that whether a statement is capable of defamatory meaning can be resolved as a matter of law).[13]

IV. All claims in any event must be dismissed because the plaintiffs are public figures and they have not plausibly alleged actual malice.

A. Actual malice must be alleged in defamation cases involving public figures.

Especially in the contentious world of political debate, the threat of penalty for making a false statement may very well inhibit speakers from making true statements. *See Gertz*, 418 U.S. at 340 ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."). That is why the Supreme Court has repeatedly held that "First Amendment freedoms need breathing space to survive." *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 329 (2010); *see also Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."). Thus, to ensure that the public debate is "uninhibited, robust, and wide-open," the Supreme Court has prescribed a scienter requirement in defamation cases—like this one—that pose particular risks to the freedom of speech and of the press. *N.Y. Times*, 376 U.S. at 270; *see also Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz*, 418 U.S. at 340.

Public officials and public figures who enter the limelight assume a "risk of closer public scrutiny," and the public's interest in their affairs is correspondingly greater. *Gertz*, 418 U.S. at 344–45. Accordingly, public officials and public figures cannot recover for defamation without showing that the defamatory statement "was made with 'actual malice'—that is, with knowledge

[13] Although none of the remaining statements is alleged to have been made by any of the defendants, the defendants note for purposes of completeness that these statements—for precisely the reasons that apply to the statements attributed to Calhoun and Eaton—are also non-actionable expressions of opinion and rhetorical hyperbole, and are therefore legally deficient on multiple overlapping grounds.

that it was false or with reckless disregard of whether it was false or not." *N.Y. Times*, 376 U.S. at 279–80 (public officials); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (public figures).

The designation of "public figure" status may rest on either of two bases. *Gertz*, 418 U.S. at 351. "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* In other cases, "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* In either instance, "such persons assume special prominence in the resolution of public questions," and they must therefore demonstrate "actual malice" before recovering for defamation. *Id.*

B. Plaintiffs Green Group and Howling Coyote are general-purpose public figures.

The Supreme Court defines a general-purpose public figure as one who has achieved "general fame or notoriety in the community, and pervasive involvement in the affairs of society." *Gertz*, 418 U.S. at 352. Although the Eleventh Circuit has not expressly weighed in on the matter, other lower federal courts, addressing how to apply the public-figure definition to non-natural persons, have repeatedly observed that the reasons for allowing suits for defamation—protecting "the essential dignity and worth of every human being," *Milkovich*, 497 U.S. at 22—are not implicated in cases involving the reputations of corporations, *see, e.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) ("[I]f the purpose of the public figure-private person dichotomy is to protect the privacy of individuals who do not seek publicity or engage in activities that place them in the public eye, there seems no reason to classify a large corporation as a private person."); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976) ("It is quite clear from the [Supreme]

Court's opinion [in *Gertz*] . . . that the values considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the Court sought to protect."). They have, accordingly, often given the definition a more expansive interpretation in cases involving corporate plaintiffs. *See, e.g.*, *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 48 (D.D.C. 2005) (treating corporate plaintiffs as public figures per se); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1347–48 (S.D.N.Y. 1977) (recognizing that corporations have different interests in protecting reputations and finding that corporate plaintiff was a general-purpose public figure by virtue of its size and public status).

The Alabama Supreme Court, for its part, has held that an insurance company "subject to close regulation by [the] government . . . invite[s] attention and comment," is "clothed with the public interest," and has sufficient "power and influence" such that it is a public figure "for purposes of [Alabama's] libel laws." *Am. Benefit Life Ins. Co. v. McIntyre*, 375 So. 2d 239, 242 (Ala. 1979),[14] *overruled on other grounds by Pemberton v. Birmingham News Co.*, 482 So. 2d 257 (Ala. 1985); *see also Coronado Credit Union v. Koat Television, Inc.*, 656 P.2d 896, 904 (N.M. Ct. App. 1982) (holding that credit unions are "so involved with the public interest" and

[14] On an application for rehearing—which was denied—the Court also addressed whether the corporate plaintiff was a limited-purpose public figure and answered this question in the affirmative, deploying precisely the same reasoning. *See id.* at 250 ("The company [plaintiff] was regulated by the State Insurance Commissioner. There is a public interest in such companies licensed by the state. By entering into such a business, a company has voluntarily subjected itself to public scrutiny. The investigation of the Insurance Commissioner is an expected incident of an insurance company's business.").

