IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

GREEN GROUP HOLDINGS, LLC,)
and HOWLING COYOTE, LLC,)
Plaintiffs,)
)
v.) CIVIL ACTION NO. 16-00145-CG-N
)
MARY B. SCHAEFFER, ELLIS B.)
LONG, BENJAMIN EATON, and)
ESTHER CALHOUN, individually)
and as members and officers of)
BLACK BELT CITIZENS FIGHTING)
FOR HEALTH AND JUSTICE,)
Defendants.)

REPORT AND RECOMMENDATIONS

Unhappy about alleged "false and malicious" statements made by members of Black Belt Citizens Fighting for Health and Justice (hereinafter, "Black Belt") regarding the operation of their landfill, the Plaintiffs filed suit against certain Black Belt members and officers for libel and slander, demanding $30 million in damages. For a variety of reasons, including the First Amendment of the United States Constitution, the Defendants assert that the Plaintiffs have failed to state a claim on which relief can be granted and that this action is due to be dismissed under Federal Rule of Civil Procedure 12(b)(6). (Docs. 15, 16).

The Plaintiffs have timely filed a response (Doc. 32) in opposition to the motion to dismiss, and the Defendants have timely filed a reply (Doc. 34) to the response. The motion is now under submission and is ripe for disposition. (*See* Doc. 29). Under S.D. Ala. GenLR 72(b), the motion to dismiss has been referred to the undersigned Magistrate Judge for entry of a recommendation as to the appropriate

disposition, in accordance with 28 U.S.C. § 636(b)(1)(B)-(C), Federal Rule of Civil Procedure 72(b)(1), and S.D. Ala. GenLR 72(a)(2)(S). Upon consideration, the undersigned RECOMMENDS that the Defendants' Motion to Dismiss (Doc. 15) be GRANTED but that the Plaintiffs be GRANTED limited leave to file an amended complaint.[1]

I. Standard of Review

In deciding a motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted," the Court must construe the complaint in the light most favorable to the Plaintiffs, "accepting all well-pleaded facts that are alleged therein to be true." *E.g.*, *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013). "Under Rule 10(c) Federal Rules of Civil Procedure, [copies of written instruments that are exhibits to a pleading] are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion." *Solis-Ramirez v. U.S. Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985) (per curiam). "Fed. R. Civ. P. 8(a)(2) requires that a pleading contain 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (quotation omitted). " 'While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the

U.S. at 679). "Importantly, ... courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Id.* (quoting *Iqbal*, 556 U.S. at 679 (quoting *Twombly*, 550 U.S. at 567)).

"[G]enerally, the existence of an affirmative defense will not support a rule 12(b)(6) motion to dismiss for failure to state a claim. A district court, however, may dismiss a complaint on a rule 12(b)(6) motion when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint." *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993) (quotation omitted)).

II. Well-Pleaded Factual Allegations and Causes of Action

Per the First Amended Complaint (Doc. 10),[2] Plaintiff Green Group Holdings, LLC established Howling Coyote Holdings, LLC for the purpose of owning and operating

approved bankruptcy sale. Beginning July 4, 2009, the previous owners of the Landfill had begun accepting shipments of waste material, consisting primarily of coal ash, released from the Tennessee Valley Authority ("TVA")'s Kingston Fossil Plant following a dike failure on December 22, 2008. The coal ash was received as part of an agreed disposal plan between the TVA and the U.S. Environmental Protection Agency ("EPA"). As part of that plan55.2 (a) -0.2 (s) 0.1 (h)] TJ ET Q q 0.24 0 0 0

issued four permits for the Landfill over time, with some being revised and/or renewed. Since the Landfill opened on October 15, 2007, it has received no notices of violation of any of its per

potentially affecting the quality of drinking water. This toxic waste effects everyone, please watch this short film about the problems at Arrowhead.

