STATE OF MICHIGAN
KALAMAZOO COUNTY CIRCUIT COURT

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff,

v.

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

Defendants.

File No.: 2018—0153-CZ

Hon. Alexander C. Lipsey

Charles J. Harder (CA #184593) (pro hac vice to be filed)
Jordan Susman (CA #246116) (pro hac vice pending)
Margo J. Arnold (CA #278288) (pro hac vice filed)
HARDER LLP
Attorney for Plaintiff
132 South Rodeo Dr., 4th Floor
Beverly Hills, CA 90212
424/203-1600

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

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

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

Plaintiff Scottsdale Capital Advisors Corp. ("Scottsdale"), submits its Response in Opposition to Defendants' MCR 2.116(C)(8) Motion for Summary Disposition of Second Amended Complaint ("Current Motion").

INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND

This action arises from Defendants' online publication of false, defamatory, and highly misleading statements on Defendants' website, www.goodetrades.com.

On April 16, 2018, Scottsdale filed its First Amended Complaint ("FAC") that alleged four defamatory statements made by Defendants.

On June 7, 2018, Defendants filed a Motion for Summary Disposition of the FAC (the "Previous Motion").

On October 4, 2018, the Court entered its Opinion and Order on Defendants' Previous Motion (the "October 4 Order") and held that one of the four defamatory statements (Statement #2) was sufficiently pleaded, but the other three defamatory statements (Statements #1, #3, and #4) were not sufficiently pleaded.

Subsequently, Defendants filed a Motion for Reconsideration, alleging palpable errors by the Court.

On October 25, 2018, the Court entered an Order Denying Defendants' Motion for Reconsideration (the "October 25 Order").

On November 8, 2018, Scottsdale filed its operative Second Amended Complaint ("SAC") that alleged two defamatory statements by Defendants: Statement #2, the statement already deemed sufficiently pleaded by the Court, and Statement #1. The SAC alleged additional facts concerning Statement #1 that demonstrate its defamatory nature.

On November 14, 2018, Defendants filed their Current Motion, which is substantially identical to their Previous Motion,[1] alleging that Statements #1 and #2 are insufficiently pleaded. Defendants' Current Motion should be denied.

Regarding Statement #2, the Court has already held on two separate occasions that it sufficiently pleads a claim for defamation. Defendants' current attempt to dismiss the statement is legally unjustified and sanctionable. *See Ortega v. Trudel*, No. 239744, 2003 WL 22018391, at *1 (Mich. Ct. App. Aug. 26, 2003).

Regarding Statement #1, Scottsdale has supplemented and bolstered the allegations against Defendants, demonstrating that the statement, when read in context, falsely implies that Scottsdale was fined $1.5 million for its involvement in the pump and dump of penny stocks. Statement #1 also falsely alleges and/or implies that Scottsdale is so deeply entrenched in the illegal pump and dump of penny stocks that it is identified and known by the association.

LEGAL STANDARD

As with their Previous Motion, Defendants again allege that there is a heightened scrutiny for reviewing defamation case for legal sufficiency based on the pleadings. (Current Motion at pp.5-7). The Court already rejected these arguments in the October 4 Order and October 25 Order. Defendants' claim of a heightened pleading standard "is without merit." (October 4 Order at p.4). Moreover, the cases cited by Defendants in the Current Motion, *Bose Corp. v. Consumers Union* and *Thomas M. Cooley Law School v. Doe 1* "are improperly interpreted" by Defendants. (*Id.*).

"[T]his Court should not implement a higher standard as the Defendant suggests, but

[1] The Current Motion even begins with the exact same three and a half-page vilification of the penny stock industry and *ad hominin* attacks on Scottsdale, and one of its principals, as the Previous Motion.

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." (*Id.* at p.5).

ARGUMENT

A. Statement #2 Sufficiently Pleads A Claim For Defamation

False Statement #2 states: "They [Scottsdale] 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."

1. The Court Has Already Held That Statement #2 Is Sufficiently Pleaded

In its ruling on Defendants' Previous Motion, the Court held:

> [Statement #2] is inherently defamatory by implying the practices of Scottsdale Capital Advisors is not in line with others in its field. The 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.

(October 4 Order at p.8). The Court affirmed its ruling in the October 25 Order, holding that there was no palpable error by the Court. The Court should therefore deny Defendants' **third attempt** to have Statement #2 dismissed.

2. The Current Motion Should Be Denied Because It Seeks The Same Relief Based Upon The Same Facts As The Previous Motion

MCR 2.612(C) provides limited bases for challenging a court's order, such as fraud, mistake, or newly discovered facts. *See Moore v. Vines*, No. 221846, 2001 WL 684561, at *1 (Mich. Ct. App. June 15, 2001) ("The doctrine of *res judicata* generally precludes relitigation of matters already decided absent certain compelling circumstances, such as those specified in MCR 2.612(C)."). Similarly, MCR 2.119(F) allows for reconsideration of an order based upon a

showing of "palpable error by which the court and parties have been misled and that a different disposition would result from correction of the error." *Burda Bros, Inc. v. Wayne Cty. Prosecutor*, No. 250487, 2005 WL 156621, at *3 (Mich. Ct. App. Jan. 25, 2005).

