IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

RICHARD ALEXANDER MURDAUGH, JR., Plaintiff, v. BLACKFIN, INC., WARNER BROS. DISCOVERY, INC., WARNER MEDIA ENTERTAINMENT PAGES, INC., CAMPFIRE STUDIOS INC., THE CINEMART LLC, NETFLIX, INC., GANNETT CO., INC. and MICHAEL M. DEWITT, JR., Defendants.	**DEFENDANTS NETFLIX, INC. AND THE CINEMART LLC'S RULE 12(B)(6) MOTION TO DISMISS** Civil Action No.: 9:24-cv-04914-RMG Hon. Richard M. Gergel

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Defendants Netflix, Inc. ("Netflix") and The Cinemart, LLC ("Cinemart") (collectively "Defendants") respectfully move the Court to dismiss the Complaint filed by Plaintiff Richard Alexander Murdaugh, Jr. ("Buster Murdaugh" or "Plaintiff") as to the documentary *Murdaugh Murders: A Southern Scandal* (the "Netflix Docuseries" or "Series"), which the Complaint alleges Cinemart produced and Netflix distributed on its streaming platform. (Compl. ¶¶ 25, 27.)[1]

INTRODUCTION

The Netflix Docuseries reports on multiple controversies and official investigations swirling around a prominent and powerful family entrenched in the local justice system for generations—the Murdaughs. Those controversies and investigations—including the double homicide of Maggie and Paul Murdaugh, the death of Mallory Beach, Stephen Smith's murder, Gloria Satterfield's death, and Alex Murdaugh's financial crimes—have for years been the subject of discussion, debate, and speculation by the populace of Hampton County, South Carolina, and have been extensively covered in the local, state, and national news media. Plaintiff complains that the Netflix Docuseries falsely accuses him of the murder of Stephen Smith. The Series makes no such assertion. Plaintiff's attempt to base a defamation claim on the Series, by implication or otherwise, fails as a matter of constitutional and state law for multiple independent reasons.

First and foremost, under the First Amendment, when a speaker expresses "a subjective view, an interpretation, a theory, conjecture or surmise," rather than claims to be in possession of objectively verifiable facts, the statement is not actionable as defamation. Here, no reasonable viewer watching the Netflix Series would conclude the Series was asserting or conveying as fact that Plaintiff murdered Stephen Smith. The Series simply reported on and raised questions about

[1] Pursuant to Local Civil Rule 7.04 DSC, Defendants Netflix, Inc. and The Cinemart LLC are not submitting a separate supporting memorandum because the grounds for this motion are set forth fully herein and because a separate memorandum would serve no useful purpose.

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an unresolved mystery: what happened in the investigation of Stephen Smith's death, did Plaintiff's powerful and well-connected family influence the investigation, and should law enforcement have done more? The Series informed the viewers about information in the public record—including rumors and speculation circulating in the community and reported to law enforcement that reflected multiple mentions of members of the Murdaugh family and Plaintiff as having a possible connection with Mr. Smith. But what the Series categorically did not do is assert as fact that Plaintiff committed the murder. Plaintiff's Complaint fails for this fundamental reason. When viewed in the context of the Series, which Plaintiff omits in his Complaint, none of the handful of statements Plaintiff cites are actionable as defamation.

Second, to the extent any fact about the death of Stephen Smith is asserted in the Series, it is the truthful fact that there were theories about a Murdaugh connection to the case that were reported to the authorities and made part of the record of their investigation. That true fact cannot be the basis for a defamation claim and is yet another reason Plaintiff's Complaint fails as a matter of law. Third, any attempt by Plaintiff to argue defamation "by implication" would not save his Complaint because regardless of how he frames his claims they are barred by the First Amendment and South Carolina law. Fourth, under the fair report privilege that protects speech and public debate concerning government records and affairs, Defendants cannot be held liable for reporting information in the Series from public records that were part of an official law enforcement investigation, nor for reporting anyone's conclusions or opinions based on that information, in the context of raising questions about that investigation. Finally, Plaintiff also fails to meet his burden of establishing the requisite degree of fault under the United States Constitution and South Carolina law.

For each of these reasons, discussed in more detail below, Plaintiff's Complaint against Defendants must be dismissed as a matter of law.

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FACTUAL BACKGROUND

A. The Extensive Media Coverage of the Murdaugh Family Scandals.

Plaintiff Richard Alexander Murdaugh, Jr. ("Plaintiff" or "Buster Murdaugh") is a member of the well-known Murdaugh family of Hampton County, South Carolina. Beginning with Plaintiff's Great-Great-Grandfather, a long line of Murdaugh men have practiced law in Hampton County and served as local solicitor. In 2023, Plaintiff's father Richard Alexander Murdaugh ("Alex Murdaugh") was convicted of the 2021 murder of his wife and son (Buster Murdaugh's mother and brother), Maggie and Paul Murdaugh. Alex Murdaugh was sentenced to two consecutive life sentences for the murders. *See State v. Murdaugh*, Appellate Case Nos. 2023-000392 and 2024-000576 (S.C. Ct. App.). He also separately pled guilty to financial crimes related to his embezzlement of funds. *See USA v. Murdaugh*, No. 9:23-cr-00396-RMG (D.S.C.) At the time of his murder, Plaintiff's brother Paul was facing criminal charges for his involvement in a boating accident that killed Mallory Beach in 2019.[2]

The scandals associated with the Murdaugh family were covered extensively in the local and national press in the years following the boating accident and the double-homicide, including how the family's standing in the community may have impacted law enforcement's investigations of incidents involving them. Multiple television stations and streaming services released programs examining the many incidents and investigations involving the members of the Murdaugh family.

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[2] Defendants trust that the Court is familiar with the controversies surrounding the Murdaugh family. Defendants recite the well-known facts only as relevant to the context of the Series and Plaintiff's Complaint. The Court can take judicial notice of the high-profile investigations and prosecutions involving the Murdaugh family, as well as the many court proceedings, because they are "generally known within the trial court's territorial jurisdiction". Fed. R. Evid. 201(b)(1). *See, e.g., Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (proper to take judicial notice of layoffs at company that were "generally known in Southern California").

As is relevant to this action, on June 17, 2022, the streaming platform discovery+ and the Investigation Discovery channel began showing a documentary series titled, "Murdaugh Murders: Deadly Dynasty". (Compl. ¶ 19.) On November 3, 2022, the streaming platform HBO Max began showing another documentary series titled, "Low Country: The Murdaugh Dynasty." (*Id.* ¶ 22.) Subsequently, Netflix released the Netflix Docuseries, which was created and produced by Cinemart. (*Id.* ¶ 25.)[3] Plaintiff does not allege that Defendants Netflix or Cinemart had any involvement in either of the other two independent docuseries noted above and cited in the Complaint as distributed by the "Warner Brothers"-related Defendants, or vice versa.

B. Public Records Detailing the Investigation Into Stephen Smith's Death and Rumors of a Murdaugh Connection Reported to Law Enforcement.

On July 8, 2015, 19-year-old Stephen Smith was found dead along a rural road in Hampton County, South Carolina. (Compl. ¶ 18; Defendants' Joint Appendix, Ex. 2, South Carolina Highway Patrol Multi-Disciplinary Accident Investigation Team ("MAIT") Stephen Smith Investigative Case Notes ("Investigative Case Notes") at 4.)[4] Although Mr. Smith's death was initially considered a hit and run, the South Carolina Highway Patrol MAIT (hereinafter "Highway Patrol") soon began investigating it as a homicide. (*Id.* at 4, 6.) An officer's notes from his meeting with the pathologist

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[3] Defendants previously submitted video copies of all three episodes of Season 1 of the Netflix Series and transcripts of the same (ECF Nos. 22 and 47), which are incorporated herein by reference. The materials are cited herein as "Ep. _" and "Ep. _ Tr." with cites to the Series timestamps and page numbers of the transcripts, respectively. The Court can consider these materials because they are integral to the Complaint. *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550 (D.S.C. 2008). *See infra*, pp. 12-13.

[4] The Court can consider the Investigative Case Notes and audio recordings of Highway Patrol's interviews because they are matters of public record that are properly subject to judicial notice. *Cobin*, 561 F. Supp. 2d at 550 (taking judicial notice of police reports in context of considering fair report privilege); Fed. R. Evid. 201(b). *See infra*, pp. 12-13. For ease of reference for the Court and efficiency, Defendants have submitted a Joint Appendix of these public records, referenced herein as Def. Jt. Appx.

confirm that Highway Patrol "had no evidence of this individual being struck by a vehicle," and were considering whether Mr. Smith's injuries could have been caused by a baseball bat. (*Id.* at 25.)