November 13, 2015: Black Belt Citizens demand no more coal ash in Uniontown! Black Belt Citizens demand ADEM and EPA enforce their laws to prevent further discrimination against the community. The landfill is poisoning our homes and destroying our Black cementery (sic). THIS IS ENVIRONMENTAL INJUSTICE! Where's our justice?

November 13, 2015: Uniontown residents continue to be upset over the actions of the Arrowhead Landfill, over the past 3 days there has been another unpermitted (illegal) discharge leaving Green Group Holdings toxic landfill. This has been occurring for years and ADEM has never enforced their permit limits to stop this problem. The majority of the residents around the landfill are worried about their water, air, property values, families' health, and the nearby sacred cemetery that is also being desecrated by the landfill.

November 20, 2015: Pictures of the New Hope Cemetery, neighbor of Arrowhead Landfill. The photos are of possible trespass and recent bulldozing done by the landfill, some of the graves are unable to be located, family members are upset over their sacred space being violated, damaged, & desecrated. Arrowhead Landfill is on the site of an older plantation. The New Hope Cemetery is the final resting place of former workers, indentured servants, and slaves of the plantation. Recent actions by the landfill and improper enforcement from the state constantly remind Uniontown's residents of their past life full of violence, hate, & oppression.

December 5, 2015: "We are tired of being taken advantage of in this community," said Uniontown resident Benjamin Eaton, who is a member of

...

This event is created to unite citizens across Perry County and Uniontown, Alabama's Black Belt, and the Southeast US to accomplish the following:

...

- Identify communities' needs against environmental injustices including illegal pollution, coal ash, corporate interests for toxic landfills, and "extreme energy waste sites"

January 14, 2016: Join us this Saturday in Uniontown for Building Bridges for Justice as we focus on the toxic, 4 million tons of coal ash sitting in the Arrowhead Landfill. The landfill's pollution problems are influencing the decrease of property values while increasing health concerns. This extremely large landfill owned by Green Group Holdings has been reportedly trespassing and desecrating a nearby Black Cemetery. These impacts are very discriminatory and we feel our civil rights are being violated by environmental racism at all levels.

February 25, 2016: "Its a landfill, its a tall mountain of coal ash and it has affected us. It affected our everyday life. It really has done a lot to our freedom. Its another impact of slavery. ...Cause we are in a black residence, things change? And you can't walk outside. And you can not breathe. I mean, you are in like prison. I mean, its like all your freedom is gone. As a black woman, our voices are not heard. EPA hasn't listened and ADEM has not listened. Whether you are white or black, rich or poor, it should still matter and we all should have the right to clean air and clean water. I want to see EPA do their job." Powerful words from our President Esther Calhoun.

March 1, 2016: The

March 17, 2016, Schaeffer sent another email on behalf of herself and Long stating that a further response to the Plaintiffs letter would be forthcoming from the Defendants or their unnamed "counsel." On March 18, 2016, all four Defendants

B. Count II – Slander

The Defendants also organized and publicized a "news conference" held in Uniontown, Alabama, on December 4, 2015, featuring the Alabama State Conference of the National Association for the Advancement of Colored People. Members of the press were present, including a reporter for al.com, who on December 5, 2015, published an online article about the event stating, in relevant part:

> "We are tired of being taken advantage of in this community," said Uniontown resident Benjamin Eaton, who is a member of the group Black Belt Citizens Fighting for Health and Justice. "The living around here can't rest because of the toxic material from the coal ash leaking into creeks and contaminating the environment, and the deceased can't rest because of desecration of their resting place."

(Doc. 10 at 13 (quoting "Cemetery Dispute the Latest Conflict Between Arrowhead Landfill, Uniontown Residents," Dennis Pillion, December 5, 2015, http://www.al.com/news/index.ssf/2015/12/arrowhead_landfill_uniontown_r.html (emphasis added by Plaintiffs))).

