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 OPPOSITION TO PLAINTIFF'S MOTION TO REMAND** 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 submit this memorandum in opposition to the motion of Plaintiff Richard Alexander Murdaugh, Jr. ("Buster Murdaugh" or "Plaintiff") to remand this case to the Hampton County, South Carolina Court of Common Pleas.

INTRODUCTION

Plaintiff's Motion to Remand concedes that he named in his Complaint the only non-diverse and individual defendant, Michael DeWitt ("Mr. DeWitt"), as part of a "'strategy to defeat federal jurisdiction'" by manufacturing a lack of complete diversity. Motion to Remand (ECF No. 41-1), at 8 ("Remand Mot."). The doctrine of fraudulent joinder prohibits a plaintiff from using a non-diverse party to destroy diversity when he cannot state a claim as a matter of law. Contrary to Plaintiff's suggestions, the fraudulent joinder rule does not require establishing "fraud" or that "defeating federal jurisdiction was the sole purpose" of suing Mr. DeWitt. *Id.* at 1. "Fraudulent joinder requires neither fraud nor joinder. It is 'a term of art [which] does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds either that no cause of action is stated against [a] nondiverse defendant, or in fact no cause of action exists.'" *Benson v. Continental Ins. Co.*, 120 F. Supp. 2d 593, 594 (S.D. W. Va. 2000) (quoting *AIDS Counseling and Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990)). Mr. DeWitt was fraudulently joined because there is no viable cause of action against him. Plaintiff's Complaint even *misrepresented* what Mr. DeWitt said in the Netflix Docuseries in an attempt to state a claim.

The Complaint asserts, in undifferentiated shotgun fashion, that all of the Defendants defamed Plaintiff by "falsely accus[ing] the Plaintiff of being involved in the murder of Stephen Smith." (Compl. ¶ 30.) While Netflix and Cinemart submit no such claim will lie based on any statements in the Netflix documentary *Murdaugh Murders: A Southern Scandal* (the "Series" or "Docuseries"), the inquiry on this Motion is limited to the words *spoken by DeWitt only*.

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Accurately transcribed and viewed in context, Mr. DeWitt's comments do not even refer to Plaintiff, much less "falsely accuse [him] of committing murder." *Id.* The First Amendment bars any claim against Mr. DeWitt for his comments in the Netflix Docuseries for four separate reasons, each of which cannot be cured.

- First and foremost, none of Mr. DeWitt's comments in the Netflix Docuseries assert *as fact* that Plaintiff killed Stephen Smith, but rather consist of theories, conjecture and surmise about the various matters being investigated and speculative rumor about the Murdaughs' connections to them. These comments cannot be the basis for a defamation claim under the First Amendment.
- Second, having *conceded* in his Motion to Remand that DeWitt's statements have "facial validity"—that is, are not actionable on their face—Plaintiff' attempts to amend his Complaint by hypothesizing that his claim against Mr. DeWitt relies on defamation "by implication." That theory does not salvage the claim. His claim against Mr. DeWitt is barred by the First Amendment regardless of how Plaintiff frames his claim.
- Third, to the extent Mr. DeWitt asserts any fact in the Netflix Docuseries, it is the literally true fact that speculative rumors connecting the Murdaughs to the Smith case were commonly known and being discussed in the community, as had been reported to law enforcement as part of its investigation into Mr. Smith's death.
- Finally, and yet another independent reason why no claim can lie against Mr. DeWitt, it is axiomatic that a defamatory statement must be "of and concerning" the plaintiff, and none of Mr. DeWitt's comments specifically references Plaintiff.

For these reasons set forth more fully below, no claim exists against Mr. DeWitt as a matter of law, and remand should be denied.

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FACTUAL BACKGROUND

A. The Extensive Media Coverage of the Murdaugh Family's Public Controversies.

Plaintiff brings this lawsuit relating to three separate documentary television series—one published on platforms relating to Discovery, another on HBO, and a third on Netflix—about the constellation of controversies and investigations swirling around a 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 many years now been discussed and debated extensively in Hampton County, South Carolina, as well as widely reported in the local, state, and national news media.[1]

Plaintiff Buster Murdaugh is the son of a central figure in all three series: now-disbarred attorney Richard Alexander ("Alex") Murdaugh, who is currently serving consecutive life sentences for the murders of Plaintiff's mother Maggie and Plaintiff's brother Paul, and who has also pleaded guilty to embezzling client funds.[2] Plaintiff claims that the three independent docuseries defamed him by allegedly implying that Plaintiff was involved in another death in Hampton County: the murder of Stephen Smith, which remains under investigation by the South Carolina Law Enforcement Division ("SLED"). Defendant Mr. DeWitt is a local journalist who

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[1] 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 Docuseries 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, 459 (9th Cir. 1995) (proper to take judicial notice of layoffs at company that were "generally known in Southern California").

[2] *See State v. Murdaugh*, Appellate Case Nos. 2023-000392 and 2024-000576 (S.C. Ct. App.); *United States v. Murdaugh*, No. 9:23-cr-00396-RMG (D.S.C.).

reported on the various Murdaugh-related investigations. Mr. DeWitt was one of many interviewees in the Netflix Docuseries, and portions of that interview are included in Season 1, Episode 3 of the Docuseries. (*See generally* Ep. 3 Transcript, ECF No. 47-3.)[3]

B. Public Records Detailing the Investigation into Stephen Smith's Death Demonstrate that Rumors of a Murdaugh Connection Were Investigated.

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 (ECF No. 51), 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.)

As part of its investigation, Highway Patrol officers conducted official interviews with 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

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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. Plaintiff was provided an opportunity to file objections contesting the accuracy of any aspect of the submitted transcripts (ECF No. 40), and provided none. 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).

