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) (admitted pro hac vice)
Jordan Susman (CA #246116) (admitted pro hac vice)
Margo J. Arnold (CA #278288) (admitted hac vice)
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 THIRD 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 Third Amended Complaint ("Current Motion").

INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND

This action arises from Defendants' publication on www.goodetrades.com of a false, defamatory, and highly misleading article (the "Article"). The Article, titled "FINRA fines Scottsdale Capital Advisors $1.5 million," opened with the sentence "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors," thus leading the reader to immediately conclude that Scottsdale was fined by FINRA for pump and dump activity.

On November 8, 2018, Scottsdale filed its Second Amended Complaint ("SAC"), which alleged two defamatory statements by Defendants, including Statement #1: **"If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."**

On November 14, 2018, Defendants filed a Motion for Summary Disposition of the SAC (the "SAC Motion").

During the December 14, 2018, hearing on the SAC Motion, the Court held that Scottsdale had adequately amended its complaint "to specifically allege those two statements as defamatory," but granted Defendants' SAC Motion because Scottsdale had not pleaded "the necessary elements of negligence in their pleadings." (Transcript at 20:13-20; 24:3-8). The Court granted Scottsdale leave to "fashion a complaint that does comport with this Court's rulings relating to establishing at least some factual basis for negligence that can be explored in the litigation process." (Transcript at 24:9-18)

On January 16, 2019, Scottsdale filed its operative Third Amended Complaint ("TAC"). Per the Court's order, Scottsdale alleged additional facts to establish that Defendants negligently published Statement #1.

On January 29, 2019, Defendants filed the Current Motion, which (1) alleges Scottsdale has failed to plead the requisite fault standard, (2) realleges that Scottsdale has failed to state a claim for defamation and (3) alleges for the first time that Scottsdale's defamation claim is barred as a matter of law based on the substantial truth defense and public interest privilege.

The Current Motion should be denied because (1) Scottsdale has sufficiently alleged that Defendants were negligent in publishing Statement #1, (2) the Court already held that Scottsdale sufficiently pleaded a claim for defamation, and (3) neither the substantial truth defense nor the public interest privilege bar Scottsdale's claim.

LEGAL STANDARD

As with their SAC Motion, Defendants again allege that there is a heightened scrutiny for reviewing a defamation case for legal sufficiency based on the pleadings. (Current Motion at pp.5-7). The Court already rejected these arguments in its October 4, 2018 Order on Defendants' motion to dismiss the First Amended Complaint. (October 4, 2018 Order at p.5). ("[T]his 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."). The Court further held that Defendants' claim of a heightened pleading standard "is without merit" and "improperly interpreted" the cases cited by Defendants, *Bose Corp. v. Consumers Union* and *Thomas M. Cooley Law School v. Doe 1.* (October 4, 2018 Order at p.4).

The proper standard of review for a MCR 2.116(C)(8) motion is to test the legal sufficiency of the pleadings. *Ben-Tech Indus. Automation v. Oakland Univ.*, No. 247471, 2005 WL 50131, at *2 (Mich. Ct. App. Jan. 11, 2005). "All factual allegations in support of the claim are accepted as true" and "any reasonable inferences or conclusions which can be drawn from the facts" must be "construed in the light most favorable to the nonmoving party." *Id.* A MCR 2.116(C)(8) motion should only be granted if "the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

ARGUMENT

A. The TAC Sufficiently Pleads Fault

"The negligence standard under Michigan law is understood to measure whether a defendant's actions were those of a 'reasonably careful journalist' or 'reasonably careful publisher.'" *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 371 F. Supp. 2d 898, 902 (E.D.

Mich. 2005) (*citing Michigan Microtech, Inc. v. Federated Publ'ns, Inc.*, 187 Mich. App. 178, 466 N.W.2d 717, 722 (1991)). The TAC easily satisfies this standard.

The TAC states, "Defendants were negligent in creating the implication in False Statement #1 that FINRA fined SCA $1.5 million for participating in illegal pump and dump schemes." (TAC ¶ 22). The TAC further alleges that although the Article references a Stockwatch article and a 111-page FINRA decision as support for False Statement #1, a plain reading of both of those documents indicates that FINRA fined SCA for selling securities without registration and without an exemption, as required by FINRA Rule 2010—**not** for participating in illegal pump and dump schemes. (*Id.*) Defendants acted negligently because "**a reasonable journalist reads the documents he cites and would not report, or imply that, a fine for procedural noncompliance is the equivalent of a fine for intentional pump and dump activity**." (*Id.*) (emphasis added).