Additionally, Defendant Esther Calhoun appeared on the radio show "Uprising with Sonali" (originating in Southern California but available for listening worldwide on the show's website), making the following statements during that appearance:

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

As a black woman, our voices are not heard. EPA hasn't listened and ADEM has not listened. Whether you are white or black, rich or poor, it should still

establish a *prima facie* case of defamation under Alabama law, a plaintiff must show: [1] that the defendant was at least negligent [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod).[5] *Fed. Credit, Inc. v. Fuller*, 72 So. 3d 5, 9-10 (Ala. 2011). *Accord U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1293 n.22 (11th Cir. 2001).

A. Member Liability

The Defendants initially argue that the Amended Complaint fails to allege facts plausibly showing that either Schaeffer or Long, individually, published any oral defamatory statements, or that any of the Defendants, at least individually,

attribute the online statements to the Defendants based on little more than the fact that they are officers and/or members of Black Belt and that they were the individuals who responded to the Plaintiffs' requests that the statements be deleted and retracted.[6]

the common behalf." 108 So. at 584 (emphasis added) (quotation omitted). Alabama case law also recognizes that "an unincorporated association ... may be liable in tort for the wrongful acts of its members when acting collectively in the prosecution of the business for which it is organized, and it is responsible for torts of its members or employees when encouraged in them, or if ratified thereafter. However, in the absence of authorization or ratification by its members, an association is not liable for intentional torts by a member or members." *Rothman v. Gamma Alpha Chapter of Pi Kappa Alpha Fraternity*, 599 So. 2d 9, 10 (Ala. 1992) (citation and quotation omitted). *See also Hunt v. Davis*, 387 So. 2d 209, 211 (Ala. Civ. App.) ("Agency must be shown, not being implied from the mere act of association, and only those members who authorize or ratify the transaction are liable."), *writ denied sub nom., Ex parte Hunt*, 387 So. 2d 28b850 0 Tm /TTJ ET Qqrfre om

a nonprofit association is liable merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association." *Id.* § 10A-17-1.07(c).[7] Likewise, "[a] tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association." *Id.* § 10A-17-1.07(d).

In deciding the present Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded allegations in the Amended Complaint and draw all reasonable inferences therefrom in favor of the Plaintiffs. The Plaintiffs have alleged only that Black Belt is an "unincorporated association," not an unincorporated nonprofit association, and have offered some authority indicating that members of an unincorporated association can be liable for the actions of other members in certain circumstances. The Defendants have failed to offer any specific argument for why Black Belt should be considered an unincorporated

simply assuming that the Court would accept their assertion at face value.

> posts defamatory messages would escape accountability.... Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997). In short, a plaintiff defamed on the internet can sue the original speaker, but typically "cannot sue the messenger." *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).

Ricci, 781 F.3d at 28 (emphasis added).

Here, members of Black Belt are alleged to be the "original speakers" of the alleged defamatory comments, not simply "the messengers."

C. First Amendment Protections

" 'Whether a communication is reasonably capable of a defamatory meaning is a question of law.' " *Butler v. Town of Argo*, 871 So. 2d 1, 19 (Ala. 2003) (quoting *Kelly v. Arrington*, 624 So. 2d 546, 548 (Ala. 1993) (per curiam)). *Accord U.S. Steel*, 261 F.3d at 1293.

> A statement is defamatory if it "tends ... to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Blevins*[*v. W.F. Barnes Corp.*], 768 So. 2d [386,] 389-90[(Ala. Civ. App. 1999)] (internal quotations omitted) (citing *Harris*[*v. School Annual Publ'g Co.*], 466 So. 2d [963,] 964[(Ala. 1985)]). When analyzing an allegedly defamatory statement, a court must give the statement's language the "meaning that would be ascribed to the language by a reader or listener of average or ordinary intelligence, or by a common mind." *Id.* at 390 (internal quotations omitted) (citing *Camp v. Yeager*, 601 So. 2d 924, 927 (Ala. 1992)); *see also Labor Review Publ'g Co. v. Galliher*, 153 Ala. 364, 45 So. 188, 190 (1907). Furthermore, the "alleged defamatory matter must be construed in connection with other parts of the conversation or publication, and the circumstances of its publication ...." *Marion v. Davis*, 217 Ala. 16, 114 So. 357, 359 (1927); *see also Drill*

> *Parts*[*& Serv. Co. v. Joy Mfg. Co.*], 619 So. 2d [1280,] 1289[(Ala. 1993)].

