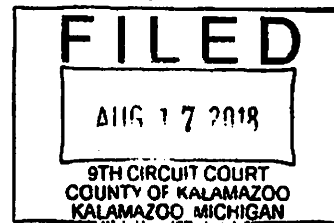


STATE OF MICHIGAN
KALAMAZOO COUNTY CIRCUIT COURT

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SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff,

File No.: 2018—0153-CZ

Hon. Alexander C. Lipsey

v.

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

Defendants.

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY DISPOSITION OF FIRST AMENDED COMPLAINT**

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Plaintiff Scottsdale Capital Advisors Corp. ("SCA"), submits its Response in Opposition to Defendants' MCR 2.116(C)(8) Motion to Dismiss ("Motion").

## INTRODUCTION

This action arises from Defendants' online publication of false, defamatory, and highly misleading statements (collectively, the "Defamatory Statements") in two different articles on

Defendants' website, www.goodetrades.com. As alleged in the operative First Amended Complaint ("FAC"), Defendants published the Defamatory Statements with the intent to smear SCA's reputation. (FAC at ¶ 2). It is therefore not surprising that the Motion begins with a three and a half page vilification of the penny stock industry—including *ad hominin* attacks on SCA and one of its principals—that is better suited for a closing statement than a motion to dismiss. Only on page 4 of the Motion do Defendants begin to discuss the allegations in the FAC. (Motion at p. 4) ("Which brings us to this lawsuit.")

In an effort to escape liability for the Defamatory Statements, Defendants argue that the Defamatory Statements must be read "in context." (Motion at p. 5). SCA agrees. Indeed, it is precisely when one reads the Defamatory Statements in context that their falsity shines through, as they falsely imply that (1) SCA was involved in the pump and dump of penny stocks, (2) SCA was fined for its involvement in the pump and dump of penny stocks, (3) SCA was involved in the pump and dump of Biozoom stock, and (4) SCA is engaged in trading that other, more reputable, brokers do not allow. Even if the Defamatory Statements themselves are true, which they are not, the implications they create are materially false and therefore actionable. *See Hawkins v. Mercy Health Servs., Inc.*, 230 Mich. App. 315, 327 (1998).

## LEGAL STANDARD

Ordinarily, one would not quibble with the legal standards alleged in a party's motion. Here, however, Defendants' Motion is rife with misleading legal standards that require correction.

First, "[o]nly the pleadings may be considered" when deciding a motion for summary disposition based upon MCR 2.116(C)(8). MCR 2.116(G)(5). Defendants try to evade this rule by attaching exhibits to their answer and then asking the Court to consider those exhibits. (*See*

Motion at p. 12, fns. 47, 48). This is improper, because "[a] party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v. Dykema Gossett*, 287 Mich. App. 296, 305 (2010).

Second, the fact that "only the pleadings may be considered" when deciding a motion for summary disposition does not mean that all of the pleadings are treated equally. In particular, *only the allegations in the complaint should be deemed true* and in the light most favorable to plaintiff. *Dalley*, 287 Mich. App. At 304-05; *Sarkar v. Doe*, 318 Mich. App. 156, 178 (2016) ("all factual allegations *made in the complaint* must be viewed in a light most favorable to the nonmoving party and accepted as true"). Defendants' flout this legal standard by treating the allegations in their answer (including the exhibits thereto) as true. This is improper.

Third, Defendants incorrectly allege that Michigan requires a heightened pleading standard in defamation cases based upon the First Amendment. (Motion at p. 6). In fact, the first case cited by Defendants, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) says nothing about the pleadings in a defamation case. And the other case cited by Defendants, *Gonyea v. Motor Parts Fed. Credit Union*, 192 Mich. App 74 (1991) says nothing about the First Amendment. Defendants are merely playing fast a loose with the holdings in the cases they rely upon.

Fourth, Defendants allege that the Court must read the Defamatory Statements in context to determine whether they are libelous, because they may have been "taken out of context." (Motion at p. 7). Although technically true, Defendants fail to mention that context is a two-way street, as Michigan recognizes claims for defamation by implication. *Hawkins*, 230 Mich. App. at 329–30. In order to determine if a statement is libelous, the "publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a

newspaper, and the language employed therein." *Sanders v. Evening News Ass'n*, 313 Mich. 334, 340 (1946). Indeed, when one reads the Defamatory Statements in context, their defamatory nature becomes readily apparent.

