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STATE OF MICHIGAN  
9TH JUDICIAL CIRCUIT COURT  
FOR THE COUNTY OF KALAMAZOO

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff,

v

Case No.: 2018-0153-CZ

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

Defendants.

\_\_\_\_\_ /

MOTION FOR SUMMARY DISPOSITION  
BEFORE THE HONORABLE ALEXANDER C. LIPSEY, CIRCUIT JUDGE  
Kalamazoo, Michigan - March 26, 2019

APPEARANCES:

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Kalamazoo, Michigan

Tuesday, March 26, 2019 - 10:18 a.m.

THE CLERK: Court is now in session. Please be seated.

THE COURT: Okay.

THE CLERK: Court calls the case of Scottsdale Capital Advisors Corporation versus MornignLightMountain, LLC. Case number 2018-0153-CZ. Please state your appearances for the record.

MS. ARNOLD: Good morning, your Honor, Margo Arnold for the Plaintiff.

MR. RICHOTTE: Good morning, your Honor, Joe Richotte, appearing on behalf of the Defendants and present with me this morning is Mr. Goode.

THE COURT: Good morning. We are here on another motion for summary disposition filed by Defendants citing MCR 2.116(C)(8).

Mr. Richotte, it is your motion.

MR. RICHOTTE: Thank you, your Honor.

Your Honor, we had an opportunity yesterday morning to file our reply to the response brief from the Plaintiff's. I just want to hit a couple of high points and then ask if the Court has any questions that I can address.

The first is an issue that has been recurring here and that is the special standard of review that we believe

1 applies in this First Amendment cases. Of course with  
2 respect to that issue the Court had in the first motion for  
3 summary disposition addressed that issue believing it only  
4 applied to a public figure litigation. We had supplied some  
5 additional cases here with this motion outlining why we  
6 believe that also applies to a private figure case.

7 With respect to the statement itself -- as the  
8 Court knows we have gone from four statements to two  
9 statements to one statement. With the remaining statement  
10 that we have here we believe that this falls within the scope  
11 of the doctrine on rhetorical hyperbole. And while I might  
12 agree with what I suspect sister Counsel will argue that the  
13 *Komarov* case is not perhaps 100 percent fact for fact on  
14 point the legal principle we believe is the same and that is  
15 statements of the everyone knows variety are not provably  
16 false.

17 One of the core problems that we pointed out in our  
18 opening brief is that the complaint relies on this notion of  
19 polling the community. If you ask enough people then you  
20 would have a sufficient quantum of evidence, if you will,  
21 that people in fact do not know this, but, of course, as we  
22 pointed out in our opening brief there is no mechanism in the  
23 law to allow for polling the community in that fashion and so  
24 there isn't really a viable means of proving the falsity of  
25 the statement, of course, that is the whole point of the

1 rhetorical hyperbole doctrine is if a statement is not  
2 provably false than it isn't actionable.

3 Even if the Court believes that it is provably  
4 false and that there is a vehicle for them to introduce such  
5 evidence we believe that the substantial truth of the  
6 statement also renders this not actionable.

7 Importantly Scottsdale does not argue that the  
8 actual words of the statement are false. Indeed, the Court  
9 has already agreed with Defendants that the statements are  
10 literally true.

11 What we are here about is an alleged implication  
12 and that is that there is an inference of criminal conduct by  
13 the juxtaposition of the headline that FINRA fined Scottsdale  
14 1.5 million for its involvement in a penny stock pump and  
15 dump scheme.

16 First FINRA is a civil regulatory authority and  
17 that would have no authority to punish Scottsdale for  
18 criminal conduct. Keeping in mind that *Air Wisconsin* -- the  
19 Supreme Court case that talks about the reasonable audience  
20 standard we have to keep in mind here that the reasonable  
21 audience is a sophisticated consumer of news regarding the  
22 penny stock market and the implication that Scottsdale wishes  
23 to read into the statement is not reasonable from that  
24 perspective.

25 A reasonable audience for the article would

1 understand that FINRA fines are civil in nature only.

2 Second even if the reasonable audience made that  
3 unreasonable inference Scottsdale refuses to acknowledge that  
4 a liable defendant is not responsible for every defamatory  
5 implication that a reader may draw from the report of true  
6 facts absent evidence and -- this is the important point --  
7 that he intended the defamatory implication.

8 One of the main issues, your Honor, as you will  
9 recall when you dismissed the last version of the complaint,  
10 is you acknowledged that the Plaintiff has to plead that fact  
11 even if it is difficult for them to do so. Even if they  
12 believe that the evidence is within our possession there is  
13 still an obligation for them to plead facts and what I think  
14 is rather telling is its opposition brief Scottsdale does not  
15 cite to a single pleaded fact to establish that intent  
16 element.

17 Third, your Honor, the implication that they are  
18 actually drawing here, we believe is substantially true even  
19 if the Court feels compelled to reach that issue. Of course,  
20 a statement is not considered false unless it would have a  
21 different effect on the mind of the reader from which the  
22 pleaded truth would have produced.

