In the Kalamazoo County Circuit Court
For the State of Michigan

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff,

v.

MORNINGLIGHTMOUNTAIN, LLC, MICHAEL GOODE, and DOES 1-10,

Defendants.

Civil No. 18-0153-CZ
HON. ALEXANDER C. LIPSEY

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER ON SUMMARY DISPOSITION UNDER RULE 2.116(C)(8)

HARDER LLP
Charles J. Harder (CA# 184593)
Jordan D. Susman (CA# 246116)
132 South Rodeo Drive, Fourth Floor
Beverly Hills, California 90212
(424) 203-1600
charder@harderllp.com
jsusman@harderllp.com
Counsel for Scottsdale Capital Advisors
Pro Hac Vice Pending

PINSKY, SMITH, FAYETTE & KENNEDY, LLP
H. Rhett Pinsky (P18920)
146 Monroe Center Street, NW, Suite 805
Grand Rapids, Michigan 49503
(616) 451-8496
hpinsky@psfklaw.com
Counsel for Scottsdale Capital Advisors

BUTZEL LONG, P.C.
Joseph E. Richotte (P70902)
Doaa K. Al-Howaishy (P82089)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1616
richotte@butzel.com
al-howaishy@butzel.com
Counsel for MLM and Michael Goode

DEFENDANTS' MOTION FOR RECONSIDERATION

Under Rule 2.119(F), Defendants MorningLightMountain, LLC, and Michael Goode (jointly, "Defendants") respectfully ask the Court to reconsider its Opinion and Order partially denying their Motion for Summary Disposition under Rule 2.116(C)(8).

JURISDICTION

Motions for reconsideration must be filed within 21 days after the date stamped on the opinion. M.C.R 2.116(F)(1). The Court issued its Opinion on October 4, 2018, making any motion for reconsideration due by October 25, 2018. (Exhibit 1, Opinion.) This Motion was timely filed on October 25, 2018.

LEGAL STANDARD

Motions for reconsideration are governed by Rule 2.119(F)(3). Generally, and without restricting the Court's discretion, a motion for rehearing or reconsideration that merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. M.C.R. 2.119(F)(3). The moving party must show a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. *Ibid.*

ARGUMENT

1. *Heightened Review:* The Court committed palpable error when it held there is no heightened pleading requirement in defamation cases.

The Court held that it "should not implement a higher standard as the Defendant suggests, but instead maintain a normal course of action regarding MCR 2.116(C)(8) that reviews only pleadings for legal sufficiency in light of the alleged wrongdoing." (Exhibit 1 at 5.) This is a mistake of law. Michigan caselaw imposes a heightened pleading standard for defamation claims.

To support its holding, the Court explained that Defendants "improperly interpreted" *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Thomas M. Cooley Law School* v. *Doe 1*, 300 Mich. App. 245 (2013), stating that these cases pertain to public officials and public figures, whereas this is (allegedly) a private-figure case. (Exhibit 1 at 4.) But the distinction between public and private figures is irrelevant to the scrutiny that must be brought to bear when assessing whether a defamation claim is properly pleaded—the distinction goes only to *the level of fault* that applies in a given case. The heightened scrutiny of the pleadings applies to *all* defamation cases, regardless of whether the plaintiff is a public or private figure. *Rouch* v. *Enquirer & News (After Remand)* ("*Rouch II*"), 440 Mich. 238, 272–27 (1992) (Riley, J. concurring) (in a *private-figure case* reviewed on appeal from a (C)(10) ruling, Justice Riley noted that the pleadings in a defamation case are also to be reviewed with heightened scrutiny when challenged under (C)(8)). Although stated in a concurrence, "Justice Riley's position [in his concurring opinion in *Rouch II* is consistent with previous decisions of this Court." *Royal Palace Homes, Inc.* v. *Channel 7 of Detroit, Inc.*, 197 Mich. App. 48, 52–53 (1992) (also apparently a *private-figure case*). *See also Trost* v. *BuckStop Lure Co., Inc.*, 249 Mich. App. 580, 587 n.2 (2002) (observing, in a *private-figure case*, that Justice Riley outlined the proper procedure for (C)(8) challenges).

Thus, the Court made a clear error of law by ruling that it was not required to performed a heightened review of the Complaint to determine whether SCA had pleaded each element of its defamation claims.

