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Re: Vivera Pharmaceuticals, Inc. vs. Gannett Satellite Information Network, LLC, et al.
Case No. CL-2023-8320

Dear Counsel:

BACKGROUND

On June 2, 2020, Defendant Gannett Satellite Information Network, LLC, otherwise known as USA Today, published an article titled "You can see the train wreck coming: Inexperienced, dubious companies among many aiming to cash in on coronavirus antibody tests" ("Article"). The

OPINION LETTER

Article discussed the U.S. Food and Drug Administration's regulation of antibody testing kits that were in high demand during the height of the COVID-19 pandemic. The Article focuses on companies, including the plaintiff, Vivera Pharmaceuticals, and their involvement in producing COVID-19 medical supplies.

In response to the Article, Plaintiff Vivera Pharmaceuticals ("Vivera") filed a complaint in this Court on September 21, 2020, for defamation, defamation per se, and tortious interference with a business expectancy. In June 2021, Defendants filed a demurrer to all counts raised in Vivera's complaint. The Court overruled Defendants' demurrer, holding that the statements concerning Vivera's CEO, Paul Edalat, were defamatory toward Vivera through innuendo. On December 8, 2022, prior to trial, the plaintiffs voluntarily nonsuited the action.

On June 2, 2023, Vivera brought a new suit for defamation and defamation by implication against Defendants. Vivera alleges that fourteen statements made in the Article by Defendants were false and defamatory and seeks $500 million in damages due to loss of business expectancies and contractual obligations. Defendants filed this demurrer on all counts.

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). "A demurrer admits the truth of all properly pleaded material facts [and] '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)).

However, in defamation cases, the Virginia Supreme Court requires the court to exercise its gatekeeper function and first determine whether each alleged defamatory statement is reasonably capable of defamatory meaning and carries the requisite defamatory "sting" before allowing the matter to be presented to the finder of fact. *See Handberg v. Goldberg*, 297 Va. 660 (2019). Thus, on demurrer, the Court must evaluate each statement and determine whether the statements are actionable as a matter of law. In my first opinion, I did not do this, and, according to *Handberg*, this was error. *Id.* I shall now correct that error.

ANALYSIS

I. Defamation

In the prior case, this Court issued an opinion letter that dismissed the Defendant's demurrer on all counts holding that the statements were defamatory towards Vivera through innuendo. However, the opinion letter did not address whether the alleged defamatory statements were opinions and therefore protected speech. The opinion also did not evaluate the defamatory statements in *seriatim* and therefore each statement will be examined individually.

In their Complaint, Vivera has alleged that fourteen statements in the Article are defamatory. The statements are as follows:

Statement 1: "On social media and in company news releases, Paul Edalat portrays himself as a jet-setting chief executive officer. He has appointed former professional athletes to the advisory board of Vivera Pharmaceuticals."

Statement 2: "[Paul Edalat] is a fraud."

Statement 3: "Investors accused [Edalat] in court of deceiving them by driving a Rolls-Royce and wearing a gold Rolex to hide his bankruptcy."

Statement 4: "[Edalat] tried to fool investors with his extravagant lifestyle: staying in luxury suites, 'wearing a diamond-studded gold Rolex watch which he brags that he purchased for more than $50,000' and 'driving fancy cars, including two Rolls-Royces, three Lamborghinis, a Land Rover, a BMW, a Ferrari, and a Hummer, among other.'"

Statement 5: "The suit went before a federal jury, which found that Edalat defrauded and libeled some of the investors. He was ordered to pay them $880,000.".

Statement 6: "The Food and Drug Administration "barred" Edalat from selling dietary supplements after his company failed a string of inspections."

Statement 7: "In a case still awaiting trial, Alternate Health Inc. alleges Edalat told a series of lies to ink a 2017 agreement worth $4.2 million to sell a cannabis supplement."

Statement 8: "Edalat said he could mass produce the product and didn't reveal he was barred from doing so."

Statement 9: "{The FDA's new rules spell out a process for evaluating the tests, but not the manufacturers. As a result,} even companies led by CEOs with a history of legal entanglements {– including at least one with a criminal past –} can sell tests."

Statement 10: "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 was reluctant to answer."

Statement 11: "Boston BioPharma also describes its test as being for diagnostic use. After USA TODAY pointed out the language, a spokesman said the company would revise its wording. Vivera Pharmaceuticals makes the claim, too, although it does include the FDA disclaimer on its site."

Statement 12: "Like Vivera Pharmaceuticals, some have ties to the world of dietary and health supplements."

Statement 13: "{Vivera's antibody test is made by a German company Edalat identified as PharmACT. That company has not applied with the FDA. But because} Vivera adds small devices to the {test} box, {including lancets to prick fingers, Edalat contended} 'the FDA looks at us more as the manufacturer.'"