23 Here the pleaded truth, of course, is that  
24 Scottsdale was fined for selling securities without a  
25 registration or an exemption for registration.

1                   But, of course, Scottsdale doesn't dispute that  
2 Defendants' analysis of the FINRA panel's decision outlines  
3 why FINRA tied the fine to Scottsdale's failure to properly  
4 police transactions that are susceptible to pump and dump  
5 transactions.

6                   Thus, in FINRA's estimation because Scottsdale  
7 didn't properly police transactions that it was required to  
8 police that it was partly responsible for the pump and dump  
9 schemes. That's why the fine was increased or at least set  
10 at the 1.5 level as an aggravating factor.

11                   Had Scottsdale done its job properly frankly  
12 innocent people would not have lost money and the reasonable  
13 audience, again sophisticated consumers of securities news  
14 would detect no meaningful difference between engaging in  
15 behavior and being responsible for that behavior. In both  
16 cases the reasonable audience would understand that  
17 Scottsdale was culpable for the frauds perpetrated on the  
18 market.

19                   The next element, of course, your Honor, is  
20 defamatory meaning -- and before we go any further there is a  
21 footnote in Scottsdale's brief where it asks for sanctions,  
22 we of course have responded with a footnote of our own  
23 outlining that, of course, the issue of sanctions we believe  
24 is inappropriate here where we are reraising arguments  
25 necessary to preserve issues for appeal.

1           With respect, your Honor, to the element itself,  
2           the defamatory meaning Scottsdale argues first that we can't  
3           really get to the FINRA report for contextual purposes on the  
4           defamatory meaning because that article is not part of -- or  
5           excuse me -- that report is not part of the article.

6           They cite cases from North Carolina and Missouri.  
7           *Nucor Corp* and *Mandel* for the proposition that the defamatory  
8           meaning has to be judged within the four corners of the  
9           document -- the four corners of the article and frankly we  
10          don't quarrel with that notion.

11          Where we differ is on the idea of attachments.  
12          Hyperlinks as we have cited in our brief, the *Slater* case and  
13          the *Adelson* case -- attachments to a document are no  
14          different than you would think of an attachment to a  
15          complaint, it is part of the document. When you click on a  
16          link it would be no different than flipping to a tab on a  
17          motion where you are going to an exhibit and that is what the  
18          link provided for here. It allowed readers to click over to  
19          the FINRA website and within ten keystrokes, three clicks of  
20          a mouse they have the document in front of them.

21          Now certainly, it is a long document. We have, I  
22          am sure, exhausted the patience of the clerk's office with  
23          the number of times we have filed the full 110 pages of that  
24          document, your Honor, but the fact is it is part of the  
25          report, it has to be considered under the case law that we



1 have cited and Scottsdale's response that damage is already  
2 done before you get the link doesn't really change the  
3 analysis. They are assuming that the reader would be  
4 essentially too lazy to read through the entirety of the  
5 FINRA report with, but the law doesn't presume laziness in  
6 the reasonable audience. It presumes that they will read  
7 that document and that is why the whole article including its  
8 attachments have to be considered.

9 Your Honor, with respect to the fair comment  
10 privilege this would only, of course, be reached if the Court  
11 were to find against us on these first several elements, the  
12 challenged statement is privileged under Michigan's fair  
13 comment privilege and we seem to have a disagreement in  
14 briefs as to the nature of the privilege that we are  
15 asserting.

16 We do contend that it is the fair comment  
17 privilege, not the public interest privilege. The fair  
18 comment privilege still remains intact and has been recently  
19 called the qualified privilege in the *Dadd* case. That is a  
20 2010 case from Michigan Supreme Court. I would also note,  
21 your Honor, that that is a private figure case where the  
22 Supreme Court held that Plaintiffs must prove untruth and  
23 actual malice when that privilege applies.

24 On indeed and partial concurrence Justice Markman  
25 traced the contours of the privilege. Where Justice Markman

1 and Justice Corrigan diverged from majority in that opinion,  
2 your Honor, was really on the language of the jury  
3 instruction, not on the nature of the scope of the privilege.  
4 So I think in this case, Justice Markman's concurrence is  
5 rather instructive on where that privilege stands today.

6 The principal of fair comment affords legal  
7 immunity for the honest expression of opinion on matters of  
8 legitimate public interest when based upon a true or  
9 privileged statement of fact. Now here, of course, we have  
10 no disagreement between the parties that that statement  
11 itself is literally true. The issue comes down to whether it  
12 is a matter of legitimate public interest.

13 We agree that conceptually *Rouch* outlines the idea  
14 that not every criminal matter is a matter of public  
15 interest, of course, some still are. Where I think we have  
16 some disagreement between two parties is that there is really  
17 different issues that are in play here.

18 First of course, FINRA is a civil fine as we talked  
19 about earlier so we are not talking about criminal matters,  
20 although I suspect what we are going to hear is that that  
21 there is some analogues, of course, within the securities act  
22 that violations of certain regulations can be criminal  
23 violations, but again reasonable audience looking at FINRA  
24 taking action would understand that that is civil in nature.