2. ***SCA's Status:*** **The Court committed palpable error when it reached the issue of whether SCA is a public or private figure.**

When discussing the applicable standard of review, the Court added that it "should not find that the Plaintiff is a public figure, even though neither party has ar-

gued such." (Exhibit 1 at 4.) The Court explained "[SCA] does not avail itself, intentionally or otherwise, to the public domain. By its nature of investment banking, the average population does not know the company by name and surely does not have a legitimate interest in its affairs." *Ibid.* This reasoning is flawed for five reasons:

First, this was not an issue presented in our motion, and thus beyond the scope of the Court's analysis at this juncture. The Court was limited to the pleadings when rendering its decision. M.C.R. 2.116(G)(5).

Second, SCA is a publicly regulated business subject to oversight from the U.S. Securities & Exchange Commission. The Court offers no legal support for its conclusion of law that the public has no legitimate interest in the business dealings of a publicly regulated company.

Third, the Court has overlooked controlling caselaw that says the "average population" is the wrong cohort for the analysis. As noted in Defendants' Reply, the U.S. Supreme Court has adopted a "reasonable audience" standard. *Air Wis. Airlines Corp.* v. *Hoeper*, 571 U.S. 237, 246–251 (2014). The reasonable audience in this case is not the average population. It is those who visit goodtrades.com, which reports on matters relevant to the microcap market. A reasonably careful journalist and a reasonably careful publisher can reasonably expect that those who visit goodetrades.com are sophisticated readers who are well versed in the industry and that they would conclude that SCA was the means by which illegal activity was implemented—particularly with the benefit of links to source documents.

Fourth, the Court conflates two distinct concepts: public-figure plaintiffs and cases involving matters of public concern. Defendants' Motion addressed the latter, not the former.

A public figure "attains that status by voluntarily assuming a role of special prominence in the affairs of society, whereas a private figure has not assumed an influential role in society." *Lakeshore Cmty. Hosp., Inc.* v. *Perry*, 212 Mich. App. 396, 403 (1995). There is also the limited-purpose public figure, which is a person who places himself in "the forefront of particular public controversies." *Gertz* v. *Welch*, 418 U.S. 323, 345 (1974). To determine whether someone is a limited-purpose public figure, a "court must look to the nature and extent of the individual's participation in the controversy." *New Franklin Enters.* v. *Sabo*, 192 Mich. App. 219, 222 (1991).

Matters of public concern, on the other hand, are of "legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego* v. *Roe*, 543 U.S. 77, 84 (2004).

In every defamation case involving a public figure, a limited-purpose public figure, *or a matter of public concern*, actual malice is a live issue. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 281–282 (1964) (public officials); *Curtis Publ'g Co.* v. *Butts*, 38 U.S. 130 (1967) (public figures); *Dun & Bradstreet* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (limiting private figures to actual damages absent actual malice).

Fifth, and finally, because Defendants moved under Rule 2.116(C)(8), holding that SCA is not a public figure arguably forecloses (impermissibly) Defendants from developing a record to prove that SCA is a general or limited-purpose public figure. While SCA may claim it is a private figure, facts adduced during discovery may prove that it has injected itself into a public controversy, which can be used on a (C)(10) motion brought after the close of discovery.

3. ***Exhibits to Defendants' Pleadings:*** **The Court erroneously held that it could not review Defendants' exhibits.**

At oral argument, the Court stated that it must look to the pleadings—both the Complaint and the Answer—and to the documents attached to those pleadings

that are necessary to give meaning to the parties' allegations and denials. (Exhibit 2, Motion Tr. 30:3–23 (Aug. 22, 2018).) Yet, in its Opinion, the Court held "the exhibits that were introduced via the Defendants' Motion are not to be reviewed when determining the Motion." (Exhibit 1 at 5.) But the only documents attached to the Motion *are the same documents attached to the Answer.* Thus, the exhibits to Defendants' Motion *are* part of the pleadings. By its own reasoning, the Court was required to view those documents when ruling on this motion. The Court should therefore grant reconsideration of this portion of its Opinion.

4. ***Fault* and *Res Ipsa Loquitur*: The Court erred by applying the doctrine of *res ipsa loquitur*, which cannot be used to prove fault in defamation cases.**

The Court's Opinion conflates falsity and fault, which are two distinct elements that require different proofs. *See Locricchio* v. *Evening News Ass'n*, 438 Mich. 84, 117–123 (1991). Error, alone, is not negligence. Assuming *arguendo* that this is a private-figure case, Statement No. 2 must be provably false *and* Defendants must have failed to exercise the degree of care that a reasonable journalist or publisher would have under the circumstances. The Court ruled, however, that proof of falsity is *ipso facto* proof that Defendants failed to exercise the requisite standard of care: "applying the legal theory of *res ipsa loquitor*, the Defendant's statements were made about a realm that they claim to have a lot of experience in. If the statements prove to be false, then by its very nature they also meet the third element's standard that requires negligence on behalf of the wrongdoer." (Exhibit 1 at 6–7.) This reasoning incorrectly interprets and misapplies the doctrine of *res ipsa loquitur.*