Accordingly, the TAC clearly states that Defendants were negligent because their actions were not those of a reasonably careful journalist or publisher. Stated differently, Defendants were negligent because they failed to give "a full and accurate account of the relevant facts" regarding the decision upon which they claimed to reporting. *In re Thompson*, 162 B.R. 748, 770 (Bankr. E.D. Mich. 1993).

Accordingly, there is no dispute that the TAC sufficiently pleads negligence, and the Current Motion should be denied.

B. <u>The Court Already Held That Statement #1 Sufficiently Pleads Defamation</u>

In ruling on Defendants' SAC Motion, the Court held: "plaintiffs amended their complaint to specifically allege [Statement #1] as defamatory." (December 14, 2018 Transcript at 20:13-20). Despite the Court's unambiguous holding, Defendants improperly try to relitigate the Court's earlier order and argue the TAC does not sufficiently allege Statement #1 is defamatory.

Michigan courts routinely deny motions that seek the same relief based upon the same facts as an earlier motion. *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)."). 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).

Because the Current Motion seeks the exact same relief based upon the exact same facts as Defendants' SAC Motion, it should be denied.[1]

C. 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

[1] 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.

> 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).

Statement #1 is defamatory because it falsely alleges and/or implies that Scottsdale is so heavily involved in the illegal pump and dump of penny stocks that it is identified and known by the association. Consequently, the Current Motion should be denied.

1. Statement #1 Is Not "Nonactionable Hyperbole"

Defendants attempt to evade liability by claiming that Statement #1 is mere "hyperbole," when it clearly is not. Defendants falsely accused Scottsdale of being fined $1.5 million for its purported involvement in criminal pump and dump schemes, when, in fact, Scottsdale was fined for mere regulatory violations. Statement #1 is not hyperbolic; it is simply false.

The one case that Defendants rely upon, *Komarov v. Advance Magazine Publ'rs, Inc.*, 691 N.Y.S.2d 298 (NY Sup. Ct. 1999), is easily distinguished. In *Komarov*, the court held that an author's comment during an interview about the plaintiff being as "well known" in his community as John Gotti, "especially read in the context of the article [at issue], where the

author was clearly trying to elicit a response from [a close associate of the plaintiff about his relationship with the plaintiff]," was "clearly understood as conjecture."

Statement #1, when read in context, is not mere conjecture and it does not merely convey that "everyone knows" there is a connection between pump and dumps and Scottsdale as Defendants claim. Rather, Statement #1 leads the reader to understand that Scottsdale is actively involved in pump and dumps and **was recently fined by FINRA for such involvement**. This is provably false, because Scottsdale has never been fined for its involvement in a pump and dump scheme.

Defendants' inference of criminal conduct is not protected hyperbole, and the Current Motion should be denied.

2. Statement #1 Is 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** (not the operative TAC) 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." (*See* Current Motion at p.10 citing SAC ¶14). Although Scottsdale genuinely believes that a

reader "could only conclude" something defamatory, the standard for defamation by implication is much more lax (i.e., "could reasonably be understood" as defamatory). Defendants fail to address this more lax standard. Because Defendants placed 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. While a media defendant is not "liable for the reader's possible inferences, speculations, or conclusions, where the defendant has not made or directly implied any provably false factual assertion," a media defendant is liable if it has "by selective omission of crucial relevant facts, misleadingly conveyed any false factual implication." *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 144, 476 N.W.2d 112, 139 (1991) (Cavanaugh, C.J., concurring).

When Statement #1 is read in context, it falsely implies that Scottsdale was fined $1.5 million for engaging in illegal pump and dump practices. At no point in the Article do Defendants mention that Scottsdale was fined for selling securities without registration and without an exemption, and **not for engaging in pump and dump schemes**.

Defendants argue that a link to a 111-page FINRA ruling later in the Article "provides the context" for their false and defamatory statements. (Current Motion at p.11). However, "context" for the purposes of determining defamatory meaning is limited to the four corners of the publication. the alleged defamatory statements must be construed only in the context of the document in which they are contained. *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 736, 659 S.E.2d 483, 487 (2008); *Mandel v. O'Connor*, 99 S.W.3d 33, 36 (Mo. Ct. App. 2003) ("When considering a writing, it is to be interpreted from its four corners and given its ordinary meaning."). Further, by the time a reader arrives at that link and reviews the FINRA decision, the damage has been done: Defendants have already falsely accused Scottsdale of being fined $1.5 million for its involvement in pump and dumps and of engaging in practices shunned by others in its field.