25 But more importantly, your Honor, the Defendants

1 provide news to investors. They include warnings about stock  
2 manipulation schemes to prevent them from being fleeced. The  
3 public has an interest in understanding how pump and dump  
4 schemes work, how they succeed, in part through companies  
5 like Scottsdale failing to police transactions, whether a  
6 scheme has been detected or is suspected so the investors can  
7 take action to protect themselves and whether they have been  
8 victimized by a scheme so that they can seek redress and, of  
9 course, these are just a handful of the legitimate public  
10 interest that are served by this reporting.

11 So to overcome the privilege Scottsdale must plead  
12 and prove actual malice under *Dadd* even if it claims to be a  
13 public figure -- or excuse me -- a private figure, but, of  
14 course, it has not done so as we have already discussed.

15 Finally, your Honor, on the issue of fault.  
16 Scottsdale alleges that a reasonable journalist reads the  
17 documents he cites. We tend to agree with that as a concept.  
18 The article here in which the statement appears quotes  
19 extensively from the FINRA report and so I think the only  
20 reasonable inference that eh Court can draw from that is that  
21 Mr. Goode did, in fact, read the article -- or excuse me --  
22 read the report.

23 Scottsdale also alleges that a reasonable  
24 journalist would not report or imply that a fine for  
25 procedural noncompliance is the equivalent of a fine for

1 intentional pump and dump schemes. Of course, as we have  
2 already discussed the Court has ruled that the Defendants did  
3 not report this. So if we are going to proceed by the  
4 implication theory that requires Scottsdale to plead facts  
5 from which the Court can infer that the Defendants intended  
6 the implication so that you see the tie in as we were talking  
7 earlier.

8 In their opening-- or excuse -- in our opening  
9 brief and as we have already laid out here this morning  
10 Scottsdale has not pleaded any facts. That is a core  
11 deficiency in the complaint that has not been remedied with  
12 this third amended complaint. It merely points to the  
13 conclusory allegation that Defendants "acted negligently."  
14 But that, of course, is insufficient. That is a legal  
15 conclusion that will not carry them across the finish line.

16 With that, your Honor, I would like to see if the  
17 Court has any questions before yielding the floor to opposing  
18 Counsel.

19 THE COURT: Well, I am going to ask you to yield  
20 the floor because I want to hear both sides of this  
21 particular coin so.

22 MR. RICHOTTE: Very good. Thank you, your Honor.

23 THE COURT: (Inaudible).

24 MS. ARNOLD: To start -- pardon me -- with whether  
25 or not there is a heightened pleading standard for defamation

1 when there is a private figure. The extra cases cited by  
2 Defendants do not state that there is a heightened pleading  
3 standard for every element. The cases cited explain that  
4 there is a specific pleading standard for the defamatory  
5 statement.

6 And here in our case we've specifically plead the  
7 defamatory statement as well as attached it to the complaint.  
8 So to the extent that they have offered new arguments for  
9 this I believe that we sufficiently addressed them in our  
10 amended complaint.

11 Moving to the next issue as to whether or not the  
12 defamatory statement is hyperbolic. Everyone knows is not a  
13 exaggerated automatically hyperbolic statement. It would be  
14 possible to determine whether or not everyone knows that  
15 Scottsdale is associated with pump and dump schemes by  
16 seeking the testimony of an expert or putting a focus group  
17 into evidence. There are many ways to do this where it is  
18 not an everyone knows hyperbolic exaggerated statement.

19 Moving next to the defamatory meaning of statement  
20 number one. We argue that you would consider the full 111  
21 page report because you look at that four corners of the  
22 defamatory article to determine the context. You look at  
23 more than just the statement because it may be an opinion  
24 piece, it may be a satirical place in the onion, you look at  
25 that to get the full content.

1           But to expect a reasonable reader to go to every  
2 cite in a report or to look up every referenced report in an  
3 article would essentially be setting the standard that an  
4 article could be completely defamatory, but as long as it is  
5 citing to another report that gets it right it -- the reader  
6 is supposed to be reading that report and coming to the  
7 conclusion of, oh this article may have gotten it wrong, but  
8 I now understand because I have done my own research.

9           It is just not reasonable to assume that a reader  
10 is going to look at an article where it is expecting to get  
11 an accurate report of the news and then do its own research  
12 into all of the cites that that article came from.

13           Defendants argue that the statement is  
14 substantially true and therefore cannot be liable for  
15 defamation.

16           First we claim that this article is defamatory for  
17 two respects.

18           First that it falsely makes the association that  
19 Scottsdale Capital Advisors is known as a pump and dump.  
20 That is not true. The article doesn't claim that it is true.  
21 The -- I apologize -- the report doesn't claim that it is  
22 true.

23           The second defamatory meaning that we have from the  
24 article is that FINRA fined Scottsdale for its involvement in  
25 pump and dump activity.