Res ipsa loquitur is a principle of tort law that allows one to infer negligence from the very nature of an injury, despite the absence of direct evidence regarding how any particular person behaved. "The doctrine implies that the court does not know, *and*

cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved." Restatement (Third) of Torts § 17 (2010) (emphasis added). It is applied in negligence cases where there is an injury for which there is no direct evidence that a particular individual caused it, but *the nature of the injury* is such that it *must* have been caused as a result of negligence. Hence *the thing speaks for itself.*

No Michigan court has ever applied this doctrine to a claim of defamation. Indeed, the doctrine cannot apply in defamation cases because a false statement is never automatically the result of actual malice or negligence. Even assuming *arguendo* that this is a private-figure case, at the pleading stage, SCA must plead *how* the reasonable reporter and publisher would have acted differently than Defendants did in this situation. *Rouch II*, 440 Mich. at 279 (Riley, J., concurring) ("The relatively simple requirement of pleading facts to support allegations of material falsity, *negligence, or reckless disregard for the truth* should be followed ... in defamation actions, and, pursuant to MCR 2.116(C)(8), defendant should have been entitled to summary disposition on this ground alone a decade ago." (emphasis added)). But the Complaint does not make any allegations of what a reasonable reporter or publisher would have done differently. Without that connection spelled out in the Complaint, SCA has failed to plead facts establishing *why* Defendants are at fault *if* Statement No. 2 is false. Thus, they have failed to adequately plead a required element with the required specificity as to that statement.

5. ***Falsity and Defamatory Meaning:*** **The Court erred when it held that Statement No. 2 is "likely false and defamatory."**

The Court held that Statement No. 2 is "likely" false and defamatory. (Exhibit 1 at 8.) This is erroneous for two reasons.

First, as to falsity, the Court held: "[w]hile the Defendant[s] claim[] the statement is not false because some large brokers still trade in existing shares of penny stocks, instead of purchasing new penny stocks, this is not asserted in the statement." *Ibid.* This is a facially incorrect statement of fact. Statement No. 2 reads: "They [Plaintiff] are one of the few brokers left that have continued to allow the *deposit and* sale of shares of illiquid penny stock. Larger brokers and discount brokers stopped allowing that over five years ago." *Ibid.* (emphasis added). *Depositing* shares and *selling* shares are two different activities. As written, Statement No. 2 says few brokers still allow *both* activities. The Complaint only identifies brokers who still trade penny stocks. (Compl. ¶ 13(b).) Nowhere in the Complaint does SCA identify *any* other brokers who still accept shares for *deposit*. Thus, it has not sufficiently alleged that the statement as written—"deposit *and* sale"—is false.

Second, as to defamatory meaning, the Court held that Statement No. 2 is "inherently defamatory" by implying that SCA engages in practices not in line with others in its field. *Ibid.* But that is the language of defamation *per se*, and this is a claim for defamation *per quod*. For something to be "inherently defamatory" it must "either hold a person up to contempt, ridicule, or scorn, impute crime, impute unchastity in a woman, or impute a loathsome disease." *Bufalino* v. *Maxon Bros., Inc.*, 368 Mich. 140, 151–152 (1962). Indeed, the Michigan Supreme Court has held that saying someone is in a particular line of business is "not in and of itself defamatory," if it is a "perfectly legitimate business"—*i.e.*, a legal one. *Ibid.* Plainly, a federally regulated business is a lawful business; the Court implicitly acknowledges as much. (*See* Exhibit 1 at 8 ("This statement [about SCA's business practices] ... even if not illegal ...".)

For these reasons, the Court committed palpable error when it ruled that SCA had adequately pleaded falsity and defamatory meaning with the specificity required for defamation actions. It should therefore reverse these rulings.

RELIEF REQUESTED

For these reasons, the Could should:

(1) HOLD that SCA's defamation claim is subject to heightened pleading requirements, even assuming *arguendo* this is a private-figure case;

(2) HOLD that the Court can review the exhibits attached to Defendants' Answer when considering a motion under MCR 2.116(C)(8);

(3) HOLD that the doctrine of *res ipsa loquitur* cannot be applied in defamation cases as a substitute for pleading fault with the required specificity;

(4) HOLD that SCA has failed to adequately plead falsity, defamatory meaning, or fault with the specificity required in defamation actions; and

(5) GRANT full summary disposition in Defendants' favor, dismissing this action in its entirety under Rule 2.116(C)(8).