[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; Fed. R. Evid. 201(b). The Netflix Defendants, along with Blackfin, Campfire and the Warner Entities, previously submitted a Joint Appendix of these public records and transcripts of the audio recordings in connection with their Motions to Dismiss. (ECF No. 51.) So as not to burden the Court and Plaintiff with duplicative materials, Defendants incorporate by reference in full the previously filed Joint Appendix, referenced herein as Dfts. Jt. Appx.

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 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, several 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-

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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, 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. at 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 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 generally* Series at ECF Nos. 22 and 47.) The Series chronicles law enforcement's investigation of each of these incidents and explores the power of

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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/.

the Murdaugh family patriarchs in Hampton County and the influence the family may have had on each of these criminal investigations.

Episode 3 of Season 1 of the Netflix Docuseries 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 chronicling 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 Highway Patrol officers began hearing of a possible Murdaugh connection in their official interviews, as documented in public law enforcement records shown and played in the Series. 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. The segment also includes interviews with Hampton County residents—including the private investigator for the Smith's, Mr. Peterson; a close friend of Mr. Smith; friends of the Murdaughs; and local news reporters, including Mr. 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.

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[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.

D. Plaintiff's Lawsuit Over the Three 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; against Defendants Blackfin, Inc., Warner Bros. Discovery, Inc., Warner Media Entertainment Pages, Inc., and Campfire Studios Inc. based on their two separate docuseries; and against Mr. DeWitt, as an individual and Gannett, as Mr. DeWitt's employer,[7] based on Mr. DeWitt's comments in the Netflix Docuseries. (Compl. ¶¶ 19, 21, 22, 24, 25, 27, 28.) The Complaint identifies no specific 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."

E. Plaintiff's Purported Claims Against Mr. DeWitt for his Statements in the Docuseries.

Mr. DeWitt is a local journalist whose career is dedicated to chronicling the history of the Lowcountry, in particular Hampton County. As a journalist, he has written for dozens of newspapers and magazines, including the *August Chronicle* and *South Carolina Living*.[8] As an author, he has published, among other works, "[a] local photo history, *Images of America – Hampton County*," which "details the impressive legacy of Hampton County, where Michael was raised." *Id.* And as an editor, he oversees the *Hampton County Guardian*, his 145-year-old hometown newspaper. *Id.* "In 2014, he was named the Hampton County Chamber of Commerce's Person of the Year for his service to the community." *Id.*

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[7] As set forth in Netflix's Notice of Removal (ECF No. 1), Defendant Gannett Co., Inc. appears to have been sued solely as Mr. DeWitt's employer; Gannett is diverse for purposes of jurisdiction.

[8] *See, e.g.*, *Success Stories: Michael M. DeWitt, Jr.*, Univ. of S. Carolina Salkehatchie, https://sc.edu/about/system_and_campuses/salkehatchie/about/success_stories/michael_dewitt/index.php. The Court can properly consider information on a government website. *See, e.g.*, *Hilton v. Gossard*, 702 F. Supp. 3d 425, 430 (D.S.C. 2023).

As a local journalist who reported on the various Murdaugh-related scandals, Mr. DeWitt was one of many interviewees for the Netflix series. *See generally* ECF No. 1-5. In Paragraph 28 of the Complaint, Plaintiff challenges four specific statements Mr. DeWitt made in Season 1, Episode 3 of the Netflix series (the "DeWitt Challenged Statements"), though Plaintiff substantively misquotes Mr. DeWitt's comments.

Because Plaintiff disputes that he has done so, *see* Remand Mot. at 7 (ECF No. 41-1) ("Mr. Murdaugh's Complaint does not misquote DeWitt"), and for the Court's convenience, the following table illustrates the difference between the *actual* statements as they appear in the Netflix Docuseries—the transcripts of which Plaintiff has not contested—and the same statements as they are misquoted, incompletely quoted and/or taken out of context in Paragraph 28 of the Complaint:

Challenged Statement	**DeWitt Statement in the Netflix Docuseries**	**DeWitt Statement in the Complaint**
The "Possible Connection" Statement	"Within one month of [Smith's] body being found, we were hearing all these rumors about a possible Murdaugh connection." *See* Ep. 3 Tr. at 11:14-16.	We were hearing all of these rumors about a possible connection.
The "Good Rumor" Statement	"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." *See* Ep. 3 Tr. at 11:16-19.	There is some truth to it.

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Challenged Statement	DeWitt Statement in the Netflix Docuseries	DeWitt Statement in the Complaint
The "Piggly-Wiggly" Statement	"[W]e 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 a 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 -- to do it. I mean, we did everything but put the Murdaugh name in -- in the story, but the story did no good. Nobody ever came forward." *See* Ep. 3 Tr. at 11:23 – 12:7.	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.

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Challenged Statement	DeWitt Statement in the Netflix Docuseries	DeWitt Statement in the Complaint
The "Bad Taste" Statement	"I began to have a bad taste in my mouth toward members of the Murdaugh family, just like a lot of people in the community did. And our coroner, Angela Topper, she goes back looking through Hampton County coroner records, and she stood up and pointed out there was something fishy about 2018, Gloria Satterfield, another case that went under the radar. She's saying that this death was ruled natural, even though it was a trip and fall. She's seeing that there was no autopsy ever done, so she wrote a letter to SLED and asked SLED to help her investigate this. At the same time, SLED has got reason to investigate Alex's financial crimes. Eventually, the Satterfield family were reading articles all over the state of South Carolina about how there was a death settlement. Her sons didn't know anything about a settlement, and they looked at each other and said, "I didn't get any money. Did you get any money?" *See* Ep. 3 Tr. at 27:7-23.	I began to have a bad taste in my mouth about the members of the Murdaugh family as many people in the community did.

The Complaint asserts that these four DeWitt Challenged Statements—referred to here as (1) the "Possible Connection" Statement; (2) the "Good Rumor" Statement; (3) the "Piggly-Wiggly" Statement; and (4) the "Bad Taste" Statement—"falsely accus[e] the Plaintiff of being involved in the murder of Stephen Smith." (Compl. ¶ 28.)