## ARGUMENT

### A. The Complaint Sufficiently Alleges The Elements of Libel

A cause of action for libel has four components: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Hawkins*, 230 Mich. App. at 324–26.

Further, a cause of action for defamation by implication if the plaintiff proves that the defamatory implications are materially false, and "that such a cause of action might succeed even without a direct showing of any actual literally false statements." *Hawkins*, 230 Mich. App. at 329–30. Accordingly, "even if defendant's statements were true, if the implications the statements created were false, the question of whether the statements were defamatory must be left up to the jury." *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 239 Mich. App. 695, 702.

"A communication is defamatory if it tends to harm an individual's reputation so as to lower him in the estimation of the community or deter others from associating with him." *Iacco v. Bohannon*, 70 Mich. App. 463, 466 (1976). "Direct accusations or inferences of criminal conduct or wrongdoing are not protected as opinion. There is no First Amendment protection for a charge which could reasonably be understood as imputing specific criminal conduct or other

wrongful acts." *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 253–54 (1988) (internal citations omitted).

**1. The False Statements in the April Article are False and Defamatory**

Read as a whole, the April Article falsely implies that SCA was wrongfully involved in the pump and dump of certain penny stocks—and fined $1.5 million by FINRA for said involvement. Over and over again, the April Article falsely imputes criminal conduct and wrongdoing to SCA. Even if one concludes that each of three false statements identified in the FAC is true (which SCA strongly contests), the implications created by those statements are false and defamatory.

**a. False Statement #1 is False**

The headline of the April Article states: "FINRA fines Scottsdale Capital Advisors $1.5 million." This is immediately followed by **False Statement #1**: **"If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."** This juxtaposition alone makes it appear that SCA was fined $1.5 million for its involvement in the pump and dump of penny stocks. *See Sanders v. Evening News Ass'n*, 313 Mich. 334, 340, (1946) ("publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.")

Defendants concede that False Statement #1 is defamatory, but try to escape liability by arguing that False Statement #1 is not false. (Motion at p. 9). Defendants' argument must fail—particularly at the pleadings stage—because False Statement #1 clearly implies something that is materially false: that SCA has been involved in "pump and dump" schemes. Nowhere in the April Article do Defendants inform their readers that SCA has never been involved in any "pump and dump" scheme, has never been a defendant in any "pump and dump" lawsuit, and has never

been convicted of engaging in "pump and dump" activity. Given the placement of False Statement #1 under a headline regarding a $1.5 million fine by FINRA, a reader could only conclude that SCA was fined for its involvement in a pump and dump. Moreover, the April Article quotes extensively from a FINRA decision that has nothing to do with any pump and dump scheme. Consequently, the implications created by False Statement #1 are false.

**b. False Statement #2 is False and Defamatory**

False Statement #1 is followed immediately by **False Statement #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."** As Defendants acknowledge, context is everything, and False Statement #2 is false and defamatory when read in context.

False Statement #2 is false because numerous large brokers continue to trade in penny stocks, including without limitation, interactive brokers, Merrill Lynch, Charles Schwab, Scottrade, Cor Clearing, and TradeKing. (FAC ¶ 13). Defendants try to wiggle their way out of the statement's falsity by claiming that the deposit and sale of penny stocks is different than the "trading" of penny stocks. This is a distinction without a difference, as stocks cannot be traded if they are not deposited and sold.

False Statement #2 is clearly defamatory, because it implies that SCA is doing something that "larger brokers and discount brokers stopped allowing" five years earlier. False Statement #2 is preceded by statements that SCA was fined $1.5 million and SCA is involved in the pump and dump of penny stocks. Read in context the implication is clear: unlike larger brokers and discount brokers, SCA is engaged in the illegal pump and dump of penny stocks. Because False Statement #2 paints SCA as a pariah company, engaging in trades that other company do not

"allow", it lowers SCA in the esteem of the community and deters people from dealing with it, and is therefore defamatory. *See Locricchio v. Evening News Ass'n,* 438 Mich. 84, 115 (1991) (a defamatory statement "tends so to harm the reputation of persons so as to lower them in the estimation of the community or to deter others from associating or dealing with them").