1           Now the reasonable audience would interpret this as  
2 meaning that it wasn't -- that it was fined for some sort of  
3 involvement when the reality is the report was explaining  
4 that FINRA fined Scottsdale for failing to adhere to some  
5 administrative requirements. Specifically that it did not  
6 have registration to act as it did and it did not meet an  
7 exception for -- to be -- not have registration. This is  
8 substantially different than being involved in pump and dump  
9 activity.

10           While there may be some concerns that it is  
11 failures to act in a way to get an exemption, for instance to  
12 have safeguards that may have prohibited pump and dump  
13 activity from occurring by its clients, that is in no way  
14 suggesting that it was actively involved in pump and dump  
15 activity.

16           Essentially this would be saying that -- someone  
17 saying there is a warrant out for my arrest for unpaid  
18 parking tickets is the same as a warrant out for my arrest  
19 because of a hit and run. While, yes the same thing is true,  
20 there is a warrant out there, what I did is substantially  
21 different and in the eyes of a reasonable reader that would  
22 create a material difference in how they view the defamatory  
23 implication from that statement.

24           Defendant has also argued that we have failed to  
25 claim -- proficiently plead defamation by implication because

1 a defendant is not liable for every inference that a reader  
2 makes.

3 This is absolutely true, however the defendant is  
4 liable for the reasonable implications that a reader would  
5 draw and we plead that it was reasonable for a reader to  
6 assume that a headline reading FINRA fines Scottsdale and the  
7 first line of the article being, if you are familiar with  
8 pump and dumps you are familiar with Scottsdale that the  
9 implication is reasonable Scottsdale has been fined for  
10 involvement in pump and dump activity.

11 Additionally a defendant is liable for defamation  
12 by implication if it has omitted a fact that creates a false  
13 implication and that is exactly what happened here.  
14 Defendants did not write in their article that Scottsdale was  
15 fined for failing to have a registration, rather it says  
16 Scottsdale was fined and then goes on to talk at length about  
17 its involvement in alleged pump and dump activity.

18 Defendants for the first time raise the argument  
19 that their article is protected by the fair comment privilege  
20 and if we look -- putting aside our argument as whether or  
21 not they were discussing fair comment versus public -- fair  
22 public interest -- if we look at fair comment the rule is  
23 that it protects honest opinion based on true fact -- true or  
24 privileged fact.

25 Here we do not have an honest opinion based on true



1 or privileged fact. We have an article that is saying it is  
2 reporting on a FINRA decision. This isn't an opinion, this  
3 is a statement of fact and it is not based on a true fact  
4 either. If the report, which again the Court has seen -- it  
5 is 100 pages -- is very clear that FINRA has fined Scottsdale  
6 for an administrative failure. It did not have the proper  
7 registration and did not fall into an exemption.

8 To opine then that this means that they were held -  
9 - they were fined for pump and dump activity or are  
10 affiliated with pump and dump activity is not an opinion  
11 based on this true fact, rather it is creating a new fact  
12 based on this report.

13 Finally, your Honor, with respect to negligence I  
14 believe we all agree that in Michigan the negligence standard  
15 is that the Defendants' actions have to measure to those of a  
16 reasonably careful journalist. And here Scottsdale pleads  
17 that a reasonable journalist reads the documents he cites and  
18 would not report or imply that a fine for procedural  
19 noncompliance is the equivalent of a fine for intentional  
20 pump and dump activity.

21 We adequately plead that Defendants were negligent  
22 because they created the implication of false statement  
23 number one that FINRA fined Scottsdale 1.5 million for  
24 participating in illegal pump and dump schemes despite the  
25 fact that the report that they are contending to report on

1 states that they were fined -- not for their involvement in a  
2 pump and dump scheme, but for the administrative failure to  
3 have a registration or qualify for an exemption.

4 Given the pleading standard of whether or not the  
5 pleadings assumed -- taken to be true and in the lights most  
6 favorable to the Plaintiff sufficiently give the Defendant  
7 notice of the claims and plead the elements sought -- this  
8 should -- excuse me -- I believe Plaintiffs have adequately  
9 pled their cause of action and that this should be dis --  
10 denied.

11 THE COURT: Thank you.

12 MR. RICHOTTE: Your Honor, I have a habit of  
13 telling you I will be brief and then I go long. I will try  
14 to -- try to stick to it this time.

15 THE COURT: Standard for attorneys.

16 MR. RICHOTTE: Let's see. Let's start with  
17 hyperbole. It is possible to prove through an expert or a  
18 focus group. What we don't have is any way of knowing how  
19 you could establish community knowledge through an expert.  
20 An expert might have special knowledge or training on a  
21 particular issues, but what is in the minds of a community is  
22 really beyond the -- if you will pardon the expression --  
23 expertise of an expert.