U.S. Steel, 261 F.3d at 1293. "

The First Amendment places constitutional limits on the application of the state law of defamation. *See Snyder v. Phelps*, 562 U.S. 443, 451 (2011) ("[T]he Free Speech Clause of the First Amendment—'Congress shall make no law ... abridging the freedom of speech'—can serve as a defense in state tort suits…"). "The First Amendment can provide protection against state law defamation claims on two bases: (1) the *type* of speech involved and (2) the *person* whom the speech concerns and the *culpability* of the speaker … The inquiry associated with each has developed under two separate lines of Supreme Court cases." *Bennett v. Hendrix*, 325 F. App'x 727, 741 n.7 (11th Cir. 2009) (unpublished) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

1. Type of Speech

> "[S]peech on 'matters of public concern' ... is 'at the heart of the First Amendment's protection.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)) … Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (internal quotation marks omitted).
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> …
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> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick*, *supra*, at 146, 103 S. Ct. 1684, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego*[*v. Roe*], [543 U.S. 77,] 83–84, 125 S. Ct. 521[(2004) (*per curiam*)]. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492–494, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387–388, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). The arguably "inappropriate or controversial character of a statement is irrelevant to the question

> whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L.Ed.2d 315 (1987).

Phelps, 562 U.S. at 451–53.

> The First Amendment protections that apply in defamation claims are rooted in the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Consistent with this principle, both the Supreme Court and [the Eleventh Circuit] have long recognized that a defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of "fact." *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, 284–86, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) (publication of pejorative definition of scab was not actionable in that use of words like "traitor" could not be construed as representations of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13–14, 90

counsel representing a steel company that the conduct of an equipment vendor, in filing an ethics complaint regarding an allegedly illegal investigation by the state attorney general's office and the steel company, was "the equivalent of Jeffrey Dahmer complaining his victims got blood on the carpet," could not reasonably be construed as defamatory in the sense that the vendor and its principal were

derogatory the expression may be. This is so because the recipient of the information is free to accept or reject the opinion, based on his or her independent evaluation of the disclosed, nondefamatory facts." *Sanders v. Smitherman*, 776 So. 2d 68, 74 (Ala. 2000) (per curiam) (citation omitted).

On the other hand, "[f]alse factual assertions are not protected under the First Amendment…" *Bennett*, 325 F. App'x at 741 (citing

operation of waste disposal sites have been matters of public debate long before the Plaintiffs took over operation of the Landfill.[9] Moreover, given its self-explanatory