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ARGUMENT

Plaintiff's joinder of Mr. DeWitt was fraudulent because no viable cause of action for defamation exists as a matter of law based on *Mr. DeWitt's actual statements* in the Netflix Docuseries. Plaintiff's Motion to Remand goes on for pages about the standard for fraudulent joinder being "more favorable to the plaintiff" than the standard on a Rule 12(b)(6) motion. (*See* Remand Mot. at 8-10.) That is irrelevant here. The First Amendment bars Plaintiff's defamation claim against Mr. DeWitt based on Mr. DeWitt's words, regardless of which standard applies. Because no claim exists as a matter of law, there is no "glimmer of hope" Plaintiff will "prevail" on such a claim. *Id.* at 9; *see* Defs. Notice of Removal at ¶ 37 citing, *e.g.*, *Boladian v. UMG Recordings,* 123 F. App'x 165, 167 (6th Cir. 2005) (denying remand); *AIDS Counseling and Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990) (where "no cause of action is stated against the nondiverse defendant, or *in fact* no cause of action exists" joinder is fraudulent; affirming finding that attempted joinder was fraudulent) (emphasis in original). Plaintiff's inability to state a claim for defamation consistent with the First Amendment is not a defect that can be cured by amendment—no amount of additional facts or deference to Plaintiff's pleading would change the actual statements Mr. DeWitt made or the constitutional bars to a defamation claim based on them.[9]

[9] Indeed, that is why when courts find statements are not actionable as a matter of law, they dismiss defamation claims with prejudice. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (dismissal with prejudice appropriate where "amendment would be futile"); *see also, e.g., Parekh v. CBS Corp.*, 820 F. App'x 827, 834 (11th Cir. 2020) ("leave to amend would be futile, because no amendment could correct the deficiency that the statements in the news report are not defamatory as a matter of law"); *Partington v. Bugliosi*, 56 F.3d 1147, 1162 (9th Cir. 1995) ("district court did not err in denying [plaintiff's] request for leave to amend his complaint" where "the district court correctly concluded that, because [plaintiff] had failed to state a claim for defamation or false light" as a matter of law, "amendment would be futile"). In those cases, as here, plaintiffs lacked even a glimmer of hope because their defamation claims failed as a matter of law.

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) (citing *Snyder v. Phelps*, 580 F.3d 206, 217 (4th Cir. 2009)). No colorable defamation claim that comports with the First Amendment can be premised on Mr. DeWitt's comments for the reasons discussed below. As the courts have recognized, removal is especially appropriate in defamation cases, which "often concern media criticism of local citizens, necessitating a forum free of local prejudice. Therefore, the underlying goals of diversity and removal jurisdiction strongly support the retention of jurisdiction in cases involving the First Amendment." Removal Not. ¶ 41 (quoting *Med. Lab. Mgmt. Consultants v. ABC*, 931 F. Supp. 1487, 1491 (D. Ariz. 1996)).

Plaintiff has no answer to this authority. Nor is there any basis for his suggestion (Remand Mot. at n. 1) that the Fourth Circuit—which consistently emphasizes First Amendment liberties in disposing of flawed defamation cases against the media as a matter of law—would hold otherwise. *See, e.g.*, *Harvey v. CNN*, 48 F.4th 257 (4th Cir. 2022); *Va. Citizens Def. League v. Couric*, 910 F.3d 780 (4th Cir. 2018); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) (all affirming dismissal of defamation claims under fundamental First Amendment law).

A. Mr. Dewitt Was Fraudulently Joined Because None of His Actual Statements Assert As Fact That Plaintiff Killed Stephen Smith, Barring Any Claim Under the First Amendment as a Matter of Law.

None of Mr. DeWitt's comments assert as fact that Plaintiff killed Stephen Smith. As such, the First Amendment bars the claims against him.

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The First Amendment protects speech that does not assert a fact 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"); *Biospherics v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998) (affirming dismissal of libel claim "[b]ecause the challenged statements are constitutionally protected"). 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.'" *Id*. 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 the reader that what is said is opinion, and not fact." *Levin v. McPhee,* 119 F.3d 189, 197 (2d Cir. 1997).

Looking at each of the four DeWitt Challenged Statements individually, none are properly considered assertions of fact rather than his constitutionally protected opinions.

1. The "Possible Connection" Statement. Mr. DeWitt's comment—"Within one month of [Smith's] body being found, we were hearing all these rumors about a possible Murdaugh connection"—is indeterminate in nature and a quintessential example of nonactionable "theory, conjecture or surmise," not verifiable fact. It would be unconstitutional to find that Mr. DeWitt was offering ***any*** statement of fact about the actual circumstances of Stephen Smith's death, let alone stating ***as a fact*** that Plaintiff killed Mr. Smith. In the controlling *Biospherics* precedent, the Fourth Circuit found "subjective and speculative supposition" in a publication cannot be "reasonably interpreted to declare or imply untrue facts" and, therefore, cannot state a claim for defamation. 151 F.3d at 184. The court specifically distinguished *Milkovich*, where an author

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stated he was "in a unique position of being the only non-involved party to observe" the events discussed, with statements like Mr. DeWitt's here which "contain[] no claim to first-hand knowledge of facts." *Id*. (citing *Milkovich v. Lorain Jour.*, 497 U.S. 1, 5-6 n.2 (1990)). *See also 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). Mr. DeWitt never states he has personal knowledge. Moreover, DeWitt immediately goes on to explain in the Good Rumor Statement that he had ***not formed*** a conclusion as to whether rumors of a "possible Murdaugh connection" were true or not. (Ep. 3 Tr. at 11:14-19.)

