NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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March 26, 2021

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Re: *Vivera Pharmaceuticals, Inc. v. Gannett Co., Inc., et al.*, Case No. CL-2020-14458

Dear Counsel:

BACKGROUND

Spring 2020 marked the onset of the Covid-19 pandemic, which led to the increased demand for supplies to respond to the outbreak. Companies began producing more medical supplies and Covid-19 tests as well as antibody tests. Plaintiff Vivera Pharmaceuticals Inc. ("Vivera") is one company that began manufacturing Covid-19 home test kits.

As more antibody tests flooded the market, the public wanted reviews of the products. Defendant Gannett Satellite Information Network, LLC, better known as USA Today, published an article (the "Article") in June 2020 discussing the U.S. Food and Drug Administration's regulation of antibody tests. The article featured Vivera as a prime example of an antibody test manufacturer with limited experience managed by a questionable CEO. It specifically highlighted Vivera CEO, Paul Edalat's troubled history with regulators and his legal

OPINION LETTER

entanglements. Vivera viewed this Article as a "scattershock attack" news report that disparaged its business.

For this reason, Vivera objected to the Article and demanded that USA Today retract certain statements. When the statements were not removed, Vivera filed a Complaint for defamation in federal court and then voluntarily dismissed the action in August 2020. On September 21, 2021, Vivera filed suit in this Court for defamation, defamation *per se*, and tortious interference with a business expectancy. Vivera seeks $500 million in damages as well as $350,000 in punitive damages. In the current matter, Defendants demur to all counts raised in Vivera's Complaint.

STANDARD

The purpose of a demurrer is to test whether a pleading states a cause of action upon which relief can be granted. Va. Code Ann. § 8.01–273(A); *Tronfeld v. Nationwide Mutual Insurance Co., et al.*, 272 Va. 709, 712-13, 636 S.E.2d 447, 449 (2006); *Welding, Inc. v. Bland County Service Authority*, 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001). "A demurrer admits the truth of all properly pleaded material facts. 'All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading.'" *Ward's Equipment, Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (quoting *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988)). A demurrer does not speak to the strength of proof of the facts alleged. *E.g., Phillip Abi-Najm, et al. v. Concord Condominium, LLC.*, 280 Va. 350, 357, 699 S.E.2d 483, 486 (2010).

ANALYSIS

I. Defamation

A. Actionable Statement

A defamation claim requires the publication of an actionable statement with the requisite intent. *See Schaecher v. Bouffault*, 290 Va. 83, 91, 772 S.E.2d 589, 594 (2015) (citing *Tharpe v. Saunders*, 285 Va. 476, 737 S.E.2d 890, 892 (2013)). A statement is considered "actionable" when it is false and defamatory. *See, e.g., Spirito v. Peninsula Airport Comm'n., et al.*, 350 F.Supp.3d 471, 480 (E.D.Va. 2018).

Defendants call upon this Court to exercise its gatekeeping function and dismiss Vivera's defamation claims based on their assertion the Article is accurate. Yet, at the pleading stage, the Court's function is limited to determining as a matter of law whether a statement is defamatory – not to verify its truth.[1] *Id.* at 482; *Handberg v. Goldberg*, 297 Va. 660, 666, 831 S.E.2d 700, 705

[1]In *Bell Atlantic Corp., et al. v. Twombly, et al.*, the Supreme Court of the United States said: "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'" 590 U.S. 544, 556 (2007) (citation omitted). Although *Twombly* is a federal case, the principle it highlights is applicable here.

(2019); *Schaecher v. Bouffault*, 290 Va. 83, 94, 772 S.E.2d 589 (2015) (citing *Perk v. Vector Res. Group, Ltd.*, 253 Va. 310, 316-17, 485 S.E.2d 140 (1997)); *see Webb v. Virginian-Pilot Media Cos.*, 287 Va. 84, 90, 752 S.E.2d 808 (2014). Rather, determining the falsity of a statement is a question for the factfinder at trial. *E.g., Goldberg*, 297 Va. at 666, 831 S.E.2d at 705.