Michigan courts routinely deny motions that seek the same relief based upon the same facts as an earlier motion. In *Burda Bros, Inc.*, the Court of Appeals upheld a trial court's denial of a plaintiff's third motion for attorney fees, stating:

> Plaintiffs' third motion for attorney fees pleaded virtually identical facts and requested the same substantive relief as plaintiffs' second motion for attorney fees, when the court ruled against them. We, therefore, agree with the trial court's treatment of plaintiffs' third motion for attorney fees as a motion for reconsideration of the court's decision on their second motion for attorney fees.

No. 250487, 2005 WL 156621, at *3 (Mich. Ct. App. Jan. 25, 2005).

In *Ortega v. Trudel*, the defendant brought a motion to remove a court-appointed counselor and to reinstate certain parenting time. After that motion was denied, the defendant filed a second motion seeking the same relief. The trial court awarded sanctions pursuant to MCR 2.114(D)(3) and (E) (holding that the motion was interposed for an improper purpose, such as "to harass or to cause unnecessary delay or needless increase in the cost of litigation"). After the defendant appealed, the Court of Appeals upheld the sanctions, stating, "Under the circumstances, we conclude that the court's action was proper." No. 239744, 2003 WL 22018391, at *1 (Mich. Ct. App. Aug. 26, 2003).

The Current Motion seeks the same relief based upon the same facts as Defendants' Previous Motion. Because the Court already ruled that there was no palpable error with its earlier ruling, the purpose of the Current Motion is clearly to harass and needlessly increase the cost of litigation. Consequently, in denying Defendants' Current Motion, the Court should also award sanctions pursuant to MCR 2.114.

3. Statement #2 Is False And Defamatory

Lest there be any mistake, Statement #2 is, in fact, false and defamatory.

As stated in Scottsdale's Opposition to the Previous Motion, Statement #2 is false because numerous large brokers continue to trade in penny stocks, including without limitation, interactive brokers, Merrill Lynch, Charles Schwab, Cor Clearing, and TradeKing. (SAC ¶ 13).

Statement #2 is defamatory because it implies that Scottsdale is doing something that "larger brokers and discount brokers stopped allowing" five years earlier. Statement #2 paints Scottsdale as a pariah company, engaging in trades that other company do not "allow." The statement therefore lowers Scottsdale in the esteem of the community and deters people from dealing with it. *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").

The Court should therefore deny the Current Motion regarding Statement #2.

B. Statement #1 Sufficiently Pleads A Claim For Defamation

Statement #1 states: "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors." Scottsdale alleges that this statement is false and defamatory when read in context:

> False Statement #1 is immediately preceded by the headline: "FINRA fines Scottsdale Capital Advisors $1.5 million." This juxtaposition makes it appear that SCA [Scottsdale] was fined $1.5 million for its involvement in the pump and dump of penny stocks. 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 Article quotes extensively from a FINRA decision that has nothing to do with any pump and dump scheme. In addition, False Statement #1 falsely alleges and/or implies that SCA is so heavily involved in the illegal pump and dump of penny stocks that it is identified and known by the association. This is

> false. Because SCA has never been involved in any "pump and dump" schemes, has never been a defendant in any "pump and dump" lawsuits, has never been charged by FINRA or any regulatory agency with involvement in a "pump and dump" scheme, and has never been fined for its involvement in a "pump and dump", the implications created by False Statement #1 in the context of the Article are false and defamatory.

SAC ¶ 13(a).

A cause of action for defamation by implication occurs when the defamatory implications of a statement are materially false, and "that such a cause of action might succeed even without a direct showing of any actual literally false statements." *Hawkins v. Mercy Health Servs., Inc.*, 230 Mich. App. 315, 329-30, 583 N.W.2d 725, 731 (1998). "[E]ven 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 (2000). "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. **Statement #1 Is Not Mere "Opinion"**

Defendants attempt to evade liability by claiming that Statement #1 is mere "opinion," when it clearly is not.

Statement #1 is immediately preceded by the headline: "FINRA fines Scottsdale Capital Advisors $1.5 million." This juxtaposition can "reasonably be understood as imputing specific criminal conduct" to Scottsdale, namely: that Scottsdale was fined $1.5 million for its involvement in the pump and dump of penny stocks. In fact, **Scottsdale has never been fined for its involvement in a pump and dump scheme.**

Defendant's inference of criminal conduct is not protected opinion, and its Current Motion should be denied.