As part of its investigation, Highway Patrol officers conducted official interviews with a number of people familiar with Mr. Smith, including his friends and his classmates. As shown in the Netflix Docuseries, documents from the official Highway Patrol records demonstrate that Plaintiff (who goes by his nickname "Buster") was specifically mentioned by individuals interviewed by law enforcement in connection with Mr. Smith's death. (Dfts. Jt. Appx. Ex. 2 at 19, 29; Ep. 3 at 2:50–3:03; 10:39–10:50 and Ep. 3 Tr. at 5:2-5, 11:10-13.)

The audio tapes of interviews conducted by Highway Patrol officers also contain repeated references to "Buster Murdaugh" as having a possible connection with Mr. Smith's death. (Dfts. Jt. Appx. Ex. 7B at 8, 9, 24-25 (discussing rumors involving "Buster Murdaugh"); Dfts. Jt. Appx. 10B at 2-3; Dfts. Jt. Appx. Ex. 8B at 3, 5, 8 (Officer: "So, he's the one that said Buster had something to do with it, but he didn't tell you how he knew that?….You are the 1, 2, 3, 4, 5, 6, 7, 8. You are the ninth person that I talked to in reference to this rumor."); Dfts. Jt. Appx. Ex. 5B at 3; Ep. 3 at 6:00–7:02; 8:55–9:08; 9:45–9:52, 10:10–10:26 and Ep. 3 Tr. at 7:13-8:15, 9:25-10:3, 10:16-18, 10:23-11:5.) Sandy Smith, Stephen's mother, told Corporal Duncan in an interview that "Everybody keeps coming up to me and saying it was the Murdaugh boys." (Dfts. Jt. Appx. Ex. 3B at 9; Ep. 3 at 6:14–6:18 and Ep. 3 Tr. at 7:22-23.) As the Netflix Docuseries also reports, the Highway Patrol nevertheless did not interview Plaintiff. (Ep. 3 at 10:39–10:50 and Ep. 3 Tr. at 11:10-13.)

In addition to Plaintiff, the Highway Patrol investigation report notes also include reference to Plaintiff's uncle, Randy Murdaugh. (Dfts. Jt. Appx. Ex. 2, Investigative Case Notes at 28 (witness stating that he is providing information on possible suspects "because Randy Murdaugh told him to call"); Dfts. Jt. Appx. Ex. 4B, Stephanie Smith Interview at 48; Ep. 3 at 9:53–10:08 and Ep. 3 Tr. at

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10:19-22 (Stephen's sister stating "Randy Murdaugh was the second person to call my dad, after the coroner and he said he wanted to take the case").) Further, a number of the interviews mention the prominence of the "Murdaugh family" in Hampton County and the fact that people may be reluctant to come forward with information because of it. (Dfts. Jt. Appx. Ex. 7B at 14; Dfts. Jt. Appx. Ex. 10B at 5-6; Dfts. Jt. Appx. Ex. 9B at 4-5; *see also* Ep. 3 at 6:21–6:48; 9:45–9:52 and Ep. 3 Tr. 7:25-8:9, 10:16-18.) The South Carolina Highway Patrol closed its case without making an arrest or identifying any individual who was responsible for the death of Mr. Smith.

Nearly six years later, in July 2021, mere weeks after the murders of Paul and Maggie Murdaugh, the South Carolina Law Enforcement Division (hereinafter "SLED") announced that it was opening an investigation into Stephen Smith's murder based on evidence uncovered during the Murdaugh double-homicide investigation. (Ep. 3 at 21:40–22:03 and Ep. 3 Tr. 19:12-20; *see also* June 22, 2021 WCBD News 2 broadcast, available at https://www.youtube.com/watch?v=M7dLk2a1Aag.) This new development was widely reported by the local news. (*Id.*; *see also, e.g.*, Michael M. DeWitt, Jr., SLED opens its own investigation into death of Stephen Smith; possible Murdaugh connection, Hampton County Guardian, June 23, 2021.)[5] As of the date the Netflix Docuseries premiered, SLED also had not made an arrest or identified any individual who was responsible for the death of Mr. Smith.

C. The Netflix Docuseries and Its Coverage of Law Enforcement's Investigation Into Stephen Smith's Death.

Netflix released Season 1 of the Docuseries "Murdaugh Murders: A Southern Scandal" on February 22, 2023. (Compl. ¶ 25.) Drawing on public law enforcement records and interviews with members of the community, the three-part documentary covers, and raises questions

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[5] Available at https://www.blufftontoday.com/story/news/local/hampton-county-guardian/2021/06/23/sled-opens-own-investigation-into-death-stephen-smith-maggie-paul-murdaugh-homicide-connection/5322059001/.

regarding, the many deaths that by that point in time were surrounding the Murdaugh family, including the murders of Paul and Maggie Murdaugh, the tragic death of Mallory Beach in the boating accident, the mysterious death of Stephen Smith, and the unresolved death of Murdaugh housekeeper Gloria Satterfield. (*See* Series *generally* at ECF Nos. 22 and 47.) The Series chronicles law enforcement's investigation of each of these incidents and explores the power of the Murdaugh family patriarchs in Hampton County and the influence the family may have had on each of these criminal investigations. For example, after the boat accident, "some in the community question[ed] if the family used their connections to protect Paul" (Ep. 1 at 2:30–2:36), and questioned whether "the Murdaughs [ ] were more worried about a cover-up than they were trying to find Mallory." (Ep. 2 at 10:44–10:52; *see also id.* at 4:53–5:01 ("These men that hold big reputations in Hampton County, I do think they would lie and I think they would cheat and I think they would cover up anything.").)

Plaintiff's Complaint focuses on Episode 3 of Season 1 of the Netflix Docuseries which covers the investigations into the deaths of Mr. Smith, Ms. Satterfield, Paul and Maggie Murdaugh, and the alleged shooting of Alex Murdaugh.[6] The Episode includes an approximately 10-minute segment which discusses law enforcement's investigation into Mr. Smith's death, the theories and speculation in Hampton County of a connection between Mr. Smith and the Murdaugh family, as reported to Highway Patrol during its investigation, and what people in the community were saying about that investigation. (Ep. 3 at 2:50–13:10.) As the Series details, following Mr. Smith's death, rumors were rampant in Hampton County about the manner of his death, and law enforcement officials looked to local residents for information. Soon after Mr. Smith's death, Highway Patrol officers began hearing of a possible Murdaugh connection in their official interviews, as documented

[6] Season 2 of the Netflix Docuseries was released on September 20, 2023. Plaintiff makes no allegations in his Complaint concerning any Episode in Season 2.

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in public law enforcement records. This segment of the Series recounts the history of the Smith investigation and unresolved questions that have been widely discussed in the community and were being investigated, or not investigated as the case may be, by law enforcement.

As part of the discussion, this segment of the Netflix Docuseries shows public records from Highway Patrol's investigative file containing Buster Murdaugh's name (Ep. 3 at 2:50–3:03; 10:39–10:50), and plays audio from the Highway Patrol interview tapes referencing rumors about the possible involvement of the Murdaughs and Buster Murdaugh. (Ep. 3 at 6:00–7:02; 8:55–9:08; 9:45–9:52, 10:10–10:26 and Ep. 3 Tr. at 7:13-8:15, 9:25-10:3, 10:16-18, 10:23-11:5.) The segment also includes interviews with Hampton County residents—including an investigator hired by the Smiths, Steve Peterson; a close friend of Mr. Smith; friends of the Murdaughs; and local news reporters, including Michael DeWitt, editor of the Hampton County Guardian—who share their perspectives on the rumors of an alleged Murdaugh connection to Mr. Smith that were reported to the authorities, and their opinions on law enforcement's handling of the investigation. Plaintiff's brother Paul Murdaugh and his uncle Randy Murdaugh are also mentioned in the segment as having been identified in Highway Patrol interviews theorizing a possible connection to the Smith investigation. (Ep. 3 at 6:21–6:48, 9:53–10:08 and Ep. 3 Tr. at 10:19-22, 12:8-24.)