The only question the Court must ask regarding the statements' falsity on demurrer is whether the alleged defamatory statement has a "provably false factual connotation and thus [is] *capable of being proven true or false*.'" *Goldberg*, 297 Va. at 666, 831 S.E.2d at 705 (quoting *Schaecher*, 290 Va. at 98, 772 S.E.2d at 597) (emphasis added). Thus, for a statement to satisfy the falsity prong on demurrer, it must, at a minimum, have the potential to be substantiated. *Id.*

In the instant matter, it is undisputed the statements within the Article can be proven true or false. Our inquiry here is whether the Article and the statements within it are defamatory.

A statement is defamatory if it has the "requisite defamatory sting to one's reputation." *Id.* at 668 (internal citations omitted). The language must "tend to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." *Id.* at 668 (internal citations omitted). The general rule is the challenged language must be considered in its plain meaning and as other people would understand it. *See generally, Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8, 82 S.E.2d 588, 592 (1954).

If the language does not appear defamatory on its face, it may still be disparaging through suggestion or innuendo. *Webb*, 287 Va. at 88, 752 S.E.2d at 811. "In determining whether words and statements complained of in the case are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Spirito*, 350 F.Supp.3d at 482 (quoting *Webb*, 287 Va. at 89-90, 752 S.E.2d at 811). The Court must review the statements in light of the circumstances in which they were made. If the conduct alleged was innocent but the statement implied wrongdoing, the statement has defamatory implications. *Spirito*, 350 F.Supp.3d at 482.

For example, in *Pendleton v. Newsome*, a school was held liable for defamation after issuing a statement saying the parent is responsible for providing the child's health information, a health emergency plan, and medications after the child died from an allergic reaction. 290 Va. 162, 772 S.E.2d 759 (2015). The Court determined this statement implied the mother was responsible for the child's death and thus defamatory. *Id.*

Applying these principles to the challenged statements, the majority of them can be proven true or false. Thus, the matter before the Court is whether the statements are defamatory. Even if they are not ostensibly defamatory, they may still be defamatory through innuendo.

STATEMENTS CONCERNING PAUL EDALAT

The Article focuses mainly on Vivera's CEO, Paul Edalat[2] and his independent business ventures and lawsuits. Defendants easily dismiss these statements because they reason Vivera cannot bring a defamation claim on someone else's behalf. However, these statements concern Vivera's reputation and perhaps could be construed as to Vivera.

To prevail on a defamation claim, a complainant must demonstrate the statements were "of or concerning" him. *E.g., Dean v. Dearing*, 263 Va. 485, 488, 561 S.E.2d 686, 689 (2002) (The Court sustained a demurrer when Plaintiff failed to allege how statements referring to law enforcement, or the police department were about him or could be understood to concern him).

Unlike the plaintiff in *Dean*, Vivera properly pled throughout the Complaint that the statements about Mr. Edalat concern Vivera and its business. For example, in paragraph 55 of the Complaint, Vivera states, "This statement is false and misleading by implying that, because an opposing party in litigation made false and misleading accusations about Edalat and accused Edalat of fraud, there must be something wrong with Vivera's antibody tests."

Additionally, a person reading the Article would understand Mr. Edalat's reputation to reflect poorly on Vivera. Although some statements are not blatantly about Vivera, they suggest Vivera is managed by an unscrupulous individual and is therefore unethical. The CEO is the face of the company and any misgivings about his honesty or transparency place Vivera's credibility into question.

The Article's first paragraph refers to the lawsuit investors filed against Paul Edalat and that the FDA barred him against selling supplements after repeatedly failing inspections. It then states, "[y]et Paul Edalat's company, Vivera Pharmaceuticals is one of more than 150 with the FDA's blessing to sell coronavirus antibody tests…" (Plaintiff's Opposition Brief Exh. 1).

The Article begins by suggesting Vivera should not be making tests because of its CEO's character. The same implications are weaved throughout the Article. Consequently, these statements imply Vivera and its products are unreliable. The statements about Mr. Edalat not only concern Vivera, but are defamatory through innuendo. Therefore, the defamation claim against Gannett Satellite Information Network, LLC, d/b/a USA Today and the authors[3] of the article survive demurrer.

STATEMENTS AS TO TESTING KITS

For our purposes, it is necessary to read the Article in its entirety. Even though some statements are ostensibly defamatory and others seemingly innocuous, the only way to determine whether the Article is defamatory through suggestion is by reading it from start to finish.

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[2] Paul Edalat is not a plaintiff in this case.
[3] David Heath, Donovan Slack, and Kevin McCoy.