"comprehensively regulated" under state law that they are public figures and must prove actual malice).[15]

Applying the reasoning of the federal cases cited above and of the Alabama Supreme Court in *McIntyre*, it is plain that the plaintiffs in this case are public figures. Nothing about the defendants' political rhetoric concerning the presence of the Arrowhead Landfill in Uniontown implicates "the essential dignity and worth of [any] human being." *Milkovich*, 497 U.S. at 22. Thus, in balancing the interests of the defendants in engaging in core political discourse against the interests of the plaintiffs in preserving their reputation—the essential task in any defamation lawsuit—there is no basis for favoring the latter over the former. But even more to the point: the plaintiffs are companies operating in a heavily-regulated industry that is subject to pervasive public oversight at both the state and federal levels. *See* Am. Compl. ¶¶ 1–2 (describing the plaintiffs); *id.* ¶¶ 19–20 (explaining the permits and inspections required of the plaintiffs to operate Arrowhead Landfill); *id.* Exs. B, C (setting forth extensive regulatory measures that apply to the handling of coal ash, the selection of coal ash repositories, and the management of landfills that contain coal ash).[16] The plaintiffs have willingly and repeatedly participated in government permitting processes subject to public oversight; they cannot now credibly claim to

[15] Although the public-private figure distinction is a question of federal constitutional law, the states are free to define liability for defamation under state law as they see fit, so long as they remain within federal constitutional bounds. Accordingly, "resort to [state] case law" on the question of "[w]hether a plaintiff is a 'public figure'" is appropriate as long as state law "provide[s] a broader"—and therefore more speech-protective—definition of this term. *Harris v. Quadracci*, 48 F.3d 247, 250 n.5 (7th Cir. 1995); *see also Michel*, 816 F.3d at 695 (recognizing state law as applicable in a diversity action for defamation where it was "broader and more protective of speech than the requirements found in the Federal Constitution"). The defendants are not aware of any Eleventh Circuit precedent that defines general-purpose public figure status more narrowly than the Alabama Supreme Court, but even if such precedent existed, the Alabama Supreme Court's decision in *McIntyre* would control in this diversity action.

[16] *See also* 40 C.F.R. Part 258 (setting forth federal regulatory criteria for managing municipal solid waste landfills such as Arrowhead Landfill).

be private persons for the purposes of pressing a defamation claim against those with opposing views on public policy. The plaintiffs are therefore public figures not only under the federal constitution, but also "for purposes of [Alabama's] libel laws." *McIntyre*, 375 So. 2d at 242.

C. Plaintiffs Green Group and Howling Coyote are limited-purpose public figures.

Even if they are not public figures for all purposes, the plaintiffs have undoubtedly "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *Gertz*, 418 U.S. at 345, and they must therefore still satisfy the "actual malice" requirement in order to state a viable claim of defamation.

The Eleventh Circuit and Alabama Supreme Court have both adopted the three-part test developed by the D.C. Circuit in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), for determining whether a plaintiff is a limited-purpose public figure. *Little v. Breland*, 93 F.3d 755, 757 (11th Cir. 1996); *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 334 (Ala. 2007). Under *Waldbaum*, a court "must (1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Little*, 93 F.3d at 757 (alteration and quotation marks omitted).

1. Public controversies surrounding the establishment and continued operation of Arrowhead Landfill and the relocation of coal ash to Uniontown have existed since 2007.