As the Netflix Docuseries makes clear, despite the possible Murdaugh connection reported to authorities, "it doesn't appear that anyone [in law enforcement] ever interviewed Buster or anyone else in the Murdaugh family." (Ep. 3 at 10:39–10:50 and Ep. 3 Tr. at 11:10-13 (Will Folks).) Notwithstanding Mr. Smith's mother's plea to the public for answers, no one came forward with information about her son's death (Ep. 3 at 11:09–11:57 and Ep. 3 Tr. at 11:20-12:7 (DeWitt)); instead, the case just "fade[d] away." (Ep. 3 at 10:26–10:38 and Ep. 3 Tr. at 11:6-9 (Steven Peterson)). As later mentioned in the Episode, in 2021, SLED opened its own investigation into Mr. Smith's death based on evidence uncovered in the Alex Murdaugh double-homicide case. (Ep. 3 at

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21:40–22:03 and Ep. 3 Tr. 19:12-20.) The Series notes that SLED did "not say what evidence lead to that decision, or whether the Murdaugh family was involved in any way." (*Id.*) Toward the end of the Episode, Plaintiff tells his father during a recorded jailhouse call that "SLED has not released anything" on the Smith investigation. (Ep. 3 at 38:49–39:03 and Ep. 3 Tr. at 32:12-21.) The Episode closes by reporting that: "The Murdaugh family has publicly denied any involvement in the death of Stephen Smith." (Ep. 3 at 47:50 and Ep. 3 Tr. at 38:11-12.)

D. Plaintiff's Lawsuit and Allegations About the Netflix Docuseries.

Plaintiff filed this action on June 14, 2024, in the Hampton County Court of Common Pleas against Netflix and Cinemart based on the Netflix Series, as well as Defendants Blackfin, Inc., Warner Bros. Discovery, Inc., Warner Media Entertainment Pages, Inc., and Campfire Studios Inc. based on their two separate docuseries. (Compl. ¶¶ 19, 21, 22, 24, 25, 27.) Netflix and Cinemart removed the case to this Court on September 9, 2024, and all Defendants consented. (ECF No. 1.)

The Complaint identifies no causes of action against any Defendant and does not request any specific relief against any Defendant—instead broadly concluding that all Defendants' various publications are "defamatory" insofar as they purportedly accuse Plaintiff of "committing murder." As to the Netflix Docuseries, Plaintiff appears to be complaining about the comments of Michael DeWitt, a local journalist who is interviewed in the Series,[7] and a handful of other statements or visuals—none of which is actionable.

i. DeWitt's Statements

Plaintiff asserts that four comments by DeWitt in the Netflix Docuseries "accus[e Plaintiff] of being involved in the murder of Stephen Smith." (Compl. ¶ 28.) The Complaint asserts the four

[7] As set forth in Netflix's Notice of Removal, ECF No. 1, Mr. DeWitt was fraudulently joined as a means of attempting to deprive the federal court of diversity jurisdiction. Defendant Gannett Co., Inc. appears to have been sued solely as Mr. DeWitt's employer and is not alleged to have had any involvement in the Netflix Series.

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comments are: [1] "We were hearing all of these rumors about a possible connection"; [2] "There is some truth to it"; [3] "We could not put the Murdaugh name in the story unless we wanted to face lawsuits. We said a prominent well-known family was rumored to be involved. Everyone knew who we were talking about. We published the story and we waited. People would come up to me in the Piggly Wiggly and pat me on the back. We're so thankful you had the courage to run the story. We did everything but put the Murdaugh name in the story"; and [4] "I began to have a bad taste in my mouth about the members of the Murdaugh family as many people in the community did." (Compl. ¶ 28.)

The main comments by DeWitt cited in the Complaint are either misquoted or lacking context. Most of the actual statements by Dewitt that are at issue are found in the following passage in the Series:

> MICHAEL DEWITT: Within one month of his body being found, we were hearing all these rumors about a possible Murdaugh connection.
>
> [A]nd I've learned as a reporter that if you hear the same rumors from different groups of people wherever you go, it's either a very good rumor, or there's some truth to it. So we did our story [in] the Thanksgiving 2015 paper, and Sandy Smith basically appealed to the community: 'My son was killed. If you know something, please come tell us. We just want answers, we want closure.'
>
> So we could not put the Murdaugh name in a story unless we wanted to face lawsuits. We said a prominent, well-known family was rumored to be involved. Everybody knew who we were talking about. We published the story and we waited. People would come up to me in the Piggly-Wiggly, pat me on the back, We're so thankful you ran that story. So proud of you to have the courage to do it.
>
> I mean, we did everything but put the Murdaugh name in the story, but the story did no good. Nobody ever came forward.

(Ep. 3 at 10:51–11:57 and Ep. 3 Tr. at 11:14-12:7.)

The Complaint misquotes the first statement ("we were hearing all these rumors about a possible Murdaugh connection") by leaving out the word "Murdaugh." The Complaint then takes out

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of context the words "There is some truth to it," omitting most of DeWitt's actual statement, which is accurately set forth above. The Complaint also omits that the comment made by DeWitt, "I began to have a bad taste in my mouth about the members of the Murdaugh family, as many people in the community did" (Compl. ¶ 28), was made during an entirely different segment of the Episode, which was not discussing or referring to the Stephen Smith murder.[8]

ii. The Other Allegations

Beyond the DeWitt statements, the only other specific allegations that Plaintiff makes are that the Series (a) "depicts a young man with red hair carrying a baseball bat" and "Plaintiff has red hair"; (b) "publishes statements such as 'everyone keeps coming up to me and saying it was the Murdaugh boys' and 'listening to these statements it is pretty clear; Stephen's death is intertwined with the Murdaughs'"; and (c) states that "Plaintiff was engaged in a romantic relationship with Stephen Smith and that it was Plaintiff, and maybe two other individuals, who killed Stephen Smith." (Compl. ¶ 25.)

As to these allegations, Plaintiff's Complaint, again, includes incomplete quotes, recites his own version of purported statements rather than the actual statements in the Series itself, and entirely omits the context for everything in the Series. The statements cited are either taken from the audio tapes of police interviews in the Smith investigation in 2015, including by Smith's mother, or otherwise comment on the widespread speculation in the community, including the Murdaugh

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[8] Plaintiff's misquotes and omissions, both of words and context, are troubling; however, neither Plaintiff's recitation nor the actual statement give rise to a defamation claim. Of course, if there is any conflict between the Complaint's allegations and the Series, the latter controls. *See Mungo v. BP Oil, Inc.*, No. 2:11–0482–CWH, 2012 WL 13005317, at *2 (D.S.C. Dec. 21, 2012) (court does not "accept as true" allegations "that contradict matters properly subject to judicial notice or by exhibit") (quoting *Veney v. Wyche,* 293 F.3d 726, 730 (4th Cir. 2002)). *See also Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) (court may consider "any facts set forth in the complaint that undermine the plaintiff's claim" including "documents referenced in the pleading if they are central to the claim").

family's involvement that was reported to law enforcement. (Ep. 3 at 2:50–13:10.) The visuals Plaintiff refers to illustrates those theories, and is shown in part as the backdrop to the Highway Patrol interview recordings. As framed in the Series, including by the Smiths' investigator Steve Peterson, these assertions in the ongoing investigation were "all rumor. Nobody claims to be the source of any information. They've all heard it from somebody else." (*Id.* at 5:27–5:35 and Ep. 3 Tr. at 7:3-5.)

STANDARD ON RULE 12(B)(6) MOTION AND MATERIALS CONSIDERED

The Court begins by considering the allegations of the Complaint, to decide "whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Conclusory allegations must be disregarded (*id.* at 678–79), and the Court need not "take the plaintiff's *interpretation* of the allegedly defamatory words at face value." *Lott v. Levitt*, 556 F.3d 564, 569 (7th Cir. 2009). In ruling on Rule 12(b)(6) motions, courts will "ordinarily examine . . . documents incorporated into the complaint by reference, *and matters of which a court may take judicial notice*." *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550 (D.S.C. 2008) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (emphasis added by court in *Cobin*).

As the statements in the Netflix Docuseries are incorporated into the Complaint by reference, are central to Plaintiff's defamation claim, and must be reviewed in context as they appear in the Series, Defendants previously submitted the entire Series, including Episode 3, as well as transcripts of each Episode (ECF Nos. 22 and 47), which are incorporated herein by reference. The Court need look no further than the Series itself to determine that Plaintiff's Complaint fails to state a claim as a matter of law because, when the statements made in the Series are reviewed in context, as they must be, the Series makes no assertion of fact about Plaintiff that is actionable as defamation.

