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

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF FIRST AMENDED COMPLAINT

INTRODUCTION

Before Defendants reply to SCA's response, it is useful to pause and recap where we are: FINRA ruled that SCA failed to exercise reasonable controls before accepting high-risk penny stocks for deposit, which allowed fraudsters to engage in a pump-and-dump scheme using Biozoom penny stocks. The Securities and Exchange Commission sanctioned an SCA representative for his role in allowing that to happen. SCA doesn't deny any of this.

Rather than spending time and money on rehabilitating its business practices, SCA is wasting a lot of other people's time and money by bullying those who reported on its public discipline with frivolous lawsuits.[1] Its purpose is transparent: to silence critical speech and make a quick buck in the process. This is why SCA works so hard to downplay and obfuscate the heightened standard of review in First Amendment cases. It's also why SCA runs away from the exhibits in Defendants' Answer that show this lawsuit was filed in bad faith. SCA hasn't been defamed or cast in a false light. The real problem is that it has been *fairly*, *accurately*, and *publicly* rapped on the knuckles for bad business practices—and SCA doesn't like it.

The Michigan Supreme Court held in *Locricchio* v. *Evening News Association* that public interest reporting must be protected from frivolous litigation and accorded maximum protection and great latitude.[2] The Court should put an end to SCA's strategic lawsuit against public participation ("SLAPP").

LEGAL STANDARD

SCA spends a good deal of time obfuscating the standard of review so it can justify ignoring the damning exhibits attached to Defendants' Answer. It's wrong for three reasons:

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[1] *See, e.g.*, *Scottsdale Cap. Advisors Corp.* v. *S&P Global, Inc.*, Civ. No. 18-1105 (D Ariz. 2018) (suing four people; motion to dismiss pending); *Scottsdale Cap. Advisors Corp.* v. *The Deal, LLC*, 887 F.3d 17 (CA1 2018) (defamation case dismissed for lack of jurisdiction). ***SCA even sued FINRA to stop its disciplinary proceeding.*** *Scottsdale Cap. Advisors Corp.* v. *FINRA*, 844 F.3d 414 (CA4 2016) (injunctive action dismissed for lack of jurisdiction).

[2] *Locricchio* v. *Evening News Ass'n*, 438 Mich. 84, 113 (1991).

First, Rule 2.116(G)(5) says that "only the pleadings may be considered when the motion is based on" Rule 2.116(C)(8). At the same time, Rule 2.110(A)(5) defines a pleading to include an answer to a complaint. So, the plain language of the rule says the Court may consider both the complaint and the answer.

Second, SCA says Defendants can't rely on the exhibits to their Answer, citing *Dalley* v. *Dykema Gossett*.[3] But *Dalley* merely states the well-worn rule that the court can't go beyond the pleadings when deciding a motion under Rule 2.116(C)(8): "A motion brought under [Rule 2.116](C)(8) tests the legal sufficiency of the complaint *solely on the basis of the pleadings*."[4] The Michigan Court of Appeals has unambiguously held that "[a]n exhibit attached to or referred to *in a pleading* becomes part of the pleadings *for all purposes*."[5] Thus, the Answer and its exhibits are fair game for this Motion.

Third, SCA complains that considering the Answer and its exhibits would conflict with the rule that "only" the allegations in a complaint should be deemed true and in the light most favorable to it.[6] But the word "only" never appears in the *Dalley* or *Sarkar* cases that SCA cites. Defendants agree that the Court must treat the allegations in SCA's complaint as true, *but* caselaw does *not* require the Court to treat the Answer as *untrue*. Unless the Answer denies or directly conflicts with allegations in the Complaint, the Court should: (1) accept the Answer and exhibits as true; and (2) construe them in the light most favorable to SCA, just like it would for allegations in the Complaint.

HEIGHTENED PLEADING REQUIREMENT

SCA knows it can't meet the heightened pleading standard for First Amendment cases, so it accuses Defendants of making it up. Its protestations do not withstand scrutiny.

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[3] SCA's Br. at 2–3 (citing *Dalley* v. *Dykema Gosset*, 287 Mich. App. 296, 305 (2010)).

[4] *Dalley*, 287 Mich. App. at 304 (emphasis added).

[5] *Slater* v. *Ann Arbor Pub. Schs. Bd. of Educ.*, 250 Mich. App. 419, 427 (2002) (emphases added).

[6] SCA's Br. at 3 (citing *Dalley*, 287 Mich. App. at 304–305, and *Sarkar* v. *Doe*, 318 Mich. App. 156, 178 (2016)).

First, SCA argues *Bose Corp.* does not set is a higher pleading standard.[7] While true, it misses the point. *Bose Corp.* says courts have a heighted duty under the constitution to rigorously review the sufficiency of defamation complaints to make sure pleading requirements are met. In other words, because of the weighty constitutional interests at stake, *Bose Corp.* requires courts to sit up a little straighter and review the pleadings more closely than they would in the run-of-the-mill case.

Second, *Gonyea* recognizes a higher pleading standard for defamation cases. We are a notice-pleading state.[8] Yet a defamation claim "must be specifically pleaded."[9] Why? Because of the First Amendment interests at stake in such cases, as Justice Riley explained in his concurring opinion in *Rouch II*.[10] While SCA says Justice Riley's concurrence is non-binding, the Michigan Court of Appeals long ago adopted his analysis as its own.[11]

ARGUMENT

1. *Substantial Truth:* Invoking defamation "by implication" doesn't avoid the substantial-truth inquiry.