**c. False Statement #3 is False, Defamatory, and Not Privileged**

**False Statement #3** states: **"When the big Biozoom (BIZM) pump happened back in 2013 many of the frozen accounts were at Scottsdale Capital."** This statement immediately follows False Statements #1 & 2, and it reinforces everything that came before.

The April Article falsely implies that SCA was fined $1.5 million for its involvement in the pump and dump of penny stocks. Between the headline and False Statements #1 & 2, the April Article has already alleged that: (1) FINRA fined SCA $1.5 million; (2) SCA is involved in the pump and dump of penny stocks, and; (3) SCA engages in trades that other more reputable firms do not allow. False Statement #3 ties the forgoing statements together by making it appear that SCA was fined $1.5 million for the pump and dump of Biozoom stock. Indeed, the very next sentence states: "On March 31st FINRA fined Scottsdale Capital $1.5 million."

Read in context, False Statement #3 alleges that SCA did something illegal, because the Biozoom accounts at SCA were frozen and then SCA was fined $1.5 million. It is patently untrue that SCA did anything illegal with regard to the trading of Biozoom stocks. Therefore False Statement #3 is false.

False Statement #3 is also defamatory because it implies that SCA was fined $1.5 million for having accounts that traded in Biozoom. Defendants attempt to escape liability by disingenuously proclaiming that SCA is merely like a bank holding embezzled funds. (Motion at p. 12). Defendants' analogy collapses if the hypothetical bank was (1) accused of allowing

certain types of accounts and transactions that more reputable banks do not allow, (2) if the article was headlined "Bank fined $1.5 million by FDIC," and (3) if the article stated: "if you follow embezzlement schemes, then you know this bank." In context, False Statement #3 is merely one part in Defendants' scurrilous hit piece on SCA.

Defendants' allegation that False Statement #3 is protected by the fair report privilege misses the point, because it excludes everything that comes before and after it in the April Article. Because of the false statements that precede it, and the misleading statements that follow it, the implications of False Statement #3 are materially false and defamatory. Those false and defamatory implications overcome the fair report privilege. *See Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 175 (1986) (the fair report privilege is a *qualified* privilege, which may be overcome by a showing of malice).

**2. The FAC Sufficiently Pleads Fault**

Defendants argue that the FAC does not plead facts sufficient to show that Defendants acted negligently because SCA "must plead facts as to what a reasonable reporter and publisher would have done under the circumstances." (Motion at p. 8). This standard has been constructed out of whole cloth, and Defendants do not cite any authority for the proposition that a plaintiff alleging defamation "must plead facts as to what a reasonable reporter and publisher would have done under the circumstances." Indeed, online searches of Michigan case law for the terms "reasonable reporter" and "reasonable publisher" yield no results.

Read as a whole, the FAC contains numerous facts demonstrating that the False Statements were published negligently **and** with malice.

First, as discussed herein, the April Article is a scurrilous hit piece that implies that SCA was fined for its involvement in a pump and dump of penny stocks—allegations that are

materially false and defamatory. (FAC ¶ 21) ("The Defamatory Statements involve materially false implications.")

Second, the FAC alleges that Defendants refused to retract, correct or apologize for the False Statements even after being given notice of their falsity and ample time to do so. (FAC ¶¶ 16, 23). Consequently, the FAC contains factual allegations showing *how* Defendants knew the False Statements were false, and *why* Defendants were reckless in their disregard of the truth.

Finally, Defendants' reliance on *Rouch,* 427 Mich. 157 is misplaced, because it is based upon dicta in a concurring opinion. In order to be controlling precedent, an opinion must be concurred in by a majority of the court. *Groening v. McCambridge*, 282 Mich. 135, 140 (1937).