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[9] *See, e.g.*, Kathleen Bonner, *Toxins Targeted at Minorities: The Racist Undertones of "Environmentally-Friendly" Initiatives*, 23 Vill. Envtl. L.J. 89, 90 (2012) ("Environmental racism gained national attention in the mid-1980s after the United States Government Accountability Office (GAO) and the United Church of Christ explored the issue in two influential studies. Each study concluded that owners of hazardous waste sites are more likely to build next to communities with a dense minority population than non-minority populations. Specifically, the United Church of Christ study explicitly connected race with an increased likelihood of exposure to hazardous wastes." (footnote omitted)); Patrick Field et. al., *Risk and Justice: Rethinking the Concept of Compensation*, 545 Annals Am. Acad. Pol. & Soc. Sci. 156, 157 (1996) ("America is having a difficult time siting much-needed waste disposal facilities for toxic materials ranging from used motor oil, to industrial solvents, to biomedical waste … The United States is even having trouble siting power plants, sewage treatment plants, and far less risky sanitary landfills. Industry spokespeople, and the critics of a selfish public unwilling to shoulder its responsibilities, have blamed the 'not in my backyard' (NIMBY) phenomenon on affluent, white, suburban residents unwilling to share the burdens of their wasteful habits."); Michael B. Gerrard, *The Victims of NIMBY*, 21 Fordham Urb. L.J. 495, 495–96 (1994) ("Many leading voices in the environmental justice movement believe that minority communities are victims of NIMBY. For example, Professor Robert D. Bullard has written that 'the cumulative effect of not-in-my-backyard (NIMBY) victories by environmentalists appears to have driven the unwanted facilities toward the more vulnerable groups. Black neighborhoods are especially vulnerable to the penetration of unwanted land uses . . . . NIMBY, like white racism, creates and perpetuates privileges for whites at the expense of people of color.' NIMBY, in its various forms, has three principal types of targets[, one of which] is waste disposal facilities, primarily landfills and incinerators."); Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001, 1001–03 (1993) ("Policy makers and local land use officials have long struggled to cope with the 'not in my backyard' (NIMBY) syndrome in attempting to site 'locally undesirable land uses' (LULUs), such as homeless shelters, drug or alcohol treatment centers, and <u>waste disposal facilities</u>. In general, LULUs are considered beneficial to society at large, and many agree that they should be located somewhere. Those same citizens protest vigorously, however, when such a use is sited near their homes. This protest is quite rational. The benefits that LULUs produce typically are diffused

name Black Belt Citizens Fighting for Health and Justice, its publicly stated goal of "getting rid of the Arrowhead Landfill," and the overall tone of its online statements, viewed collectively rather than in isolation, a reasonable person would hardly expect Black Belt's views on the Landfill to be unbiased.[10]

Providing further context for the alleged defamatory speech, the Amended Complaint acknowledges that the Landfill is used as a repository for coal ash released in the 2008 Kingston spill. The "Administrative Order and Agreement on Consent" between the TVA and EPA, which ultimately led to the ash material being deposited at the Landfill and which the Plaintiffs have attached to their pleading, recognizes that coal ash is potentially hazardous to the environment and human health.[11] Highlighting the public nature of these issues, Black Belt has not limited

Against this backdrop, as established by the Amended Complaint's well-pleaded allegation, the undersigned concludes that most of the statements at issue, assuming they are defamatory under Alabama law,[12] are nonetheless protected by the First Amendment as statements of opinion and/or rhetorical hyperbole concerning a matter of public interest. The undersigned finds that only the following challenged statements are sufficiently factual to be susceptible of being proved true or false:

- The statement on Black Belt's website that "deliberate discharges from the landfill reveal high levels of arsenic."
- The statement from the November 2, 2015 Facebook post that "Arrowhead Landfill, continue to leak toxins into rivers, streams, and groundwater."
- The statement made by Eaton at the December 4, 2015 new conference, and repeated in the December 5, 2015 Facebook post, that "toxic material from the coal ash [is] leaking into creeks and contaminating the environment."
- The statement from the January 11, 2016 Facebook post that "[t]his landfill is experiencing unpermitted amounts of water runoff leaving its site and entering neighboring property."
- The statement from the March 1, 2016 Facebook post that the Landfill experiences "the constant run-off of contaminated water."

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[12] Given that the Plaintiffs admit to storing coal ash, a hazardous substance, at the Landfill, the undersigned concludes that the Defendants' repeated references to the Landfill as "toxic" are also un-actionable statements of truth.

757 (quoting *Silvester v. Am. Broad. Cos., Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988)).[13] *See also Cottrell*, 975 So. 2d at 334 ("The three-pronged test applied in *Little* provides a workable means of determining whether a plaintiff in a defamation action is a limited-purpose public figure because of his role in a public controversy; this Court adopts it…").

