State of Michigan
In the Court of Appeals

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff-Appellee,

v.

MORNINGLIGHTMOUNTAIN, LLC, and MICHAEL GOODE,

Defendants-Appellants,

–and–

DOES 1–10,

Defendants–Not Participating.

Docket No. 348702

Kalamazoo Circuit No.: 18-0153-CZ
HON. ALEXANDER C. LIPSEY

APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTION

The Court has appellate jurisdiction to grant applications for interlocutory appeals that are filed within 21 days after entry of the order to be appealed. MCR 7.203(B)(1); MCR 7.205(A)(1). On April 25, 2019, Defendants timely filed an interlocutory appeal from an order denying summary disposition ("**SDO**"), which the trial court entered 21 days earlier on April 4, 2019. SDO at 1 (Appx. 1a); Register of Actions (Appx. 18a). On September 13, 2019, the Court granted leave to appeal.

QUESTIONS PRESENTED

1. The Third Amended Complaint asserts a claim for defamation. A heightened pleading standard applies to defamation claims. Did the trial court commit reversible error by failing to apply this standard when it assessed Defendants' motion under Rule 2.116(C)(8)?

Trial court: No

2. When analyzing a defamation claim, a trial court must consider the challenged statement in full context. Did the trial court commit reversible error by failing to consider the full Article in which the challenged statement appeared?

Trial court: No

3. A viable defamation claim requires a provably false statement of actual, objectively verifiable facts. Is the challenged statement capable of being proved false as a matter of law with actual, objectively verifiable facts?

Trial court: Not reached

4. Substantial truth is an absolute defense to a defamation claim. Is the challenged statement substantially true as a matter of law when considered in the full context of the Article in which it appears?

Trial court: Not reached

5. To state a claim for defamation by implication, a plaintiff must plead a defamatory implication and facts that would support an allegation that the defendant intended the audience to draw that implication. Does the Third Amended Complaint plead sufficient facts to support the alleged inference and intent?

Trial court: Not reached

6. A defamation claim requires an unprivileged publication of the challenged statement to a third party. Is the challenged statement privileged under the fair-comment privilege, and if so, has Plaintiff pleaded in avoidance of the privilege?

Trial court: Not reached

7. A defamation plaintiff must adequately plead that the defendant published the challenged statement with the requisite level of fault. Does the Third Amended Complaint do so?

Trial court: Yes

8. If the Court reverses the SDO, should the Court remand for entry of an order of dismissal with prejudice because further amendment would be futile?

Trial court: Not reached

PUBLICATION

Defendants respectfully suggest that a decision in this case would meet the standards for publication in Rule 7.215(B)(1) or (B)(3). A predicate question of law discussed in Argument Part II is whether hyperlinks embedded in an online article are the functional equivalent of attachments that are part of the article, such that the linked documents must be considered when analyzing a challenged statement in its full context, as required under *Sanders* v. *Evening News Association*, 313 Mich. 334, 340 (1946), and *Croton* v. *Gillis*, 104 Mich. App. 104, 108 (1981). The answer to this question would serve as a new rule of law or as a novel extension of an existing rule of law.

INTRODUCTION

This is a defamation action that implicates core First Amendment principles. Scottsdale Capital Advisors Corporation ("**Scottsdale**"), a regulated securities broker, has sued MorningLightMountain, LLC ("**MLM**"), and Michael Goode (jointly, the "**Defendants**") over unfavorable news coverage posted at goodetrades.com, a blog reporting on news about penny-stock trading. The challenged statement—"If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors" (the "**Statement**")—appears in an article titled "FINRA fines Scottsdale Capital Advisors $1.5 million" (the "**Article**"). Scottsdale has aggressively sued those who deigned to cover the story.[1]

The trial court declined to apply heightened scrutiny when reviewing the pleadings. It held that heightened scrutiny does not apply in libel cases involving private-figure plaintiffs, even though Defendants supplied multiple private-figure cases applying such scrutiny. At the same time, however, the trial court expressed openness to appellate guidance on this issue. Motion Hr'g Tr. 32:24–34:12 (Appx. 50a–52a).

Challenged statements must also be viewed in light of the full article. *Sanders* v. *Evening News Ass'n*, 313 Mich. 334, 340 (1946); *Croton* v. *Gillis*, 104 Mich. App. 104, 108 (1981). Defendants supplied the entire Article with their Answer, and relied upon the article in support of their motion for summary disposition under Rule 2.116(C)(8). Although Rule 2.116(G)(5) requires C8 motions to be reviewed on the "pleadings," a defined term that includes an Answer under Rule 2.110(A)(5), the court declined to review it. Applying a lower level of scrutiny to an incomplete version of the Article precluded a proper assessment of Defendants' motion, which is critical to protecting their First Amendment interests.

In addition, the trial court erroneously declined to decide as a matter of law whether the Statement is: (1) capable of being proved false with actual, objectively verifiable facts; (2)

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[1] See, *e.g.*, *Scottsdale Cap. Advisors Corp.* v. *S&P Global, Inc.*, Civ. No. 18-1105 (D. Ariz. 2018) (defamation case dismissed by stipulation); *Scottsdale Cap. Advisors Corp.* v. *The Deal, LLC*, 887 F.3d 17 (CA1 2018) (defamation case dismissed for lack of jurisdiction). Scottsdale 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).

substantially true in the context of the full Article in which it appears; or (3) protected under the common law fair-comment privilege. These are questions of law which the trial court mistook for questions of fact.

The trial court also erroneously held that the Statement is capable of defamatory meaning by implication. Although Michigan recognizes claims for defamation by implication, our courts do not permit libel plaintiffs to squelch true speech by manufacturing an actionable "implication" that is not fairly supported by the article. See *Royal Palace Homes, Inc*. v. *Channel 7 of Det., Inc*, 197 Mich. App. 48, 56 (1992); *Nehls* v. *Hillsdale Coll.*, 178 F. Supp. 2d 771, 779 (ED Mich. 2001), *aff'd* 65 Fed. Appx. 984 (CA6 2003) (citing Michigan law). Yet that is what the SDO permits here. The trial court incorrectly accepted Scottsdale's assertion that a story about a civil regulator imposing a civil fine supported an inference that Defendants had accused Scottsdale of criminal behavior.

Moreover, even in private-figure actions,[2] a plaintiff must plead facts that, if proved, would show that the defendant intended the implication alleged. *See* Argument, Part IV.B, *infra*. The Third Amended Complaint is devoid of any alleged facts on this intent question. Nor are there any reasonable inferences that can be drawn from the pleaded facts that satisfy the pleading requirement.

Finally, it would be futile to allow Scottsdale any further pleading amendments. No new allegations can make the Statement provably false, materially false, or defamatory. The case should be remanded for entry of an order granting summary disposition for Defendants.

[2] Defendants dispute Scottsdale's allegation that it is a private figure. Facts that would establish Scottsdale is a public figure are not pleaded in the Third Amended Complaint, so the time is not yet ripe for Defendants to seek summary disposition on the public-figure question.

BACKGROUND

Before turning to the facts and legal arguments, Defendants respectfully submit that the Court would benefit from an overview of the penny stock market and an unlawful stock scheme involving penny stocks. This information is in the record, and serves as the backdrop for this litigation. Appx. 993a–998a.