Plaintiff's motion does not address the principles discussed in *Biospherics* and the other controlling and persuasive authorities discussed in the Removal Notice and above. Instead, Plaintiff cites *Milkovich* for the proposition that "opinions may imply an assertion of objective fact". (Remand Mot. at 17.) But Plaintiff ignores that in applying *Milkovich*, the Fourth Circuit held that 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. Indeed, Mr. DeWitt's comments in the "Possible Connection" Statement, and elsewhere, are exactly the opposite of the example Plaintiff gives: "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth[.]" (Remand Mot. at 18 (citing *Milkovich*).) Mr. DeWitt, by contrast, does not state that it is his belief that Plaintiff is Mr. Smith's killer, and the context of his comments undermines the notion that he was "stating facts of which he had personal knowledge." *Woodward*, 932 F. Supp. at 726-27; *see also Biospherics*, 151 F.3d at 184; *Levin v. McPhee*, 119 F.3d at 197 (affirming dismissal of

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defamation claim complaining of book reporting comments by individuals who had "their own personal theories" regarding mysterious death implicating plaintiff but had no "first-hand knowledge of what happened"; "a reasonable reader would understand that any allegations of murder, especially any implicating Levin, are nothing more than conjecture and rumor").

2. The "Good Rumor" Statement. The Court need not credit Plaintiff's misquotation of the "Good Rumor" statement in the Complaint, as what governs the legal analysis is the actual language spoken in the Netflix Docuseries: "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." *See* Ep. 3. at 10:51–11:57. The "Good Rumor" statement is fundamentally a non-actionable expression of opinion rather than a provable assertion of fact. It expresses Mr. DeWitt's subjective views about the nature of gossip and how a practicing journalist weighs the rumors he hears—namely, that a compelling and captivating narrative may spread widely within a community irrespective of its truth. Mr. DeWitt is offering his observations and does not state as fact that "there's some truth" to the rumor of a possible Murdaugh connection to Mr. Smith's death. There is nothing "objectively verifiable" about the "Good Rumor" statement, and "a statement not subject to objective verification is not likely to assert actual facts." *Snyder v. Phelps*, 580 F.3d 206, 219 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011). Again, the First Amendment therefore bars any defamation claim premised on the Good Rumor Statement as a matter of law.

3. The "Piggly-Wiggly" Statement. To begin, Mr. DeWitt's observations in the "Piggly-Wiggly" statement—that he and his news organization "feared" lawsuits from the "Murdaugh" family if they put their name in a story—is an expression of emotion and opinion, not a verifiable fact. Like Mr. DeWitt's "Possible Connection" Statement, it is plain from the framing and context of Mr. DeWitt's comments that he was discussing second-hand rumors swirling in the community at the time (stating that "a well-known family was rumored to be involved")—***not*** offering ***any***

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statement of fact about Stephen Smith's death based on personal knowledge, let alone stating as a fact that Plaintiff killed Mr. Smith. *See Biospherics*, 151 F.3d at 184; *Levin*, 119 F.3d at 197.

4. The "Bad Taste" Statement. Mr. DeWitt's "Bad Taste" comment about the Murdaugh family is precisely the type of subjective, unverifiable observation that courts have consistently found to be constitutionally protected opinion. *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); *see also, e.g., Trump v. Chicago Trib. Co.*, 616 F. Supp. 1434, 1438 (S.D.N.Y. 1985) ("The words of the Latin proverb are particularly appropriate here: De gustibus non est disputandum, there is no disputing about tastes"). Such statements are simply nonactionable as a matter of law. Moreover, the "Bad Taste" statement is contained within his discussion of the "Gloria Satterfield" investigation, which Plaintiff does not allege as having anything to do with the allegedly defamatory nature of any of Mr. DeWitt's statements.

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In sum, all of Plaintiff's claims based on Mr. DeWitt's statements are barred by the First Amendment as a matter of law.

B. Plaintiff's Attempt to Amend His Complaint to Add a Defamation "By Implication" Claim Does Not Give His Claim as to Mr. DeWitt a Glimmer of Hope.

While the Complaint fails to state whether Plaintiff is alleging defamation *per se* or defamation by implication, the defamation claims against Mr. DeWitt are barred under either theory because the statements are nonactionable opinion for the reasons stated above. That is enough to end the inquiry because Plaintiff does not have even a glimmer of hope of prevailing on

those claims in the face of the First Amendment's bar. But even beyond that, Plaintiff's claims against Mr. DeWitt fundamentally fail for additional reasons.

Plaintiff asserts that Mr. DeWitt was "accusing the Plaintiff of being involved in the murder of Stephen Smith." (Compl. ¶ 28.) Because none of the DeWitt Challenged Statements actually say that, however, Plaintiff now purports to assert an unpleaded claim for defamation-by-implication in his Motion to Remand. (Remand Mot. at 12-17.) Indeed, Plaintiff appears to *concede* in his Motion to Remand that DeWitt's statements have "facial validity"—that is, are not actionable on their face—so he hypothesizes a claim for defamation by implication, positing "potential defamatory implications within the context of other statements and extrinsic facts." (Remand Mot. at 14.)

Labeling his claims "defamation by implication" does not give Plaintiff's purported claim against Mr. DeWitt with a "glimmer of hope" of success. As the Fourth Circuit has emphasized, "because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir. 1993). The Fourth Circuit thus requires such claims to survive a two-prong test: First, the "defamatory implication must be present in the plain and natural meaning of the words used," which is to say the challenged statement must "be *reasonably* read to impart the false innuendo." *Id.* at 1092-93 (emphasis added). Second, the challenged language "must also affirmatively suggest that the author *intends* or *endorses* the inference." *Id.* (emphasis added). Plaintiff cannot meet either requirement.[10]

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[10] It is well-settled that the *Chapin* test presents a question of law for the Court to determine as a threshold matter. *See, e.g.*, *Malone v. WP Co., LLC*, 2023 WL 6447311, at *7 (W.D. Va. Sept. 29, 2023) (applying *Chapin* test and dismissing defamation claim on preliminary motion); *Harvey v. CNN,* 520 F. Supp. 3d 693, 716 (D. Md. 2021) (same), *aff'd*, 48 F.4th 257 (4th Cir. 2022); *Lokhova v. Halper*, 441 F. Supp. 3d 238, 262 (E.D. Va. 2020) (same), *aff'd*, 995 F.3d 134 (4th Cir. 2021).