Additionally, on a Motion to Dismiss, the Court may take "judicial notice of matters of public record." *Id.* (quoting *Sec'y of State for Defence v. Trimble Navig. Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007)). Defendants submit and request that the Court take judicial notice of police reports included

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in the Stephen Smith investigation file from Highway Patrol (Dfts Jt. Appx. Ex. 2), as well as audio recordings of Highway Patrol's interviews with informants regarding the Smith investigation. (Dfts. Jt. Appx. Exs. 3A–11A.) These materials are incorporated into the Series, and they are public records of which the Court can take judicial notice. *See Cobin*, 571 F. Supp. 2d at 550 (considering police report as public record in context of evaluating fair report defense); *see also Clenney v. Swartz*, No. 1:14-cv-1702 (GBL/TCB), 2015 WL 11121852, at *1 (E.D. Va. Apr. 16, 2015), *aff'd*, 620 F. App'x 206 (4th Cir. 2015) (taking judicial notice of a police report on a Motion to Dismiss).[9] Defendants also request that the Court take judicial notice of SLED's decision to open an investigation into the Smith murder based on information uncovered during the investigation of the murders of Maggie and Paul Murdaugh, which is a matter of common public record and knowledge, and was extensively reported in the media. Fed. R. Evid. 201(b)(1); *supra* p. 6.

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ARGUMENT

To state a cause of action for defamation, a plaintiff must plead and prove, among other things, (1) a false and defamatory statement of fact specifically concerning plaintiff, that (2) is subject to no privilege. *Stokes v. Oconee Cnty.*, 895 S.E.2d 689, 694 (S.C. Ct. App. 2023); *see also Boone v. Sunbelt Newsp., Inc.*, 556 S.E.2d 732, 736 (S.C. Ct. App. 2001) (holding "article could not reasonably be read to make a false statement of fact" concerning plaintiff). When considering whether Plaintiff states a claim for defamation, the "inquiry is not only to assess whether the statements in the complaint 'may constitute a sufficient basis for Plaintiffs' defamation claim,' but also to consider whether such a claim would comport with the First Amendment." *Rollins Ranches, LLC v. Watson*, No. 0:18-CV-03278-SAL, 2021 WL 5355650, at *4 (D.S.C. Nov. 17, 2021) (citation omitted).

[9] Defendants submit as part of the Joint Appendix transcripts of the audio recordings to aid the Court's review. (Exs. Dfts. Jt. Appx. Exs. 3B–11B.)

At the outset, Plaintiff's claim is flawed because he names eight separate defendants based on three separate documentary series, but fails to identify any cause of action against any defendant. Instead, he alleges wrongdoing in undifferentiated, shotgun fashion against all defendants. Such allegations are "too nebulous to survive a motion to dismiss." *Dickerson v. Albemarle Corp.*, No. 5:14-CV-03722-JMC, 2016 WL 245188, at *4 (D.S.C. Jan. 21, 2016) (dismissing defamation claim as insufficiently plead); *see Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1323 (11th Cir. 2015).[10]

Even giving the flawed pleading the full benefit of the doubt, Plaintiff simply cannot state a claim as a matter of law. His Complaint violates the First Amendment and should be dismissed with prejudice for multiple independent reasons.

First, none of the handful of statements Plaintiff identifies in the Netflix Docuseries assert as fact that Plaintiff killed Stephen Smith or was in fact "involved" in his murder. Nor do the statements collectively assert as fact that Plaintiff killed Stephen Smith. To the contrary, viewing the Series and the challenged statements in the context in which they are presented, as required, plainly demonstrates that the Series is discussing, reporting, and raising questions about the various matters being investigated by law enforcement, and the reported rumors and community speculation about the Murdaughs' connections to them. As a matter of law and the First Amendment, such "theories, conjecture and surmise" cannot be the basis for a defamation claim.

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[10] The insufficiency of Plaintiff's Complaint is highlighted by his attempt to amend his pleading through his brief in support of remand to state court, in which he now insists his claim is one for "defamation by innuendo or implication." *See* ECF No. 41-1 at 12; *Sadler v. Pella Corp.*, 146 F. Supp. 3d 734, 759 n.13 (D.S.C. 2015) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.") (citation omitted); *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 F. App'x 556, 563 (4th Cir. 2008) (plaintiff may not amend complaint through argument in a brief). In any event, regardless of how Plaintiff chooses to describe his claim, allowing Plaintiff to base liability on the statements or purported implications that Plaintiff ascribes to the Series is contrary to law and the First Amendment for the reasons discussed below, *see infra*.

Second, Plaintiff cannot meet his burden of proving material falsity. To the extent the Series or statements at issue assert any facts, it is the following literally true fact: speculative allegations connecting the Murdaughs, including Plaintiff, to the Smith case were commonly known and being discussed in the community, and had been reported to law enforcement as part of its investigation into Smith's death.

Third, any attempt by Plaintiff to now argue defamation "by implication" would not save his Complaint because regardless of how he frames his claim, it is barred by the First Amendment and South Carolina law.

Fourth, Plaintiff's Complaint fails because the statements at issue in the Series are protected by the fair report privilege, which confers a constitutionally critical right to report on and discuss official proceedings, actions and records, without fear of liability.

Fifth, beyond these incurable problems that doom the Complaint as a matter of law, Plaintiff also fails to plead the requisite standard of fault, regardless of whether he is a private or a public figure.

A. The Complaint Fails as a Matter of Law Under the First Amendment Because the Netflix Docuseries Does Not Assert as Fact That Plaintiff Killed Stephen Smith or Was Involved in His Murder.

Viewed in proper context, none of the statements identified by Plaintiff, nor the Series as a whole, assert as fact that Plaintiff killed Stephen Smith. As such the First Amendment bars the Complaint as a matter of law.

The First Amendment protects speech that does not constitute a factual statement about the plaintiff. *See Blanton v. City of Charleston*, No. 2:13–2804–CWH, 2014 WL 4809838, at *5 (D.S.C. Sept. 26, 2014) ("Because the Court concludes as a matter of law that none of the three statements at issue can reasonably be interpreted as stating a fact about the plaintiff, the plaintiff has no foundation for his defamation claim against the defendant."); *CACI Premier Tech., Inc. v.*

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Rhodes, 536 F.3d 280, 300 (4th Cir. 2008) (statements "are not actionable" where "they do not assert actual facts about" plaintiff). Whether the complained of statements reasonably can be interpreted as conveying actual facts about Plaintiff is properly determined on a motion to dismiss as a matter of law. *See, e.g., Biospherics v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998); *see also Rollins Ranches*, 2021 WL 5355650, at *4 (court must consider First Amendment when considering if a complaint states a claim for defamation).

In determining whether a statement makes a factual assertion, the court must consider context: whether "the general tenor" of the speech at issue "negate[s] [the] impression" that the speaker is making an "objectively verifiable" statement of fact rather than expressing his or her own "subjective assertion." *Milkovich v. Lorain Jour.*, 497 U.S. 1, 21-22 (1990). "Context is key, as it matters not only what was said, but who said it, where it was said, and the broader setting of the challenged statements." *Bd. of Forensic Document Exam'rs, Inc. v. ABA*, 922 F.3d 827, 832 (7th Cir. 2019); *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994) (emphasizing "importance of context" as it "helps determine the way in which the intended audience will receive" a statement); *see also Snyder v. Phelps*, 580 F.3d 206, 219-20 (4th Cir. 2009) (courts must consider the "context and general tenor" of allegedly defamatory statement when analyzing whether it constitutes opinion).

Under settled law in the Fourth Circuit and across the country, when, as here, "a speaker plainly expresses 'a subjective view, an interpretation, a theory, conjecture or surmise, rather than claim[s] to be in possession of objectively verifiable facts, the statement is not actionable.'" *Biospherics*, 151 F.3d at 186 (quoting *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993)) (cleaned up). Indeed, "[w]hen the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, this signals to the reader that what is said is opinion, and not fact." *Levin v. McPhee,* 119 F.3d 189, 197 (2d Cir. 1997).

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Context is crucial here. The Series is a "true crime" documentary series focused on the power and influence of the Murdaugh family and how such power and influence may have impacted the course of justice. It makes no factual claims about who, if anyone, actually killed Stephen Smith. *Neither Mr. DeWitt nor anyone else who appears in the Series ever asserts who killed Stephen Smith based on their personal knowledge*. Likewise, no one in the Series asserts they are in possession of verifiable "truth" of any particular theory—much less one that conclusively names Plaintiff as Stephen Smith's murderer. It would be contradictory to the Series itself to find that it provides an answer or conclusion as to who murdered Stephen Smith, especially where it is plainly disclosed that the statements and theories are second-hand speculation, and the Series specifically states that Highway Patrol's investigation "fade[d] away" and SLED declined to provide what led to its decision to open an investigation.