SCA makes a bald assertion that the false statements "involve materially false implications" without identifying the implications and pleading facts as to why the statements give rise to those implications.[12] It claims the freedom to craft those explanations on the fly in its brief.[13] Even assuming SCA could square that argument with it is strict pleading obli-

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[7] SCA's Br. at 3 (citing *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984)).

[8] *See Dalley*, 287 Mich. App. at 305 (quoting *Roberts* v. *Mecosta County Hosp.*, 470 Mich. 679, 700 n.17 (2004) (the court rules create a "notice pleading environment")).

[9] *Gonyea* v. *Motor Parts Fed. Credit Union*, 192 Mich. App 74, 77 (1991).

[10] *Rouch* v. *Battle Creek Enquirer* (*On Remand*) (*Rouch II*), 440 Mich. 238, 272 (1992) (Riley, J., concurring). *See also MacGriff* v. *Van Antwerp*, 327 Mich. 200, 204–205 (1950) (Butzel, J.) (specific allegations must be pleaded to avoid immunity or privilege in cases alleging defamation).

[11] *See, e.g.*, *Trost* v. *Buckstop Lure Co., Inc.*, 249 Mich. App. 580, 587 n.2 (2002) (where a defamation plaintiff fails to plead his claim with specificity, the proper recourse is to move for summary disposition under Rule 2.116(C)(8), citing Justice Riley's concurrence).

[12] First Am. Compl. ("FAC") ¶ 21.

[13] SCA Br. at 3–4.

gations, the substantial-truth doctrine still applies to claims of defamation by implication.[14] When concocting its storyline, SCA never explains how those "implications" withstand a plain reading of the linked FINRA records and other publicly-available information (attached to the Answer), which objectively disprove SCA's fabricated implications.

2. *No Fault:* Nothing in SCA's Response proves fault is pleaded adequately.

Defendants observed in their opening brief that defamation plaintiffs must identify the proper level of fault—either actual malice (if a public figure) or negligence (if a private figure)—and plead facts that would establish that level of fault if proved.[15]

For actual malice, SCA does not plead *how* a defendant knew the statements were false or *why* they were reckless in their alleged disregard of the truth. All it can muster is: we told them the statements were defamatory after publication, and they refused to retract the articles.[16] But fault is assessed *at the time of publication*, not at the time of a retraction demand.[17] Retraction demands are relevant only to a damages analysis.[18]

For negligence, SCA says there is no such thing as a "reasonable reporter" or "reasonable publisher" standard.[19] It missed *Michigan Microtech, Inc.* v. *Federated Publications Inc.*, which specifically mentions both the "reasonably careful publisher" and "reasonably careful journalist" standard.[20] These standards are intertwined with the "reasonable audience" standard.[21] A reasonably careful journalist and publisher can reasonably expect that those who visit goodetrades.com are sophisticated readers—*i.e.*, people familiar with the

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[14] *Collins* v. *Detroit Free Press*, 245 Mich. App. 27, ___ (2001) (citing *Hawkins* v. *Mercy Health Servs., Inc.*, 230 Mich. App. 315, 333–336 (1998); *American Transmission, Inc.* v. *Channel 7 of Detroit, Inc.*, 239 Mich. App. 695, 701–705 (2000)).

[15] Defendants' Br. at 7–8.

[16] SCA Br. at 8–9.

[17] *Peisner* v. *Detroit Free Press*, 104 Mich. App. 59, 64 (1981), *mod. on other grounds*, 421 Mich. 125 (1984).

[18] M.C.L. § 600.2911(2)(b).

[19] SCA Br. at 8.

[20] *Michigan Microtech, Inc.* v. *Federated Publ'ns Inc.*, 187 Mich. App. 178, 186 (1991).

[21] *Air Wis. Airlines Corp.* v. *Hoeper*, 571 U.S. 237, 246–251 (2014).

microcap market. Those readers, being well versed in the industry, would conclude that SCA was the *means by which* a pump-and-dump was accomplished, not that SCA had itself engaged in illegal activity—particularly with the benefit of links to source documents.

3. ***No False Light:*** **SCA admits its false-light claim is based on a privacy interest it doesn't have.**

SCA says Defendants are "confused" about Michigan law on false light.[22] They're not. *Booth Newspapers* held that businesses have no privacy interest.[23] SCA confirms that its false-light claim is "for ... invasion [of] privacy."[24] It seems pretty clear that SCA, a corporate entity, is alleging a claim based on the invasion of a privacy interest it doesn't have.

4. ***No Second Amended Complaint:*** **Leave to amend should not be granted unless SCA presents a meritorious basis for amendment.**

After filing two complaints, SCA has still not sufficiently pleaded claims for defamation and false light. Before it gets a third bite at the apple, it should—at a minimum—be required to file a motion with a draft pleading so that the Court can evaluate whether Defendants should be forced to incur more time and expense on this SLAPP suit.

Respectfully submitted,

BUTZEL LONG, P.C.

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[22] SCA Br. at 11.

[23] *Booth Newspapers, Inc.* v. *Kent County Treas.*, 175 Mich. App. 523 (1989).

[24] SCA Br. at 13.