The Penny Stock Market

A "penny stock" is a security issued by a small company that trades at less than $5.00 per share.[3] Also known as "microcap stocks," penny stocks are issued by companies, many of which do not file financial reports with the U.S. Securities & Exchange Commission.[4] The SEC describes these securities as "among the most risky," suffering from a scarcity of publicly-available information that allows "fraudsters [to] easily spread false information about microcap companies, making profits while creating losses for unsuspecting investors."[5] They are very speculative investments, and Congress has tightly regulated broker-dealers who facilitate penny-stock trading under the Securities Exchange Act of 1934.[6]

One fraud particularly affecting penny stocks is the classic pump-and-dump scheme. The scheme involves touting a company's stock through false and misleading statements to the marketplace to ignite a buying frenzy that "pumps" the price of a stock. The hucksters then sell (or "dump") their stocks at the pumped up price, realizing a handsome profit. Once they dump their shares and stop hyping the stock, the price falls and investors lose their money.[7]

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[3] U.S. Secs. & Exch. Comm'n ("**SEC**"), Penny Stock Rules (May 9, 2013) ("PENNY STOCK RULES") (available at http://bit.ly/SEC-Penny-Stock-Rules).

[4] SEC, Microcap Stock: A Guide for Investors, Introduction (Sept. 13, 2013) (available at http://bit.ly/SEC-Microcap-Guide).

[5] *Ibid.*

[6] PENNY STOCK RULES, *supra* at n.3.

[7] SEC, "Pump-and-Dumps" and Market Manipulations (Jun. 25, 2013) (available at http://bit.ly/SEC-Pump-and-Dumps).

The Biozoom Scheme

Defendants' report on news about the penny stock market, including pump-and-dump schemes affecting the market. One of the schemes they reported on involved the Biozoom stock. Entertainment Art, Inc., a company that sold leather handbags, abruptly announced in April 2013 that it was changing its name to Biozoom and was becoming a biomedical technology company.

Scottsdale is a broker dealer that facilitated penny-stock trading and claims to be one of the dominant companies in the microcap securities market for handling more than $125 million worth of trades in 2015 alone.[8] Scottsdale accepted the new Biozoom shares for deposit and facilitated their trading in the microcap market.

From March–June 2013, at least eight people opened accounts with broker-dealers and deposited millions of shares of Biozoom stock. They falsely claimed that they had recently purchased the stock from Entertainment Art's original shareholders and that the stock could be freely traded.[9] After pumping the stock, the fraudsters dumped (*i.e.*, sold) 14 million shares in three months. They netted almost $34 million, of which about $17 million was wired to overseas bank accounts.[10] Eventually, the stock collapsed.

In July 2013, the SEC brought an enforcement action, *U.S. Securities & Exchange Comm'n* v. *Tavella*, to recover the ill-gotten gains and make swindled investors whole. Many of the trading accounts frozen through the SEC's enforcement action were held at Scottsdale.[11] Indeed, while this lawsuit has been pending, the SEC entered an order sanctioning Scottsdale's representative for facilitating the sale of 8.2 million Biozoom shares that generated $18.5 million in gains—just over half the shares and half the gains—for the

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[8] Third Am. Compl. at 3, ¶ 11. (Appx. 801a).

[9] *SEC* v. *Tavella*, No. 13-4609 (SDNY), Compl. ¶¶ 3–5 (Jul. 3, 2013) (APPX. 832a–833a).

[10] *Id.* at 2–3, ¶¶ 6–7.

[11] *Tavella*, Stip. Order Granting Prelim. Inj., Asset Freeze, and Other Relief (R. 16, Jul. 16, 2013); Final J. Defs. Graciarena & Loureyro (R. 67, Dec. 8, 2014); Final Default J. against Tavella [and Others] (R. 69, Jan. 9, 2015).

fraudsters.[12] The representative's offense was "fail[ing] to conduct a searching inquiry into facts surrounding the proposed sales" of unregistered Biozoom stock, despite the presence of "significant red flags."[13]

Among other things, it was this same kind of failure to conduct searching inquiries that resulted in FINRA later taking disciplinary action against Scottsdale in 2017 over Scottsdale's subsequent sales of stock that were issued by three other companies unconnected with the Biozoom fraud, but had similar indicia of being sham transactions.[14] FINRA imposed a $1.5 million fine against Scottsdale for "institutionaliz[ing] misconduct as its standard way of doing business," among other aggravating factors.[15] Part of the institutionalized misconduct included Scottsdale's failure to revise its procedures to focus on potential sham transactions after botching its gatekeeping role in the Biozoom pump-and-dump scheme that led to the SEC's enforcement action in *Tavella*.

The statement that Scottsdale claims is libelous is contained within the Article, which was published after the Biozoom fraud. The Article includes extensive quotations from FINRA's enforcement decision. It also includes a link to the decision.

The statement at issue in this case does nothing more than correctly note that penny stocks were illegally traded through Scottsdale brokerage accounts. Despite the accuracy of the statement, Scottsdale has sued MLM and Goode because it objects to the "juxtaposition" of the Article's headline in conjunction with the challenged statement.

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[12] *In re Timothy* C. *Scarpino*, SEC No. 3-18483, Order Instituting Admin. and Cease-and-Desist Proceedings, Making Findings, Imposing Remedial Sanctions, and a Cease-and-Desist Order (May 15, 2018).

[13] *Id.* at 2, Part III, Summary.

[14] See Amended Extended Hr'g Panel Decision 5–8 at Part I, *FINRA Dep't of Enforcement* v. *Scottsdale Cap. Advisors Corp.*, No. 2014041724601 (Jun. 20, 2017) (the "**FINRA Decision**") (Appx. 973a).

[15] *Id.* at 105, Part IV.A(1)(d) (Appx. 973a).

STATEMENT OF FACTS

After Scottsdale filed its original Complaint, but before serving it upon Defendants, Scottsdale filed its First Amended Complaint as a matter of right.[16] The First Amended Complaint asserted a claim for defamation (alleging four libelous statements) and a claim for false light.[17] On Defendants' motion, the trial court dismissed the First Amended Complaint.[18] The court held that a corporation cannot maintain a false-light claim under Michigan law, and that three of the four statements—including the statement at issue on appeal—were inadequately pleaded.[19] The trial court also held, however, that one of the statements was adequately pleaded under the doctrine of *res ipsa loquitur*. The trial court granted Scottsdale leave to amend its pleading to save the other statements.

Defendants moved for reconsideration, explaining that the doctrine of *res ipsa loquitur* cannot apply in defamation actions because negligence cannot be presumed in defamation cases—a plaintiff must plead facts that, if proved, show that the defendant acted with actual malice or negligence.[20] The Court declined to reconsider its ruling.[21]

Thereafter, Scottsdale filed a Second Amended Complaint, which asserted only one of the three dismissed statements.[22] In other words, Scottsdale's defamation claim shrank from four statements to two. On Defendant's motion, the trial court dismissed the Second Amended Complaint.[23] It held that: (1) its earlier *res ipsa* ruling was incorrect; and (2) the Second Amended Complaint failed to adequately plead fault as to either statement.[24] The trial

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16 Register of Actions at 1 (Appx. 16a).