The tenor, language and context of the at-issue comments—those by Mr. DeWitt, as well as other informants and interviewees Plaintiff recites in the Complaint—are clearly presented and stated as conjecture and speculation about the events surrounding Smith's death. All of DeWitt's statements were those of a journalist and community historian, simply sharing what he heard from multiple sources and what was reported in the newspaper in 2015, putting viewers "in the shoes" of a member of the local community.[11] For example, Mr. DeWitt's comment about a "possible"

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[11] As Netflix's removal petition points out, with respect to Plaintiff's claim against DeWitt as an individual defendant, all of DeWitt's comments are subject to dismissal *for the further reason* that they do not reference Plaintiff specifically and instead comment on the Murdaugh family generally. (*See* Netflix's removal petition establishing DeWitt's fraudulent joinder, ECF No. 1 at 11-15.) Plaintiff's Motion to Remand—which Defendants will respond to separately—misses the point that DeWitt personally can only be held liable for his own statements and not those of other speakers or for the context in which his statements are placed in the Series. But, even if Plaintiff could establish that the statements he complains of were "of and concerning" him, he has no claim against *any* Defendant—DeWitt, Netflix or the Cinemart—for the reasons discussed herein because, in all events, under the First Amendment none of the statements in DeWitt's commentary (Compl. ¶ 28) are actionable assertions of fact.

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Murdaugh "connection" of an indeterminate nature[12] is a quintessential example of nonactionable "theory, conjecture or surmise," not verifiable fact. It would be contrary to the Series itself, and unconstitutional, to find that Mr. DeWitt was offering *any* statement of fact about the actual circumstances of Smith's death, let alone stating as a fact that Plaintiff killed Mr. Smith.

Similarly, other statements cited in paragraph 25 of the Complaint are likewise plainly uncertain, second-hand speculation and guesswork when viewed and considered in the context of the Series. The obvious point of the statements is to relay to the viewer that there was speculation regarding Murdaugh involvement, but that *no one* ever claimed in real time or in the Series to be in possession of first-hand knowledge about who killed Stephen Smith. (*See* Ep. 3 at 5:18–5:28 (Police Informant: "Well, recently *I heard* that these *two, maybe three* young men were in a vehicle. *I guess* they were attempting to mess around with him *or something like that*"); *id.* at 5:18–5:28, 5:43–6:05 (Images illustrating the speculative theory involving "two, maybe three" youths); *id.* at 6:14–6:18 (Sandy Smith, to Police: "Everybody keeps coming up to me and saying it was Murdaugh boys").)

The theories and speculation conveyed in the Series are analogous to the book at issue in *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997), in which the plaintiff sued the author and publishers of a book and magazine article that provided a non-fiction account of the death of a Russian dissident painter. The book "describe[d] factual and historical accounts of real events" that "remain[] shrouded in mystery even to the present day." *Id.* at 197. The plaintiff claimed that the book and article defamed him by reporting comments from people who knew the dead painter that implicated the plaintiff in his murder. *Id.* at 192. The district court disagreed and granted a Rule 12(b)(6) motion to dismiss the complaint, and the Second Circuit affirmed. *Id.* at 194-95, 197. The

[12] For ease of reference, the statement is set forth in full on page 10 of the brief, *supra*.

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decision emphasized that the book and article provided additional context—"differing accounts" that were "explicitly presented as 'versions'" and told by individuals who "might be expected to have their own personal theories regarding the mystery" but who had no "firsthand knowledge of what happened that day." *Id.* at 197. In that context, "any allegation of Levin's possible involvement in a murder is in the category of opinion—opinion based on speculation without any implication of fact," such that "a reasonable reader would understand that any allegations of murder, especially any implicating Levin, are nothing more than conjecture and rumor." *Id.*; *accord Biospherics*, 151 F.3d at 184 ("The context and tenor of the article thus suggest that it reflects the writer's subjective and speculative supposition," not factual statements).

The same is true here. As the Smith family investigator Steve Peterson put it, framing the statements for viewers of the Series: "But it's all rumor. Nobody claims to be the source of any information. They've all heard it from somebody else." (Ep. 3 at 5:27–5:35; *see also id.* at 5:35–5:59 (highway patrol officer stating that he needs to find "somebody who's willin' . . . to give me some solid information").) *See Biospherics*, 151 F.3d at 184 (distinguishing article in *Milkovich*, where author stated he was "in a unique position of being the only non-involved party to observe" events discussed, in contrast to article that "contains no claim to firsthand knowledge of facts"); *Woodward v. Weiss*, 932 F. Supp. 723, 726-27 (D.S.C. 1996) (doctor's assessment of another's work was "clearly" opinion not fact because he "did not actually treat the patients," and any reader would be "fully aware that Dr. Weiss *was not stating facts of which he had personal knowledge*, but was opining based on records which were sent to him") (emphasis added); *see also Gibson v. Boy Scouts of Am.*, 163 F. App'x 206, 213 (4th Cir. 2006).

Community members also shared their own opinions, including on the Murdaughs' powerful influence in the community and on various, multiplying investigations. For example, Mr. DeWitt's "bad taste in [his] mouth" comment about the Murdaugh family generally (Ep. 3 at 31:44–32:44 and

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Ep. 3 Tr. at 27:7-23) is stated in the context of discussing the "Gloria Satterfield" investigation (*id.*), and is definitively not an assertion of fact, but his own personal—and constitutionally protected—viewpoint. *See, e.g.*, *Lapkoff v. Wilks*, 969 F.2d 78, 82 (4th Cir. 1992) (remark that "personally, I wouldn't trust him as far as I can throw him," was "clearly [speaker's] opinion" and "by any standard, it is protected speech"); *Rollins Ranches*, 2021 WL 1138022, at *8 (finding that references to plaintiffs as "evil people," vaguely accusing them of "lies," "illegal practices," or "breaking the law" was protected opinion). Such statements are simply nonactionable as a matter of law.

As the Fourth Circuit has explained in applying *Milkovich*, where, as here, speakers express "an interpretation, a theory, conjecture or surmise," they are, as a matter of law, not "claim[ing] to be in possession of objectively verifiable facts." *See Biospherics*, 151 F.3d at 184, 186. And even if anyone had stated point blank that they reached the conclusion that Plaintiff is Smith's killer based on first-hand knowledge—which no one in the Series does—"[b]ecause the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993). "[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995).

B. The Only Factual Statement Made in the Docuseries is the True Statement That Community Members Reported Theories About a "Murdaugh Connection" to the Smith Death to Authorities.

Truthfully reporting the existence of rumors and allegations that were reported to law enforcement during an unresolved investigation implicating a prominent family and naming Plaintiff repeatedly, in a documentary series raising questions about how law enforcement handled multiple investigations involving members of that family, is core First Amendment speech, not

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actionable defamation. All of the statements Plaintiff recites in paragraphs 25 and 28 of his Complaint fit that description, and the Complaint should be dismissed for this further reason.

Falsity is a required element of a defamation claim and Plaintiff's constitutional burden, as the Series is about matters of public concern. *See Erickson v. Jones St. Publ'rs, LLC*, 368 S.C. 444, 465-66 (2006) (citing *Phila. Newsp., Inc. v. Hepps*, 475 U.S. 767 (1986)); *Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 270 (4th Cir. 2022) (affirming dismissal for failure to plead falsity in matter of public concern).[13] As discussed above, there can be no falsity without an assertion of fact, and the Netflix Docuseries simply does not assert as a fact that Plaintiff killed Stephen Smith or was involved in his murder. To the extent any fact about the death of Mr. Smith is asserted in the Series, it is the fact that there were rumors circulating about a Murdaugh connection to the Smith case and that these theories were reported to the authorities. That is 100% true, and Plaintiff cannot state a claim based on truthful statements.

It is beyond debate that there *were* rumors that "the Murdaughs" were connected in some way to Stephen Smith's murder, and questions were being raised as to how those rumors may have impacted law enforcement's handling of the case. Reports made in the Highway Patrol's investigation of the Smith case bear that connection out: the Murdaughs' names—including Plaintiff's name—were repeatedly referenced, as reported by the Series, and the Highway Patrol's investigation was then inexplicably dropped. Subsequently, a SLED spokesperson publicly confirmed in a statement that SLED had opened its own investigation into the Stephen Smith case based on what it learned in the investigation of the murders of the two members of the Murdaugh

[13] The discussion of ongoing murder investigations, especially involving a high-profile family like the Murdaughs, is plainly a matter of public concern. *See, e.g., Hepps*, 475 U.S. at 769, 776 (articles probing private figure stockholder's use of links to organized crime to influence state government processes were of public concern).

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family (Plaintiff's mother and brother), crimes for which a third member of the family—Plaintiff's father—ultimately was charged and convicted.