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: OCTOBER 25, 2018

JOSEPH E. RICHOTTE (P70902)
DOAA K. AL-HOWAISHY (P82089)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1616
richotte@butzel.com
al-howaishy@butzel.com
Counsel for MLM and Michael Goode

EXHIBIT 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO
****

SCOTTSDALE CAPITAL ADVISORS CORPORATION

Plaintiff,

v

MORINGLIGHTMOUTAIN, LLC, MICHAEL GOODE AND DOES 1-10,

Defendants.

Circuit Court File No. 2018-0153-CZ

Hon. Alexander C. Lipsey

OPINION AND ORDER

Jordan D. Susman (CA# 184593)
HARDER LLP
Attorney for Plaintiff
132 South Rodeo Dr., 4th Floor
Beverly Hills, CA 90212
(424) 203-1600

Joseph E. Richotte (P70902)
BUTZEL LONG, PC
Attorney for Defendants
41000 Woodward Avenue
Bloomfield Hills, MI 48304
(248) 258-1616

H. Rhett Pinsky (P18920)
PINSKY, SMITH, FAYETTE & KENNEDY, LLP
Local Counsel for Plaintiff
146 Monroe Center St., NW – Suite 805
Grand Rapids, MI 49503
(616) 451-8496

At a session of Court in the City and County of
Kalamazoo, State of Michigan, on
this 4th day of October, 2018.

PRESENT: HONORABLE ALEXANDER C. LIPSEY, Circuit Court Judge

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Scottsdale Capital Advisors, the Plaintiff, is an investment banking company that partakes in penny stock trading. Penny stocks are smaller, non-SEC regulated stocks. Scottsdale was used by certain investors to perform a pump-and-dump scheme in order to alter the current stock value for a company called Biozoom. The Defendants, MorningLightMountain, Michael Goode, and Does 1-10, report via blog and social media posts about issues facing the trading and investment world.

On April 17, 2017 and June 14, 2017, MorningLightMountain through the website GoodeTrades.com published two articles which Plaintiffs allege were defamatory. Plaintiff claims the April article contains at least three defamatory, false remarks. The Plaintiffs quote the following three:

1. "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."
2. "They [SCA] are one of the few brokers left that have continued to allow the deposit and sale of shares of illiquid penny stocks. Larger brokers and discount brokers stopped allowing that over five years ago."
3. "When the big Biozoom (BIZM) pump happened back in 2013 many of the frozen accounts were at Scottsdale Capital."

The June article contains at least one defamatory, false remark including the following:

1. "Lest anyone think that these are just minor paperwork deficiencies with no real consequences, I remind you that one pump and dump alone, Biozoom, (BIZM) led to over $17 million in fraudulent profits for manipulators / insiders, and many of accounts were at Scottsdale Capital Advisors."

Based on these alleged defamatory remarks, Plaintiff filed a summons and complaint on April, 16, 2018 in the 9th Circuit Court of Kalamazoo County. The Defendants filed a Motion for Summary Disposition on June 7, 2018. Plaintiffs responded on August 17, 2018 and Defendants replied on August 20, 2018.

STANDARD OF REVIEW

(C)(8)

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) is appropriate when the opposing party has failed to state a claim on which relief can be granted. A Motion for Summary Disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Beaudrie v Henderson*, 465 Mich 124, 129 (2001). "[A]ll well pleaded allegations are accepted as true, and construed most favorably to the non-moving party." *Wade v Dep't of Corr*, 439 Mich 158, 162-163 (1992). A mere statement of conclusions, unsupported by factual allegations, is not sufficient to state a cause of action. *ETT Ambulance Svc Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade* at 163.

ANALYSIS

Through the parties' filed briefs, there are three issues at bar. First, there is a question regarding the standard of review. Second, there is a question what exhibits and evidence are admissible under review of MCR 2.116(C)(8). Third, there is a question whether the initial and amended complaint (the Complaint) properly give asserted factual basis for all the elements necessary to allege a defamation case.