17 First Am. Compl. ¶¶ 11–33 (Appx. 56a–60a).

18 Memorandum Order Dismissing First Am. Compl. at 9–10 (Appx. 14a–15a).

19 *Ibid.*

20 Defendants' Mot. for Reconsid. at 6–7 (Appx. 514a–515a).

21 Order Denying Mot. for Reconsid. (Appx. 3a–4a).

22 Second Am. Compl. (Nov. 13, 2018) (Appx. 575a).

23 Order Dismissing Second Am. Compl. (Dec. 14, 2018) (Appx. 2a).

24 See *ibid.*

court granted Scottsdale leave to amend its complaint because Scottsdale had relied upon the earlier *res ipsa* ruling when crafting the Second Amended Complaint.[25]

Scottsdale then filed its Third Amended Complaint, which asserted a claim for defamation based on just one statement. Defendants filed an Answer and a motion for summary disposition under C8.[26] The motion argued that the Complaint failed to adequately plead a claim for defamation because the challenged statement is not provably false, is substantially true, is not defamatory, and is protected under Michigan's fair-comment privilege.[27] Defendants also argued that the Third Amended Complaint failed to specifically plead fault.[28] After Scottsdale filed its opposition brief and Defendants filed their reply, the trial court heard oral argument on the motion. The trial court denied Defendants' motion in an oral ruling from the bench. Immediately thereafter, the trial court granted Defendants' oral motion for a stay of proceedings pending appeal.

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[25] *Ibid.*

[26] Register of Actions at 1 (Appx. 16a).

[27] Defendants' Third Mot. Summ. Dispo. at 8–17 (Nov. 15, 2018) (Appx. 1000a–1009a).

[28] *Id.* at 17–18 (Appx. 1009a–1010a).

STANDARD OF REVIEW

As with all appeals from summary disposition, the Court's review is plenary. *Associated Builders & Contractors* v. *Wilbur*, 472 Mich. 117, 123 (2005).

GOVERNING STANDARD

Under MCR 2.116(C)(8), courts must dismiss a claim where the allegations on the face of the pleadings, taken as true, fail to state a claim recognized at law, such that no factual development could possibly justify recovery even after drawing all reasonable inferences in the plaintiff's favor. *Singerman* v. *Municipal Serv. Bureau*, 455 Mich. 135, 139 (1997); *Wade* v. *Michigan Dep't of Corrections*, 439 Mich. 158, 162–63 (1992). Although the C8 standard is fairly pro-plaintiff, this Court has "recognized the need for affording summary relief to defendants [in libel actions] … to avoid the chilling effect on freedom of speech and press." *Ireland* v. *Edwards*, 230 Mich. App. 607, 613 n.4 (1998). "Summary judgment is an integral part of the constitutional protection afforded [to] defendants…." *Id.* at 613.

THE STATEMENT

"If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors." Third Am. Compl. ¶ 13 (Jan. 11, 2019) (Appx. 801a).

ARGUMENT

To adequately plead a claim for defamation, a libel plaintiff must prove that the defendant: (1) made a false statement of fact, (2) that was defamatory, (3) which was "of and concerning" the plaintiff, (4) in the form of an unprivileged publication to a third party, (5) with a level of fault amounting to at least negligence, and (6) damages. *Northland Wheels Roller Skating Ctr.* v. *Detroit Free Press*, 213 Mich. App. 317, 323 (1995). Here, the Statement is not provably false, is substantially true, and is not defamatory as a matter of law. In addition, Scottsdale has neither pleaded in avoidance of the common-law fair-comment privilege nor adequately pleaded fault. According, the Court should reverse the SDO and remand for entry of an order dismissing the Third Amended Complaint with prejudice.

I. SPECIAL PLEADING STANDARD: The trial court failed to apply the heightened First Amendment pleading standard that applies in all libel actions.

Courts have a special, heightened duty to rigorously review the sufficiency of the allegations before them because of the constitutional implications for free speech—to sit up a little straighter and review defamation pleadings more closely than in the run-of-the-mill case. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 511 (1984). Heightened scrutiny allows courts to resolve several questions of law on the pleadings, including whether a statement is capable of being defamatory; the nature of the speaker and the level of constitutional protections afforded to the statement; and whether actual malice exists, if the plaintiff is required to show that level of fault. *Thomas M. Cooley Law Sch.* v. *Doe 1*, 300 Mich. App. 245, 342 (2013).

Michigan courts have taken this duty seriously, long ago adopting an *Iqbal*-like pleading standard that requires plaintiffs to specifically plead: (1) the defamatory words and the facts that would establish the words are false; (2) the facts identifying the publication of those words to a third party; (3) the level of fault that must be proved and the facts that would establish that the speaker acted with that level of fault; and (4) the harm suffered by the publication. *Gonyea* v. *Motor Parts Fed. Credit Union*, 192 Mich. App. 74, 76–77 (1991). *Accord Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (federal plaintiffs must "plausibly" plead claims through specific factual allegations). Pleading specific facts is a "relatively simple requirement," and defendants are entitled to summary disposition under C8 "on this ground alone" when plaintiffs fail to follow it. *Rouch* v. *Enquirer & News (After Remand)*, 440 Mich. 238, 279 (1992) ("*Rouch II*") (Riley, J., concurring).

Scottsdale has argued that heightened scrutiny and the heightened pleading standard only applies in cases involving public figures, emphasizing that it has cast itself as a private figure in the Third Amended Complaint. This is a false distinction because these rules apply equally in public-figure and private-figure cases. For example, in *Rouch II*, a private-figure case reviewed on appeal from a C10 ruling, Justice Riley opined that the pleadings in a defamation case should also be reviewed with the same kind of heightened scrutiny when challenged

under C8. This Court long ago adopted Justice Riley's concurrence for C8 appeals in private-figure cases. See, *e.g.*, *Royal Palace Homes*, 197 Mich. App. at 52–53; *Trost* v. *Buckstop Lure Co., Inc.*, 249 Mich. App. 580, 587 n.2 (2002).

Despite controlling caselaw applying *Rouch II* to private figure cases, the trial court declined to apply the required heightened scrutiny. In a ruling that conflated two separate and distinct concepts—*heightened scrutiny* of a complaint for compliance with the *Gonyea* pleading requirements to protect a defendant's First Amendment interests on one hand, and the plaintiff's duty to *adequately plead the element of fault* on the other—the trial court declined to review the pleadings under the heightened standard:

> [T]he Court has made a ruling with regard to whether there's a heightened standard relating to this particular Plaintiff and the Court is standing by its earlier ruling that Plaintiff does not have to establish actual malice in the publication of this particular article and actually this particular phrase which is the only thing left in terms of an action.

Motion Hr'g Trans. 30:11-16 (Mar. 26, 2019) (Appx. 48a. *Compare with* First SDO 3–5 (Oct. 4, 2018) (Appx. 8a–10a). Thus, the trial court failed to properly examine Defendants' motion.

When subjecting Scottsdale's defamation claim to the required heightened scrutiny, the claim fails. Scottsdale has not pleaded specific facts that support its defamation claim. For the reasons argued in Parts III, IV, and VI, *infra*, the Third Amended Complaint—like its predecessors—is filled with general allegations that are simply insufficient to satisfy the heightened pleading standard that applies under *Gonyea*.

II. FULL ARTICLE NOT CONSIDERED: The trial court failed to consider the full Article, which is required under Michigan law to fully assess the context of the Statement.

A court must read the challenged statement in context, fairly and reasonably construing the entire article to determine whether the challenged statement is libelous. *Sanders*, 313 Mich. at 340; *Croton*, 104 Mich. App. at 108. A statement "does not become actionable merely because it could be taken out of context." *Nehls*, 178 F. Supp. 2d at 779.