For instance, the Article states:

> The FDA now requires all companies to reveal the results of validation tests to the agency. Many companies post accuracy numbers on their website. Vivera does not – and when asked about the test's accuracy, McColgan [an agent for Vivera] was reluctant to answer.

(Complaint ¶ 57; Plaintiff's Opposition Brief Exh. 1).

This statement on its own suggests Vivera is refusing to be transparent with the public as well as regulators. Similar statements are dispersed throughout the Article and even imply that Vivera representatives are concealing information regarding the accuracy of the tests. (Complaint ¶ 63-64; Plaintiff's Opposition Brief Exh. 1).

A person reading the Article's claims about Paul Edalat, Vivera's lack of transparency, and failure to comply with FDA requirements would question Vivera's reputation and the efficacy of its products.

In their brief and oral argument, Defendants wholeheartedly aver the Article's assertions are true. At this stage, it is not the Court's role to make that determination. Defendants conflate the merits of the case with the purpose of demurrer. It is not the Court's position that Vivera will prevail because there is no way to know at this point. However, based on the pleadings and the Article, it is evident that the Article is reasonably capable of defamatory meaning.

ACTUAL MALICE

For defamation actions brought regarding matters of public concern, actual malice must be proven. *Shenandoah Publ'g House, Inc. v. Gunter*, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993). Actual malice is the knowledge that the statement is false, or the defendant acted with reckless disregard for whether it is false or not. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). "[R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Actual malice is a subjective standard which must be proven by clear and convincing evidence. *See Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 714 (4th Cir. 1991); *Hatfill v. The New York Times, Co.*, 532 F.3d 312 (4th Cir. 2008). Whether a statement was actuated by malice is a question for the jury. *E.g., Fuste, M.D., et al. v. Riverside Healthcare Association, Inc. et al.*, 265 Va. 127, 135. 575 S.E.2d 858, 863 (2003).

At this stage, the Court need not determine whether there was actual malice in publishing the Article. Rather, the inquiry is whether Vivera sufficiently pleads Defendants acted with malice or reckless disregard for the truth. Here, Vivera, at a minimum, without relying on mere conclusory statements, properly alleges Defendants acted with a reckless disregard for the truth.

In the Complaint, Vivera alleges Defendants sought out one-sided statements from attack pieces against the company. (Complaint at ¶ 46-47). It also alleges Defendants relied on articles and information that were later retracted. (*Id.*) Vivera further claims Defendants failed to investigate public records revealing the falsity of its statements and the FDA standards it refers to in the Article. (*Id.* at ¶ 48-49, 58, 60). These are only a few examples of the ways in which Vivera claims the existence of malice. Whether Defendants actually acted with malice must be left to the factfinder to determine.

DEFAMATION PER SE

Under Virginia law, defamatory statements that prejudice one's profession or trade are actionable for defamation *per se. See Fleming v. Moore*, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981); *see also Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 146–47, 334 S.E.2d 846, 849 (1985). "There must be a nexus between the content of the defamatory statement and the skills or character required to carry out the particular occupation of the plaintiff." *Id.* A plaintiff "maligned by defamation per se" can recover compensatory damages incurred as a result of injury to their reputation. *Tronfeld v. Nationwide Mutual Insurance Co., et al.*, 272 Va. 709, 713-14, 636 S.E.2d 447, 450 (2006). In a defamation *per se* action the complainant does not need to demonstrate financial loss. *Id.* at 714.

Similar to defamation claims, the statements made must be defamatory and may be deemed as such by innuendo. *Fuste v. Riverside Healthcare Association, Inc., et al.*, 265 Va. 127, 132, 575 S.E.2d 858, 861 *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 7, 82 S.E.2d 588, 591 (1954).

For the reasons stated above, Vivera sufficiently pleads the statements within the Article prejudiced Vivera in its profession or trade. Therefore, the demurrer as to this count is overruled.

QUALIFIED PRIVILEGE/STATUTORY IMMUNITY

In their demurrer, Defendants assert the statements within the Article are protected from liability under Virginia Code § 8.01-223.2(A). That statute provides a person is immune from liability for a claim of defamation or tortious interference if the statements made discuss matters of public concern, unless the statements were made with "actual or constructive knowledge that they are false or with reckless disregard for whether they are false." *Id.*

In this case, the statements at issue concern the Covid-19 pandemic and the marketing surrounding anti-body tests. It is indisputable the statements are of public concern. Even if the statements are privileged, Vivera's claims should not be dismissed because the complaint properly alleges malice as described above. Therefore, it would be premature to dismiss Vivera's claims under the theory of qualified privilege.