1. **THE STANDARD OF REVIEW IS NOT ALTERED JUST BECAUSE THE CASE AT BAR INVOLVES AN ALLEGED DEFAMATION.**

The first issue is whether there is a heightened scrutiny when reviewing defamation cases in the scope of MCR 2.116(C)(8). Defendant, the moving party, claims that there is a heightened scrutiny when reviewing a defamation case for legal sufficiency based on its pleadings. The Plaintiff properly states that this claim is without merit. The two cases the Defendants cite to, *Bose Corp. v Consumers Union* and *Thomas M Cooley Law School v Does 1*, are improperly interpreted. 466 US 485 (1984); 300 Mich App 245 (2013). In *Bose Corp.*, the Supreme Court references decisions made in light of *New York Times Co v Sullivan*. 466 at 487-86. This case pertains to public officials. In defamation cases, most states impart a higher standard for public officials to prove "actual malice" before a proper claim can be made. *New York Times Co v Sullivan*, 376 US 254, 268 (1964).

Furthermore, the Defendant's citation of *Thomas M Cooley Law School v Does 1* also fails to appreciate the different standard between a public official or figure and a private one. The Defendant does not assert that the Plaintiff is a public official or figure, and thus by Michigan law the Plaintiff is not required to prove "actual malice" since proof or assertion of "actual malice" is reserved for defamation cases in which a public figure is the victim of the alleged defamatory remarks. *Peterfish v Frantz*, 168 Mich App 43, 52 (1988).

Further, this Court should not find that the Plaintiff is a public figure, even though neither party has argued such. A public figure is a "person who by his accomplishments, fame, or mode of living, or by adopting a calling which gives the public a legitimate interest in his act ivies, affairs, and character, has become a public personage. *Arber v Sahlin*, 382 Mich 300, n 4 (1969). Scottsdale Capital Advisors Corporation does not avail itself, intentionally or otherwise, to the public domain. By its nature of investment banking, the average population does not know the company by name and surely does not have a legitimate interest in its affairs.

For these reasons, this Court should not implement a higher standard as the Defendant suggests, but instead maintain a normal course of action regarding MCR 2.116(C)(8) that reviews only pleadings for legal sufficiency in light of the alleged wrongdoing. At bar, only normal defamation is being asserted by a private party.

2. **THE EXHIBITS AND EVIDENCE PRODUCED IN THE MOVING PARTY'S ORIGINAL BRIEF FOR SUMMARY DISPOSITION ARE NOT CONSIDERED WHEN REVIEWING WHETHER OR NOT THE ORIGINAL AND AMENDED COMPLAINT SUFFICIENTLY PLEADS A CLAIM IN WHICH RELIEF CAN BE GRANTED.**

The second issue is whether the Defendants' attached exhibits to their brief for their Motion for Summary Disposition are reviewable by this Court when deciding on a Motion brought under MCR 2.116(C)(8). The Plaintiff is correct that a Motion for Summary Disposition brought under MCR 2.116(C)(8) allows for the court to review only the pleadings already on file as evidence to support the moving party's Motion. *Dalley v Dykema Gossett*, 287 Mich App 296, 305 (2010). Because of this, the exhibits that were introduced via the Defendant's Motion are not to be reviewed when determining the Motion. This Court should only review the prior pleadings, both the original and the amended complaint, and any documents that were previously, properly submitted to the Court.

3. **THE ORIGINAL AND AMENDED COMPLAINT SUFFICIENTLY ASSERT AT LEAST ONE FACTUAL BASIS FOR WHICH THIS COURT CAN GRANT RELIEF THAT IS BEING REQUESTED.**

For recovery under MCR 2.116(C)(8), the moving party must prove that the Complaint does not establish the elements of the alleged wrongdoing with proper, factual basis. For a party to succeed in a defamation claim, the complainant must establish and prove that there were (1) false and defamatory statements concerning the plaintiff from an (2) unprivileged communication to a third party from (3) fault amounting at least to negligence on the part of the publisher and (4)

either actionability of the statement irrespective of the special harm or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 25 (2005).

While the parties may disagree on the some peripheral facts outside of the pleading, the issue before this Court is whether the Complaint by the Plaintiff establishes enough asserted factual basis for the Complaint to be properly pleaded. *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 685 (1989). In the Complaint, there are four statements made by the Defendant's publication that the Plaintiff alleges to rise to the level of defamation. Only one of the statements need to be properly pleaded for the Motion for Summary Disposition to be denied.

When analyzing each statement, the question is not whether there is enough evidence to make a legal determination as to whether the Defendant is culpable, but rather the Complaint properly asserts a legal stance in which relief can be granted by this Court. In their brief, the Defendant does not address the second and fourth elements of defamation. Instead, the Defendant claims that either the Plaintiff did not establish in their Complaint that the statements were false or defamatory and/or that the duty of care, negligence, has not been met.

The Plaintiff asserts in the Complaint that the Defendant should have known that the statements were false, or in the least acted in reckless disregard when it published the articles.[1] While this statement does not have alleged evidence to prove directly that the Defendant knew of the claim's falsity, this assertion implies a fact basis. If the Defendants were journalist that work within the realm of the investment banking, as they do, then they would likely know if the statements were intentionally false.