A C8 motion is reviewed on the "pleadings." MCR 2.116(G)(5). By court rule, the pleadings include both the complaint *and* the answer. MCR 2.110(A). Records attached to a pleading are part of the pleading for all purposes. *Slater* v. *Ann Arbor Pub. Sch. Bd. of Educ.*, 250 Mich. App. 419, 427 (2002). Thus, under *Sanders*, *Croton*, and under Rule 2.116(G)(5), the trial court was required to consider the entire Article when assessing the merits of Defendants' motion.

The entire Article includes the FINRA Decision and all of the other linked references in the Article. Scottsdale argued that the FINRA Decision is not part of the Article, citing *Nucor Corp.* v. *Prudential Equity Gp.*, 659 S.E.2d 483, 485 (N.C. App. 2008), and *Mandel* v. *O'Connor*, 99 S.W.3d 33, 37 (Mo. App. 2003), for the proposition that defamatory meaning is judged by the content within the "four corners of the publication." Defendants do not quarrel with that statement of the law conceptually, but the four corners of a publication includes documents attached to the publication, *Service Employees Int'l Union Local 5* v. *Professional Janitorial Serv. of Houston, Inc.*, 415 S.W.3d 387, 402–403 (Tex. App. 2013), just like attachments to a complaint are part of the complaint, *cf. Slater*, 250 Mich. App. at 427. Neither *Nucor Corp.* nor *Mandel* involved online publications or publications with attachments.

Several courts have, however, ruled implicitly or explicitly that hyperlinks embedded in an online article are the functional equivalent of attachments that are part of the article. See *Fridman* v. *BuzzFeed, Inc.*, 172 A.D.3d 441 (N.Y. App. 2019); *Adelson* v. *Harris*, 402 P.2d 665 (Nev. 2017) (*"Adelson III"*) (so holding in response to a certified question from the federal court); *Nicosia* v. *De Rooy*, 72 F. Supp. 2d 1093 (ND Cal. 1999). These are persuasive decisions,

and the Court should adopt this rule for Michigan. A defamation plaintiff shouldn't be heard to complain that an article omits relevant information, while asking a court to ignore that the article provides the audience with a link to the decision—the digital equivalent of flipping to the appendix of this brief.

In *Fridman*, a plaintiff sued BuzzFeed for defamation over a story regarding the Steele dossier. The court relied on hyperlinks to a CNN article and the Steele dossier in the BuzzFeed story to apply the fair-report privilege. *Fridman*, 172 A.D.3d at 442. Although the fair-report privilege (which drove the analyses in *Adelson* and *Fridman*) is not at issue here, the substantial-truth doctrine and the fair-comment privilege are. Importantly, all three of these defenses require the challenged Statement to be read in its full context—*i.e.*, the full article.

The *Adelson* case is persuasive for both its procedural and substantive rulings. A donor to Sen. Mitt Romney's 2012 presidential campaign sued a political advocacy group and its leaders for defamation over an online petition the group launched regarding the donor's alleged business practices. *Adelson* v. *Harris*, 973 F. Supp. 2d 467, 471–475 (SDNY 2013) (*"Adelson I"*). The defendant prevailed on a motion to dismiss under Rule 12(b)(6)—the federal cognate to our Rule 2.116(C)(8). *Id.* at 471.

As part of its analysis, the district court noted that the SEC considers hyperlinks in an online offering to be akin to including the contents of the second site in the same delivery envelope as the prospectus. *Id.* at 484 (citing SEC Release No. 7233, 1995 WL 588462 (Oct. 6, 1995)). It went on to analogize hyperlinks as the twenty-first century equivalent of turning over the cruise ticket. *Adelson I*, 973 F. Supp. 2d at 484. Much like Scottsdale, the plaintiff in *Adelson* argued that hyperlinked material is not properly considered because it is outside the four corners of the publication. The district court rejected the argument: "This contention is premised on a type of formalism that is misplaced in Internet defamation law." *Ibid.* In so ruling, the court offered sound public policy reasons for protecting defendants who hyperlink their sources from defamation claims:

> [***P***]***rotecting defendants who hyperlink to their sources is good public policy***, as it fosters the facile dissemination of knowledge on the Internet. It is true, of course, that shielding defendants who hyperlink to their sources makes it more difficult to redress defamation in cyberspace. But this is only so because Internet readers have far easier access to a commentator's sources. ***It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits.***

Id. at 485 (emphases added).

On appeal, the Second Circuit certified two questions to the Nevada Supreme Court, one of them relating to the hyperlink issue. *Adelson* v. *Harris*, 774 F.3d 803 (CA2 2014) (*"Adelson II"*). The Nevada Supreme Court noted that: (1) hyperlinks "provide strong attribution ***because they allow direct access*** to underlying materials, are intuitively easy to use, and are extremely prevalent online"; and (2) "a reader can click on a hyperlink ***and immediately determine*** whether official proceedings are implicated." *Adelson III*, 402 P.3d at 669 (emphases added). Although it is "clear that [courts] must consider ***more than*** the underlying source material connecting to a hyperlink," *ibid.* (emphasis added), *Adelson III* can be fairly read to hold that courts must ***at least*** look to the hyperlinked material when assessing whether the fair-report privilege applies.

Ultimately, the Second Circuit affirmed the dismissal. *Adelson* v. *Harris*, 876 F.3d 413 (CA2 2017) (*"Adelson IV"*). Thus, when studied together, *Adelson I*, *III*, and *IV* support the notion that it is proper to look to linked material when assessing a challenge to the complaint.

Finally, in *Nicosia*, the defendant argued that his online post, which accused the plaintiff of committing embezzlement, constituted nonfactual opinion on disclosed facts found in other articles that he hyperlinked in his post. The plaintiff, like Scottsdale does here, argued that the challenged statement "must be read in isolation from the other [hyperlinked] articles because the ... posting which contained the allegation did not include any underlying facts." *Nicosia*, 72 F. Supp. 2d at 1103. The court rejected the plaintiff's contention: "The[hyperlinked] articles were ***at least*** as connected to the news group posting as the back page of a newspaper is connected to the front. ***Thus, the Court considers the articles part of the context of the***

embezzlement accusation." *Ibid.* (emphases added).

In our case, Scottsdale claims that Defendants misrepresented the FINRA Decision. If the FINRA Decision is part of the Article as Defendants argue, then the challenged statement must be assessed against the FINRA Decision, as it is part of the full context of the Article. The trial court, however, declined to consider the FINRA Decision. Motion Hr'g Tr. at 30:25–31:6 (Appx. 48a–49a). It is unclear whether the trial court rejected the *Adelson* line of cases or failed to consider the FINRA Report under *Sanders*, *Croton*, and Rule 2.116(G)(5). *Ibid.* Either way, it failed to analyze the Statement in the context of the entire Article. It therefore failed to properly examine Defendant's motion, for the reasons argued in Part V, *infra*.

Scottsdale has previously argued that the trial court considered the FINRA Decision but did not find it "dispositive." Opp'n to Lv. 5. Defendants interpret the court's remarks differently. The court declined to decide under C8 whether the Statement was provably false or hyperbole, whether it was defamatory, or whether fault was adequately pleaded, saying that such matters must be considered under C10 because they require proofs:

> [T]he ***question of negligence, hyperbole, of whether in fact there is falsehood involved, where in fact the statement itself is defamatory in nature goes to, in essence, proofs that may or may not be available*** to the Plaintiff. The arguments raised, the citation as to the various—both the FINRA report …. [and] a whole lot of matters that don't necessarily touch on this particular issue, ***all of those are considerations that the Court might well determine in a (C)(10) motion as dispositive*** of this proceeding, but I am not considering this as dispositive in a (C)(8) proceeding.