"Investigations are often important governmental occurrences. Permitting lawsuits for accurate reports of such events would threaten to black out significant news." Hon. Robert D. Sack, Sack on Defamation: Libel, Slander & Related Problems, § 7:3.5(B)(8) (4th Ed.). As the Seventh Circuit explained in *Global Relief Found. v. N.Y. Times Co.,* 390 F.3d 973, 985 (7th Cir. 2004), "requiring the media to prove the actual and ultimate guilt of the subject of a government investigation would dramatically and improperly chill the ability of the press to report on the actions of government and would deny the public information about matters of vital public concern". Thus, apart from the fair report privilege—which as shown below in Section D, also applies here—the Seventh Circuit held that a charity suspected of ties to terrorism had no defamation claim against media defendants whose "reports were either true or substantially true recitations of the government's suspicions" about plaintiff. *Id.* at 986. And the Fourth Circuit similarly held statements in a broadcast "disclosing that [plaintiff] was under investigation by state authorities" and discussing "the existence of official concern about" its activities were true and as such "may never provide the foundation for a defamation claim." *AIDS Counseling & Testing Centers v. Grp. W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990).

Other circuit courts of appeal have similarly held the media cannot be held liable for reporting the historical fact that allegations have been made surrounding controversial events. *See, e.g., Green v. CBS Inc.*, 286 F.3d 281, 284 (5th Cir. 2002) (television program profiling group of lottery winners "merely report[ed] allegations" made by ex-husband of one of the winners; "defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported"); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985), *reh'g en banc*, 788 F.2d 1300, 1301 n.2 (1986) (magazine's report of the "historical fact"

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of past rape allegation did not mean magazine "espoused the validity" of the accusation"); *Blesedell v. Chillicothe Tel. Co.*, 811 F.3d 211, 225 (6th Cir. 2016) ("relay[ing] . . . 'statements from individuals' alleging that [plaintiff] had sold parts for drugs" not actionable because it "truthfully reported that an individual made an allegation about [plaintiff]").

The same is true here. Defendants cannot be held liable for accurately reporting on the allegations and theories reported to authorities and the serious questions that were raised about law enforcement's investigation of Smith's death in light of the suspected connection to Plaintiff and other members of his family. As the Fourth Circuit has emphasized, speech that "invite[s] the public to ask" questions about matters of public concern is the "paradigm of a properly functioning press." *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087, 1096 (4th Cir. 1993). Further, as discussed next, to the extent Plaintiff tries to suggest that the complained-of statements collectively—in raising questions about the unsolved Smith case and reporting the literally true facts about the swirl of allegations and official inquiries connecting Plaintiff and other Murdaughs to it—could be the basis for a defamation "by implication" claim, the Fourth Circuit's decision in *Chapin* stops that effort in its tracks.

C. Any Attempt to Argue Defamation "By Implication" Would Not Save Plaintiff's Complaint.

Plaintiff's Complaint fails to identify what theory he is alleging—defamation *per se* or defamation "by implication." Either way, his Complaint is barred by the First Amendment for the reasons noted above in Sections A and B. But in addition, Plaintiff also independently fails to state a claim as a matter of basic defamation law.

Plaintiff cites no statements that are *per se* defamatory. The absence of any statement that "itself" and "on its face" contains allegedly false and defamatory language is fatal to a claim of defamation *per se*. *Erickson*, 368 S.C. at 465. And indeed, Plaintiff appears to concede in his Motion to Remand that statements in the Netflix Docuseries have "facial validity"—that is, are not

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actionable on their face given that "truth" is "a bar"—so he hypothesizes an unpleaded claim for defamation by implication, positing "potential defamatory implications within the context of other statements and extrinsic facts." (ECF No. 41-1 at 14.) Whether statements are "reasonably capable of conveying a defamatory implication [is a] matter[ ] of law to be decided on a motion to dismiss." *Agbapuruonwu v. NBC Subsidiary (WRC-TV)*, 821 F. App'x 234, 239 (4th Cir. 2020).

As is evident from viewing the whole Series, it presents "a story constructed around questions, not conclusions," and "language of ambiguity and imprecision permeates" the Series. *Chapin,* 993 F.2d at 1098 (article allegedly insinuating that plaintiff's charity was cheating and defrauding the public was "a story constructed around questions, not conclusions. But the mere raising of questions is, without more, insufficient to sustain a defamation suit in these circumstances"). Like in *Chapin*, there is no conclusion revealing who, in fact, murdered Smith. Legitimate questions are raised as to why the question remains unresolved. As Plaintiff concedes, any purported implication has to be reasonable (ECF No. 41-1 at 13), and it would be unreasonable, and inconsistent with the entirety of the Series, to view it as implying that Plaintiff was, in fact, the murderer of Smith. As the Fourth Circuit held, it cannot be reasonable to read the Series as "express[ing] the libelous meanings ascribed to it by the plaintiffs" because the Series "does not speak in certainties" and its "words cannot be perverted to 'make that certain which is in fact uncertain.'" 993 F.2d at 1091, 1096 (citations omitted).

Plainly stated, while Plaintiff professes to rely on context to construct the claimed defamatory implication—that the Series conclusively identifies him as Smith's killer—*what the Series actually says, in context, does not support but instead undermines* the meaning or implication that Plaintiff ascribes to it. *See id.* (affirming dismissal); *Agbapuruonwu*, 821 F. App'x at 237-39, 241 ("no defamatory implication" that plaintiff committed a crime could "reasonably be gleaned from" news broadcast about wife's welfare fraud that "display[ed] images of [plaintiff] and his LinkedIn profile

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immediately after [wife's] mug shot," and noted that his business "made $1.5 million last year" and that he "is believed to have fled the country"); *Robins v. Nat'l Enquirer, Inc.*, No. 3:95-224-17, 1995 WL 776708, at *2 (D.S.C. Apr. 10, 1995) (dismissing defamation by implication claim asserting that juxtaposition of "the headlines, photos and copy" of National Enquirer article "actually and impliedly implicate Plaintiff as one who is at least partially responsible for the deaths of Susan Smith's children").[14]

Furthermore, where, as here, the "the expressed facts are literally true"—here, that there were rampant rumors and allegations in the police investigation record linking Plaintiff and the Murdaughs to Smith's death—Plaintiff "must make an especially rigorous showing" that the language not only can reasonably be read to impart the false implication, but also "affirmatively suggest[s] that the author intends or endorses the inference." *Chapin*, 993 F.2d at 1092-93. Thus, even if it were reasonable to ascribe Plaintiff's defamatory implication to the Series, the claim still would fail because there is nothing to "affirmatively suggest" that Defendants "intend[ed] or endorse[ed] the inference." *Id.* at 1092–93. Again, the Series expressly presents the rumors and allegations raised in the investigation not as fact but as theories and speculation based on no personal knowledge; as Mr. Peterson put it, they were "all rumor. Nobody claims to be the source of any information. They've all heard it from somebody else." (Ep. 3 at 5:27–5:35.) Rather than identifying a killer, the Series questions why law enforcement has not yet found the answer.

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[14] *See Toussaint v. Palmetto Health*, No. 3:15-02778-MGL, 2017 WL 1950955, at *2 (D.S.C. May 10, 2017) ("objectively unreasonable" as matter of law to draw defamatory implication that plaintiff "abandoned his patients" from statement that he "will no longer practice" with defendants); *Boykin v. Prisma Health,* No. 3:23-CV-1234-CMC, 2023 WL 5488448, at *6 (D.S.C. Aug. 8, 2023) ("to the extent Plaintiff seeks to proceed based on defamatory 'implication' that she was unfit in her profession based on her being surveilled, written up, and terminated," such claim would be dismissed), *rept. and rec. adopted*, 2023 WL 5487118 (D.S.C. Aug. 24, 2023).

D. The Allegations and Theories Recited in the Docuseries Were the Subject of an Official Police Investigation and Are Protected by the Fair Report Privilege.

Many of the statements Plaintiff complains of in his Complaint are additionally protected by the fair report privilege.[15] "The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them." *Reuber v. Food Chemical News*, 925 F.2d 703, 712 (4th Cir. 1991). That purpose is surely served by reporting on law enforcement's investigation into a murder that has connections to an influential family. The privilege to do so "has long been recognized in South Carolina courts," *A.E.P., III v. Charleston Cnty. Sch. Dist.*, Nos. 2015-CP-10-2389, 2014-CP-10-7655, 2016 WL 8198930, at *2 (S.C. Com. Pl., Nov. 18, 2016), *aff'd*, 838 S.E.2d 698 (S.C. Ct. App. 2019), *aff'd on other grounds*, 890 S.E.2d 567 (S.C. 2023) (citing cases), and broadly covers reporting on "the substance of statements, actions, proceedings, reports, or records of public officials or agencies, even if what was stated by the government official turns out to be false and defamatory." *Id.* at *3; *White v. Wilkerson*, 493 S.E.2d 345, 348 (S.C. 1997).