The same principle applies for Defendants' assertion that the statements about Mr. Edalat's lawsuits are protected under the Fair Reporting Privilege. "The general rule, which has

been repeatedly stated by this court, is that it is the court's duty to determine as a matter of law whether the occasion is privileged, while the question of whether or not the defendant was actuated by malice, and has abused the occasion and exceeded his privilege are questions of fact for the jury." *See Alexandria Gazette Corp. v. West,* 198 Va. 154, 160, 93 S.E.2d 274, 280 (1956). If the statements within the public record are false, the privilege is not destroyed. *Id.* The record does not need to be reported verbatim but must be substantially correct. *Id.*

Defendants seek to apply the Fair Reporting Privilege to the statements regarding Mr. Edalat's lawsuits. The statements reporting what Mr. Edalat has to pay from prior suits and the allegations from parties' pleadings are privileged. However, these statements cannot be dismissed on demurrer because it is the factfinder's role to determine whether these statements were published with malice and whether the defendant exceeded its privilege. *Id.* at 160. Therefore, the demurrer as to the defamation and defamation *per se* counts is overruled.

TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

Lastly, Vivera raised in Count III that Defendants tortiously interfered with its business expectancy. To survive demurrer, the complainant must plead the following elements: (1) the existence of a business relationship or expectancy with a probability of future economic benefit to the Plaintiff; (2) Defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that, absent the Defendant's intentional misconduct, Plaintiff would have continued in the relationship or realized the expectancy; (4) interference by improper methods; and (5) damages. *See Glass v. Glass*, 228 Va. 39, 52, 321 S.E.2d 69, 77 (1984); *Duggin v. Adams*, 234 Va. 221, 226, 360 S.E.2d 832, 835 (2001).

In its Complaint, Vivera lists the elements of tortious interference with a business expectancy. However, it does not provide any facts in support of its allegations. Vivera does not name any contracts or business expectancies with which it was involved. Instead, it generally states it has contracts and business expectancies with multiple agencies and investors that Defendants knew about. (Complaint at ¶ 97). It further claims Defendants knew the Article would interfere with these relationships, but offers no explanation about the alleged interference. Vivera claims it suffered lost contracts and relationships without providing factual support. (*Id.* at ¶ 98). Therefore, the demurrer as to this Count is sustained without prejudice.

VICARIOUS LIABILITY – CORPORATE DEFENDANTS

Vivera contends it asserted claims against the parent companies individually, and not under a theory of vicarious liability. However, it did not include facts in the Complaint connecting the corporate entities to the alleged defamatory actions.

The only way the parent companies could be held liable is under the theory of vicarious liability. Ordinarily, principals and employers are held vicariously liable for the actions of their employees within the scope of employment. *E.g., Parker v. Carilion Clinic*, 296 Va. 319, 333, 819 S.E.2d 809, 817 (2018). However, to hold parent companies liable for the acts of their

subsidiary in the Commonwealth, the corporate veil must be pierced. *E.g., Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 634, 561 S.E.2d 663, 669 (2002).

Within the Commonwealth, veil piercing "is an extraordinary act to be taken only when necessary to promote justice." *Transparent GMU v. George Mason University*, 298 Va. 222, 245, 835 S.E.2d 544, 555 (2019) *quoting C.F. Trust, Inc. v. First Flight L.P.*, 266 Va. 3, 10, 580 S.E.2d 806, 810 (2003). To pierce the corporate veil, the complainant must demonstrate the parent company exercised domination and control over the subsidiary in a manner that led to unjust loss or injury to the complainant. *E.g. Eure*, 263 Va. at 634, 561 S.E.2d at 669. Separate corporate entities will remain separate in the eyes of the courts unless a corporation is shown to be the "adjunct, creature, instrumentality, device, stooge, or dummy of another corporation." *Id.* (quoting *Beale v. Kappa Alpha Order*, 192 Va. at 399, 64 S.E.2d at 798 (1951)). A showing that a corporation is owned by another entity and shares common directors and executives is insufficient to pierce the corporate veil. *Transparent GMU*, 298 Va. at 246, 835 S.E.2d at 555.