Motion Hr'g Tr. 30:21–31:6 (emphases added) (Appx. 48a–49a). In other words, the court would not consider the FINRA Decision at the C8 stage because negligence, hyperbole, falsity, and defamation are *fact* questions that cannot be answered without looking beyond the pleadings. But these are actually *questions of law*. SACK ON DEFAMATION § 4:3.7 nn. 291, 293 (5th ed. 2018) (whether statement is provably false); *Ireland* v. *Edwards*, 230 Mich. App. 607,

619 (1998) (whether statement is capable of defamatory meaning); SACK § 2:4.16 (same); *Rouch II*, 440 Mich. at 271–272 (Riley, J., concurring) (whether fault is adequately pleaded).

Scottsdale claims that the Statement misrepresents the FINRA Decision. There is only one way to determine whether Scottsdale is right (*i.e.*, whether the Statement is provably false): the Court must review the FINRA Decision. Yet, the trial court specifically says it would not consider the decision "as dispositive" in a C8 proceeding. The most reasonable interpretation of the court's statement is that it did not consider the FINRA Decision or the other linked materials because it thought they were outside the pleadings—as it had ruled before. First SDO 5 (Appx. 10a). But these materials are part of the pleadings. Argument Part II, *supra* at 11. Accordingly, the Court should hold that the trial court committed reversible error by failing to consider the FINRA Decision.

III. NOT PROVABLY FALSE: The trial court should have dismissed the defamation claim because the Statement is not provably false.

To be actionable, the Statement must be provably false. *Ireland*, 230 Mich. App. at 636 (citing *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 17–22 (1990)). In other words, the statement must state "actual, objectively verifiable facts." *Milkovich*, 497 U.S. at 17–21. Nonfactual hyperbole is not provably false. As noted in Part IV.B, *infra,* Scottsdale has been connected to *at least two* pump-and-dump schemes in the years preceding publication of the Article. The Statement thus amounts to "everyone knows" about the connection, which is classic rhetorical hyperbole that is not actionable. *Komarov* v. *Advance Magazine Publ'rs, Inc.*, 691 N.Y.S.2d 298, 301–302 (N.Y. Sup. Ct. 1999) (holding that a statement that plaintiff was as "well known" in the community as the notorious mobster John Gotti was rhetorical hyperbole that cannot be proven false and therefore not actionable). See also *Hogan* v. *Winder*, 762 F.3d 1096, 1107–1108 (CA10 2014) (accusing someone of blackmail for threatening to sue a former employer was not actionable because, in context, it was nonactionable hyperbole); *Fasi* v. *Gannett Co.*, 930 F. Supp. 1403 (D Haw. 1995) ("Frank 'the Extortionist' Fasi is at it again" was hyperbole, not a true accusation of criminal activity); *Haberstroh* v. *Crain Publ'ns, Inc.*, 189 Ill. App. 3d 267 (1989) (saying a professor was on an "acid trip" was not an accusation of illegal drug use); *McGilvray* v. *Springett*, 68 Ill. App. 275 (1896) (statement that the plaintiff had stolen money from the town treasury "and everybody knows it" was not slanderous; bystanders understood this was not an accusation of larceny, but allegedly overbilling the town for services).

Scottsdale cannot objectively prove that those who followed penny stock pump-and-dump schemes did *not* know of Scottsdale. It says that it could do so through a poll or a focus group, see Third Am. Compl. ¶ 15 (Appx. 802a); Motion Hr'g Tr. 13:11–18; 18:16–19:9 (Appx. 31a, 36a–37a); Opp'n to Lv. 7–8, but we do not try cases by polling the community. Trials are not gameshows where people "text their vote" to the jury. Scottsdale has not cited a single similarly situated case in Michigan that allowed such evidence. Nor has it cited a case from anywhere else in the country allowing such evidence to prove any element of a defamation case.

The trial court erroneously ruled that Defendants' objection to Scottsdale's proposed polling evidence is best raised in a C10 motion. Motion Hr'g Tr. at 30:25–31:6 (Appx. 48a–49a). Dismissal under C8 is appropriate when no factual development could possibly justify recovery. *Maiden* v. *Rozwood*, 461 Mich. 109, 119 (1999). Scottsdale did not proffer any method by which it could acquire and introduce admissible evidence on the question of community knowledge. Having failed to do so, a dismissal under C8 is proper.

IV. SUBSTANTIAL TRUTH: Even if the Court were to conclude that the Statement is one of fact and is capable of being proved false with actual, objectively verifiable evidence, the trial court should still have dismissed the defamation claim because the Statement is not materially false.

A. As written, the Statement is not materially false.

As it did in the First Amended Complaint, Scottsdale argues in the Third Amended Complaint that the Statement is false because it has "never been involved in any 'pump and dump' schemes, has never been a defendant in any 'pump and dump' lawsuits, and has never been convicted of engaging in 'pump and dump' activity." Compare First Am. Compl. ¶ 15 (Appx. 57a–58a) with Third Am. Compl. ¶ 15 (Appx. 802a). Yet, on its face, the Statement doesn't accuse Scottsdale of any of these things. The trial court agreed when it dismissed this Statement from the First Amended Complaint, First SDO 7 (Appx. 12a), but the court has now inexplicably allowed the Statement to proceed without Scottsdale curing the error. See Motion Hr'g Tr. 29:18–31:18 (Appx. 47a–49a). This was erroneous.

B. The implication Scottsdale draws from the Statement is unreasonable and there no facts pleaded that could support an inference that Defendants intended the unreasonable inference—even so, it is substantially true.

Scottsdale alleges that the juxtaposition of the headline "FINRA fines Scottsdale Capital Advisors $1.5 million" against the Statement implies that FINRA fined Scottsdale for affirmatively participating in a criminal act: the pump and dump of penny stocks. Third Am. Compl. ¶ 14 (Appx. 801a). Thus, Scottsdale alleges the existence of a defamatory meaning by implication.

In a lengthy and strongly worded opinion in *Locricchio* v. *Evening News Association*, 438 Mich. 84 (1991), the Michigan Supreme Court placed severe restrictions on "libel by implication." Relying on *Sanders*, the Court held that, under Michigan law, "imposing liability on a media defendant for facts it publishes accurately and without material factual omissions about public affairs" is prohibited. *Id.* at 117. Noting that defamation by implication was not so "analytically distinct" as to "require a departure from the guiding principles of general libel and First Amendment libel law," *id.* at 132, the Court emphasized the "severe constitutional"

burden of proving falsity that a plaintiff must carry. *Id.* at 122. *Locricchio* renders it extremely difficult, if not practically impossible, to advance a defamation by implication claim under Michigan law. This is as it should be. The falsity requirement should be construed and applied in a manner that assures literally true speech is not punished.

Courts look with extreme skepticism upon any theory that threatens to soften the requirement that a libel plaintiff plead and prove a specific false statement of fact. Emphasizing the principles articulated *Locricchio*, this Court has held that a libel defendant "is not responsible for every defamatory implication a reader might draw from his report of true facts, absent evidence that he intended the defamatory implication." *Royal Palace Homes*, 197 Mich. App. at 56. A statement "does not become actionable merely because it could be taken out of context." *Nehls*, 178 F. Supp. 2d at 779. There are no facts pleaded in the Third Amended Complaint that, if proven, would establish that Defendants intended to imply that Scottsdale was *affirmatively committing* pump-and-dump schemes, as opposed to serving as the means by which such schemes were accomplished.