2. **Statement #1 Implies Something False**

Defendants next try to evade liability by arguing that Statement #1 is not false. Defendants' argument must fail because Statement #1 falsely implies that Scottsdale was fined $1.5 million for its involvement in the pump and dump of penny stocks. Given the placement of Statement #1 under a headline regarding a $1.5 million fine by FINRA, a reader could reasonably conclude that Scottsdale was fined for its involvement in a pump and dump. Consequently, the implications created by Statement #1 are false.

3. **Statement #1 Is Defamatory**

Defendants' final argument—that Statement #1 is not defamatory—is a strawman argument that ignores the controlling legal standard.

First, as stated above, "There is no First Amendment protection for a charge which **could reasonably be understood** as imputing specific criminal conduct or other wrongful acts." *Hodgins*, 169 Mich. App. at 253-54 (emphasis added). Instead of addressing this legal standard, Defendants dispute Scottsdale's allegation in the SAC that, "Given the placement of False Statement #1 under a headline regarding a $1.5 million fine by FINRA, a reader could only conclude that [Scottsdale] was fined for its involvement in a pump and dump." Although Scottsdale genuinely believes that a reader "could only conclude" something defamatory, the standard for defamation by implication is much more lax, and Defendants fail to address this more lax standard. Put simply, because of the placement of Statement #1 under a headline regarding a $1.5 million fine by FINRA, a reader **could reasonably conclude** that Scottsdale was fined for its involvement in a pump and dump, when in fact, it was not.

Second, Defendants misconstrue defamation by implication. When Statement #1 is read in context, it falsely implies that Scottsdale was fined $1.5 million for its involvement in a pump and dump. Statement #1 is immediately followed by Statement #2, which the Court already held "is inherently defamatory by implying the practices of Scottsdale Capital Advisors is not in line with others in its field." Defendants argue that a link to a 111-page FINRA ruling later in the article "provides the context" for their false and defamatory statements. However, by the time a reader arrives at that link, the damage has been done: Defendants have already falsely accused Scottsdale of being fined $1.5 million for its involvement in a pump and dump and of engaging in practices not in line with others in its field.

Third, Defendants mischaracterize the FINRA ruling to which the article linked. The 111-page FINRA ruling concerned a purported violation of Section 5 of the Securities Act relating to the sale of unregistered securities—not Scottsdale's involvement in a pump and dump scheme.[2]

In sum, Statement #1 is false, defamatory, and not mere opinion. The Court should therefore not dismiss Statement #1.

C. The SAC Sufficiently Pleads Fault

Defendants argue that the SAC does not plead facts sufficient to show that Defendants acted negligently. Defendants are wrong.

The Court already addressed this argument in the October 4 Order, holding:

> If the Defendants were journalist[s] that work within the realm of the investment banking, as they do, then they would likely know if the statements were intentionally false. . . . If this court deems the statements to be false, then it consequently also determines that the

[2] Defendants argue that Scottsdale conflates committing fraud with being a tool of fraud. (Current Motion at p.12). Defendants are grasping at straws, as Statement #1 falsely implies that Scottsdale was fined $1.5 million for its involvement in a pump and dump scheme.

> 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.

(October 4 Order at pp.6-7).

The Court gave two reasons for its holding: (1) the doctrine of *res ipsa loquitor*, and (2) Defendants' refusal to retract, correct, or apologize for the statements. (*Id.*)

In their Current Motion, Defendants do not dispute that their refusal to retract, correct, or apologize for the false statements demonstrates fault, thereby conceding that the SAC sufficiently pleads fault on that basis.

Defendants' claim that "no Michigan court has ever applied *res ipsa loquitor* to a claim for defamation" ignores the fact that the Court already ruled on this exact same argument in the October 4 Order. Further, in the October 25 Order, the Court held that its application of *res ipsa loquitor* was not palpable error. The Court should therefore deny Defendants' **third attempt** to argue that the SAC insufficiently pleads fault.[3]

D. Leave To Amend Should Be Granted If Necessary

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).

Should the Court determine that the SAC is somehow lacking, Scottsdale respectfully requests an opportunity to amend.

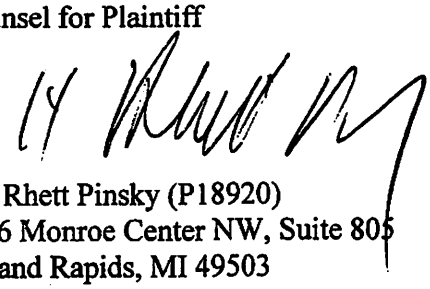
CONCLUSION

As demonstrated herein, the SAC alleges sufficient facts to state causes of action for Defamation against Defendants. Therefore, the Current Motion should be denied.

[3] Defendants' request for the exact same relief based on the exact same facts as before is sanctionable per MCR 2.114. *See Ortega*, 2003 WL 22018391, at *1.

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

Dated: November 29, 2018

By: 

H. Rhett Pinsky (P18920)
146 Monroe Center NW, Suite 805
Grand Rapids, MI 49503
(616) 451-8496