The first prong of the *Waldbaum* test requires asking whether there existed a public controversy that was "more than merely newsworthy"—that is, whether there was an "issue [that] was being debated publicly and . . . had foreseeable and substantial ramifications for nonparticipants." *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1495 (11th Cir. 1988) (citing *Waldbaum*, 627 F.2d at 1297). Issues that arise in heavily regulated industries or that have

received extensive public debate satisfy this criterion. *See Little*, 93 F.3d at 757; *Silvester*, 839 F.2d at 1495.

In this case, a controversy of indisputably public nature arose regarding the relocation of coal ash from the catastrophic spill in Tennessee in December 2008. *See* Am. Compl. ¶¶ 14, 15 & Exs. B, C. The choice of Arrowhead Landfill as the site for this coal ash was the subject of substantial public debate and regulatory attention. *See, e.g.*, *id.* Exs. B, C (regulatory actions setting forth basis for disposal of coal ash from Kingston Fossil Plant and its relocation to the Arrowhead Landfill); Pillion Article (explaining an ongoing public debate about "concerns after the [Arrowhead] landfill accepted around 4 million tons of coal ash material from the . . . Tenn. spill in 2009"). In a broader sense, so too was the establishment and continued operation of Arrowhead Landfill in Uniontown since 2007. The landfill required extensive permitting, *see* Am. Compl. ¶ 19; was the subject of 183 public complaints to the ADEM since 2007 and a civil rights complaint to the EPA, *see supra* notes 8 & 9; Pillion Article ("Residents living just outside the . . . Arrowhead Landfill in Uniontown have had complaints about the facility since it opened in 2007 . . . . The Environmental Protection Agency has also agreed to investigate a complaint made against the Alabama Department of Environmental Management that ADEM violated Black Belt residents' civil rights by renewing the landfill's permit and allowing an expansion of the disposal area."); and resulted in "numerous" inspections by both the ADEM and the EPA, Am. Compl. ¶ 20. The intense and well-documented public attention to an issue arising in a highly regulated industry plainly constitutes a "public controversy" under the first *Waldbaum* prong. *Silvester*, 839 F.2d at 1495.

2. The plaintiffs have been extensively involved in this controversy since December 2011.

The second *Waldbaum* prong requires assessing "the extent to which the plaintiffs are involved in the public controversy." *Id.* at 1496. To satisfy this prong, "the plaintiff either (1) must purposely try to influence the outcome of the public controversy, or (2) could realistically have been expected, because of [its] position in the controversy, to have an impact on its resolution." *Id.* (alteration and quotation marks omitted).

Green Group and Howling Coyote assumed ownership over Arrowhead Landfill on December 21, 2011. Am. Compl. ¶¶ 11–12. Since then, of course, they have had the ability to influence the operation of the landfill and the means by which coal ash is transported, treated, and stored in Uniontown. The second *Waldbaum* prong is thus easily satisfied. *See Little*, 93 F.3d at 758 ("Little's choice to assume the position of leadership at the Mobile Convention & Visitors Corporation, an organization involving public scrutiny, shows a voluntary decision to place himself in a situation where there was a likelihood of public controversy."); *Silvester*, 839 F.3d at 1497 ("Plaintiffs . . . thrust themselves into [a] position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants. By becoming important members of the regulated . . . industry, they invited public scrutiny, discussions, and criticism."); *White v. Mobile Press Register, Inc.*, 514 So. 2d 902, 904 (Ala. 1987) ("[The plaintiff's] prior association with E.P.A., and his choice of a career as a high level executive in [the hazardous waste] industry[, which] is the subject of much public interest and concern[,] show a voluntary decision to place himself in a situation where there was a likelihood of public controversy.").

3. The allegedly defamatory statements about the landfill are germane to the plaintiffs' participation in the public controversy.