24 When we talk about focus groups we run into the  
25 problem that we are really still talking about a poll. A

1 focus group is by nature going to be limited. This is a  
2 online article, which I am sure is why it has drawn the  
3 attention of Scottsdale to this courtroom. How is it that we  
4 are going to poll a focus group from all across the country  
5 and get everybody here to talk about what their views are --  
6 and then of course even then that is not going to be  
7 everybody, it is going to be a subset of everybody so how you  
8 extrapolate that for the jury I think still raises ultimate  
9 proof problems.

10 Within the question about defamatory meaning and  
11 whether you can consider the report, I will assume at this  
12 point, your Honor, for argument purposes that the Court will  
13 actually consider the report, what we get down to is really a  
14 fundamental disagreement as to whether linked out information  
15 is part of the article and if the Court were to read the  
16 *Adler* case from Nevada and there's both a -- I should say all  
17 -- there is three cases, there is a Federal District Court  
18 decision where the matter originated. It then went up to  
19 the, I believe, 10th Circuit governs Nevada -- or is that a -  
20 the 9th --

21 MS. ARNOLD: 9th Circuit.

22 MR. RICHOTTE: -- it is 9th Circuit. Our friends  
23 in the 9th Circuit certified the question to the Nevada  
24 Supreme Court and both the Federal District Court and the  
25 Nevada Supreme Court found that linked out information is

1 something that should be considered when assessing the action  
2 ability of an article.

3 With respect, your Honor, to substantial truth I  
4 would like to focus a moment on the warrant analogy because I  
5 think it is a good one, but I also think it is very helpful  
6 to us. If a news report -- if a police blogger for example  
7 in you local newspaper were to have a story in there that  
8 somebody had an arrest warrant period. No explanation. Just  
9 there is an arrest warrant. If you know this person either  
10 let them know or bring it to the attention of the police.  
11 All right. But it doesn't talk about parking, it doesn't  
12 talk about what the underlying charge is.

13 Would the person have a cause of action to come  
14 into court and say, well, Judge, they didn't tell everybody  
15 that it was just a parking ticket, now I have got people in  
16 the community thinking I am some very bad vicious criminal  
17 because I have an arrest warrant.

18 What we are really talking about at that point  
19 isn't the accuracy of the news -- we are not even talking  
20 about fair implications, what we are talking about is  
21 editorial control over the paper.

22 And that is really what is going on here. If you  
23 actually go back to the statement that we are all talking  
24 about. It is sometimes easy to overlook as we dive in. The  
25 statement is, if you have followed penny stocks and pump and

1 dumps for a few years than you know Scottsdale Capital  
2 Advisors. Well, what is that you know? Right. Not that  
3 they have been involved in a pump and dump scheme because  
4 remember the juxtaposition here is the headline. FINRA fines  
5 Scottsdale 1.5 million. Doesn't say why they fine them 1.5  
6 million. It says fined them 1.5 million. If you follow pump  
7 and dumps than you know Scottsdale Capital Advisors.

8 If the Court goes back and takes a look at that  
9 opening paragraph it introduces the reader to the topic that  
10 is being discussed. Scottsdale and the fine that it is going  
11 to be talking about.

12 The second paragraph is where we actually start  
13 talking about the FINRA report and when we talk about the  
14 FINRA report there is a huge excerpt there talking about John  
15 Hurry and the deviousness -- it is an actual quote from the  
16 FINRA report -- all right -- that the deviousness of what  
17 happened with respect to Scottsdale's failure to comply with  
18 regulatory requirements merited an increase in the fine.

19 And indeed I would like to point the Court to page  
20 11 of our opening brief where we talk about the Panamanian  
21 pump and dump from 2008 to 2012 to the Bahamian pump and dump  
22 in 2008 and those are in the FINRA panel decision, pages 11  
23 and 12.

24 Later on after FINRA has talked about Scottsdale's  
25 role in those two pump and dumps -- and it is talking about

1       aggravating factors for the \$1.5 million fine FINRA writes  
2       finally, although -- and I am going to use Scottsdale as  
3       opposed to the company or the other reference that is used as  
4       an oblique reference to Scottsdale -- finally although  
5       Scottsdale was not charged in Reuttiger, Gibraltar I,  
6       Gibraltar II and Tavella -- and those are cases that tie back  
7       to those pump and dumps -- those cases did involve alleged  
8       misconduct through accounts at Scottsdale. Those cases put  
9       Scottsdale on notice of the risk of sham transactions and the  
10      use of nominees to conceal beneficial ownership and  
11      facilitate unlawful distributions of securities. They  
12      heightened the need for Scottsdale to be alert to red flags.  
13      In light of this history it is aggravating that Scottsdale  
14      performed its gatekeeping function so poorly.

15                So part of this \$1.5 million fine -- we are not  
16      contending that all of it -- is attributable to pump and  
17      dumps, but FINRA specifically noted you have a history of  
18      facilitating pump and dumps by your nonfeasance. You aren't  
19      doing what you are required to do and people are getting  
20      scammed. It put you on notice. You have to improve your  
21      policing function if you are to continue to do business with  
22      FINRA.