For purposes of withstanding demurrer, the complainant must plead the elements of vicarious liability and allegations in support of piercing the corporate veil in the Complaint. Even though Vivera argues it properly pleads the corporate veil should be pierced, Vivera does not explain the relationships between the corporate entities. In its response to demurrer, it explains the parent companies and USA Today function as one unit, engage in informal corporate practices, and all have complete control over USA Today's social media accounts and website, but none of these allegations are in the Complaint. Rather, the Complaint lists the parent companies and explains USA Today is a subsidiary company. Vivera failed to provide facts in support of its contention that the parent companies have complete domination and control over USA Today. Therefore, the demurrer as to USA Today's parent companies is sustained without prejudice.

VICARIOUS LIABILITY – INDIVIDUAL CORPORATE EXECUTIVES

The demurrer of the corporate executives is sustained without prejudice. Vivera failed to plead the executives were individually responsible for the Article and corporate officers are not held liable for the actions of a corporate employee. A corporate defendant may be held liable independent of vicarious liability if it ratified or directed the misconduct and was authorized to do so under the corporate bylaws. *See Parker v. Carilion Clinic*, 296 Va. 319, 343-44, 819 S.E.2d 809, 823 (2018). However, corporate officers cannot be held vicariously liable for the tortious actions of the employee because the corporate entity is the principal. *Parker*, 296 Va. at 344, 819 S.E.2d at 823-24; *Cf. Phillips Oil Co. v. Linn*, 194 F.2d 903, 905 (5th Cir. 1952) ("Corporate liability for the negligent acts of a mere servant or employee rests upon the doctrine of respondeat superior. The liability of the master for the negligent acts of his vice principal is placed upon very different grounds, namely, that the negligent acts of the vice principal are the very acts of the corporation itself.") (citations omitted). "Absent special circumstances, it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to the vicarious liability for the torts of its employees or agents." *See Meyer v. Holley*, 537 U.S. 280, 285-86 (2003) (citing *A.W. Fletcher, Cyclopedia of the Law of Private Corporations*, 1137, pp.

300-301 (rev.ed.1991-1994)). Thus, individual employers of a corporation can only be held directly liable for their own malfeasance and not vicariously liable for tortious conduct of corporate employees.

In the Complaint, Vivera lists the corporate executives and their respective positions within the Gannett companies. Vivera does not allege the corporate executives individually engaged in defamation or tortious interference. Rather it vaguely alleges Michael Reed, Paul Bascobert and Thomas Curley had "supervisory authority" over Gannett and USA Today's staff. It further alleges Maribel Wadsworth and Thomas Curley responded to Vivera's objections and refused to change the Article. Although Vivera provided factual allegations describing specific conduct, they failed to articulate a nexus between the executive's roles and Vivera's alleged damages. As a result, the demurrer as to the corporate executives is sustained without prejudice.

CONCLUSION

For these reasons, the demurrer as to the claims against the corporate executives and USA Today's parent companies and tortious interference is sustained without prejudice. The demurrer as to the defamation and defamation per se counts is overruled.

An Order is attached.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIVERA PHARMACEAUTICALS, INC.	)	
	)	
Plaintiff,	)	
v.	)	Case No. CL-2020-14458
	)	
GANNETT CO., INC., et al.	)	
	)	
Defendants.	)	
	)	

ORDER

This cause came to be heard on the 19th day of February 2021 on Defendants' Demurrer. For the reasons explained in my Opinion Letter dated March 26, 2021, it is hereby **ORDERED** as follows:

Defendant's Demurrer as to all claims against the corporate executives in their personal capacity and USA Today's parent companies is SUSTAINED without prejudice;

Defendant's Demurrer as to Plaintiff's first Count I (Defamation) and second Count II (Defamation Per Se) is OVERRULED;

Defendant's Demurrer as to Plaintiff's third Count III (Tortious Interference with a Business Expectancy) is SUSTAINED without prejudice; and

Plaintiff has twenty-one (21) days from the date this Order was entered to file an amended complaint.

THIS CAUSE IS CONTINUED.

ENTERED this 26th day of March 2021.

[redacted]

The Honorable Robert J. Smith
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.