There is no question that South Carolina's fair report privilege encompasses the Series' reporting on the Smith investigation; however, the privilege as articulated under the laws of New York and California, where Netflix and Cinemart reside,[16] is unqualified, providing even stronger fair report protection, and should be applied here. But no matter which State's law is applied, Plaintiff's claims cannot stand. *Agbapuruonwu*, 821 F. App'x at 239 (application of the fair report privilege is matter of law "to be decided on a motion to dismiss.")

[15] Defendants do not concede that anything in the Series is defamatory as a matter of law; but in any event, the Series is also not actionable under the fair report privilege.

[16] The Series was produced by Cinemart, a limited liability company organized under the laws of New York and with its principal place of business in New York. (ECF No. 1-4, Willoughby Nason Decl. at ¶ 2.) Netflix distributed the Series from California, where it is headquartered in and based in Los Gatos. (Compl. ¶ 11.)

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1. The Fair Report Privilege Bars the Complaint Regardless of Which State's Law Applies.

The challenged statements are protected by the fair report privilege under New York, California and South Carolina law. The New York and California privileges broadly privilege "fair and true report[s]" of "any judicial proceeding" or "other official proceeding. . . ." N.Y. Civ. Rights Law § 74; Cal. Civ. Code § 47(d) (same). The South Carolina fair report privilege likewise broadly "protects fair and accurate reports of 'judicial records and proceedings and other official acts, reports, and records.'" *White*, 493 S.E. 2d at 348.

Regardless of which State's law applies, the fair report privilege encompasses reporting on records from police and other agency investigations and statements made therein by witnesses and authorities. New York's privilege "has been applied to statements about various types of official investigations—whether by the FBI, a district attorney, or the New York City Department of Consumer Affairs." *Aboutaam v. Dow Jones & Co.*, No. 156399/2017, 2019 WL 1359772, at *12 (Sup. Ct. N.Y. Cnty. Mar. 26, 2019), *aff'd*, 119 N.Y.S.3d 458 (1st Dep't 2020); *Rodriguez v. Daily News, L.P.*, 37 N.Y.S.3d 613, 615 (2d Dep't 2016) (police investigation of attempted rape was "official proceeding"; NYPD erroneously identified plaintiff as assailant). California's privilege has similarly been applied to articles "based upon information obtained from a police department crime report and an FBI 'rap sheet.'" *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434 (9th Cir. 1992) (citing *Howard v. Oakland Trib.*, 199 Cal. App. 3d 1124, 1127 (1988) and *Hayward v. Watsonville Reg.*, 265 Cal. App. 2d 255 (1968)); *see also Reeves v. Am. Broad. Cos.*, 719 F.2d 602, 606 (2d Cir. 1983). And "longstanding South Carolina case law" likewise encompasses "investigative reports, or arrest records," *Miller v. S.C. Dep't of Prob.*, No. 2:09-967-JFA-RSC, 2009 WL 1348604, at *3 (D.S.C. May 12, 2009); *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546 (D.S.C. 2008), including "remarks made in the prosecution of an inquiry regarding a crime which has been committed; and for the purpose of detecting and bringing the criminal to

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punishment." *Harkness v. City of Anderson, S.C.*, No. C.A. 8:05–1019–HMH, 2005 WL 2777574, at *5 (D.S.C. Oct. 25, 2005).

The courts have "consistently held that 'even the announcement of an investigation by a public agency, made before the formal investigation has begun, is protected as a report of an official proceeding'" and "reports on allegations that lead to a government investigation are fully protected." *Cummings v. City of N.Y.*, No. 19-cv-7723 (CM)(OTW), 2020 WL 882335, at *16 (S.D.N.Y. Feb. 24, 2020), *aff'd*, 2022 WL 2166585 (2d Cir. June 16, 2022) (citations omitted). Thus, in *Cummings*, the Court held that media reports on the Department of Education's investigation of plaintiff, "including the allegations from parents and students that triggered the investigation," were fully privileged. *Id.*

"Crucially," the privilege protects "reporting on charges and allegations made in proceedings regardless of whether the underlying allegations are in fact true," *id.; see also A.E.P., III*, 2016 WL 8198930, at *3 (privilege "protects those who accurately report the substance of statements, actions, proceedings, reports, or records of public officials or agencies, even if what was stated by the government official turns out to be false and defamatory"). The privilege "does not require the reporter to resolve the merits of the charges, nor does it require that he present the plaintiff's version of the facts." *Dorsey*, 973 F.2d at 1436; *Glendora v. Gannett Suburban Newsp.,* 608 N.Y.S.2d 239, 240 (2d Dep't 1994) (omitting plaintiff's "side" could not defeat privilege; affirming dismissal); *Padgett v. Sun News,* 278 S.C. 26, 32-33 (1982) ("the fact that the person about whom the article is written protested the publication" does not defeat the privilege, and a publisher is not "required to go behind the allegations contained in the public record").

Moreover, the privilege is limited only by the media's responsibility to "ensur[e] that the 'gist or sting'" of the public record is "accurately conveyed" and "this responsibility carries with it a certain amount of literary license." *Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226, 242

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(1999); *Geiger v. Town of Greece*, 311 F. App'x 413, 417 (2d Cir. 2009) (that article "uses more colorful language than" government document "does not 'suggest more serious conduct than that actually suggested in the official proceeding'"; affirming dismissal, holding plaintiff's assertion that article was "not 'fair and true'" was "plainly meritless"); *Cobin*, 561 F. Supp. 2d at 554-56 (privilege "does not require that the published report be verbatim of the official report" and extends to reports giving a "rough-and-ready summary" of official records; holding "phrase 'beat up his wife' does not deviate from the Police Report in a way that would forfeit [the] privilege's protection. At worst, it is a somewhat crude shorthand") (citations omitted).

Here, each of the passages to which Plaintiff refers in paragraph 25 of his Complaint relies on information that is part of the public record from the police investigation, including police reports and tape recordings of informants, and on statements of individuals summarizing what is in the official documents:

- "Everyone keeps coming up to me and saying it was Murdaugh boys": this line comes directly from the audiotape of Sandy Smith's interview with police. (Dfts. Jt. Appx. Ex. 3B at 9; Ep. 3 at 6:14–6:18 (playing audio) and Ep. 3 Tr. at 7:22-23.)
- "Listening to these statements it is pretty clear, Stephen's death is intertwined with the Murdaughs": These lines are extracted from the interview with Steve Peterson, in which he is describing what he found in examining the public record of the statements in the police investigation. (Ep. 3 at 6:48–6:54 and Ep. 3 Tr. at 8:10-12.) Mr. Peterson's description of the record is accurate; the statements repeatedly reference Buster Murdaugh and other Murdaughs in connection with Smith's death. (*See, e.g.*, Dfts. Jt. Appx. Ex. 7B at 8, 9, 24-25; Dfts. Jt. Appx. 10B at 2-3; Dfts. Jt. Appx. Ex. 8B at 3, 5, 8; Dfts. Jt. Appx. Ex. 4B, Stephanie Smith Interview at 48; Ep. 3 at 6:00–7:02; 8:55–9:08; 9:45–9:52, 10:10–10:26 and Ep. 3 Tr. at 7:13-8:15, 9:25-10:3, 10:16-18, 10:23-11:5.)

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- "Plaintiff was engaged in a romantic relationship with Stephen Smith" and "it was Plaintiff, and maybe two other individuals, who killed Stephen Smith": As an initial matter, these statements are Plaintiff's interpretation of the Series, and do not accurately reflect the statements made in the Series, none of which are presented as conclusive fact. The actual statements in the Series accurately describe the speculative second-hand theories that were relayed to the police and are part of the investigation record, *i.e.*, one of the police informants heard that Plaintiff and Smith had a romantic relationship (Dfts. Jt. Appx. Ex. 6B at 4; Ep. 3 at 6:55–7:02), and another "recently heard" that "it was Buster, and *maybe one or two other people*" and "[t]hey were riding down 601, saw the car on the side of the road, *I guess* saw the boy walking. . . *I guess* they were attempting to mess around with him *or something like that*" (Dfts. Jt. Appx. Ex. 7B at 8, 9; Ep. 3 at 5:18–5:28, 8:55–9:07).
- Depiction of "a young man with red hair carrying a baseball bat": the depiction to which Plaintiff refers actually shows blurry images of a *group* of young men, some of whom appear to be holding bats, walking on the side of a road, then inside a vehicle. None of their faces are shown. This is a visual illustration of the speculation and theories that were rampant in the community, including as reported to and being investigated by the police based on the police informants' second-hand speculation described above. (Dfts. Jt. Appx. Ex. 7B at 8, 9; Ep. 3 at 5:18–5:28, 5:43–6:05, 8:55–9:25, 9:37–9:51.)