23                And Scottsdale's response was, we do just fine,  
24      thank you very much, we don't need to improve. Well  
25      Scottsdale saw that -- excuse me -- FINRA saw that

1 differently and decided that a \$1.5 million fine was  
2 necessary to coerce Scottsdale into improving its actions.

3 When you talk about a \$1.5 million fine and you  
4 talk about everybody knowing Scottsdale -- anybody in the  
5 securities market -- at least the penny stocks side of the  
6 securities market that has followed pump and dumps would be  
7 aware of the Panamanian scheme, would be aware of the  
8 Bahamian scheme, be aware of the litigation that was  
9 surrounding that and would be aware that it was Scottsdale  
10 that assisted inserting those shares into the market.

11 So under those circumstances, your Honor, we  
12 believe that the substantial truth is evident from the  
13 article.

14 On the final issue of privilege and whether what we  
15 are talking about here is an opinion it seems pretty clear to  
16 me that if you are talking about -- and this goes back as  
17 well to the rhetorical hyperbole side of things, everybody  
18 knows, right, if you have been paying attention to penny  
19 stocks over the last few years you know about frauds that  
20 have gone on in the market. If you know of frauds that have  
21 gone on in the market then you would know of the Panamanian  
22 scheme, of the Bahamian scheme.

23 So we get back to is it a fair comment to say, kind  
24 of, here we go again, right, if you've paid attention you  
25 know about these guys and here is what FINRA has done about

1 their failure to uphold their end of the regulatory scheme.

2 So given that, your Honor, unless the Court has any  
3 questions I would be happy to take a seat.

4 THE COURT: Thank you.

5 MS. ARNOLD: Just a couple points.

6 THE COURT: Sure.

7 MS. ARNOLD: Going back to the arrest analogy and  
8 whether or not we are trying to stifle editorial opinion by  
9 going into -- the Defendants did just say that FINRA issued a  
10 fine, but explained what they believed the fine was for.  
11 There is a substantial difference in saying that somebody was  
12 fined by FINRA or by saying somebody was arrested.

13 The reader can draw their own conclusions, but when  
14 the publisher is explaining what that fine is for or what  
15 that arrest is for they are telling the reader this is what  
16 she should be thinking, this is the implication of this fine  
17 and in that they are creating a negative defamatory  
18 conclusion. In this case if Defendants had just written  
19 FINRA fines Scottsdale that would leave the reader to draw  
20 their own conclusions as to how severe that fine is.

21 That is not what Defendants did. Defendants went a  
22 step further and said FINRA fines Scottsdale and that that  
23 fine was associated with pump and dump activity which draws  
24 the reader to conclude that this wasn't just a mere fine, but  
25 one associated with pump and dump activity. Something that's



1 both illegal and frowned upon in the investment community.

2 To discuss substantial truth going into the report  
3 -- the FINRA report and how it went through the history of  
4 pump and dumps and some of Scottsdale's client's affiliations  
5 with such pump and dumps, FINRA never stated in its report  
6 that Scottsdale was affirmatively participating in or  
7 allowing pump and dump activities to occur. Rather it said  
8 that enough of these have happened and that FINRA was not  
9 satisfied with Scottsdale changing its gatekeeping activities  
10 to prevent this.

11 Now Scottsdale disagreed and in fact they have  
12 appealed this FINRA decision, but their failure to adequately  
13 gate keep to FINRA's expectation does not mean that they were  
14 actively involved in pump and dump activity or doing anything  
15 beyond their administrative duties.

16 To say that it is substantial true that people in t  
17 the investment community who are familiar with pump and dump  
18 activities and familiar with penny stocks would then be  
19 familiar with Scottsdale essentially defeats the hyperbole  
20 argument. If that is something that would could prove is  
21 substantially true than it is not hyperbole, it is capable of  
22 being proved -- proven true or false.

23 However, it is not substantially true because they  
24 have not been associated with pump and dump activity. They  
25 have been associated with failing to properly gate keep, to

1 receive an exemption to a registration requirement. They  
2 have been associated with administrative failure, again,  
3 which they are appealing. They are not associated with pump  
4 and dump activity or affirmatively acting within the pump and  
5 dump schemes.

6 If your Honor has any questions I am happy to  
7 answer them at this time.

8 THE COURT: No, no question as this point.

9 MR. RICHOTTE: Your Honor, I appreciate the Court  
10 indulging and extended argument this morning.

11 THE COURT: Sure.

12 MR. RICHOTTE: I want to focus -- I will make these  
13 kind of my final remarks and reply -- the focus that  
14 Scottsdale is asking the Court to hone in on is the  
15 juxtaposition between the headline, FINRA fines Scottsdale  
16 Capital Advisors 1.5 million and the opening statement -- the  
17 lead if you will of the article, which is sentence 1,  
18 paragraph 1, if you have followed penny stocks and pump and  
19 dumps for a few years then you know Scottsdale Capital  
20 Advisors, herein referred to as Scottsdale Capital.