In sum, Statement #1 is false, defamatory, and not hyperbole. The Court should therefore deny the Current Motion.

D. Statement #1 Is Not Protected by the Substantial Truth Defense

Defendants attempt to evade liability by claiming that the implication created by Statement #1 is substantially true. Defendants are wrong.

A substantial truth defense requires that the gist or sting of the statement be true. *Collins v. Detroit Free Press*, 245 Mich. App. 27, 33 (2001). Here, the gist of Statement #1—that Scottsdale was fined $1.5 million for its involvement in a pump and dump scheme—is demonstrably false.

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. And the FINRA decision to which the Article contains a hyperlink does not provide context for the false and defamatory statement nor evidence that the statement is substantially true. 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.

Hawkins v. Mercy Health Servs., Inc., 230 Mich. App. 315, 335, 583 N.W.2d 725, 734 (1998), is instructive. In *Hawkins*, the court held that a news release stating that a nurse had been terminated for her involvement in administering an overdose was not substantially true because the nurse had actually been terminated for denying that she participated in a conversation criticizing a doctor's standard of care. "Looking at the evidence in a light most favorable to [the nurse] it was erroneous to conclude as a matter of law that the implication created by the [news] release would have the same effect on the mind of the audience as would a statement accurately identifying the reasons underlying the discharge." *Id.*

Hawkins is similar to the fact pattern here, as Defendants stated that Scottsdale was punished for actions that were worse than what actually occurred. Defendants falsely wrote and published that Scottsdale was fined for affirmative intentional actions (pump and dump schemes)

when it was actually fined for administrative negligence (believing it qualified for an exemption to the requirement to be registered to sell securities). When the allegations in the TAC are viewed in a light most favorable to Scottsdale, it would be erroneous to conclude as a matter of law that the implication created by Statement #1 would have the same effect on the mind as would a statement that accurately identified the reasons for FINRA's fine. Consequently, the Current Motion should be denied.

E. Statement #1 Is Not Protected by the Public Interest Privilege[2]

Defendants' final argument, that Statement #1 is protected by the "fair-comment privilege", is baseless.

Michigan's common law public concern privilege does not require private-figure plaintiffs to allege actual malice. *Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 182, 398 N.W.2d 245, 256 (1986). In *Rouch*, the Michigan Supreme Court questioned whether the common law public concern privilege, which requires the plaintiff to prove both falsity and actual malice if the statements at issue are of a matter of public concern, equally applied to both public figure and private figure plaintiffs. In reviewing cases where the privilege had been applied, including *Lawrence v. Fox,* 357 Mich. 134, 97 N.W.2d 719 (1959), *Peisner v. Detroit Free Press,* 82 Mich. App. 153, 266 N.W.2d 693 (1978), the Supreme Court held that Michigan had "never applied the privilege in a case involving a strictly private-person plaintiff." *Id.* After considering recent constitutional changes to libel law, including the United States Supreme Court decision in *Gertz v. Robert Welch,* the Michigan Supreme Court held that the heightened fault

[2] Michigan has both a fair comment privilege and a qualified public-interest privilege. "Although federal courts applying Michigan law have sometimes confused the fair-comment privilege with the qualified public-interest privilege, the fair-comment privilege is involved only where the matter complained of is comment, as distinguished from statement of fact." *Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 180, 398 N.W.2d 245, 255 (1986) (internal quotes and citations omitted). While Defendants' moving papers use the term "fair comment privilege," the arguments made and cases cited demonstrate that Defendants' are actually referring to the "public-interest privilege."

requirement would apply to libel cases involving public figures.[3] This decision was affirmed by the Michigan Supreme Court in *Locricchio v. Evening News Ass'n,* 438 Mich. 84, 114, 476 N.W.2d 112, 125 (1991).

Defendants' arguments based upon the public interest privilege are fatally defective.