This argument is convincing for two reasons. First, applying the legal theory of res ipsa loquitor, the Defendant's statements were made about a realm that they claim to have a lot of

[1] Amended Complaint, ¶ 26, April 20, 2018.

experience in. If the statements prove to be false, then by its very nature they also meet the third element's standard that requires negligence on behalf of the wrongdoer. Second, Defendants have refused to retract, correct, or apologize for the statements and thus were on notice about their potential falsity.[2] If this court deems the statements to be false, then it consequently also determines that the Defendant's actions were negligent when reporting false statements. Because of this, only the falsity or defamatory nature will need to be assessed per statement within the Complaint.

A. "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."

The first statement from the April 2017 article implies that Scottsdale is associated with pump and dump schemes. The Court is not currently worried about whether this statement is true or false, but is ONLY worried about whether the Complaint filed by the Plaintiff properly asserts a factual basis that this statement by Defendant is false or defamatory. Defendants argue that this statement is factual because the statement does not explicitly state the Plaintiffs have never been a defendant in any pump and dump lawsuit, but claim that the Plaintiffs are still associated with pump and dump schemes because of their broker-dealer status in penny stocks.

The Plaintiff asserts that this statement implies that Scottsdale Capital Advisors are conducting pump and dump schemes. The Complaint alleges that the Plaintiff has never been a defendant and has never been convicted for engaging in pump and dump schemes. This is a strong argument since the Defendant's statements are not commenting on the Plaintiff's status in legal matters, but instead stating that pump and dump activity has been associated with the Scottsdale Capital Advisors. The Complaint does not properly allege a factual basis to refute this, for this reason the Defendant is correct, the Complaint does not properly give a basis to claim the first statement is false.

[2] Amended Complaint, ¶ 23, April 20, 2018.

B. "They [SCA] are one of the few brokers left that have continued to allow the deposit and sale of shares of illiquid penny stocks. Larger brokers and discount brokers stopped allowing that over five years ago."

The second statement pertains to the amount of brokers who still partake in transactions of illiquid penny stocks. The Complaint attempts to prove this statement's falsity by asserting many large brokers continue to trade in penny stocks. The Defendant's statement asserts that all large brokers have stopped using this penny stock method. The alleged statements made by Defendants could shed a poor light on the Plaintiff in regards to what is common practice and whether the Plaintiff is following normal standards within the practice.

While the Defendant claims the statement is not false because some large brokers still trade in existing shares of penny stocks, instead of purchasing new penny stocks, this is not asserted in the statement and the Complaint properly asserts a basis to prove that statement #2 is false. Further, the statement is inherently defamatory by implying the practices of Scottsdale Capital Advising is not in line with others in its field. This statement would likely affect the opinions of its viewers, even if not illegal, that the practices by the Plaintiff are unusual and not for the betterment of its clients. For this reason, this statement is likely false and defamatory.

C. "When the big Biozoom (BIZM) pump happened back in 2013 many of the frozen accounts were at Scottsdale Capital."

This last statement from the April 2017 article is not false nor defamatory. The assertion in the Complaint states that "only a handful of accounts at SCA were frozen as a result of Biozoom trading. The difference between "many" and "only a handful" is meritless. Further, the Complaint asserts that SCA has never been a defendant in any lawsuit involving Biozoom stock. Once again, the statement by the Defendants do not declare that the Plaintiff was involved in a Biozoom related lawsuit, and thus the Complaint does not properly assert a factual basis for the claim.

D. "Lest anyone think that these are just minor paperwork deficiencies with no real consequences, I remind you that one pump and dump alone, Biozoom (BIZM) led to over $17 million in fraudulent profits for manipulators / insiders, and many of their accounts were at Scottsdale Capital Advisors."

The final statement comes from the June 2017 article. Defendant's statement in the June article, unlike statement #2 from the April article, does not imply any wrongdoing by Scottsdale Capital Advisors and only states that the accounts that were wrongfully partaking in the pump and dump scheme were being held through the Plaintiff. The Complaint asserts that this statement by Defendant implies the Plaintiff was handling the trading of Biozoom stock and that it was involved in lawsuits regarding the same matter.

The Complaint seems to be making assertions regarding statements that were never made. The statement from the June 2017 article by the Defendants does not claim the Plaintiff is a party to a lawsuit involving Biozoom stock nor does it state that the Plaintiff was partaking in the pump and dump scheme. The only claim is that many of the accounts that were taking part in pump and dump were held at Scottsdale Capital Advisors. For this reason, this statement is also not properly pleaded in the Complaint to assert that it is factually false.