21 Your Honor, if we go back to what the reasonable  
22 audience would understand when they look at this, who is  
23 Scottsdale Capital Advisors? What is their role in the  
24 securities market? Their role is essentially to facilitate  
25 the entry of stocks in the marketplace. They don't -- they

1 may trade on behalf of their clients if you will, but their  
2 role isn't to create the stock. All right. Their role is to  
3 simply provide a means, a vehicle by which stock enters the  
4 market.

5 So what would a reasonable audience member  
6 understand from that? They would understand that the company  
7 that is supposed to be policing these transactions has been  
8 involved in pump and dump schemes that clearly got past  
9 whatever policing functions had been created internally. All  
10 right.

11 But I think you also have to zoom out from the  
12 headline and the lead. You have to take a look at the rest  
13 of the article. And, of course, we have talked about the  
14 FINRA report itself, I don't need to exhaust the Court's  
15 patience on that issue. Even if you look at just the rest of  
16 the first paragraph. They are one the of the few brokers  
17 left -- brokers, so now we have -- even for people who might  
18 have a marginal knowledge of the market we have identified  
19 these people as brokers -- that continue to allow the deposit  
20 and sale of shares in illiquid penny stocks. So we have now  
21 defined who is Scottsdale, what do they do, what is their  
22 role in the securities market? Larger brokers and discount  
23 brokers stopped allowing that over five years ago. Right.  
24 That statement is no longer part of this action either.

25 When the big Biozoom pump happened in 2013 many of

1 the frozen accounts were at Scottsdale Capital. So again  
2 this is further evidence that we are not talking about a  
3 person who has concocted a scheme, what we are talking about  
4 is a business that -- and I -- we used this analogy, I think  
5 back on our very first motion, right, to the bank -- right --  
6 where laundered funds are deposited and the bank is supposed  
7 to have things in place to stop that from happening, right,  
8 they are supposed to have reports that go out to (Inaudible)  
9 --

10 THE COURT: (Inaudible).

11 MR. RICHOTTE: Yes, exactly, your Honor. So nobody  
12 would confuse the bank for having engaged in the money  
13 laundering, right, it is the unwitting tool.

14 Now, here, right the unwitting nature of  
15 Scottsdale's participation according to FINRA is no longer  
16 really that unwitting, right. When you have consistently  
17 been snookered by people who are looking to commit frauds on  
18 the market you have got to pay a little bit more attention  
19 and up your game and they didn't do that. All right.

20 That, of course, is the second, third and ongoing  
21 paragraphs of the article, right. So, of course, we  
22 referenced the fine, we give people a link to it and then we  
23 give an expert -- excerpt. And what does the excerpt talk  
24 about? Right. The excerpt talks about -- right -- all of  
25 the problems and why it is that FINRA issued the fine.

1           So it isn't as if reading this article you get the  
2 conclusion you are fined for pump and dumps, right. It is  
3 very clear you have violated a bunch of regulatory  
4 provisions, this is a civil regulatory institution, you have  
5 been fined civilly, right, and we understand in part why  
6 because you have been engaged in lax oversight that has  
7 allowed these pump and dumps.

8           So, again, what does the reasonable audience  
9 understand. That is the touchstone under *Air Wisconsin*.  
10 There is really no confusion here from the standpoint of the  
11 reader. What is it that is being conveyed? It isn't that  
12 Scottsdale has engaged in pump and dump activity. All right.  
13 It is that Scottsdale has been the conduit through which pump  
14 and dump activity has occurred because of inadequate  
15 oversight.

16           Thank you, your Honor.

17           THE COURT: Thank you.

18           This matter is before the Court on summary  
19 disposition motion under Michigan Court Rule 2.116(C)(8).

20           This is kind of the third time through so I think  
21 parties are clear that the Court is clear that the function  
22 at this particular juncture is for the Court to analyze in  
23 this case the third amended complaint as to whether --  
24 looking simply at the pleadings -- whether the Plaintiff has  
25 -- has or has not stated a claim upon which relief can be

1 granted.

2 I would note parties have made substantial  
3 arguments regarding what can or cannot be shown in terms of  
4 whether the Plaintiff actually falls under a -- I guess I  
5 will take the last argument -- under a lax enforcement  
6 mechanism, an active engagement in pump and dump or some  
7 other status which would cause the public to lose faith in  
8 the Plaintiff.

9 The Court has -- and I will take a little diversion  
10 here -- the Court has made a ruling with regard to whether  
11 there's a heightened standard relating to this particular  
12 Plaintiff and the Court is standing by its earlier ruling  
13 that Plaintiff does not have to establish actual malice in  
14 the publication of this particular article and actually this  
15 particular phrase which is the only thing left in terms of an  
16 action.

17 But, the question still needs to be determined as  
18 to the other pieces that the Defendant has raised -- so  
19 called barriers to going forward with this action based upon  
20 the latest amended complaint.