The statements and visual illustrations of which Plaintiff complains are at the heart of what the fair report privilege is intended to protect, and cannot be the basis for a claim as a matter of law. *See Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 274 (4th Cir. 2022) (affirming application of fair report to statements that a lawyer told a CNN reporter about what "his client would say in response to the subpoena and summarized" official documents); *Agbapuruonwu*, 821 F. App'x at

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240 ("the message conveyed by the Report's selective coverage of the Magistrate's Notes is no different than that conveyed by the Magistrate's Notes themselves"; affirming dismissal).[17]

2. New York's and/or California's Fair Report Privilege Should Be Applied.

The fair report privilege under both New York and California law differs from South Carolina's privilege in that the privilege in South Carolina is qualified, *i.e.,* it can be defeated on a showing of malice, *see Padgett*, 278 S.C. at 31, whereas the privilege under both California and New York law, codified at Cal. Civ. Code § 47(d) and N.Y. Civ. Rights Law § 74, is "absolute and is not defeated by allegations of malice or bad faith." *Kinsey v. N.Y. Times Co.*, 991 F.3d 171, 176 (2d Cir. 2021) (citation omitted); *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 431 (2016) (both affirming dismissal).

"Because choice of law analysis is issue-specific, different states' laws may apply to different issues in a single case, a principle known as 'depecage.'" *Kozel v. Kozel*, 299 F. Supp. 3d 737, 751 (D.S.C. 2018) (quoting *Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006)). Accordingly, whether a statement is defamatory is distinct from the issue of whether that statement is privileged, and privileges "meant to protect speakers"—including specifically fair report privilege—are governed by the law of where the publisher/speaker is domiciled. *Wilkow v. Forbes, Inc.*, No. 99 C 3477, 2000 WL 631344, at *7 (N.D. Ill. May 15, 2000), *aff'd*, 241 F.3d 552 (7th Cir. 2001) (applying New York law where publisher was located).[18] California's and New York's interest "in fixing the scope of a privilege applicable to conduct taking place within [their] borders is paramount," and the policy reflected in their fair report privileges "would be wholly

[17] "Important here" also, "the fair report privilege proscribes liability for 'any actionable implication that may be contained' in a protected statement." *Agbapuruonwu*, 821 F. App'x at 241 (quoting *Chapin*, 993 F.2d at 1098).

[18] Defendants do not concede that South Carolina law applies to the other substantive issues in the case, but at minimum it does not apply to the fair report privilege issue.

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eviscerated" if it was "evaluated under another state's privilege laws." *Id.*; *Kinsey*, 991 F.3d at 178 ("the Times is domiciled in New York," where the alleged defamatory statement was published, and "New York has strong policy interests in regulating the conduct of its citizens and its media"); *Goguen v. NYP Holdings, Inc.*, 544 P.3d 868, 881 (Mont. 2024) (issue of fair report privilege was governed by law of speaker's domicile). Accordingly, the absolute fair report privilege under New York and California law applies here, and defeats Plaintiff's claims as a matter of law.[19]

3. The First Amendment also Precludes Liability for Truthfully Publishing Information in Official Public Records.

In addition to the fair report privilege, the Series is also protected by a related First Amendment privilege established by *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) and its progeny, holding that the media cannot be exposed to liability "for truthfully publishing information released to the public in official court records." While *Cox* concerned privacy claims and the publication of truthful information in court records, its holding applies with equal measure to any claim arising out of the accurate reporting of information in government records. *See, e.g., Medico v. Time, Inc.*, 643 F.2d 134, 144 (3d Cir. 1981) (applying *Cox* to defamation claims arising out of accurate reporting on confidential FBI reports); *Liberty Lobby, Inc. v. Dow Jones & Co.,*

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[19] Because the fair report privilege is absolute under New York and California law, that ends the inquiry if those laws are applied. However, even if South Carolina's qualified fair report privilege were applied, the protections also would defeat any claim by Plaintiff in any event, as Plaintiff does not adequately allege actual malice. Plaintiff's boilerplate allegation that the "Defendants"—lumping together all eight Defendants without distinction—made the statements with "reckless indifference" (Compl. ¶ 29) is insufficient to overcome the privilege. "This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that *Twombly* and *Iqbal* rejected." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.,* 674 F.3d 369, 378 (4th Cir. 2012) (affirming dismissal, finding that allegations of actual malice were "entirely insufficient"); *Harvey,* 48 F.4th at 274 (holding that "Amended Complaint did not add any new facts regarding the state of mind of the reporters who published the statements" and did not plausibly allege that reporters "subjectively knew the information was false, or that it was subjectively false"). Plaintiff's lack of specificity in pleading actual malice is woefully insufficient to overcome South Carolina's fair report privilege.

Inc., 838 F.2d 1287, 1299 (D.C. Cir. 1988) (affirming dismissal of defamation claim based on accurate report of court proceedings as privileged under *Cox* and the fair report privilege); *Miller v. S.C. Dep't of Prob.*, No. 2:09–967-JFA-RSC, 2009 WL 1348604, at *3 (D.S.C. May 12, 2009) (citing *Cox* and *Medico* in discussing fair report privilege to defamation claim).

Cox emphasized the chilling effect that a rule prohibiting the publication of publicly available information would have on the media: "Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law." 420 U.S. at 496. That policy is directly at odds with Plaintiff's attempt to hold Defendants Netflix and Cinemart liable for accurately reporting on the allegations contained in the official public record of the police investigation. This is particularly true here, where the Series involves reporting on and questions about what law enforcement did or did not do in an investigation, and the potential influence of a powerful family, whose members were for decades entrusted with responsibilities in the local justice system. As the South Carolina Supreme Court has observed, imposing liability in such a case would "make it impossible for a publisher to accurately report a public record without assuming liability for the truth of the allegations contained" therein, which "would amount to imposition of liability without fault contrary to the rule in *Gertz v. Welch*, 418 U.S. 323, 345–350 [1974]." *Padgett*, 278 S.C. at 33.

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E. Plaintiff's Complaint Also Must Be Dismissed Because He Failed to Plead Common Law Malice.

In addition to all of the reasons above, the Complaint must be dismissed because Plaintiff fails to plead any facts demonstrating fault on the part of Defendants, which he must do irrespective of whether he is a public or private figure, as he concedes. (Motion to Remand at 34).[20] Because

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[20] Whether or not Plaintiff is a public figure is an issue that will be taken up at a later stage of the proceedings based on evidence submitted, as Plaintiff himself concedes. (Motion to Remand, at 34.) If Plaintiff were a public figure, he fails to plead actual malice, as discussed *supra*, p. 32, n.19.

this lawsuit involves an issue of public concern, binding South Carolina law establishes that to establish fault, Plaintiff "must plead and prove common law malice." *Erickson v. Jones St. Publ'rs, LLC*, 368 S.C. 444, 465 (2006); *McGlothlin v. Hennelly*, No. 20-1537, 2021 WL 2935372, at *1 (4th Cir. July 13, 2021).

Common law malice "refers to feelings of ill-will, spite, or desire to injure," *Boone*, 556 S.E.2d at 737-38, and if defendant did not "harbor[] serious doubts about the accuracy of his statements" plaintiff "cannot show" defendant "acted with common law malice." *McGlothlin*, 2021 WL 2935372, at *1-2; *see also Floyd v. Knight*, No. 2:21-CV-03288-RMG, 2023 WL 4409037, at *13 (D.S.C. Apr. 27, 2023), *report and recommendation adopted,* 2023 WL 4013520 (D.S.C. June 15, 2023) (no common law malice where evidence defendant "reasonably believed" statements to be true); *Kelley-Moser Consulting, LLC v. Daniels*, No. 3:10-CV-02057-CMC, 2012 WL 554643, at *13 (D.S.C. Feb. 21, 2012) ("considers the motivation of the alleged wrongdoer" and whether defendant demonstrated ""ill will" with "the design to causelessly and wantonly injure") (internal quotation marks omitted).

Similar to the lack of facts to justify a finding of actual malice, the Complaint fails to plead a single factual allegation relating to *any* of the Defendants' states of mind—let alone Netflix or Cinemart specifically. Nor does Plaintiff plead in any fashion that Defendants acted out of "ill will, spite, or desire to injure" him or "harbored serious doubts about the accuracy" of the Series. For this independent reason, the Complaint must be dismissed.

CONCLUSION

Defendants respectfully request that Plaintiff's Complaint be dismissed with prejudice and for such other relief the Court deems just and proper.

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Dated: October 16, 2024

Respectfully submitted,

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