First, the fine levied on Scottsdale by FINRA is not a matter of public interest. "There is an important distinction between matters which truly promote the public interest and matters which are merely interesting to the public." *Rouch*, 427 Mich. at 163, at 247 (citing 3 Restatement Torts, 2d, § 598, comment [b]). Criminal matters, while interesting, are not always matters of public interest. *Rouch v. Enquirer & News of Battle Creek,* 137 Mich. App. 39, 49, 357 N.W.2d 794, 800 (1984), *aff'd and remanded,* 427 Mich. 157, 398 N.W.2d 245 (1986). Articles meant to update the public on "a continuing violation of the law, like a police burglary ring" have been held as matters of public interests. *Id.* (citing *Stice v. Beacon Newspaper Corp., Inc.,* 185 Kan. 61, 340 P.2d 396, 76 A.L.R.2d 687 (1959)). Similarly, articles about crime by government officials or judicial misconduct when prosecuting crimes have been held as matters of public interest. *Id.* (citing *Miner v. The Detroit Post & Tribune Co.,* 49 Mich. 358, 364, 13 N.W. 773 (1882)); *Lawrence v. Fox,* 357 Mich. 134, 97 N.W.2d 719 (1959) (publication reported that plaintiff, a deputy superintendent of police, had engaged in fraud, corruption, and protection of criminals.); *Peisner v. Detroit Free Press,* 82 Mich. App. 153, 266 N.W.2d 693 (1978) (article accused plaintiff of failing to raise the issue of judicial misconduct on appeal of an indigent defendant's criminal conviction because the plaintiff was the judge's longtime friend and former campaign manager).

Comparatively, publications that simply report that a private-figure previously committed a crime are not necessarily matters of public interest. *Rouch*, 137 Mich. App. at 54-55, 357

[3] *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 347, 94 S. Ct. 2997, 3010, 41 L. Ed. 2d 789 (1974), held that the *New York Times v. Sullivan* heightened fault standard must be used for actions involving public figures, but "States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

N.W.2d at 802 (citing *McAllister v. The Detroit Free Press Co.,* 76 Mich. 338, 43 N.W. 431 (1889); *Lancour v. Herald & Globe Ass'n.,* 111 Vt. 371, 17 A.2d 253, 132 A.L.R. 486 (1941); *Hornby v. Hunter,* 385 S.W.2d 473 (Tex. Civ. App. 1964); *Phillips v. The Evening Star Newspaper Co.,* 424 A.2d 78 (D.C. App. 1980). *Rouch* concerned a news article reporting the arrest of a man for allegedly raping his ex-wife's teenage babysitter. The Court of Appeal found, and the Supreme Court affirmed that "the details of plaintiff's alleged crime were merely matters that the public would find generally interesting and not matters deserving of robust public debate." *Rouch*, 137 Mich. App. at 58, 357 N.W.2d at 804 ("The fact that plaintiff had been arrested for raping his ex-wife's teenage baby sitter and cutting off the baby sitter's clothes with a knife does not contribute to the public's interest in reducing or detecting crime.").

Here, Defendants allegedly reported on the outcome of a FINRA proceeding in which Scottsdale was fined (although the Article misconstrued the subject of Scottsdale's violation). The Article did not contribute to the reduction or detection of FINRA violations nor report on the wrongdoing of a government officer. *Rouch*, 137 Mich. App. at 58, 357 N.W.2d at 804. Rather, the Article simply reported that a proceeding occurred and on the outcome of the proceeding (albeit, it grossly misstated the outcome).

Even if the Article concerned a matter of public interest (it didn't), the public interest privilege would still not apply because Scottsdale adequately pleaded that Defendants were, at a minimum, negligent in the publication. (*See* Section A, herein).

This instant matter is strikingly similar to the facts in *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 355, 43 N.W. 431, 437 (1889), in which a newspaper accused the plaintiff of being arrested for felony post office burglary, and the Court found the article to be unprivileged defamation because the plaintiff had actually been arrested for the misdemeanor sale of stamps without a license. The Court held that there was a lack of care on the part of the author and newspaper because they had a copy of the plaintiff's arrest complaint, which stated the charges.

Here, Defendants had access to the FINRA ruling against Scottsdale for violation of Section 5 of the Securities Act but falsely reported that Scottsdale was fined for its involvement

in pump and dump schemes. Consequently, Statement #1 is not privileged, and the Current Motion should be denied.

F. 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 TAC is somehow lacking, Scottsdale respectfully requests an opportunity to amend.

CONCLUSION

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

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

Dated: March 19, 2019

By: _____

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