As noted in Part II, *supra*, the Statement must be read in context, fairly and reasonably construing the entire article to determine whether the challenged statement is libelous. *Sanders*, 313 Mich at 340; *Croton*, 104 Mich App at 108. The FINRA Decision provides the context. It details how Scottsdale's business is susceptible to sham transactions.

For example, FINRA noted, among Scottsdale's many shortcomings, that the SEC had previously sued two of Scottsdale's registered representatives in a case involving a Panamanian-based pump-and-dump in 2008–2012. FINRA Decision 11–12 and nn. 18, 20, Part III.B(1)(a)(iv)(a) (Appx. 879a–880a). Accounts at Scottsdale were also used in a Bahamian-based pump-and-dump in 2008-2010. *Ibid.* FINRA fined Scottsdale in part because FINRA directly tied the success of the $34 million Biozoom pump-and-dump scheme to Scottsdale's lax anti-fraud safeguards, which it never improved despite being on notice that its existing safeguards were inadequate to detect and prevent fraud. *Id.* at 107, Part IV.A(3) (Appx. 975a). FINRA explained that, in accepting penny stocks for deposit in the earlier schemes, Scottsdale

failed to exercise its gatekeeping role to safeguard against being used by its customers as a *means* to execute a pump-and-dump fraud.

Scottsdale's subsequent failure to adequately police transactions—as it was required to do under SEC Rule 17a-8, the Bank Secrecy Act ("**BSA**"), and its implementing regulations, see BSA, 31 U.S.C. § 5311, *et seq.*; 31 C.F.R. § 1023.320(a)(2); and 17 C.F.R. § 240.17a-8 (SEC regulation requiring brokers to follow the BSA and its rules)—signaled to FINRA that Scottsdale had not heeded the lessons of its earlier roles in pump-and-dump schemes. FINRA considered this an aggravating factor, which formed a basis for the $1.5 million fine:

> Finally, although [Scottsdale] was not charged in ... *Ruettiger*, *Gibraltar I*, *Gibraltar II*, and *Tavella*, those cases did involve alleged misconduct through accounts at [Scottsdale]. These cases put [Scottsdale] on notice of the risk of sham transactions and the use of nominees to conceal beneficial ownership and facilitate unlawful distributions of securities. They heightened the need for [Scottsdale] to be alert to red flags. ***In light of this history, it is aggravating that Scottsdale performed its gatekeeping function so poorly.***

FINRA Decision at 104, Part IV.A(1)(d) (emphasis supplied) (Appx. 972a). Scottsdale mischaracterizes the FINRA Decision when it alleges that the decision and the fine have "nothing to do" with Scottsdale's role in pump-and-dump schemes. See Third Am. Compl. ¶ 14 (Appx. 801a).

Under Section 5 of the Securities Act, the sale of securities without registration is unlawful unless an exemption exists. 15 U.S.C. § 77e(a)(1). In selling penny stocks without registration, Scottsdale "usually relie[d] on a 'safe harbor' exemption created by the [SEC], Rule 144." FINRA Decision at 5, Part I.A (Appx. 873a). When a securities transaction involves "large blocks of thinly traded, little-known securities acquired in a chain of private transactions," like the Biozoom stock, it is "a red flag that the SEC and FINRA have both said requires a 'searching inquiry.'" *Id.* at 6, Part I.A(3) (Appx. 874a). "These red flags ought to have been investigated and properly resolved *before* the securities could be sold. [Scottsdale],

however, ***blinded itself*** to the multiple red flags signaling that the transactions were unlawful public distributions of securities. It did not conduct the required searching inquiry. It [therefore] sold the securities without a reasonable basis for a Rule 144 exemption." *Id.* at 7, Part I.A(3) (emphasis supplied) (Appx. 875a).

Explaining Scottsdale's willful blindness, FINRA noted that "[Scottsdale] was on notice that its business was susceptible to sham transactions and the use of nominees to conceal the true beneficial owners of securities. ***In four disciplinary actions*** involving Scottsdale's own employees and customers, the SEC alleged that sham transactions and nominees were used in unlawful sales in violation of Section 5 of the Securities Act. Those unlawful sales in turn were used to facilitate fraud and manipulation." FINRA Decision at 11, Part III.B(1)(a)(iv)(a) (emphasis added) (Appx. 878a). FINRA identified the nature of the fraud and manipulation, two of which involved pump-and-dump schemes. *Id.* at 11–12 (Appx. 879a–880a). After detailing Scottsdale's shortcomings in each of the earlier regulatory actions—including the Biozoom fraud—FINRA held that those actions "should have caused [Scottsdale] to take special care ... to revise its procedures to focus on potential sham transactions and the use of nominees. [Scottsdale] did not." *Id.* at 13 (Appx. 881a).

Scottsdale tried to minimize the significance of its gatekeeping function, arguing that it was unfair to look back to the pump-and-dump schemes because no formal accusation had been made in the current disciplinary case that the challenged transactions were part of a pump-and-dump fraud. *Id.* at 13, Part III.B(1)(a)(iv)(b) (Appx. 881a). FINRA was unmoved: "It is not necessary, however, to prove that fraud occurred in order to conclude that [Scottsdale and other respondents] failed to perform their gatekeeping duty adequately." *Ibid.* In trying to make the same argument here, Third Am. Compl. ¶ 14 (Appx. 801a), Scottsdale ignores the central thrust of the Article: a company—with a history of being used as a tool to execute pump-and dump schemes because of its repeated failure to take its gatekeeping function seriously—was fined $1.5 million for yet again not doing its job to adequately safeguard the investing public.

Although Scottsdale essentially concedes that anyone reading the FINRA Decision would understand this context, it argues that the "damage is done" before the reader gets to the FINRA report. Opp'n to Third MSD 8 (Appx. 1029a). This is just another way of saying the reader can't be expected to read the entire article if it is too long. *But that isn't the law.* A court must read the challenged statement in context, fairly and reasonably construing *the entire article* to determine whether the challenged statement is libelous. *Sanders*, 313 Mich. at 340; *Croton*, 104 Mich. App. at 108.

Here, Scottsdale argues that the statement falsely implies that FINRA fined it $1.5 million for its involvement in a penny stock pump-and-dump scheme, which it says is an "inference of criminal conduct." Opp'n to Third MSD 7, Part C.1 (Appx. 1028a). This is unpersuasive for three reasons.

First, FINRA is a *civil* regulatory authority that would have no authority to punish Scottsdale for *criminal* conduct. Keeping in mind that *Air Wisconsin Airlines Corp.* v. *Hoeper*, 71 U.S. 237, 246–251 (2014), requires the Court to assess the challenged statement from the perspective of the reasonable audience—here, sophisticated consumers of news concerning the penny-stock market—the implication Scottsdale wishes to read into the statement is not reasonable. The reasonable audience for the Article would understand that FINRA fines are civil in nature.

Second, even if the reasonable audience made that unreasonable inference, Scottsdale refuses to acknowledge that a libel defendant "is not responsible for every defamatory implication a reader might draw from his report of true facts, absent evidence that he ***intended*** the defamatory implication." *Royal Palace Homes*, 197 Mich. App. at 56 (emphasis added). Scottsdale has not pleaded any facts from which the Court could reasonably infer that Defendants intended the implication that Scottsdale tries to read into the statement. Tellingly, Scottsdale could not cite a single fact *pleaded in the complaint* to establish this intent element. See Opp'n to Third MSD 7–9 (Appx. 1028a–1030a).