Plaintiff concedes that any purported implication has to be reasonable. (Remand Mot. at 13.) And here, it would be *unreasonable* to view Mr. DeWitt's remarks as implying that Plaintiff was, in fact, Mr. Smith's killer. This is made clear by the way Plaintiff has to contort the language of the Netflix Docuseries in arguing his claim. Plaintiff's theory of defamation by implication relies on arguing that statements made by individuals *other than* Mr. DeWitt—the "context" surrounding Mr. DeWitt's statements, but not his statements themselves—imbues Mr. DeWitt's statements with an alleged defamatory meaning. But Mr. DeWitt cannot be held liable for any statements other than his own. Mr. DeWitt is not responsible for what other speakers said or the "juxtapositions" or "graphics" in the Netflix Docuseries. While Defendants firmly believe no claim exists with respect to the Netflix Docuseries, in any part or as a whole, the question presented for fraudulent joinder is whether Plaintiff can state a viable, individual claim *against Mr. DeWitt* for *Mr. DeWitt's own remarks*. Plaintiff's reliance on purported statements in the Series that Mr. DeWitt *did not make* (*see* Remand Mot. at 3, 7) cannot establish a cause of action against Mr. DeWitt.

Considering Mr. DeWitt's own statements, he does not assert or imply a conclusion as to who, in fact, murdered Mr. Smith. His comments about a "possible" and tenuous connection of an indeterminate nature is the definition of nonactionable "theory, conjecture or surmise," not a verifiable assertion of guilt, and cannot be the basis for a claim under the First Amendment. *Biospherics*, 151 F.3d at 186. The defamation by implication claim in *Chapin* alleged that an article insinuated plaintiff's charity was cheating and defrauding the public; the Fourth Circuit affirmed dismissal because the article was "a story constructed around questions, not conclusions" and "the mere raising of questions is, without more, insufficient to sustain a defamation suit in these circumstances." *Id.* at 1098. That holding is dispositive here: it is patently unreasonable to interpret Mr. DeWitt's remarks as "express[ing] the libelous meanings ascribed to [them] by the plaintiffs" because Mr. DeWitt "does not speak in certainties" and his "words cannot be perverted to 'make

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that certain which is in fact uncertain.'" 993 F.2d at 1091, 1096 (citations omitted). Indeed, Mr. DeWitt immediately goes on to explain in the "Good Rumor" statement that he had *not* formed a conclusion as to whether the rumors of a "possible Murdaugh connection" were true, which directly refutes Plaintiff's alleged implication. The "Piggly-Wiggly" statement likewise negates Plaintiff's claimed implication because it notes that no one has come forward to link Mr. Smith's death to the Murdaugh family—let alone to Plaintiff specifically—and the Smith family was still looking for "answers."[11] *See, e.g., Deripaska v. Assoc. Press,* 282 F. Supp. 3d 133, 148 (D.D.C. 2017) (defamation-by-implication fails where challenged report includes language "that negate[s] the implication[] that [Plaintiff] conjures up").

As to the second prong of the *Chapin* test, nothing about the DeWitt Challenged Statements "affirmatively suggest[s]" that Mr. DeWitt "intend[ed] or endorse[d]" the alleged implication that Plaintiff had in fact murdered Mr. Smith. 993 F.2d at 1092-93. Plaintiff argues that "DeWitt juxtaposes the fact that as a reporter he has learned that if you hear the same rumor from different groups of people wherever you go that there may be some truth to it with subsequent statements asserting rumors of a connection between Mr. Murdaugh's family and the death of Stephen Smith." (Remand Mot. at 16.) That is demonstrably inconsistent with Mr. DeWitt's statements on their face. Mr. DeWitt's comments, consistent with the rest of the Netflix Docuseries, are explicitly couched in terms of speculation ("possible" connection; rumors may or may not have "some truth to them") about an unsolved case ("nobody came forward"; "we just want answers"). His use of

[11] Plaintiff argues that Mr. DeWitt "implies that his hope was that the story would result in something being done by law enforcement, presumably with regards to a member or members of the Murdaugh family." (Remand Mot. at 17.) Again, Mr. DeWitt reached no conclusion about the Murdaughs' involvement; his "hope," like Sandy Smith's was to find answers: "If you know something, please come tell us. We just want answers. We want closure." (Ep. 3 at 11:19–11:23 and Ep. 3 Tr. at 11:22-23.) *Deripaska,* 282 F. Supp. 3d at 147 ("This expresses a desire for more information, rather than a statement 'laden with factual content,'" and "whether Deripaska's business deals are worth investigating is not a verifiable statement of fact").

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terms expressing the lack of any knowledge of who was in fact responsible for Mr. Smith's death undermines the claimed defamatory implication that Plaintiff had, in fact, murdered Mr. Smith.

Plaintiff seems to think that even though, as shown above, none of the DeWitt Challenged Statements is actionable as a matter of law, he can end-run the First Amendment's limitations by simply asserting that in combination or "juxtaposition," Mr. DeWitt's remarks imply something different than what he actually said. (*E.g.,* Remand Mot. at 12, 13.) That is not the law. *Whether looked at singularly or collectively, and whether labeled as defamation per se or defamation by implication, Mr. DeWitt's comments do not assert as fact that Plaintiff killed Stephen Smith*. As such, they cannot be the basis for a defamation claim consistent with the First Amendment.