21 I would note the question of negligence, hyperbole,  
22 of whether in fact there is falsehood involved, where in fact  
23 the statement itself is defamatory in nature goes to, in  
24 essence, proofs that may or may not be available to the  
25 Plaintiff. The arguments raised, the citation as to the

1 various -- both the FINRA report, which the Court understands  
2 is rather elaborate and had a whole lot of matters that don't  
3 necessarily touch on this particular issue, all of those are  
4 considerations that the Court might well determine in a  
5 (C) (10) motion as dispositive of this proceeding, but I am  
6 not considering this as dispositive in a (C) (8) proceeding.

7 Looking at the amended complaint the Court is  
8 satisfied that the issue at this point has been properly  
9 raised so that it can be properly disposed of by this Court  
10 upon full exposition of the underlying facts. I'm convinced  
11 that the parties have so narrowed the -- sharpened the focus,  
12 I guess, is the best way of saying it, of this matter as to  
13 the specific legal issues as related to the facts that -- as  
14 each side sees it that a court can, in fact, grant relief  
15 either by way of dismissal or of affirmation to the  
16 respective parties.

17 So for that reason the Court is going to deny  
18 motion for summary disposition under 2.116(C) (8).

19 Ms. Arnold, I guess you can prepare a quick order -

20 -

21 MS. ARNOLD: Yes, your Honor.

22 THE COURT: -- for the reasons stated on the  
23 record.

24 MR. RICHOTTE: Your Honor, just a few housekeeping  
25 matters --

1 THE COURT: Sure.

2 MR. RICHOTTE: -- based on that ruling. The first  
3 is taking a look at the docket sheet I saw that we have trial  
4 scheduled for rather early --

5 THE COURT: I saw that this morning too.

6 MR. RICHOTTE: -- next month.

7 THE COURT: And I am not sure that that is really  
8 going to give you guys much of a period to do discovery if  
9 nothing else.

10 MR. RICHOTTE: I would agree, your Honor. Perhaps  
11 Counsel can work out a case management order and submit that  
12 for your consideration.

13 THE COURT: That would be acceptable. I -- we have  
14 narrowed down the particular, I guess, focus in terms in  
15 terms of statements to the point where I think things can be  
16 fairly efficiently handled, but it still is going to require  
17 a little bit of time and probably some exchange in documents  
18 so I would -- yes, if you can provide a reasonable scheduling  
19 criteria in this case. I hate disrupting people's summers  
20 but my suspicion is we could probably get to this sometime in  
21 mid to late summer.

22 MR. RICHOTTE: Okay.

23 THE COURT: I think that would be good.

24 MR. RICHOTTE: All right. And on that note, your  
25 Honor, I hope you will understand the spirit of which this is



1 offered, it is fairly common in these kinds of cases for a  
2 Defendant to seek an interlocutory review --

3 THE COURT: Sure.

4 MR. RICHOTTE: -- because there are appellate  
5 standards that --

6 THE COURT: Yep.

7 MR. RICHOTTE: -- come into play in defamation  
8 actions.

9 THE COURT: Yep.

10 MR. RICHOTTE: I can talk further obviously with  
11 Mr. Goode after this as to whether he intends to pursue that,  
12 but at least preliminary indications that I have from him  
13 were that he would like to pursue that option. So what I  
14 would like to do is first ask the Court -- before we go into  
15 the scheduling issue --

16 THE COURT: Sure.

17 MR. RICHOTTE: -- for a stay as the Court may be  
18 aware I have to ask the Court for a stay before I would even  
19 be able to --

20 THE COURT: Stay of proceedings.

21 MR. RICHOTTE: Stay of the proceedings, right  
22 before proceeding to the Court of Appeals. I would like to  
23 at least make that oral motion now.

24 THE COURT: Yeah. Ms. Arnold, do you have any  
25 position on that?

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MS. ARNOLD: No. No objection.

THE COURT: You probably object, but you don't really have any position that can be winnable in front of the Court at that point. Court will grant your request for a stay of these proceedings pending an interlocutory appeal. Quite honestly I -- well, I guess, it probably wasn't ripe earlier because the Court had dismissed each of the other amended complaints, but I anticipated that you would want to at least test the Court with regard to the question of public versus private and that is fine and you may have some other things so I have no problem with going ahead and getting guidance from that standpoint.

MR. RICHOTTE: All right. I appreciate that, your Honor.

THE COURT: No problem.

MR. RICHOTTE: In that case I will be more than happy to prepare that order, we can I am sure exchange them and submit them as stipulated orders for the Court's entry.

THE COURT: No problem. Thank you --

MR. RICHOTTE: All right.

THE COURT: -- very much. I appreciate it.

T MR. RICHOTTE: hank you, your Honor.

THE COURT: Yep. Court will stand in recess.

(At 11:08 a.m., proceeding concluded)

1 STATE OF MICHIGAN )

2 COUNTY OF KALAMAZOO )

3

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5 I certify that this transcript, consisting of 35 pages, is a  
6 complete, true, and correct transcript to the best of my  
7 ability of the proceedings held and testimony taken in this  
8 case on Tuesday, March 26, 2019, before the Honorable  
9 Alexander C. Lipsey, Circuit Judge.

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Dated: 04.06.19

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