CONCLUSION

As noted above, all of the legality hinges on the falsity or defamatory nature of each statement and whether the Complaint has properly asserted a basis on which the overall claim can stand. Statement #1, #3, and #4 are not sufficiently pleaded because the Complaint does not assert facts that prove these statements were false. However, Statement #2 likely does meet this standard. Because of this, the overall Complaint is sufficiently pleaded when viewed in light favorable to the non-moving party.

As to Count II, Invasion of Privacy; False Light, the Court having determined that Plaintiff Corporation would have no expectation of privacy Count II fails to state a claim under MCR 2.116(C)(8).

For the reasons cited above, Defendants' Motion for Summary Disposition is **DENIED**.

IT IS SO ORDERED.

Dated: October 4, 2018

Alexander C Lipsey

Honorable Alexander C. Lipsey
Circuit Court Judge

PROOF OF MAILING

I, Denise Wilson, certify that on this date October 4, 2018 I mailed a copy of this document to the parties in interest at their above stated addresses via first-class mail and/or interoffice mail.

Denise H. Wilson

Denise H. Wilson
Judicial Aide to the Hon. Alexander C. Lipsey

EXHIBIT 2

STATE OF MICHIGAN

IN THE 9TH 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., 4TH 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

TABLE OF CONTENTS

WITNESSES:	PAGE
NONE	

EXHIBITS:	DESCRIPTIONS	IDENTIFIED	ADMITTED
NONE			

Kalamazoo, Michigan

Wednesday, August 22, 2018 - 9:01:29 a.m.

THE CLERK: All rise.

Kalamazoo County 9th Circuit Court is now in session. The Honorable Alexander C. Lipsey presiding.

Please be seated.

THE COURT: Okay.

THE CLERK: Court calls the case of Scottsdale Capital versus MorningLightMountain, LLC; case number 2018-0153-CZ.

Please state your appearances for the record.

MR. RICHOTTE: Hi. Good morning, your Honor. Joe Richotte appearing on behalf of the defendant.

MR. KURTZ: Good morning, your Honor. Nicholas Kurtz on behalf of the plaintiff.

MR. GOODE: Good morning, your Honor. Michael Goode the defendant and the sole member of the corporate defendant MorningLightMountain, LLC.

THE COURT: Okay.

Good morning. You may be seated.

We are here on kind of a roundabout journey. But, we're here on a Motion for Summary Disposition under 2.116(C)(8), basically dealing with the sufficiency of the plead--pleadings allegation under C8 - alleges that there

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

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

MR. RICHOTTE: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

errors is certainly not clear from the complaint.

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

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

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

authority for the securities market.

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

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

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

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

These other companies that are identified in the complaint as doing the training, certainly, we'll accept

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

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

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

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

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

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

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

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

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

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

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

of public interest privilege.

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, your Honor, unless you have any questions.

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

So, you may proceed.

MR. KURTZ: Thank you, your Honor.

I may go a little bit in reverse or easiest to

first.

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

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

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

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

see the document sin whole.

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

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

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

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

interpret the allegations of the complaint.

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

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

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

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

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

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

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

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

things that when taken together simply are not true.

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

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

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

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

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

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

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

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

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

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

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

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

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

intertwined in this falsity defamation and intent.

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

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

THE COURT: Okay.

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

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

THE COURT: Thank you.

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

THE COURT: Yep.

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

THE COURT: You may.

MR. KURTZ: Thank you--

THE COURT: Go ahead.

MR. KURTZ: --your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, your Honor.

THE COURT: Thank you.

This matter is before the court on a Motion for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, I would note that statements one, three

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

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

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

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

Mr--I guess, Mr. Richotte--

MR. RICHOTTE: Yes.

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

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

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

on the False Light count?

THE COURT: Yes.

On the False Light count, I believe that--. Well, my ruling would be that the False Light count is not viable under C8. In essence, for the reasons argued by the defendant; mainly that this is no expectation privacy in-- in a corporation. This is certainly a public corporation.

MR. RICHOTTE: I will be happy to prepare that order and work opposing counsel to get that submitted to your Honor.

THE COURT: Thank you.

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

THE COURT: You may.

MR. RICHOTTE: I may have one question for the court after this.

THE COURT: Sure.

(At 9:58:21 a.m., sidebar conversation between Attorney Richotte and Michael Goode)

MR. RICHOTTE: Thank you, your Honor. It turns out I don't have an additional question.

THE COURT: That's fine.