South Carolina state and federal courts, exercising their gatekeeper role, have repeatedly dismissed conclusory defamation by implication claims like Plaintiff's. For example, Plaintiff cites *Fountain v. First Reliance Bank*, 398 S.C. 434 (2012), but there, the statement that bank would not make a loan so long as plaintiff was involved in the venture was, as here, "a true statement," and the court rejected as a matter of law the attempt to base a claim on the purported further "insinuat[ion] that he was an unfit businessman." *Id.* at 442. And in *Toussaint v. Palmetto Health*, No. 3:15-02778-MGL, 2017 WL 1950955 (D.S.C. May 10, 2017) this Court held it was "objectively unreasonable" as matter of law to draw the defamatory implication that plaintiff "abandoned his patients" from a statement that he "will no longer practice" with defendants.[12]

[12] *See also, e.g., 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); *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"). *See generally Agbapuruonwu v. NBC Subsidiary (WRC-TV)*, 821 F. App'x 234, 239 (4th Cir. 2020) (whether statements are "reasonably capable of conveying a defamatory implication [is a] matter[ ] of law to be decided on a motion to dismiss"; affirming dismissal).

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Like the documentary of which they are part, Mr. DeWitt's Challenged Statements emphasize that Mr. Smith's death is an unsolved mystery and truthfully relate the rumors and speculation that were circulated in the community and reported to law enforcement. Those rumors reflected multiple mentions of members of the Murdaugh family, including Plaintiff, and whether Plaintiff's powerful and well-connected family influenced the investigation. Nothing about that is defamatory—and under the First Amendment, it could not be.

C. To the Extent Mr. DeWitt Makes Any Factual Statements, They Are Truthful and Cannot Be the Basis for Any Defamation Claim As A Matter of Law.

Falsity is a required element of a defamation claim and Plaintiff's constitutional burden because 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)).[13] As discussed above, there can be no falsity without an assertion of fact, and Mr. DeWitt simply does not assert as a fact that Plaintiff killed Stephen Smith or was involved in his murder. To the extent Mr. DeWitt states any fact about the death of Mr. Smith in the DeWitt Challenged Statements, 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. Plaintiff does not and cannot deny that his name was mentioned in connection with Mr. Smith's death and reported to the authorities. As a matter of law Plaintiff cannot state a claim based on truthful statements. *Harvey v. CNN*, 48 F.4th 257, 270 (4th Cir. 2022) (affirming dismissal for failure to plead falsity in matter of public concern); *Tannerite Sports, LLC*

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[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). The separate issue of whether Plaintiff is a "public figure" does not matter to this issue, because there is no question the speech here is of "public concern" and as a result Plaintiff must plead and prove falsity. *Id.*

v. NBCUniversal News Grp., 864 F.3d 236, 247 (2d Cir. 2017) ("a plaintiff must plead facts demonstrating falsity to prevail on a motion to dismiss the complaint in federal court").

Plaintiff does not and cannot carry his falsity burden as to the "Possible Connection" statement, because records of which the Court may take judicial notice conclusively establish 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. Official records of 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 inexplicably dropped. *See* Dfts' Jt. Appx., ECF No. 51. Then 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 family (Plaintiff's mother and brother), crimes for which a third member of the family—Plaintiff's father—ultimately was charged and convicted. *See supra*, p. 6.[14]

Because it is beyond dispute that a "connection" *does indeed exist* between the Murdaugh family and the investigation of Mr. Smith's murder, Plaintiff cannot carry his burden of establishing that it was materially false for Mr. DeWitt to state that he had heard "rumors about a possible Murdaugh connection" to Mr. Smith's murder. Indeed, Plaintiff concedes that it "matters little"—which is to say, cannot be defamatory—that "rumors concerning Mr. Murdaugh, his family, and Mr. Smith abounded in Hampton County"; that "DeWitt has actually found in his experience as a reporter

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[14] Plaintiff admits "[t]here was rampant, widespread speculation that Mr. Smith's death may not have been an accident at the time of DeWitt's publications"—conveniently omitting the undeniable fact that this widespread speculation *connected his family* to that suspicious death. (Remand Mot. at 16.)

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that pervasive rumors are often true" and "DeWitt had in fact reported that a prominent local family was rumored to be involved in Mr. Smith's death." (Remand Mot. at 13.)

Likewise, Plaintiff cannot establish that the "Piggly-Wiggly" Statement is materially false. Indeed, given this lawsuit, Plaintiff can hardly deny Mr. DeWitt's assertion that putting the Murdaugh name in print increases the risk of drawing a libel claim. And again, as discussed above and as records of which this Court may take judicial notice conclusively show, a prominent, well-known family was rumored to be involved in Mr. Smith's death.

D. The First Amendment Bars Plaintiff's Reliance on the General Common Law Rule Regarding Repetition of a Libel.

Plaintiff's motion recites at length the general rule that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." (*See* Remand Mot. at 16 (quoting Restatement (Second) of Torts § 578).) Plaintiff's argument seems to be that Mr. DeWitt defamed Plaintiff by republishing allegedly defamatory matter that other people said publicly and to police. But the common law republication rule Plaintiff cites does not apply here, and does not give his claim a "glimmer of hope."

First, as noted, the common law of defamation is qualified by the First Amendment, *see, e.g., Rollins Ranches*, 2021 WL 5355650, at *4; *MRR Southern, LLC v. Citizens for Marlboro Cnty.*, No. 4:09-03102-JMC, 2012 U.S. Dist. LEXIS 40650, at *8-9 n.2 (D.S.C. Mar. 26, 2012) (First Amendment "invalidate[s] some of the common law defamation requirements"), and as a matter of law, the statements at issue are nonactionable protected speech under the Fourth Circuit's (and other courts') interpretation of *Milkovich*. *See supra* Section A. Thus, in *Levin v. McPhee, supra*, the district court cited § 578 for the general rule that "the defamatory meaning of the statement is not changed by its attribution to others," but held that the "layers of attribution and the use of the phrase 'some people think' are important in determining whether the statement,

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although actionable at common law, is a constitutionally protected expression of opinion." 917 F. Supp. 230, 237 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 189 (2d Cir. 1997) (affirming dismissal on opinion grounds).