**3. The False Statement in the June Article is False and Defamatory**

**False Statement #1** in the June Article states: **"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."** Defendants argue that this False Statement has been plucked out of context, and "the Court must fairly and reasonably construe the entire article whether [the] statement is libelous." (Motion at pp. 12-13). SCA wholeheartedly agrees. When False Statement #1 is read in context, it clearly implies that SCA was involved in the pump and dump of Biozoom stock, which it was not.

The June Article begins by saying: "FINRA fined SCA $1.5 million for doing a really poor job at preventing illegal sales by penny stocks insiders." The June Article then quotes extensively from the FINRA Hearing Panel Decision ("FINRA Panel Decision") that fined SCA $1.5 million. This is followed by extensive quotes from a complaint filed by the SEC against Alpine Securities on June 5, 2017 ("SEC Complaint"). Of critical importance, *neither the*

*FINRA Panel Decision, nor the SEC Complaint, accused SCA of any wrongdoing with regard to the trading of Biozoom stock.* It is for this reason that the juxtaposition of False Statement #1 with the allegations of wrongdoing by John Hurry and Alpine is so pernicious: it falsely implies that SCA was involved in the pump and dump of Biozoom stock, when SCA has never been involved in any "pump and dump" schemes (including any "pump and dumps" involving Biozoom shares), has never been a defendant in any "pump and dump" lawsuits, and has never been convicted of engaging in "pump and dump" activity.

Instead of acknowledging these truths, Defendants falsely allege that SCA "permitted fraudsters to steal almost $34 million from investors." (Motion at p. 14). Contrary to the allegations in the Motion, SCA does not have a track record—adjudicated or otherwise—of "permit[ting] fraudsters to steal" any money from investors. SCA has never "permitted fraudsters to steal" money from investors. By this accusation in the Motion, Defendants continue to disparage SCA and misrepresent that SCA was involved in the pump and dump of Biozoom stocks.

**B. <u>The Complaint Sufficiently Alleges The Elements of False Light</u>**

To state a claim for false light in Michigan, a plaintiff must allege: (1) publication of a false statement harmful to plaintiff's interest; (2) the intention that the publication cause harm, recognition of likely harm, or negligence to likely harm; and (3) knowledge that the statement is false or reckless disregard to its veracity. *See Kollenberg v. Ramirez*, 127 Mich. App. 345, 352 (1983); *see also Derderian v. Genesys Health Care Sys.*, 263 Mich. App. 364, 385 (2004) ("In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or

beliefs that were false and placed the plaintiff in a false position."). All of these elements are present in the FAC.

First, the FAC alleges that Defendants published false statements that harmed SCA. Specifically, Defendants falsely published that SCA is involved in the pump and dump of stocks (FAC ¶¶ 12-15); that SCA engages in suspect trading practices eschewed by other brokers (FAC ¶¶ 12-13); that SCA's involvement in pump and dump schemes has caused harm to third parties (FAC ¶¶ 12-15).

Second, the FAC alleges that Defendants were, at a minimum, negligent to the likely harm of their false publication. (FAC ¶¶ 16, 23, 26, 30).

Third, the FAC alleges, "At the time Defendants published statements, they knew the Defamatory Statements were false and/or acted in reckless disregard as to the falsity of the publicized matter and the false light in which SCA would be placed." (FAC ¶ 30).

**1. SCA May Plead A Claim For False Light**

Defendants argue that SCA, as a business, is precluded from pleading a claim for false light. Defendants are, at best, confused.

First, no Michigan court has ever held that a business cannot maintain a claim for false light. Indeed, the case cited by Defendant, *Booth Newspapers, Inc. v. Kent County Treas.*, 175 Mich. App. 523 (1989) says nothing about false light.

Second, several business plaintiffs have brought cases for false light in Michigan under Michigan law. In *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 978 F. Supp. 2d 849 (W.D. Mich. 2013), *aff'd*, 759 F.3d 522 (6th Cir. 2014), a law school brought claims against a law firm and attorneys for defamation, tortious interference with business relations, breach of contract, and false light. The false light claim was dismissed because the law school was a

public figure and unable to establish actual malice—not because it was a business asserting a right it did not have. *Id.* at 859–60. And in *Northland Wheels Roller Skating Ctr., Inc. v. Detroit Free Press, Inc.*, 213 Mich. App. 317, 330 (1995), the court dismissed the business-plaintiff's false light claim because the statements at issue were not defamatory—not because it did not have a right to bring the claim.