Third, the implication of which Scottsdale complains is substantially true. Substantial truth is an absolute defense to a defamation claim. *Collins* v. *Detroit Free Press*, 245 Mich. App. 27, 33 (2001). The doctrine precludes liability if the gist or sting of the statement is true. *Ibid.* "[A] statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Hawkins* v. *Mercy Health Servs.*, 230 Mich. App. 315, 332 n.12 (1998) (cleaned up).

Here, the pleaded truth is that Scottsdale was fined for selling securities without a registration or an exemption from registration, not for engaging in pump-and-dump schemes. Third Am. Compl. ¶ 22 (Appx. 803a); Opp'n to Third MSD 8 (Appx. 1029a). Yet the FINRA Decision details how and why FINRA tied the fine to Scottsdale's failure to properly police transactions susceptible to pump-and-dump frauds. FINRA held that shares sold through Scottsdale were not exempt from registration because the exemption required Scottsdale *to properly police transactions*, which it did not do. Opp'n to Third MSD 12–13 (Appx. 1033a–1034a). Thus, in FINRA's estimation, Scottsdale was partly responsible for the pump-and-dump schemes. Had Scottsdale done its job properly, innocent people would not have lost money.

Scottsdale's claim rests on the distinction between actively committing fraud and being used as a tool for fraudsters. A person who followed pump-and-dump schemes—*i.e.*, the reasonable audience—would know the difference between these two things *and* understand from the linked FINRA Decision that Scottsdale was involved in pump and dumps *as a tool*. Moreover, the linked FINRA Decision shows that regulators found Scottsdale to be a willing tool because it "institutionalized misconduct as its standard way of doing business." FINRA Decision at 105, Part IV.A(l)(d) (Appx. 973a). Anyone who followed pump-and-dump schemes would know of Scottsdale. Anyone who read the entire article (including the linked FINRA Decision) would also understand *how* Scottsdale was involved. At the same time, the reasonable audience—sophisticated consumers of news concerning penny stocks—would detect no meaningful difference between "engaging in" behavior and "being responsible

for" that behavior. In both cases, the reasonable audience would understand Scottsdale was *legally culpable* for frauds perpetrated on the market.

Importantly, however, even if the Court were to conclude that the FINRA Decision is not part of the Article and cannot be considered on a C8 motion, the main text of the Article still belies the inference that Scottsdale asserts. The first paragraph introduces Scottsdale *as a broker* that allows the deposit and sale of penny stocks. Article ¶ 1 (Appx. 823a). The first paragraph also contextualizes the Statement, reminding readers that many of the accounts frozen in connection with the Biozoom pump-and-dump scheme were at Scottsdale. *Ibid.*

Accordingly, Scottsdale's claim is barred under the substantial-truth doctrine.

V. FAIR-COMMENT PRIVILEGE: The trial court should have dismissed the defamation claim because the Article addresses a matter of public concern, making the Statement privileged under the common law fair-comment privilege.

The existence of an *unprivileged* statement of fact is an element of a defamation claim that must be pleaded. *Northland Wheels*, 213 Mich. App. at 323. The plaintiff must plead in avoidance of a privilege that is evident from the face of the complaint. See *MacGriff* v. *Van Antwerp*, 327 Mich. 200, 204–205 (1950) (the plaintiffs failed to plead a viable claim against government officials in their official capacity for conspiracy to defame because the plaintiffs needed to plead specific illegal acts to overcome the defendants' privilege).

Privileges in defamation cases fall into one of two broad categories: absolute privileges and qualified privileges. Sack § 8.1. Absolute privileges apply by virtue of the speaker's status or position. *Id.* at § 8:1. All other privileges are qualified privileges, because their application depends in part on the content of the statement. *Ibid.*

The fair-comment privilege, which protects public discourse by sheltering communications about matters of public concern, *Milkovich*, 497 U.S. at 13, is a qualified privilege that extends to comments on facts that are readily accessible to the reader. See *Sarkar* v. *Doe*, 318 Mich. App. 156, 191 (2016) (anonymous posts regarding a professor's alleged scientific misconduct were protected speech when based on underlying facts available to the reader); SACK § 4:4.2 n.307 (citing RESTATEMENT (FIRST) OF TORTS § 606(a)(ii)). Citing *Van Vliet* v. *Vander Naald*, 290 Mich. 365, 371 (1939), the Michigan Supreme Court reaffirmed in *Dadd* v. *Mt. Hope Church*, 486 Mich. 857 n.1 (2010), that the plaintiff must prove that the defendant made the challenged statement with actual malice if a qualified privilege applies.[29]

[29] In a partial concurrence, Justice Markman traced the contours of the privilege. See *Dadd*, 486 Mich. at 860–862, 864–867 (Markman, J., concurring in part, dissenting in part). Justice Markman's discussion of the privilege is consistent with the majority opinion. The Court differed over whether the jury was properly instructed. The majority did not believe it reversible error for the instructions to omit a reference to "actual malice," finding the use of "reckless disregard" to be sufficient under the circumstances.

Here, the statement is fair comment by a media defendant about disciplinary action taken against a regulated entity whose willful nonfeasance facilitated pump-and-dump frauds. Scottsdale says that "criminal matters" are not always matters of public interest, Opp'n to Third MSD 11 (Appx. 1032a), but that confuses the real issues of interest to the public in two respects. First, as noted in Argument Part IV.B, *supra*, the FINRA fine is a *civil* matter. Second, Defendants provide news to investors, including warnings about stock manipulation schemes to prevent them from being fleeced. The public has an interest in understanding how pump-and-dump schemes work, how they succeed (in part through companies like Scottsdale failing to police transactions), whether a scheme has been detected or is suspected (so that investors can protect themselves), and whether they have been victimized by a scheme (so they can seek redress), among other interests.

Scottsdale has not denied that the FINRA Decision is newsworthy for these reasons, so the public-concern element is satisfied. See Opp'n to Lv. 11–12. Defendants not only disclosed the existence of the FINRA Decision in the Article, but they also provided readers a link to access it, so the accessibility element is satisfied. See Answer, Third Am. Compl., Exh. A at 1 (Appx. 823a). Thus, the only issue is whether the Statement is comment or fact. Scottsdale contends that the Statement, and the implications Scottsdale asks the Court to draw from them, are untrue statements of fact. Opp'n to Lv. 11–12. Defendants disagree for two reasons.

First, the Statement is akin to saying: "if you've been watching news about pump-and-dumps over the last few years, Scottsdale is a name you'll recognize." That's comment, not fact.

Second, even if *arguendo* it were a statement of fact, the privilege still applies on the facts as pleaded. Although Scottsdale says it was fined only for an "administrative failure"—it did not have the proper registration and it did not fall into an exemption, Opp'n to Lv. 12—that's just sanitizing the facts. By law, Scottsdale could not sell securities without a registration unless it qualified for an exemption. 15 U.S.C. § 77e(a)(1). An exemption exists under SEC

Rule 144, if a number of conditions are met. Among those conditions: if "red flags" exist, then a "searching inquiry" must be made to ensure the sale is lawful. If a searching inquiry is not performed, then the exemption is lost. See *World Trade Fin. Corp.* v. *U.S. Secs. & Exch. Comm'n*, 739 F.3d 1243, 1247–1250 (CA9 2014). FINRA found that Scottsdale was on notice that it was being used to facilitate sham transactions, yet it still failed to guard against such activity in the future. Argument, Part IV.B, *supra*. Thus, the "administrative failure" was failing to scrutinize transactions, which allowed pump-and-dump schemes to go forward. For all its protestations, ***Scottsdale has never disputed this analysis.***

Under *Dadd*, to overcome Defendants' qualified privilege, Scottsdale must plead facts that, if proved, could establish actual malice. It has not done so. Therefore, the trial court should have dismissed the Third Amended Complaint for failing to plead an *unprivileged* publication of the Statement.