Likewise, *Gray v. St. Martin's Press*, 221 F.3d 243 (1st Cir. 2000) held a statement attributed to a former CIA official implying that the plaintiff attorney agreed to spy on clients at the behest of the CIA director—even if a potentially defamatory republication under Restatement section 578—was not actionable. Citing *Levin*, the court held the test "is whether the statement is properly understood as purely speculation or, alternatively, implies that the speaker or writer has concrete facts that confirm or underpin the truth of the speculation . . . The former is protected as opinion; the latter is taken as an indirect assertion of truth." *Id.* at 250 (affirming dismissal on summary judgment where official's "own view is couched as a belief as to what 'may have' happened . . . and where the underlying facts are disclosed, it becomes even more clear that the writer or publisher is merely speculating ('if so') about the inference"). On their face, Mr. DeWitt's comments are explicitly labeled and properly understood as pure speculation based on rumors about what may have happened; he *doesn't know* if it's "it's either a very good rumor, or there's some truth to it."[15] In other words, even if *arguendo*, the rumors were false and defamatory, liability would not attach to Mr. DeWitt's explanation of those rumors.

Second, while acknowledging the common law doctrine of republication reflected in § 578, the Fourth Circuit in *Chapin* held that "[l]iteral adherence to this rule would sap the vigor of public debate, and could frighten the press from even reporting to the public the few debates that might occur," and "[f]or these reasons, the republication rule has been severely limited by the courts,"

[15] Plaintiff acknowledges that Mr. DeWitt "mak[es] sure to state that the basis for his statements is rumor" (Remand Mot. at 17)—***not*** "facts of which he had personal knowledge." *Woodward,* 932 F. Supp. at 727; *Biospherics*, 151 F.3d at 184.

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including under the fair report privilege. *Chapin,* 993 F.2d at 1096-97 (newspaper could not be held liable for republishing Congressman's arguably defamatory statement, in reference to plaintiff, that "[n]o one should line their pockets by playing on the sentiments of the holiday season").

"The noble guarantee against laws abridging the freedom of the press, enshrined in the First Amendment, would be incongruous indeed," if reporters could be punished "for accurately reporting allegations of wrongdoing in a matter of public interest." *Reeves v. Am. Broad. Cos.*, 719 F.2d 602, 603-604 (2d Cir. 1983) (affirming dismissal of defamation claim based on news report of charges made in secret grand jury and other proceedings in which "[n]o formal charges were ever filed"). "[C]ases interpreting the Constitution provide additional support for our conclusions." *Id.* at 607 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)); *see also MRR Southern*, 2012 U.S. Dist. LEXIS 40650, at *8-9 n.2 (First Amendment's limitations on state defamation law "are necessary because '[t]he protection of the public requires not merely discussion, but information . . . . Whatever is added to the field of libel is taken from the field of public debate'") (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256, 272 (1964)).

Plaintiff's assertions that Mr. DeWitt's comments "serve the sole purpose of amplifying rumor" (Remand Mot. at 8), "do not concern any official acts", and were "merely republications of rumors he had heard in the Hampton County community" (*id.* at 25) grossly mischaracterize Mr. DeWitt's statements and the context in which they were made. Mr. DeWitt truthfully recounted the indisputable historical fact that rumors and allegations connected Plaintiff's family to a crime that was the subject of a law enforcement investigation. Mr. DeWitt and the other Defendants could not report on the controversy over why the investigation was dropped without discussing the Murdaugh connection that was common knowledge in the county. Even without the benefit of the fair report privilege, that cannot be the basis for suit. "Investigations are often important governmental occurrences. Permitting lawsuits for accurate reports of such events would

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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, independent of the fair report privilege, 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*, 903 F.2d at 1004. 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 and newsworthy events.[16]

The same principle controls here. Mr. DeWitt cannot be held liable for accurately reporting on the serious questions that were raised about law enforcement's investigation of Mr. Smith's death in light of the connection suspected by some in law enforcement and the community to Plaintiff

[16] *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" 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]").

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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,* 993 F.2d at 1096.

E. Mr. DeWitt's Statements Do Not Reference Plaintiff and Do Not Impute The Claimed Defamation Of and Concerning Plaintiff.

Plaintiff concedes, as he must, that he is not mentioned by name or reference in the DeWitt Challenged Statements. It is axiomatic that a defamatory statement must be specifically "of and concerning" the Plaintiff to be actionable. *See, e.g., Burns v. Gardner*, 328 S.C. 608, 615 (Ct. App. 1997) ("plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred"); *AIDS Counseling & Testing Centers*, 903 F.2d at 1005 ("Common sense, as well as the law of defamation, dictates that, in order for a claim for defamation to arise, a publication must refer to the individual who seeks to sue on the publication").

Plaintiff attempts to salvage his claim by arguing that the "of and concerning" requirement is met because the Netflix Docuseries "juxtaposes" Mr. DeWitt's comments with other mentions of Plaintiff by name in public records from law enforcement's investigation, high school photos of Plaintiff, and imagery of "red hair" individuals. (Remand Mot. at 3.) Again, Plaintiff's argument concedes that Mr. DeWitt's statements *on their own* are not "of and concerning" him. Plaintiff's admission that he cannot state a claim against Mr. DeWitt *as an individual defendant* because his theory of the law depends upon the statements of others surrounding Mr. DeWitt's statements is dispositive and fatal of Plaintiff's Motion to Remand. The lack of any viable claim against Mr. DeWitt for the *words spoken by Mr. DeWitt*—none of which mention Plaintiff—defeats Plaintiff's "of and concerning" argument.