> Under the first prong of the *Waldbaum* test, a public controversy must be more than merely newsworthy. [*Waldbaum*, 627 F.2d] at 1296; *Wolston v. Readers Digest Association, Inc.*, 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450 (1979) ("The private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."). In addition, the public controversy must not be an essentially private concern such as divorce. *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154 (1976). If it is evident that resolution of the controversy will affect people who do not directly participate in it, the controversy is more than merely newsworthy and is of legitimate public concern. *Waldbaum*, 627 F.2d at 1296. In short, as the court stated in *Waldbaum*, "[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy." *Id.* at 1297.

Silvester, 839 F.2d at 1494–95. Moreover, "[t]he public controversy must have preexisted the alleged defamation." *Little*, 93 F.3d at 757 (citing *Silvester*, 839 F.2d at 1495). "To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can

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[13] The three-part *Waldbaum* test remains the applicable standard for determining limited-

see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment." *Waldbaum*, 627 F.2d at 1297 (citation and footnote omitted).[14]

Considering the allegations in the Amended Complaint, it is evident that the controversies in this case are the environmental, public health, and social impacts on the Perry County community from the Plaintiffs' operation of the Landfill, particularly its acceptance and storage of coal ash from the Kingston spill. These controversies preexisted the alleged defamatory statements, and "it is evident that resolution of the[se] controvers[ies] will affect people who do not directly participate in" them; thus, they are "more than merely newsworthy and [are] of legitimate public concern." *Silvester*, 839 F.2d at 1494–95.

Of particular note, the allegations in the Amended Complaint readily show that the Plaintiffs' operation of the Landfill, particularly in its use as a repository for hazardous material, is heavily regulated at both the state (i.e., ADEM) and federal (i.e., EPA) level. The Eleventh Circuit has recognized that "the public has a marked interest in a controversy that involves alleged violations of important state regulations." *Id.*

noting that "one factor supporting [the *Reliance Insurance*] court's conclusion that plaintiff insurance company was a public figure was that plaintiff was subject to close state regulation." 839 F.2d at 1495. Similarly, the *Silvester* court found that the "highly regulated nature" of the American jai alai industry underscored "[t]he public nature of the controversy" at issue in that case, noting:

> Extensive state regulation of jai alai exists in all states in which the

> influence the outcome" of the public controversy, or (2) "could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Id.*

Silvester, 839 F.2d at 1496.

The Plaintiffs insist that they are simply "a landfill company insofar as this litigation is concerned" and have made not attempt to voluntarily become a part of the public controversies at issue here. Such assurances, however, are not dispositive.

> In general, public figures voluntarily put themselves into a position to influence the outcome of the controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S. Ct. at 3009. However, "occasionally, someone is caught up in the 1 (l) 0.5ntrover

As discussed previously, landfills and other waste disposal sites are subject to heavy government regulation and have long attracted public controversy. Relevant to this action, the Landfill has attracted particular controversy over its acceptance of coal ash from the Kingston spill, an event predating the Plaintiffs' ownership of the Landfill. The Plaintiffs "voluntarily engaged in a course that was bound to invite attention and comment" when they purchased the Landfill from its previous owners at a bankruptcy sale. *Cf. Silvester*, 839 F.2d at 1497 ("Plaintiffs initially thrust themselves into this position of prominence by voluntarily entering [the] strictly regulated, high-profile [jai alai]

Waldbaum prong. *Cf. Silvester*, 839 F.2d at 1497 ("Finally, it is self-evident that the defamatory parts of the '20/20' broadcast were germane to the plaintiffs' participation in the controversy as is required under the third prong of the *Waldbaum*

> Actual malice requires more than a departure from reasonable journalistic standards. *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999). Thus, a failure to investigate, standing on its own, does not indicate the presence of actual malice. *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). Rather there must be some showing that the defendant purposefully avoided further investigation with the intent to avoid the truth. *Id.*

Michel, 816 F.3d at 702–03 (citations to New York state law omitted).