VI. FAULT NOT ADEQUATELY PLEADED: The trial court should have dismissed the defamation claim because Scottsdale's general allegations of fault are legally insufficient to state a claim.

To adequately plead fault, a plaintiff must identify the level of fault that applies to the claim *and* allege facts that would establish that level of fault if proved. *Gonyea*, 192 Mich. App. at 76–77; *Rouch II*, 440 Mich. at 279. There are two levels of fault: negligence and actual malice. *Ibid.* The negligence standard applies in cases involving private figures; the actual-malice standard applies in cases involving public officials, public figures, and limited-purpose public figures. *Ibid.* Scottsdale alleges that it is a private figure and that MLM and Goode are the direct and proximate cause of its damages, Third Am. Compl. ¶ 29 (Appx. 804a), so it impliedly pleads the level of fault to be negligence.

Negligence is defined as the failure to use the care that an ordinary person would use under the circumstances. MICH. CIV. J. INSTR. 10.02. Thus, in order to meet the *Iqbal*-like pleading standard under *Gonyea*, Scottsdale must allege what a reasonably careful reporter and reasonably careful publisher would have done under the circumstances, and then plead facts alleging that MLM and Goode failed to do those things. *Michigan Microtech, Inc.* v. *Federated Publ'ns*, *Inc.*, 187 Mich. App. 178, 186 (1991). These standards are intertwined with the "reasonable audience" standard. *Air Wis. Airlines Corp.*, 71 U.S. at 246–251. The Complaint does not satisfy these pleading requirements.

Scottsdale alleges that a reasonably careful reporter "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." Third Am. Compl. ¶ 24 (Appx. 803a). On its face, Defendants did not report this. Proceeding on a defamation-by-implication theory requires Scottsdale to plead facts from which the Court can infer that Defendants *intended* the implication. As argued in Part IV.B, *supra*, Scottsdale has pleaded no such facts from which the reasonable audience of readers who are well-versed in the microcap market could find that Defendants intended the inference Scottsdale urges. Scottsdale would presumably have the Court draw an inference that Goode did not read the FINRA Decision, but the Article in

which the Statement appears quotes from the FINRA Decision at length. Thus, the Article itself precludes this from being a *reasonable* inference. *Lakeside Oakland Dev.* v. *H&J Beef Co.*, 249 Mich. App. 517, 530 n.4 (2002) ("[w]hen considering a motion under MCR 2.116(C)(8), ... any *reasonable* inferences or conclusions that can be drawn from the facts, are accepted as true." (cleaned up) (emphasis added)).

Ultimately, then, Scottsdale's position is that a reasonable journalist would take the time to read source material, but: (1) a reasonable reader would not do so, even though the material forms part of the Article; and (2) the Court should not do so when assessing the sufficiency of the Complaint. Not only does the law presume that the reasonable reader reads the entire story, but in this case the law also presumes that they're sophisticated readers.

Under *Air Wisconsin*, Goode and MLM can reasonably expect that the reasonable audience of visitors to the Website are people familiar with the microcap market, including the players in the market and their roles (*e.g.*, depositor-sellers, broker-dealers, and buyers, etc.). Those readers, being versed in the industry, would conclude that Scottsdale was the *means* by which a pump-and-dump was accomplished, not that Scottsdale had itself engaged in illegal activity—particularly with the benefit of links to source documents.

Under *Rouch II*, a failure to plead *both* the level of fault that must be proved *and the facts* that would establish the speaker acted with that level of fault entitles MLM and Goode to summary disposition under MCR 2.116(C)(8). *Rouch II*, 440 Mich at 279 (Riley, J., concurring). Scottsdale's failure to plead facts adequately supporting a claim of negligence is fatal to the Complaint and the trial court erred in denying summary disposition under MCR 2.116(C)(8).

VII. AMENDMENT FUTILE: The Court should preclude Scottsdale from trying to amend its Complaint.

Leave to amend should be withheld when amendment would be futile. *Allegheny-Ludlam Corp.* v. *Michigan Dep't of Treas.*, 207 Mich. App. 604, 605 (1994). Amendment would be futile in this case. As a matter of law, the Statement is: (1) not provably false; (2) substantially true when considered in light of FINRA's disciplinary decision; (3) not capable of defamatory meaning; and (4) privileged. No amount of re-pleading can change this.

CONCLUSION

One must question Scottsdale's motives for continuing to press this claim. Although irrelevant for C8 purposes, Scottsdale has admitted in discovery that: (1) none of its clients has mentioned the Statement; (2) it has lost no customers; and (3) it has suffered no lost revenue.[30] Even assuming Scottsdale could prevail on a theory of defamation *per se*, a plaintiff is only entitled to nominal damages unless he can prove that the defendant acted maliciously. *Burden* v. *Elias Bros. Big Boy Restaurants*, 240 Mich. App. 723, 727–728 (2000). Having accused Defendants of acting only negligently, carelessly, or recklessly,[31] and having admittedly suffered no actual losses (despite persistently claiming otherwise in the complaints),[32] the only apparent reason for continuing this lawsuit is to gain editorial control over unfavorable news coverage—other than damages (to which it not entitled), the only other relief requested is "an injunction enjoining further publication of [the Statement]."[33] In other words, this lawsuit is about one thing: shutting down free speech. It is commonly known as a "strategic lawsuit against public participation." It is brought with the intent to censor the speaker's message because it is unwanted, not because it is false or defamatory. Fortunately, the First Amendment no more allows a "litigation veto" than it does a "heckler's veto."

This Court is solicitous of the First Amendment in libel cases lodged against the media. It favors early summary disposition to protect free-speech principles. It requires plaintiffs to specifically plead the level of fault that applies and facts supporting its existence. It prohibits general allegations. And it performs an independent examination of the record to ensure against forbidden intrusions into the field of free expression. Despite these well-established standards, the trial court failed to apply the exacting level of scrutiny required in this case.

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30 Third MSD Exh. 1, Interrog. Answers 27–30 (Appx. 1015a–1017a).

31 Compl. ¶¶ 22–25 (Appx. 805a).

32 Compare Third MSD Exh. 1, Interrog. Answers 27–30 (Appx. 1015a–1017a) with First Am. Compl. ¶ 17 (Appx. 85a), Second Am. Compl. ¶ 15 (Appx. 578a), and Third Am. Compl. ¶ 17 (Appx. 802a).

33 Third Am. Compl, Prayer for Relief ¶ C (Appx. 804a).

Applying the appropriate level of scrutiny, this case should not be permitted to proceed further. The Statement is not provably false with actual, objective facts. Even if the Statement were provably false, it is not actionable under both the substantial-truth doctrine and the fair-comment privilege. A reasonable person who reads the Article in its full context (an individual whom the law presupposes is a sophisticated reader) would conclude that Scottsdale was the means by which a pump-and-dump was accomplished, not that Scottsdale was engaging in illegal activity. Each of these is an independent ground to reverse and remand for dismissal.

PRAYER FOR RELIEF

WHEREFORE, Defendants respectfully request that the Court reverse the SDO and remand this action for entry of an order of dismissal with prejudice.

Respectfully submitted,

BUTZEL LONG, P.C.

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