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While acknowledging "the general rule is that an individual member of a group may not maintain an action for defamation of the group," Plaintiff invokes an exception for "small group" defamation. (Remand Mot. at 18-19.) That exception changes nothing; the claimed defamation is that Plaintiff killed Stephen Smith and none of Mr. DeWitt's comments about the Murdaugh family generally make that assertion. As the Fourth Circuit observed in *AIDS Counseling & Testing Centers*, affirming the district court's holding that a news broadcast critical of a business organization could not be the basis for a defamation claim by its individual investors, the complained-of publication must "contain some 'special application of the defamatory matter' to the individual." 903 F.2d at 1005 (citations omitted). Because the DeWitt Challenged Statements about the Murdaugh family writ large have no "special application" to Plaintiff, and certainly not of the specific "*defamatory matter*" he alleges—*i.e.*, that he killed Stephen Smith—his defamation claim against Mr. DeWitt simply fails as a matter of law.[17]

For example, the "Bad Taste" statement ("I began to have a bad taste in my mouth toward members of the Murdaugh family, just like a lot of people in the community did") in no way refers to Plaintiff ***or*** to the Stephen Smith murder. Reviewing this statement in full context reveals Mr. DeWitt is speaking about the reputation of the Murdaugh family in the community—*specifically* as a result of the behavior of *Alex* Murdaugh, the infamous disgraced lawyer whose actions are central to the Series, and Gloria Satterfield's death. *See* Ep. 3 at 31:34–32:44 and Ep. 3 Tr. at 27:7-23 (Mr. DeWitt discussing coroner asking SLED to investigate the Satterfield death, and "[a]t the same time, SLED has got reason to investigate Alex's financial crimes"). The context

[17] Plaintiff incorrectly asserts that the "of and concerning" element is *ipso facto* "a jury issue" (Remand Mot. at 19), but it is for this Court to determine, *as a matter of law,* whether Plaintiff has satisfied this element of his claim. *See, e.g., AIDS Counseling & Testing Centers*, 903 F.2d at 1005; *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001) (whether statement is "of and concerning" the plaintiff "should ordinarily be resolved at the pleading stage"); *Burns*, 328 S.C. at 615-16 (affirming dismissal).

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unequivocally undermines any possibility that the "Bad Taste" statement "may be reasonably understood to refer to" Plaintiff or Mr. Smith. (Remand Mot. at 19.) The "circumstances" here do *not* "reasonably give rise to the conclusion that there is particular reference to [a] member" of the group other than Alex Murdaugh. *Id.* at 20 (quoting Restatement (Second) of Torts § 564A).

The other three DeWitt Challenged Statements, even if discussing the topic of Mr. Smith's death and the "Possible Connection" of the Murdaugh family to the investigation thereof ("We were hearing all of these rumors about a possible Murdaugh connection" and "We said a prominent well-known family was rumored to be involved") or Mr. DeWitt's views on reporting rumors ("Good Rumor") or the possibility that the newspaper would face lawsuits if the Murdaugh name appeared in the article ("Piggly-Wiggly"), are not of and concerning Plaintiff. Commenting on the community's speculation about some unspecified involvement of the Murdaugh family, *and the influence and litigiousness of that family generally,* is not specific to Plaintiff, much less in the defamatory way he alleges. *See Stokes*, 441 S.C. at 580-81 (noting that alleged defamatory statements "did not reference Stokes's name and did not communicate any false message about him as an individual," and instead referenced "the Department," "they," and "them"; affirming dismissal as matter of law on summary judgment).[18] Just as important, these generalized, truthful observations cannot be the basis for the specific defamation Plaintiff alleges—that Plaintiff killed Mr. Smith.

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[18] *Compare Holtzscheiter v. Thomson Newsp., Inc.*, 332 S.C. 502 (1998), the main "small group" defamation case on which Plaintiff relies; there, newspaper said of plaintiff, whose daughter was murdered, that "there simply was no family support to encourage [the daughter] to continue her education." In contrast to the unspecific musings about "the Murdaughs," the statements about "family" in *Holtzscheiter* directly implicated the mother, who was responsible for the deceased daughter's support. This case is governed by authority like *Stokes* and *AIDS Counseling* where the statements had no such direct and special application to Plaintiff in the defamatory sense he alleges.

Moreover, Plaintiff's attempt to use a "small group" defamation theory to forge a particularized personal defamation out of general commentary critical of his powerful family vividly illustrates why the "of and concerning" rule has First Amendment implications.

At its core, "[t]he 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society." *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1044 (1986). Plaintiff is "required to show specific reference" to him. *Id.* at 1042. The reason is clear: "[T]he absence of the 'of and concerning' requirement 'could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues, or groups, which are in the public eye.'" *Id.* at 1044. That public policy exists precisely for lawsuits like this one. Under the First Amendment, Plaintiff cannot ask the Court, in the guise of a defamation claim, to silence commentary about the Murdaugh family generally.

In any event, again, even if any of the DeWitt Challenged Statements could conceivably be found of and concerning Plaintiff, they are not actionable and Plaintiff's purported claim based on them is foreclosed by the First Amendment for the reasons discussed above in Sections I.A-D.

<u>**CONCLUSION**</u>

In light of the foregoing, Defendants respectfully request that Plaintiff's Motion to Remand be denied.[19]

[19] Defendants oppose Plaintiff's unsupported request for attorney's fees and costs. Plaintiff's Motion to Remand should be denied, but even if the Court were to remand, Defendants had an "objectively reasonable basis" for seeking removal. *See Martin v. Franklin Cap. Corp.,* 546 U.S. 132, 136 (2005); *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996) (no fees absent "evidence of bad faith"); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig.*, 2016 WL 7339811, at *5 (D.S.C. Oct. 24, 2016) (Gergel, J.) (remanding but declining to award

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Respectfully submitted,

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attorney's fees because there was "an objectively reasonable basis for seeking removal"); *City of Charleston v. Brabham Oil Co., Inc.*, 2023 WL 11867279, at *7 (Gergel, J.) (D.S.C. July 5, 2023) (declining to award attorney's fees).