Third, although characterized as an invasion of privacy tort, false light is, in fact, closely related to defamation. *See Battaglieri v. Mackinac Ctr. For Pub. Policy*, 261 Mich. App. 296, 304 (2004) ("this cause of action [false light] is similar to a defamation claim"). The "gravamen of this tort [false light] is that a defendants publication attributed to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Id.* at 303-04. As alleged in the FAC, the gravamen of SCA's claim for false light is "Defendants broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to SCA characteristics and/or conduct that were false and placed SCA in a false position." (FAC ¶ 29).

Accordingly, SCA is permitted to plead a claim for false light.

**2. False Light Is A Different Tort Than Public Disclosure Of Private Facts**

Defendants allege that SCA must plead the disclosure of private facts to maintain a claim for false light. Defendants are wrong as a matter of law.

Public disclosure of private facts is a different tort than false light. *See Battaglieri*, 261 Mich. App. at 300 ("The common-law right of privacy is said to protect against four types of invasion of privacy. 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's

advantage, of the plaintiff's name or likeness."); *see also Dalley v. Dykema Gossett*, 287 Mich. App. 296, 306 (2010) ("Today, the invasion of privacy tort has evolved into four distinct tort theories: (1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage.").

Here, SCA's claim against Defendants is for false light—the third theory of invasion privacy—not public disclosure of public facts. Defendants' attempt to impose the elements of a different tort on SCA's false light claim must therefore be rejected.

**3. The Defamatory Statements Are False**

As discussed extensively above, the Defamatory Statements in the April and June Articles are false. Over and over again, Defendants falsely stated and/or implied that SCA is involved in the pump and dump of penny stocks, that SCA was fined for its involvement in the pump and dump of penny stocks, that SCA was involved in the pump and dump of Biozoom stocks, and that SCA is engaged in trading that "larger brokers and discount brokers stopped allowing" five years earlier. All of the foregoing statements are false.

**4. The FAC Sufficiently Pleads Fault**

Defendants incorrectly claim that the FAC does not sufficiently plead fault to maintain SCA's claim for false light. (Motion at pp. 15-16) As discussed above, the April Article is a scurrilous hit piece that implies SCA was fined for its involvement in a pump and dump of penny stocks—allegations that are materially false and defamatory. (FAC ¶ 21) ("The Defamatory Statements involve materially false implications.") Second, the FAC alleges that Defendants refused to retract, correct or apologize for the False Statements even after being given notice of

their falsity and ample time to do so. (FAC ¶¶ 16, 23). Consequently, the FAC contains factual allegations showing *how* Defendants knew the False Statements were false, and *why* Defendants were reckless in their disregard of the truth.

Again, Defendants' reliance on *Rouch*, 427 Mich. 157 is misplaced, because it is based upon dicta in a concurring opinion.

### C. <u>Leave To Amend Should Be Granted If Necessary</u>

Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2). "Michigan's court rule regarding the amendment of pleadings provides for a liberal handling of requests to amend." *Clapham v. Yanga*, 102 Mich. App. 47, 52 (1980); *see also Hanon v. Barber*, 99 Mich. App. 851, 859 (1980) (only when amendment would be "futile, or of bad faith, or the result of undue delay or dilatory motive" should leave to amend be denied).

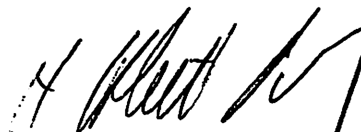
Should the Court determine that the current complaint is somehow lacking, SCA respectfully requests an opportunity to amend.

## CONCLUSION

As demonstrated herein, the FAC alleges sufficient facts to state causes of action for Defamation and False Light against Defendants. Therefore, the Motion should be denied.

PINSKY, SMITH, FAYETTE & KENNEDY, LLP
Local Counsel for Plaintiff

Dated: August 15, 2018

By: 

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