MR. KURTZ: Your Honor, if I may pose some logistical question--

THE COURT: Yes.

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

My interpretation is if we want to amend on those other statements we can. Do we want to send some kind of deadline or--or have that--

THE COURT: Yeah.

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

THE COURT: I--I think--yeah, I think that probably makes some sense.

I--I--. Well, yeah, we getting--we getting the end of vacation seasons.

So, we'll do 14-days to amend, and then if you do amend the defendant has, under the rules, a period of time to respond--to file an answer.

MR. KURTZ: And, to be somewhat (inaudible) it sounds like you had to prepare a written something--

THE COURT: Something--something written--

MR. KURTZ: --or--

THE COURT: --I will--. What I can do is--I can whip this up. Technically, as this is a business court case you're entitled to have a document prepared and I will so prepare it and issue that opinion.

MR. KURTZ: I--I really appreciate that, because we didn't have the forethought of having a court recorder

and my note taking is not the best.

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

I mean, technically it is recorded, but by the same token that doesn't really give you a whole flavor in my--my transcriptionist regularly admonishes me that I mumble too much, so a written document probably is a better one for you anyway.

MR. KURTZ: Fair enough.

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

THE COURT: Sure.

MR. KURTZ: Do we want to do a time frame on the--doing the order?

MR. RICHOTTE: Sure.

Your Honor, perhaps if you're going to issue the opinion does it make sense for the court to issue or you still want us to have a separate order to that effect?

THE COURT: I think a--I think a separate order just from the standpoint of you guys indicating what it is that you understand in terms of direct.

I will--I will issue the opinion and then give you, I think, a week to fashion the order after you get the opinion.

MR. KURTZ: Really appreciate it, your Honor. That works nicely.

THE COURT: Okay.

We'll do that. I'll make a note to myself before I forget.

MR. RICHOTTE: Any other logistics?

MR. KURTZ: I'm done.

MR. RICHOTTE: No. No. That's all right. I just wanted to make sure we--we got everything covered. All right.

THE COURT: Okay.

MR. RICHOTTE: Your Honor, we'll wait for the opinion--

THE COURT: Yep.

MR. RICHOTTE: --and then get crafting an order after that.

THE COURT: Okay.

No problem. Court will stand in recess.

MR. KURTZ: Thank you.

MR. RICHOTTE: Thank you.

(At 10:02:18 a.m., proceedings concluded)

STATE OF MICHIGAN)
)
COUNTY OF KALAMAZOO)

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

October 17, 2018

Date

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

In the Kalamazoo County Circuit Court
For the State of Michigan

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff,

v.

MORNINGLIGHTMOUNTAIN, LLC, MICHAEL GOODE, and DOES 1–10,

Defendants.

Civil No. 18-0153-CZ

HON. ALEXANDER C. LIPSEY

HARDER LLP
Charles J. Harder (CA# 184593)
Jordan D. Susman (CA# 246116)
132 South Rodeo Drive, Fourth Floor
Beverly Hills, California 90212
(424) 203-1600
charder@harderllp.com
jsusman@harderllp.com
Counsel for Scottsdale Capital Advisors
Pro Hac Vice Pending

BUTZEL LONG, P.C.
Joseph E. Richotte (P70902)
Doaa K. Al-Howaishy (P82089)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1616
richotte@butzel.com
al-howaishy@butzel.com
Counsel for MLM and Michael Goode

PINSKY, SMITH, FAYETTE & KENNEDY, LLP
H. Rhett Pinsky (P18920)
146 Monroe Center St., NW, Suite 805
Grand Rapids, Michigan 49503
(616) 451-8496
hpinsky@psfklaw.com
Counsel for Scottsdale Capital Advisors

PROOF OF SERVICE

Michelle L. Guardiola hereby states that on August 17, 2018, she served a copy of the Defendants' Motion for Reconsideration of Order on Summary Disposition Under Rule 2.116(C)(8) and this Proof of Service via Federal Express, addressed to Plaintiff's counsel at the following addresses:

HARDER LLP Charles J. Harder (CA# 184593) Jordan D. Susman (CA# 246116) 132 South Rodeo Drive, Fourth Floor Beverly Hills, California 90212	PINSKY, SMITH, FAYETTE & KENNEDY, LLP H. Rhett Pinsky (P18920) 146 Monroe Center St., NW, Suite 805 Grand Rapids, Michigan 49503

I declare that under the penalty of perjury that the statements above are true to the best of my information, knowledge and belief.

BUTZEL LONG

Michelle L. Guardiola

MICHELLE L. GUARDIOLA