The allegedly defamatory statements in the Complaint concern the existence and operation of Arrowhead Landfill and its effects on Uniontown and its citizens, Am. Compl. ¶¶ 22, 24, 26, 29, 37, both of which phenomena are self-evidently attributable to Green Group and Howling Coyote, the owners of the landfill. The statements are therefore undoubtedly "germane to the plaintiff[s'] participation in the controversy" under the third *Waldbaum* factor. *Little*, 93 F.3d at 757.

D. The plaintiffs have not alleged actual malice.

Because the plaintiffs are public figures, they must allege with sufficient factual plausibility that the statements in the Complaint were made with "actual malice"—i.e., "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *N.Y. Times*, 376 U.S. at 279–80; *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("[O]nly those false statements made with the high degree of awareness of their probable falsity . . . may be the subject of . . . civil . . . sanctions.").

Even assuming that any of the rhetoric upon which the defamation claims are based could be taken literally, there are no factual allegations in the Complaint that support any inference that such statements were made with a "high degree of awareness of their probable falsity." *Garrison*, 379 U.S. at 74. The only allegation of actual malice is the following purely conclusory recital of the scienter element of a cause of action for libel: "Plaintiffs aver that the Defendants published the above material knowing of its falsity and sensationalizing sting, with malice by intentional action or with reckless disregard for the truth . . . ." Am. Compl. ¶ 34; *see also id.* ¶¶ 23, 38, 40 (same). This is a legal conclusion, not a factual allegation, and it therefore falls short of the plausibility requirement of Rule 8(a)(2). *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice."). In fact, the Eleventh Circuit has affirmed the dismissal of a defamation complaint that alleged malice at precisely this level of generality. *See Michel*, 816 F.3d at 703–04 ("Michel alleges in a purely conclusory manner that the defendants were 'reckless' in publishing the article. Allegations such as these amount to little more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' which are insufficient to support a cause of action." (quoting *Iqbal*, 556 U.S. at 678)). Under the specific holding of *Michel* and the principles of *Iqbal* and *Twombly*, the defamation claims must be dismissed for failure to state a claim.

But the defects in the allegation of scienter do not stop there. Somewhat counterintuitively, the plaintiffs have incorporated a document into their pleadings that further undermines their conclusory allegation of malice and establishes conclusively that actual malice could not be alleged or proven in this case. Exhibit B to the Complaint is the *Administrative Order and Agreement on Consent* entered into by the EPA and the TVA in the wake of the December 2008 coal ash spill in Tennessee, setting forth a plan for the administrative response to this disaster. Among the findings of fact in this document are the following:

- On January 21, 2009, TVA submitted written notification to the Tennessee Emergency Response Commission, pursuant to which TVA reported a discharge of 5.4 million cubic yards of ash *containing the following constituents: arsenic, beryllium, chromium, copper, lead, mercury, nickel, zinc, antimony, cadmium, silver, selenium, thallium, and vanadium oxide*.

- On February 4, 2009, EPA . . . and [the Tennessee Department of Environment and Conservation] issued a letter to TVA in which EPA provided notice to TVA that *EPA considers the release* [of coal ash] *to be an unpermitted discharge of a pollutant in contravention of the Clean Water Act*.

- EPA has classified arsenic *as a known human carcinogen*; and long-term exposure of aquatic organisms to high levels of metals like arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, and zinc *may cause decreases in survival, growth, or reproduction* to those aquatic organisms.