Disregarding the Plaintiffs' conclusory assertions that the defamatory statements were made "with malice by intentional action or with reckless disregard for the truth" and "with the malicious intent or reckless disregard to publish such false statements despite knowing or having reason to know of their falsity" (Doc. 14 at 11 – 12, 14, ¶¶ 34, 40) – "[a]

In sum, most of the Defendants' alleged defamatory statements are protected by the First Amendment as opinion and/or rhetorical hyperbole concerning a matter of public interest. As for those few statements identified above as not enjoying such protection, the claims based on them are still due to be dismissed because the Plaintiffs, who are limited purpose public figures, have failed to plausibly allege that the statements were published with actual malice. Accordingly, the Defendants' motion to dismiss the First Amended Complaint under Rule 12(b)(6) (Doc. 15) is due to be GRANTED.

D. Leave to Amend

The Defendants have argued that the First Amended Complaint should be dismissed with prejudice without giving the Plaintiffs an opportunity to file a second amend complaint that might save some or all of their claims from dismissal. Moreover, a "district court is not required to grant a plaintiff leave to amend his complaint sua sponte[prior to granting dismissal under Rule 12(b)(6)] when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc). At most, the

(citing *Michel*, 816 F.3d at 706 ("A dismissal based on the failure to plead facts giving rise to an inference of actual malice should be without prejudice and the plaintiff should have the opportunity to amend his complaint.")).[19] The undersigned finds that this request is due to be GRANTED.[20] As discussed above, however, even if actual malice could be successfully alleged, most of the alleged defamatory statements are still otherwise protected by the First Amendment and cannot support a claim for defamation. Thus, the undersigned finds that dismissal with prejudice of the Plaintiffs' claims is appropriate to the extent they are based on those otherwise protected statements.

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[19] To the extent the Plaintiffs' suggestion that "any dismissal should be without prejudice with leave to amend" constitutes a blanket request for leave amend, such a request is insufficiently raised, and should be DENIED, as to any issue other than actual malice. *See Davidson v. Maraj*, 609 F. App'x 994, 1002 (11th Cir. 2015) (per curiam) (unpublished) ("It has long been established in this Circuit that a district court does not abuse its discretion by denying a general and cursory request for leave to amend contained in an opposition brief." (citing *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009); *Wagner*, 314 F.3d at 542; and *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1222 (11th Cir. 1999) (per curiam) ("Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."); *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1208 (11th Cir. 2012) (per curiam) ("The Fund's request for leave to amend appeared in its response to the Defendants' motion to dismiss. The Fund failed, however, to attach a copy of this proposed amendment or set forth its substance. Therefore, the district court did not err by denying the Fund's request.").

[20] The undersigned disagrees with the Defendants' assertion that further leave to amend should be denied because the Plaintiffs "failed to avail themselves of a previous opportunity to amend." (Doc. 34 at 18). The undersigned had previously ordered the Plaintiffs to amend their complaint solely to correct deficiencies in their allegations supporting subject matter jurisdiction, which the Plaintiffs did in the First Amended Complaint. While the Plaintiffs certainly could have filed a second amended complaint "as a matter of course" in an attempt to address some or all of the issues raised in the Defendants' motion to dismiss rather than litigate the merits of the motion, *see* Fed. R. Civ. P. 15(a)(1)(B), the Plaintiffs have cited no authority, nor is the undersigned aware of any, that holds a plaintiff's failure to do so forfeits any opportunity to later request amendment to avoid a Rule 12(b)(6) dismissal with prejudice.

IV. Conclusion and Recommendations

In accordance with the foregoing analysis, it is RECOMMENDED that the Defendants' motion to dismiss the First Amended Complaint under Rule 12(b)(6) (Doc. 15) be GRANTED as follows:

1. The Plaintiffs claims for libel and slander based on the

3. The Plaintiffs should be granted leave to file, by a date certain, a second amended complaint solely for the purpose of alleging facts sufficient to plausibly show actual malice to support the claims for libel and slander that are dismissed without prejudice. The second amended complaint should omit mention of all statements that form the basis of defamation claims that are dismissed with prejudice.

4.

of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 13th day of October 2016.

<u>/s/ Katherine P. Nelson</u>
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE