

**FILED**

**Oct 22, 2018**

9TH JUDICIAL CIRCUIT  
COUNTY OF KALAMAZOO  
KALAMAZOO, MICHIGAN

STATE OF MICHIGAN

IN THE 9<sup>TH</sup> CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff,

v

Case No.: 2018-0153-CZ

MORNINGLIGHTMOUNTAIN, LCC  
MICHAEL GOODE, and DOES 1-10

Defendant.

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE ALEXANDER C. LIPSEY, CIRCUIT COURT JUDGE

Kalamazoo, Michigan - Wednesday, August 22, 2018

APPEARANCES:

For the Plaintiff:

NICHOLAS A. KURTZ (CA#232705)  
HARDER LLP  
132 SOUTH RODEO DR., 4<sup>TH</sup> FLOOR  
BEVERLY HILLS, CA 90212  
424-203-1600

For the Defendant:

JOSEPH E. RICHOTTE (P70902)  
BUTZEL LONG, PC  
41000 WOODWARD AVENUE  
BLOOMFIELD HILLS, MICHIGAN 48304  
248-258-1616

RECORDED BY:

VIDEO RECORDED

TRANSCRIBED BY:

REBECCA D. ABBS-KUCKS (CER 7921)  
Certified Electronic Reporter  
PO BOX 24  
VICKSBURG, MICHIGAN 49097  
269-352-9227

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

TABLE OF CONTENTS

WITNESSES:

PAGE

NONE

EXHIBITS:

DESCRIPTIONS

IDENTIFIED

ADMITTED

NONE

1 Kalamazoo, Michigan  
2 Wednesday, August 22, 2018 - 9:01:29 a.m.  
3 THE CLERK: All rise.  
4 Kalamazoo County 9<sup>th</sup> Circuit Court is now in  
5 session. The Honorable Alexander C. Lipsey presiding.  
6 Please be seated.  
7 THE COURT: Okay.  
8 THE CLERK: Court calls the case of Scottsdale  
9 Capital versus MorningLightMountain, LLC; case number 2018-  
10 0153-CZ.  
11 Please state your appearances for the record.  
12 MR. RICHOTTE: Hi. Good morning, your Honor.  
13 Joe Richotte appearing on behalf of the defendant.  
14 MR. KURTZ: Good morning, your Honor. Nicholas  
15 Kurtz on behalf of the plaintiff.  
16 MR. GOODE: Good morning, your Honor. Michael  
17 Goode the defendant and the sole member of the corporate  
18 defendant MorningLightMountain, LLC.  
19 THE COURT: Okay.  
20 Good morning. You may be seated.  
21 We are here on kind of a roundabout journey.  
22 But, we're here on a Motion for Summary Disposition under  
23 2.116(C)(8), basically dealing with the sufficiency of the  
24 plead--pleadings allegation under C8 - alleges that there  
25

1 is no--no claim on which relief can be granted as a matter  
2 of law.

3 The court has had an opportunity to review the  
4 submission of the parties and, I guess, Mr. Richottee it's  
5 your motion.

6 MR. RICHOTTE: Thank you, your Honor.

7 Your Honor, since you've had an opportunity to  
8 review the submissions I'd like to spend oral argument this  
9 morning hitting some of the high points in the motion, and  
10 seeing if your Honor has any questions for me to answer.

11 First and foremost, I think, is the disagreement  
12 between the parties when it comes to what you can consider  
13 on a C8. As we've argued in our briefing papers, the court  
14 rule specified that you can consider the pleadings.  
15 Pleadings are defined by the court rule to include the  
16 answer.

17 I know there's a disagreement as to materials  
18 that are attached to the answer, but we've supplied some  
19 case law that demonstrates that you can in fact view  
20 anything that's attached to, because it becomes  
21 incorporated into the pleadings. So, just like you'd  
22 consider the articles that are attached by the plaintiff to  
23 their complaint, you can also consider the materials that  
24 are attached to our answer.  
25

1           In addition, there was a point made in the  
2 response brief that the court can only consider the  
3 allegations in the complaint. I would respectfully  
4 disagree with that.

5           While, I think it is somewhat unusual on a C8  
6 motion for somebody to have entered an answer and to ask  
7 the court to consider that, I think the proper approach  
8 would be just as you would with the complaint, view any  
9 allegations in there as true, but view them in the light  
10 most favorable to the plaintiff, unless, of course, it's a  
11 straight out denial and then of course you would have to  
12 consider what the--what the complaint alleges.

13           Turning to the defamations count, your Honor, I  
14 think the primary issue that we have is a failure to  
15 adequately plead fault. In a defamation action there is  
16 either a negligent standard or an actual malice standard,  
17 and that depends based on First Amendment law whether you  
18 have somebody who is a private figure or a public figure.

19           Here Scottsdale is alleging that it is a private  
20 figure and so is trying to take advantage of the less  
21 stringent negligence standard. But, we have a disagreement  
22 as to what that standard means.

23           There is a reasonably careful publisher and a  
24 reasonably careful journalist standard that would apply  
25

1 here, and there's also, according to a recent Supreme Court  
2 decision, U.S. Supreme Court out of 2014, *Air Wisconsin*  
3 *versus Hoeper*, which we've cited in our reply; a reasonable  
4 audience standard that also informs that analysis.

5 So, the question becomes what would a reasonably  
6 careful journalist have done given the expected audience of  
7 readers or hearers of the statement.

8 Here there's no allegations in the complaint  
9 regarding what we as a publisher or as journalist should  
10 have done differently, right. If you're going to argue  
11 that a reasonably careful journalist would have done X, you  
12 have to plead what that X is and we don't have that here.

13 What we do have at most in their response brief  
14 is an indication that there was a retraction demand, but  
15 that retraction demand came after publication. And, the  
16 case law is pretty clear that you have to take a look at  
17 the statement and the negligence at the time of  
18 publication.

19 Similarly, and I think this more of a corollary,  
20 the statute indicates that retraction goes to damages,  
21 right, and not to the issue of fault.

22 If however, actual malice were to apply, and they  
23 do appear to plea that in the alternative, and even if they  
24 were to tell you at oral argument that they aren't really  
25

1 trying to plead actual malice in the alternative it's still  
2 relevant to the pleadings on the false like claim. Right.  
3 So, we're going to have to talk about actual malice either  
4 way.

5 To--to plead actual malice, you have to allege  
6 that the statement was either made knowingly false or made  
7 with a reckless disregard for the truth. Right. We have  
8 to know how we knew that this was false, or why we were  
9 reckless for allegedly disregarding it.

10 Again, we get back to the same issue of the  
11 retraction demand, is really the only issue that they  
12 raise, but that is a post-publication analysis that doesn't  
13 really apply.

14 When you talk about reckless disregard you're  
15 talking about either a high degree of awareness of the  
16 publications probable falsity, or you have to be able to  
17 prove that the defendant entertained a serious doubt as to  
18 the truth of the publication.

19 But, here in both articles, Judge, there is a  
20 link out to the source documents. So, the question really  
21 becomes what more could a reasonable publisher have done  
22 under those circumstances. And, certainly if we're citing  
23 to underlining litigation documents how we would have a  
24 serious doubt that those documents contained falsity or  
25

1 errors is certainly not clear from the complaint.

2 I would also note, Judge, that although we have  
3 investigated, even if they were to allege that there was a  
4 failure to investigate the accuracy of the information, our  
5 courts held in *Smith versus Anonymous Joint Enterprises*  
6 that a failure to investigate the accuracy of information,  
7 even if a reasonably prudent person would have done so,  
8 isn't enough to meet the reckless disregard standard. Of  
9 course, again, here we have just an indication just from  
10 links and the excessive quote--extensive quotes rather,  
11 from those underlining source documents that investigation  
12 did in fact occur.

13 If we get past the fault issue, Judge, which I  
14 think is primarily fatal to their claim, we're then going  
15 to get into the actual statements themselves. I know that  
16 the parties have a disagreement as to how you would read  
17 those various statement. We read them, frankly, as not  
18 false.

19  
20 Anyone who has followed penny-stocks for the last  
21 few years would know about a company that was, at least,  
22 involved in the sense of providing a platform for trading  
23 that resulted in about a thirty some odd million dollar  
24 fraud that the SEC has been investigating and pursuing  
25 vigorously, as has FINRA, which is the self-regulatory



1 authority for the securities market.

2 The second statement is that there are few  
3 brokers left who have continued to allow deposit sale of  
4 shares of illiquid penny-stocks. Larger brokers and  
5 discount brokers stopped allowing that over 5-years ago.

6 For that, your Honor, it's not false, because  
7 there is a distinction, although they try to say, you know,  
8 pay no attention to the man behind the curtain when it  
9 comes to the difference between the deposit and the trading  
10 of stocks.

11 I think the best way to consider this, Judge, is  
12 the concept of grandfathering, right. We're very familiar  
13 with that in the law. Something that was prohibited now  
14 becomes--or excuse me, was permitted becomes prohibited.  
15 You allow the person who was doing something properly to  
16 continue on until natural time would--would bring them into  
17 compliance.

18 We're more or less in that kind of situation  
19 here. There's no allegations in the complaint that there  
20 are any other companies that accepted a deposit of shares  
21 for trade. That's step one of the process. If you don't  
22 deposit shares as they indicate, you then can't trade them.

23 These other companies that are identified in the  
24 complaint as doing the trading, certainly, we'll accept  
25

1 that true for purposes of C8; that's their allegation we  
2 have to accept it as true. But, there's a difference  
3 between those companies allowing shares that are already in  
4 the market place that continue to be traded versus bringing  
5 new shares in.

6 Now, it may it be that they'll stand up here and  
7 say, Judge, of course, there are other companies that do  
8 that, but, that's not pleaded in the complaint. Certainly,  
9 since they're making such a big deal of the fact that this  
10 apparently niche market carries with it some stigma, then I  
11 think it's on them when it comes to the pleading to  
12 establish those underlining facts to support their claim.

13 But, beyond that it's not defamatory for that  
14 simple purpose that identifying somebody as working in a  
15 niche market is not itself defamatory.

16 The third statement in the April article is that  
17 when the big Biozoom pump happened back in 2013 many of the  
18 frozen accounts were at Scottsdale. What we have here is a  
19 disagreement in terminology. Right.

20 Their view of the world is of all of the accounts  
21 that we have this is a fraction of the business. Fair  
22 enough, but that's not what we alleged. Right.

23 The articles statement is that many of the  
24 accounts involved in that scheme were seized and frozen at  
25

1 Scottsdale. I don't think there's any disagreement that  
2 that is literally true.

3 Then they go on to say that Scottsdale has never  
4 been a defendant in any lawsuit involving the trading of  
5 Biozoom stock. Again, that may very well be, but that's  
6 not what the statement says. So, if we're here on an  
7 allegation of falsity there's going to have to be some  
8 indication that they were--or excuse me, that the statement  
9 itself indicated that they were a defendant.

10 We don't believe that it's defamatory as well,  
11 because the fact, again, that something was frozen in the  
12 ordinary course of business is not in and of itself  
13 defamatory.

14 Then finally, we have the privilege statement  
15 issue. We have the fair-report privilege by statute. I  
16 would note, your Honor, that there is going to be some  
17 disagreement between the parties on this because they view  
18 the fair-report privilege as a qualified privilege and they  
19 cite the *Rouch* decision in their response.

20 I took a look at *Rouch* last night as we were  
21 preparing for this morning, and there's act--it's  
22 interesting. If you read the opinion there's actually two  
23 sections in the *Rouch* opinion - one that discusses the  
24 fair-report privilege and one that discusses the common law  
25

1 of public interest privilege.

2 The page that they cite to is actually to the  
3 common law qualified public interest privilege; not to the  
4 fair-report privilege that we're relying on.

5 I think when we're talking about the statutory  
6 fair-report privilege, the only sense in which it can be  
7 qualified is that you have to actually meet the predicate,  
8 right, that it is a report on a public proceeding.

9 Once you get to that point, the question is, is  
10 it fair and true, right, which is really just another  
11 falsity analysis that we've already just discussed. So, I  
12 don't think that there's any dispute, or at least there  
13 should be, that the fair-report privilege would certainly  
14 immunize that third statement.

15 Then we move to the June article where there is a  
16 reminder that the Biozoom fraud cost 17 million dollars in  
17 profits to manipulators and insiders with many of those  
18 accounts at Scottsdale.

19 If you go through the June article you'll see  
20 that it's much longer. It contains many more excerpts from  
21 the underlining FINRA opinion. We're talking 111 pages  
22 that FINRA goes through and details what went wrong at  
23 Scottsdale. Right. There's no accusation, contrary to  
24 what I suspect you'll hear in oral argument, that we've  
25

1 accused Scottsdale of being involved or being part of or a  
2 mastermind or anything like that with respect to the pump-  
3 and-dump scheme.

4 But, what we're saying is, FINRA has identified  
5 you as having lacks internal controls, and those lacks  
6 internal controls allow somebody to commit a fraud through  
7 you. Not that you did anything intentionally, but your  
8 failure to do your job on the regulatory side is what  
9 caused or at least allowed for this fraud to move forward.

10 So, I think that's a fairly important fact that  
11 shouldn't get lost in the--the details of this morning's  
12 argument.

13 The very last issue here, Judge, relates to the  
14 False Light complaint. Of everything else that's in our  
15 papers, I want to focus this morning only on the fact that  
16 *Booth Newspapers* specifies that there is no privacy  
17 interest for a corporation.

18 The response to that is, well nobody has said  
19 that a corporation can't bring a False Light claim; that  
20 may or may not be true. But, what they tell you later on  
21 in their brief is that invasion of privacy is now  
22 delineated in four or five different torts.

23 What that really means is that there's four or  
24 five different ways to end a privacy. So, the question is  
25

1 do you have an underlining privacy interest that can be  
2 protected in that space. The answer is no. Under *Booth*  
3 *Newspapers* it's very clear there's no privacy interest,  
4 which reminds me of the old Latin phrase we all learned in  
5 law school, right, *nemo dat quod non habet* - you can't get  
6 what you don't have. The corollary being nobody can take  
7 from you what you don't have. I can't invade a privacy  
8 interest if you don't have one.

9 So, for that reason we would ask that the False  
10 Light count be dismissed, and we do believe that it would  
11 be appropriate for the court to dismiss this with  
12 prejudice. But, certainly if the court is inclined to give  
13 them a third opportunity to plead that they should have to  
14 do that by motion so that we can all talk about whether  
15 they have met the standard before we have to incur  
16 additional time on this file.

17  
18 Thank you, your Honor, unless you have any  
19 questions.

20 THE COURT: Nope. You covered each of the  
21 points. I'll hear what Mr. Kurtz has to say. I'll  
22 probably have some questions after that.

23 So, you may proceed.

24 MR. KURTZ: Thank you, your Honor.

25 I may go a little bit in reverse or easiest to

1 first.

2 I just want to point out some--some issues. On  
3 the leave to amend issue, I would respectfully disagree  
4 that this would not be third bite at the apple if your  
5 Honor believes that the complaint does not have sufficient  
6 allegations. This is the first amended complaint, but the  
7 only allegation that was changed was the location of the  
8 defendants. So--so, to suggest a third bite at the apple  
9 really isn't fair.

10 So, again, if your Honor feels that the--the  
11 allegations are not sufficient, I believe there are  
12 additional allegations that can be alleged, obviously,  
13 depending on your Honor's ruling.

14 First, on the procedural aspect of can we  
15 consider these exhibits to an answer. Your Honor's  
16 practiced longer than I have. I've only been around, you  
17 know, 13-years or so. I've never seen it done. That  
18 doesn't mean it can't be done.

19 But, in--in the legal authority cited every case  
20 that's cited by them and even us in considering documents  
21 attached to pleadings - the only case as cited show it as a  
22 complaint, which makes sense. Because, if the defendants  
23 are challenging the sufficiency of a complaint that may  
24 only partially refer to documents then the court needs to  
25

1 see the document sin whole.

2 Just like here - if they're challenging that the  
3 statement alleged to be defamatory must be read in context  
4 then it makes sense. The judge--the court needs to see the  
5 entire article.

6 So, that's just from a common sense practical  
7 aspect, otherwise this would be a total end-run around this  
8 initial challenge to the pleadings procedure, and you could  
9 literally file an answer that basically says whatever you  
10 want it to say, attach whatever documents you want and then  
11 tell the court - well, you have to assume these are true.  
12 You know, as a practical matter it doesn't make sense.

13 On the--the legal aspect of it, I will point out  
14 that MCR 2.13(F) in relation to this issue says that  
15 documents attached to the pleadings may be accepted. It  
16 refers specifically to written instruments and the cases  
17 have interpreted that as, you know, legally binding  
18 documents that show an obligation such as a contracted  
19 deed, a trust document - some of those things.

20  
21 I have a couple cases--obviously, these--this was  
22 brought up in a reply. I can cite them to you if you want,  
23 but I think it's, you know, it's well-laid out in the rule  
24 and in the cases that interpreted that, your Honor, should  
25 consider really only the pleadings and what is necessary to



1 interpret the allegations of the complaint.

2 Addressing some of counsel's other comments. The  
3 standards on fault. I think what is being overlooked here  
4 is the allegations of intent where we did allege  
5 allegations of malice. You know, from a--from a big  
6 picture standpoint this gets into the next issue of falsity  
7 and--and whether the statements are defamatory.

8 As alleged, and from a big picture scenario, what  
9 we are alleging is that the defendants acted in a smear  
10 campaign to defame my client. Now, within that was this  
11 intentional use of juxtaposition and statements created by  
12 themselves to infuse these implications into otherwise  
13 public facts or public documents.

14 So, they're kind of a corollary and I'll just  
15 point out that, you know, obviously in defamation cases in  
16 a lot of tort cases things like intent, malice have to be  
17 proved by circumstantial evidence, because the wrong-doers  
18 they simply don't stand up and say, you got me, I did it -  
19 I'm a bad person. I mean, that's just--that's what  
20 happens.

21  
22 So, it has to be proven through these underlining  
23 issues. So, when counsel says, well you shouldn't look at  
24 the failure to retract after give--being given notice of  
25 the falsity and whey some of the statements are wrong. You

1 should only look at that for damages or it shouldn't be  
2 considered in--in this intent scenario, because it was  
3 after the publication. I don't think that's completely  
4 true, because, again, you have to look at the whole picture  
5 of what was going on.

6 Obviously, the intent at the time of publication  
7 is important, but this other circumstantial evidence goes  
8 on to prove that. The fact that somebody, we're alleging,  
9 publishes a lie, is presented with the true, and continues  
10 to maintain the lie, I think is relevant to show that  
11 intent or malice.

12 On the--the issue of falsity and whether the  
13 statements are defamatory, which I think is really  
14 intertwined here. As we point out, and as counsel even  
15 referred, this is really something where I think we're both  
16 reasonable people. There's a difference of opinion. I  
17 think reasonable readers would have a difference of  
18 opinion, and this is where there's a question for the jury.

19 As we point out, our focus and our response is  
20 really, and I'll get into it a little more, this kind of  
21 implication. So, they don't come out and just say,  
22 Scottsdale Crap--Scottsdale Capital are crooks. You know,  
23 they just don't come out and say it. It's this kind of  
24 innuendo, this implication by piecing together certain  
25

1 things that when taken together simply are not true.

2 So, you have to look at the--the whole article or  
3 both of the articles and say what would a reasonable reader  
4 really interpret that as meaning. And, if we're having  
5 this reasonable debate any common juror is going to have  
6 that. So, I think this is truly an issue that can't be  
7 decided as a matter of law.

8 Getting into the specifics, and again, this kind  
9 of implication/justification--or juxtaposition, your Honor,  
10 may or may not be familiar with, you know, what was  
11 commonly referred to these days as "click-bait". I think  
12 this is one kind of form of that, which is you create a  
13 headline. You create a slogan. You create some kind of  
14 issue that's sexy, that drives people to your site. They  
15 want to click on the link to get to your article. That's  
16 what happened here.

17 The headlines, the first couple statements,  
18 especially in the first article all have different--  
19 different points to make, but they present this big picture  
20 that supposed to look sexy so that you come and read the  
21 article. That is Scottsdale Capital - they've been fined a  
22 million and a half dollar. Scottsdale Capital they're  
23 involved in pump-and-dump schemes. Scottsdale Capital  
24 they're not like everybody else - no one else does this  
25

1 stuff - they're--they're doing shady--shady business.

2 So, when taken into the context--and that's at  
3 the beginning, your Honor, and that's all linked at the  
4 beginning. That's--that's the "click-bait. That's what's  
5 created by defendants. This isn't what counsel was  
6 referring to as the FINRA or the SEC articles or statement.  
7 This is not any of that. This is specifically created  
8 verbiage by the defendant to get you to come to their site.

9 So, that's also in line with the intent, but also  
10 here the juxtaposition and the imposition.

11 So, if we look at it clear--and the--you know,  
12 this goes back to the--to the reasonable debate. Said in  
13 isolation, as counsel's pulled out some of these statement  
14 that says - well, this context of the statement is not  
15 true. He's forgotten that their own argument initially  
16 was, well everything needs to be read in context.

17 So, when we read it in context the fine against  
18 Scottsdale Capital has nothing to do with them being  
19 involved in a pump-and-dump scheme. But, that's the  
20 headline - Scottsdale Capital fined 1.5 million. The very  
21 next sentence, if you know pump-and-dump schemes you know  
22 Scottsdale Capital.

23 So, any logical person is going to read those  
24 combined and say, well they got fined a million and a half  
25

1 dollars for pumping and dumping. That's categorically not  
2 true, and I don't think defendants are going to say that  
3 that's true. They're just going to say, well each sentence  
4 on its own is true. You know, Scottsdale Capital did get  
5 fine a million and a half dollars. That's true.

6 Well, your Honor, come on let's--let's be  
7 realistic here. So, I'm kind of beating a dead horse, but  
8 it's, you know, obviously, is--as a--an attorney that has  
9 spent a lot of work in defamation law and, you know,  
10 honestly plaintiff's work. Maybe I'm a little bias.

11 But, you know, this is--this is something I've  
12 seen throughout my years of practice where--when alleged--  
13 when defendants have alleged defamation come--come up and  
14 say, well it's--it's partially true. I'm giving you some  
15 of the--I've giving you the SEC reporter. I'm giving you a  
16 link to go look at the documents.

17 Well, they're not, you know, they're not giving  
18 you the whole story because they're creating this "click-  
19 bait". They're creating this tag-line. They're creating  
20 this slogan to get people to their site and drive in  
21 business and then say, well for the real story go somewhere  
22 else. I got you here. I'm driving up my numbers. I'm  
23 getting advertising revenue. But, if you want the truth,  
24 ah go somewhere else. For me that's--that's all  
25

1 intertwined in this falsity defamation and intent.

2 The last--counsel brought up an issue about the  
3 fair-report privilege. I'll just add on a procedural  
4 statement, they only argue it applies to one statement so  
5 it wouldn't knock out the complaint. From a bigger  
6 standpoint, I think it's commonly held that First Amendment  
7 privileges, whether statutory or not, are all under the  
8 backdrop of being a qualified privilege, because First  
9 Amendment defenses in general can always be overcome by  
10 showing of malice. So, the fair-report privilege, along  
11 the lines of the First Amendment, I don't see why it would  
12 be any different in this scenario.

13 So, if your Honor has any questions I'd be happy  
14 to--to field them.

15 THE COURT: Okay.

16 I don't have any--don't have any questions for  
17 today. There are a lot of issues that, depending on my  
18 ruling, may weight a later time. But, for today I'm  
19 satisfied.

20 MR. RICHOTTE: I appreciate that, your Honor,  
21 and--

22 THE COURT: Thank you.

23 MR. RICHOTTE: --thank you so much for your time.

24 THE COURT: Yep.

1 MR. KURTZ: Your Honor, I'm not sure if you're  
2 contemplating a brief reply.

3 THE COURT: You may.

4 MR. KURTZ: Thank you--

5 THE COURT: Go ahead.

6 MR. KURTZ: --your Honor.

7 Your Honor, I will--I know I promised earlier I  
8 would hit the highpoints and then ended up taking a little  
9 longer. I--I do plan on only hitting a few highpoints on--  
10 on counsel's argument.

11 With respect to fault. The suggestion that there  
12 are allegations of malice in the complaint, I think, don't  
13 bear scrutiny if you actually read through the complaint.  
14 They alleged that it's an intentional smear campaign and  
15 they do allege in a very generic, unsupported way these  
16 facts lead to an implication.

17 What they don't allege in the complaint is what  
18 that implication is. We're hearing a lot about it in the  
19 briefing, but you don't get to manufacture those  
20 implications on the fly to respond to counsel's argument.  
21 You have to put them in--into the document themselves.

22 Counsel also indicates that you typically prove  
23 malice by circumstantial evidence, and that's certainly  
24 true. I do a lot of criminal defense work and that's how  
25

1 prosecutors have to prove their cases in 99-percent of the  
2 world.

3 But, you still have to from a pleading standpoint  
4 allege what the facts are that would support that  
5 allegation of malice. So, when we get a retraction demand  
6 that says, these things aren't true - well, that's just  
7 them saying it's not true. It doesn't tell us why they  
8 think that it's untrue. I think we're left with, when it  
9 comes to falsity, and I'll segue into that, yes we're  
10 certainly going to tell you if a particular isn't false,  
11 right. Headline - FINRA fines Scottsdale Capital 1.5  
12 million dollars. That's alleged as "click-bait" and yet  
13 it's true. Right. There's no question that you can go to  
14 a public record and FINRA has fined them 1.5 million  
15 dollars.

16 They keep saying that the articles alleged they  
17 were involved, and I emphasize that word "involved" in a  
18 pump-and-dump scheme. That's not what we say. What we say  
19 is, if you've followed pump-and-dump schemes then you're  
20 familiar with this entity. Why? Because, they happen to  
21 have lacks controls that have resulted in fraudulent  
22 activity being conducted through their platform. Right.  
23 That's the essence of FINRA allegations.

24 So, they want to talk about context and they say,  
25



1 we suspect that counsel is going to get up here and forget  
2 that he made the argument early about having to consider  
3 the totality of the article. Well, you do have to consider  
4 the totality of the article, and that includes 111-page  
5 opinion that says, Scottsdale you did this wrong. The  
6 people at your company were asleep at the switch.

7 And, if you dig into that 111-pages, Judge, and  
8 I--I know you probably don't want too. But, if you--if you  
9 dig into it what you will see is allegations that  
10 Scottsdale principal John Hur--yeah, John Hurry was  
11 essentially ex-communicated from the securities market  
12 because of his absolute refusal to acknowledge any  
13 wrongdoing, and lies that he reportedly told the FINRA.

14 Now, I'm sure that there's a disagreement from  
15 Mr. Hurry as to whether he lied to FINRA. That's FINRA's  
16 finding and I get that. But, that is the context for this  
17 article, right. It's that you have a company that has not  
18 done its job. It has been fined and here's links out to  
19 those underlining articles. So, it's not so much "click-  
20 bait" as it's a portal to explain to people.

21 This isn't something that you're going to  
22 necessarily find if you just run a Google search for  
23 Scottsdale Capital. But, if you come to Good Trades, which  
24 is an online platform that does a lot of news on the penny-  
25

1 stock market, right. This is something that's relevant in  
2 that market.

3 And--you know, so when you look at this in--in  
4 totality, we can't forget why they were fined 1.5 million.  
5 I think that's the point that plaintiffs want to gloss  
6 over. I think if you--if you keep in mind the why, you get  
7 to this is not a materially false statement.

8 Very last statement, Judge, is I'm privilege--  
9 counsel said that, you know, well First Amendment  
10 privileges are qualified. I don't know that I would make  
11 that broad of generalization, but if we assume, even just  
12 for argument sake, that that were true this is a statutory  
13 privilege. We're not alleging when it comes to that  
14 privilege that it's based on the First Amendment.

15 It may have its origins in the First Amendment in  
16 the sense that the legislature is looking to protect free  
17 speech. But, the legislature is certainly free to bestow  
18 an unqualified privilege so long as you fit within its  
19 parameters, and that's what we alleged that we do here.  
20 So, I would--I would just urge the court to keep that  
21 distinction in mind as it considers the privilege analysis.

22 Thank you, your Honor.

23 THE COURT: Thank you.

24 This matter is before the court on a Motion for  
25

1 Summary Disposition filed by defendant MorningLightMoutain,  
2 LLC, Michael Goode and DOES 1-10.

3 Under 2.116(C)(8), as the court has indicated C8  
4 motions require the court to look at the pleadings and  
5 determine if on C8 motions if the complaint states any  
6 cause of action that can be granted relief by the court.

7 It's designed to establish whether in fact  
8 there's a cognoscible legal issue that's being present, as  
9 opposed to C10s, which relate to whether there's material  
10 facts in dispute requiring a trier of fact to resolve it,  
11 or any of the other sections of 2.116(C); statute of  
12 limitations, matter having already been adjudicated,  
13 etcetera.

14 In essence, this is, as parties have indicated,  
15 this is a defamation action filed by the plaintiff based  
16 upon two major--two articles; one on April 17 of 2017, and  
17 June 14 of 2017, which MorningLightMoutain on its website  
18 published two articles that plaintiff alleges were  
19 defamatory.

20 The April article is alleged to contain three--at  
21 least three defamatory or false remarks; specifically,  
22 quote, "if you have followed penny-stocks and pump-and-  
23 dumps for a few years and you know the Scottsdale Cap  
24 advisors". Second was, "they, Scottsdale are one of the  
25

1 few holders left that continue--have continued to allow  
2 deposit and sale of shares of illiquid penny-stocks.  
3 Larger brokers and discount brokers stopped allowing that  
4 over 5-years ago." Third, alleged in--item was, "when the  
5 big Biozoom pump happened back in 2013 many of the frozen  
6 accounts were at Scottsdale."

7 The June article there's alleged one defamatory  
8 or false remark, which was, quote, "lest anyone think that  
9 these are just minor paperwork deficiencies with no real  
10 consequences, I remind you that one pump-and-dump along,  
11 Biozoom led to over 17 million dollars in fraudulent  
12 profits for manipulators/insiders, and many of those  
13 accounts were at Scottsdale Capital Advisors."

14 Based upon those alleged defamatory statements  
15 plaintiff filed a complaint April 16 of this year. That  
16 complaint--the parties actually move these proceedings to  
17 federal court, which then by agreement of the parties ended  
18 up moving back here with the result in a Motion for Summary  
19 Disposition file on June 7 of this year; response filed by  
20 plaintiffs on August 17 and a reply to that response filed  
21 by the defendants on August 20.

22 It appears that there are three issues that the  
23 parties have argued. First of all, is the question of the  
24 standard of review. Second, there's a question of what  
25

1 exhibits are admissible under C8 motions. And, third,  
2 whether there was--the initial and amendments complaint  
3 properly give asserted factual basis for the elements  
4 necessary to allege a defamation case.

5 The question of heightened scrutiny, I believe,  
6 while in some ways tempting to side with--with defendants  
7 based upon the Bose Corporation and the Thomas Cooley  
8 School, the court is not persuaded that simply because the,  
9 you know, in this case Scottsdale is a commercial entity  
10 that it in fact fits within the standards required to  
11 assert that they are a public official, we'll call it the  
12 entity that is subject to the higher scrutiny of actual  
13 malice as opposed to, quote/unquote, "negligence"  
14 defamation.

15 In fact that were the case, quite frankly, any  
16 public entity, any business, would be subject to that  
17 heighten scrutiny for any defamation action they chose to  
18 file in court. And, I don't believe that the case law or  
19 the intent of the legal process is that all commercial  
20 entities have to attain that particular standard.

21 That may ultimately be the direction the process  
22 goes, but from our court's perspective I am not willing to  
23 extend that further standard of actual malice to this case.  
24 Although, as parties have alleged or have argued today  
25

1       there is at least whiffs of claims of actual malice  
2       throughout this particular process.

3               This court also in one sense believes that  
4       looking at C8 motions, they do require that the court not  
5       only look at the allegations, but those attachments that  
6       give meaning to the allegations, as opposed to necessarily  
7       substantive support, if you will, of the allegations, which  
8       I characterize as being more in the line of possible C10  
9       motions at a later time.

10              The allegations of defamation should in and of  
11       themselves establish that there is or is not negligence and  
12       should or should not have those specifically set forth in  
13       the complaint, and theoretically the--the answer to the  
14       complaint such that someone reading those two documents  
15       understand at least what the--what the case is about, what  
16       the specifics of wrongdoing are alleged in the complaint,  
17       and what denies, if any, exist with regard to the answer.

18              In that regard, I think that the court is bound  
19       to look at the actual pleading documents, and only those  
20       items that are attached that in fact are necessary to give  
21       meaning to the actual allegations and denials that occur  
22       within those pleading documents.

23              At this point, the court is going to address the  
24       case with that narrow focus; that narrow reference.  
25

1                   Looking then at the basics. In order to  
2                   establish a defamation action, the complainant must  
3                   establish and the ultimately it must be proof that there  
4                   were false or defamatory statements concerning the  
5                   plaintiff. That there was an unprivileged communication to  
6                   a third party, in this case would be to the public. And,  
7                   that false amounting to at least negligence on the part of  
8                   the publisher and actual--and actionability of the  
9                   statement with respect to the special harm or existence  
10                  of a special harm caused by the publication. That cites to  
11                  the *Mitan versus Campbell* case, 476--474 Mich 21.

12                  While the parties may disagree as to some of the  
13                  peripheral facts outside the pleadings, the issue before  
14                  the court is whether--by the plaintiff established enough  
15                  asserted factual basis for the complaint to be properly  
16                  indicated as pleaded.

17                  Those four statements made by the defendant's  
18                  publication that plaintiff alleges arises to a level of  
19                  defamation each can be examined individually. I would  
20                  simply say that in order for the, quote/unquote,  
21                  "complaint" to survive just one of them needs to be  
22                  property pled in order to go forward.

23                  The court notes that defendant has provided the  
24                  court with the option of--of dismissing the complaint  
25

1 without prejudice to the plaintiff refiling once a--and  
2 these are not the words of the defendant, but basically  
3 once they get their complaint in order. I'll leave it to  
4 the ultimate decision in this matter as to whether that  
5 avenue needs to be taken.

6 As you look at each of the--the particular  
7 statements, the questions is not whether there's enough  
8 evidence to make a legal determination as to whether the  
9 defendant is in fact culpable, but rather whether the  
10 complaint properly asserts a legal stance, which relief can  
11 in face be granted by this court.

12 I would note that in their brief the defendant  
13 does not address the second or fourth element of  
14 defamation. Instead, they--the claims of either plaintiffs  
15 that do not establish a complaint such as the statements  
16 were false or defamatory, and that there was a duty of care  
17 and negligence have not been met. That was the primary  
18 focus.

19 Plaintiff asserts that the complaint--in the  
20 complaint that defendant should have known that the  
21 statements were false or at least acted in reckless  
22 disregards when it--when it issued the public articles--or  
23 published the articles. This statement does not have  
24 alleged evidence to prove directly the defendant knew of  
25



1 the claims falsity. This certain--assertion is based and  
2 applies bias.

3 If the defendant were journalist that worked  
4 within the realm of investigative--investment banking as  
5 defendant do, they would likely know the statements were  
6 intentionally false. That's, I think a little bit of a  
7 stretch given the fact that these rely on, I guess, source  
8 information, which would at least lead to statements that  
9 would direct a reader to any further inquiry if they in  
10 fact desired.

11 I had some concerns with regard to the question  
12 of misleading as opposed to false, which goes, I guess, to  
13 the bottom line or early assertions of whether something  
14 is--is a false statement or is--in the old terms mere  
15 puffery and that the courts have long recognized did not  
16 rise to a level of defamation.

17 But, in this particular case, I think that with  
18 at least regard to some of the statements, I--I don't need  
19 to go down that particular path.

20  
21 First statement - "if you have followed penny-  
22 stocks and pump-and-dumps for a few years then you know  
23 Scottsdale Capital Advisors." That does imply that  
24 Scottsdale is associated with pump-and-dumps schemes.  
25 However, I'm not worried at this point about whether that

1 statement's true or false, but only whether the complaint  
2 filed by the plaintiff properly asserts a factual basis  
3 that the statement by the defense--defendant is false or  
4 defamatory.

5 Defendants argue the statement is factual,  
6 because the statement does not explicitly state plaintiffs  
7 have--the plaintiffs have never been a defendant in a pump-  
8 and-dump lawsuit. But, the claim by the plaintiff is  
9 still--are still associate with pump-and-dump schemes,  
10 because of their broker/dealer status with regard to penny-  
11 stocks.

12 The plaintiff asserts that this statement implies  
13 that Scottsdale Capital advertisement--advertiser--advisors  
14 are--are conducting pump-and-dump schemes. And, the  
15 complaint alleges that the plaintiff has never been a  
16 defendant, has never been convicted for engaged in pump-  
17 and-dump schemes, and this clearly is a strong argument  
18 since the defendant's statement--statements are not  
19 commenting--commenting on the plaintiff's status in legal  
20 matters, but instead stating that pump-and-dump activities  
21 have been associated with Scottsdale Capital Advisors.

22 In that context, I do not believe that the  
23 complaint states a factual basis to establish a defamatory  
24 action.  
25

1           As to the second matter - that's SCA is one of  
2 the few brokers left that have continued to allow the  
3 deposit and sale of shares of illiquid penny-stocks.  
4 Larger brokers and discount brokers stopped allowing that  
5 over 5-years ago. This basically indicates who still  
6 participates in the transactions.

7           Plaintiff's complaint attempts to prove the  
8 statements falsity by asserting that many large broke--  
9 brokers continue to trade in penny-stocks. Defendant's  
10 statements assert that all large broker--brokers have  
11 stopped using this penny-stock method. The implication  
12 that defendant makes--that defendant makes sheds poor light  
13 on the defendant (sic) in regards to what is common  
14 practice and whether the plaintiff is following normal  
15 standards of practice.

16           While the defendant claims the statement is not  
17 false, because some large brokers still trade in existing  
18 shares of penny-stocks instead of purchasing new penny-  
19 stocks. This is not asserted in the statement and the  
20 complaint properly asserts that--on the basis to prove that  
21 statement number two, again, isn't false--is false.

22           Further, the statement is inherently defamatory  
23 when applying the practices of Scottsdale Capital is not in  
24 line with the others in the field. This statement would  
25

1 likely affect the opinion of its viewers even if not  
2 illegal. That the practices of the plaintiff are unusual  
3 and not for the (inaudible) of its client. Therefore, if  
4 proved this could be false and/or defamatory.

5 As to statement three, that Biozoom happened back  
6 in 2013 and that many of the frozen accounts were at  
7 Scottsdale. The last--this last statement on April 2017  
8 article is not false or defamatory. Assertion that the  
9 complaint states that only a handful of accounts at SCA  
10 were frozen as a result of Biozoom trading. The  
11 difference, however, between many and only a handful, I  
12 think is meritless.

13 Further, the complaint asserts that SCA has never  
14 been a defendant in a lawsuit involving Biozoom stock.  
15 Once again that statement the defendant did not declare  
16 that plaintiff was involved in the Biozoom related lawsuit,  
17 and thus the complaint clearly does not establish a factual  
18 basis to allege defamation with regard to that particular  
19 claim.  
20

21 Finally, the lest anyone think - the June 2017  
22 article, "lest anyone think that there are--that these are  
23 just minor paperwork deficiencies with no real  
24 consequences, I remind you that one pump-and-dump alone,  
25 Biozoom, led to over \$17 million dollars in fraudulent

1 profits for manipulators/insiders, and many of their  
2 accounts were at Scottsdale Capital Advisors", closed  
3 quote.

4 That does not imply any wrongdoing on the part of  
5 Scottsdale. It only states that the accounts that were  
6 wrongfully partaking in the pump-and-dump schemes were  
7 being through the plaintiff. The complaint asserts that  
8 this statement by the defendant implies that defendant  
9 (sic) was handing--handling the trading of Biozoom stock  
10 that was involved in lawsuits regarding the same matter.

11 However, the claim--this complaint seems--making  
12 assertions regarding statements that were in fact never  
13 made. The statement in the June 2017 article by the  
14 defendant does not claim that plaintiff was a party to the  
15 lawsuit involving Biozoom, nor does it state that the  
16 plaintiff was partic--partaking in the pump-and-dump  
17 scheme. The only claim is that many of the accounts that  
18 were taking part in this pump-and-dump scheme were held at  
19 Scottsdale Capital Advisors.

20  
21 Based on that, the court does not believe that  
22 claim is properly plead in the complaint.

23 Looking at this as whole, I am not going to  
24 dismiss the case under 2.116(C)(8).

25 However, I would note that statements one, three

1 and four have not been sufficiently plead to form a basis  
2 for an action in this case.

3 Number two, at least meets the standard of  
4 possibility of a cause of action.

5 Therefore, the complaint is not dismissed at this  
6 particular point. However, I do believe that unless there  
7 is an amendment as to ones--statements one, three and four  
8 that those alleged allegations are not sufficient under C8  
9 to go forward and that they will not be allowed to go  
10 forward on that basis.

11 Ultimately, I guess, that means plaintiff has, at  
12 least opportunity, if they believe they have something that  
13 will in fact provide a factual basis, at least allegations,  
14 as to one, three and four - they may choose to amend.  
15 Otherwise, we will simply go forward on Count--on the  
16 statement number two with regard to any further litigation  
17 in this matter.

18 Mr--I guess, Mr. Richotte--

19 MR. RICHOTTE: Yes.

20 THE COURT: --if you could prepare the order on  
21 this.

22 MR. RICHOTTE: Your Honor, I'd be happy to do  
23 that.

24 If I can also ask if the court has a ruling today  
25

1 on the False Light count?

2 THE COURT: Yes.

3 On the False Light count, I believe that--.

4 Well, my ruling would be that the False Light count is not

5 viable under C8. In essence, for the reasons argued by the

6 defendant; mainly that this is no expectation privacy in--

7 in a corporation. This is certainly a public corporation.

8 MR. RICHOTTE: I will be happy to prepare that

9 order and work opposing counsel to get that submitted to

10 your Honor.

11 THE COURT: Thank you.

12 MR. RICHOTTE: If I may have just a moment to

13 confer?

14 THE COURT: You may.

15 MR. RICHOTTE: I may have one question for the

16 court after this.

17 THE COURT: Sure.

18 (At 9:58:21 a.m., sidebar conversation between

19 Attorney Richotte and Michael Goode)

20 MR. RICHOTTE: Thank you, your Honor. It turns

21 out I don't have an additional question.

22 THE COURT: That's fine.

23 MR. KURTZ: Your Honor, if I may pose some

24 logistical question--

25

1 THE COURT: Yes.

2 MR. KURTZ: --if you'll entertain those.

3 My interpretation is if we want to amend on those

4 other statements we can. Do we want to send some kind of

5 deadline or--or have that--

6 THE COURT: Yeah.

7 MR. KURTZ: --as part of the order as well?

8 THE COURT: I--I think--yeah, I think that

9 probably makes some sense.

10 I--I--. Well, yeah, we getting--we getting the

11 end of vacation seasons.

12 So, we'll do 14-days to amend, and then if you do

13 amend the defendant has, under the rules, a period of time

14 to respond--to file an answer.

15 MR. KURTZ: And, to be somewhat (inaudible) it

16 sounds like you had to prepare a written something--

17 THE COURT: Something--something written--

18 MR. KURTZ: --or--

19 THE COURT: --I will--. What I can do is--I can

20 whip this up. Technically, as this is a business court

21 case you're entitled to have a document prepared and I will

22 so prepare it and issue that opinion.

23

24 MR. KURTZ: I--I really appreciate that, because

25 we didn't have the forethought of having a court recorder



1 and my note taking is not the best.

2 THE COURT: No, that's fine. That's fine.

3 I mean, technically it is recorded, but by the

4 same token that doesn't really give you a whole flavor in

5 my--my transcriptionist regularly admonishes me that I

6 mumble too much, so a written document probably is a better

7 one for you anyway.

8 MR. KURTZ: Fair enough.

9 And, do we want to--. I'm a logistical guy.

10 THE COURT: Sure.

11 MR. KURTZ: Do we want to do a time frame on the-

12 -doing the order?

13 MR. RICHOTTE: Sure.

14 Your Honor, perhaps if you're going to issue the

15 opinion does it make sense for the court to issue or you

16 still want us to have a separate order to that effect?

17 THE COURT: I think a--I think a separate order

18 just from the standpoint of you guys indicating what it is

19 that you understand in terms of direct.

20 I will--I will issue the opinion and then give

21 you, I think, a week to fashion the order after you get the

22 opinion.

23 MR. KURTZ: Really appreciate it, your Honor.

24 That works nicely.

25

1 THE COURT: Okay.  
2 We'll do that. I'll make a note to myself before  
3 I forget.  
4 MR. RICHOTTE: Any other logistics?  
5 MR. KURTZ: I'm done.  
6 MR. RICHOTTE: No. No. That's all right. I  
7 just wanted to make sure we--we got everything covered.  
8 All right.  
9 THE COURT: Okay.  
10 MR. RICHOTTE: Your Honor, we'll wait for the  
11 opinion--  
12 THE COURT: Yep.  
13 MR. RICHOTTE: --and then get crafting an order  
14 after that.  
15 THE COURT: Okay.  
16 No problem. Court will stand in recess.  
17 MR. KURTZ: Thank you.  
18 MR. RICHOTTE: Thank you.  
19  
20 (At 10:02:18 a.m., proceedings concluded)  
21  
22  
23  
24  
25

1 STATE OF MICHIGAN )  
2 )  
3 COUNTY OF KALAMAZOO )  
4  
5

6 I certify that this transcript consisting of 43 pages, is a  
7 complete, true, and correct transcript of the MOTION FOR SUMMARY  
8 DISPOSITION to the best of my ability, of the proceedings held  
9 in this case on Wednesday, August 22, 2018, before the Honorable  
10 Alexander C. Lipsey.

11 October 17, 2018



12  
13 Date

Rebecca Abbs-Kucks CER #7921  
PO BOX 24  
Vicksburg, MI 49097  
269-352-9227