Am. Compl., Ex. B at 7–8, ¶¶ 15, 16, 19 (emphasis added). The document also concludes that "[t]he conditions described in the Findings of Fact . . . constitute an actual or threatened 'release' of hazardous substances from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22)." *Id.*, Ex. B at 8, ¶ 20.e.[17]

This document defeats any conceivable inference that words and phrases such as "toxic," "pollutant," and "coal ash leaking into creeks and contaminating the environment," Am. Compl. ¶¶ 24, 26, 37—even if they could be construed as literal assertions of fact—were spoken with a "high degree of awareness of their *probable falsity*." *Garrison*, 379 U.S. at 74 (emphasis added). It demonstrates that the defendants' assertions were *probably true*—and, by implication, could not have been made with the requisite malice. Even taking the EPA's findings with a heavy dose of skepticism, they are still the factual findings of a federal agency made in the aftermath of a coal ash disaster that contaminated the environment and precipitated the transfer of coal ash to Uniontown; at an absolute minimum, they supply a reasonable basis for a person—especially a non-expert—to conclude that coal ash is a risky and toxic pollutant, and that Arrowhead Landfill poses a threat of contaminating Uniontown and affecting the lives of its inhabitants. The defendants therefore could not, as a matter of law, have made any of the statements in the Complaint with actual malice.[18]

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[17] *See also* U.S. Envt'l Protection Agency, *Frequently Asked Questions About the Coal Ash Disposal Rule* (July 9, 2015), https://www.epa.gov/coalash/frequent-questions-about-coal-ash-disposal-rule ("Coal ash contains contaminants like mercury, cadmium and arsenic associated with cancer and various other serious health effects.").

[18] Even if there were allegations or evidence that contradicted the findings in the *Administrative Order and Agreement on Consent*—and there is none—this document would still supply a reasonable basis for all of the statements in the complaint. *See N.Y. Times*, 376 U.S. at 287–88 (explaining that the actual malice standard does not impose a duty to make any reasonable investigation into the truth of an assertion or the validity of the evidence upon which it is based). Thus, not only have the plaintiffs failed to allege actual malice, but granting them

Conclusion

For the reasons explained above, the defendants respectfully request that the Court dismiss the Complaint with prejudice and enter Judgment in favor of the defendants.

June 2, 2016

Respectfully submitted,

/s/ *Randall C. Marshall*

Randall C. Marshall (MARSR3023)
ACLU Foundation of Alabama
P.O. Box 6179
Montgomery, AL 36106-0179
Tel: (334) 420-1741
Fax: (334) 269-5666
Email: rmarshall@aclualabama.org

William M. Dawson (ASB-DAW002)
1736 Oxmoor Road
Birmingham, AL 35209
Phone: (205) 795-3512
Fax: (205) 870-7763
bill@billdawsonlaw.com

Matt Swerdlin (ASB-9090-M74S)
1736 Oxmoor Road
Birmingham, AL 35209
Phone: (205) 795-3517
Fax: (205) 443-6573
matthewswerdlin@gmail.com

Lee Rowland (*pro hac vice* pending)
Benjamin Good (*pro hac vice* pending)
Dennis Parker (*pro hac vice* pending)
Rachel Goodman (*pro hac vice* pending)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654

Charles S. Sims (*pro hac vice* pending)
Proskauer Rose LLP
11 Times Square
New York, NY 10036
Phone: (212) 969-3950
Fax: (212) 969-2900

leave to amend their Complaint to fix this deficiency would be futile. *See, e.g.*, *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1255 (11th Cir. 2008) (affirming denial of leave to amend on the basis of futility).

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, I did serve the above Memorandum through the Court's ECF filing system pursuant to Fed. R. Civ. P. 5(b)(2)(E) to the following counsel for all Plaintiffs:

Kirkland E. Reid
Jones Walker LLP
11 N. Water St., Suite 1200
Mobile, AL 36602
Tel: (251) 439-7513
Fax: (251) 439-7358
Email: kreid@joneswalker.com

Michael D. Smith
Smith and Staggs, LLP
701 22nd Avenue
Tuscaloosa, AL 35401
Tel: (205) 409-3140
Email: msmith@smithstaggs.com

/s/ *Randall C. Marshall*

Randall C. Marshall (MARSR3023)
ACLU Foundation of Alabama
P.O. Box 6179
Montgomery, AL 36106-0179
Tel: (334) 420-1741
Fax: (334) 269-5666
Email: rmarshall@aclualabama.org