Statement 14: 'It's all FDA confidential. We have a great test, that's all I can say.'"
Thus, in this opinion letter, each statement is addressed to determine whether the statements about Paul Edalat are "of and concerning" the company Vivera and whether such statements are actionable for defamation.

A. Vivera's Standing Regarding Statements 1-8

The first issue the Court must address is whether Vivera has standing to bring forth the defamation claim based upon comments solely directed at its CEO. Under Virginia common law, a private individual asserting a claim of defamation first must show that the alleged defamatory statements are 'of and concerning' the plaintiff. *Schaecher* at 99 (quoting *Dean v. Dearing*, 263 Va. 485, 488 (2002)). For corporations pleading defamation, "[w]ords spoken or written of a [corporation's] officer give no right of action to the corporation unless spoken or written in direct relation to the trade or business of the corporation. If they relate solely to the stockholder, officer, or employee in his private or personal capacity, only the individual can complain." *Id.* (quoting *Life Printing & Publishing Co. v. Field*, 324 Ill. App. 254, 58 N.E.2d 307 (1944)).

Eight out of the fourteen statements alleged in the Article, specifically Statements 1 through 8, refer to Vivera CEO, Paul Edalat. Statement 1 refers to both Mr. Edalat and Vivera. Statements 2 through 8 are solely directed to Mr. Edalat in his personal capacity. Vivera argues that "Defendants published statements about Edalat intending to harm Vivera's reputation, lower Vivera's reputation in the estimation of the community, and deter third parties from dealing with Vivera." *See* Compl. ¶ 87. However, the "of and concerning" element of common law defamation cannot be satisfied based on the assumption that readers concluded that statements about the CEO's private life, such as how he portrays his personal life to the public or his involvement in prior lawsuits unrelated to his current company, were written in direct relation to Vivera's trade or business. Statements 2 through Statement 8 solely discuss Paul Edalat and his prior misfortunes, but, as written, do not directly relate to Vivera's business or the COVID-19 manufacturing industry, thus, Vivera has no standing to bring a defamation claim in reference to these statements. However, Statement 1, directly discusses Mr. Edalat's conduct within Vivera's business operations, specifically how he appoints the advisory board of the company, and therefore Vivera maintains sufficient standing on this statement.

In my prior opinion letter, the Court held that the Defendants alleged defamatory statements were defamatory against Vivera through innuendo, without considering Vivera's standing to bring such an action. It is true that, by revealing Mr. Edalat's pending fraud charges, a reader could imply that Vivera could be engaging in fraudulent behavior. However, a mere negative implicative statement about a company's employee, but not written in direct relation to the company's business is not sufficient. *See Schaecher*, 209 Va. at 99 (a written statement revealing that an employee

faced foreclosure in a separate business venture had no "direct" relation to her dealings with the current company and therefore could not be a defaming statement "of and concerning" the company).

Assuming *arguendo* that Vivera has standing to bring forth its claim for defamation by implication for statements referring to Mr. Edalat in his personal capacity, the Court must still evaluate, first, whether the alleged defamatory statements are "reasonably capable of defamatory meaning", i.e., whether the statements are protected speech or instead can be reasonably proven true or false, and, second, whether the alleged defamatory statements have the requisite sting to harm the plaintiff's reputation. *See Schaecher v. Bouffault*, 290 Va. 83, 99-102 (2015).

B. Defamatory Meaning

In their demurrer, Defendants assert that their statements are constitutionally protected "expressions of opinion" and are therefore not actionable as defamation.

Opinions are statements that largely depend on the speaker's viewpoint. *Raytheon Tech. Servs. v. Hyland*, 273 Va. 292, 301 (2007). However, a "statement that is worded as an expression of opinion but actually asserts a fact that can be proven in court to be false" is not protected speech. *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347 (2019). Thus, I will now evaluate whether each statement is protected speech and whether it carries sufficient defamatory meaning.

Statement 1 is not a pure expression of opinion and can be proven true or false. The Article states that Paul Edalat portrays himself as a "jet-setting chief executive officer" on social media and appoints athletes to the company's advisory board. Both allegations do not turn on the author's viewpoint and could supported or refuted by evidence adduced at a trial.

Statements 2 through 8, which mention that Paul Edalat "is a fraud", "wear[s] a gold Rolex to hide his bankruptcy", and "was ordered to pay [investors] $880,000" are each quoting lawsuits that currently are or were pending before a court and are lawsuits that do not concern Vivera. Defendants are not opining that Paul Edalat is "a fraud" in the colloquial sense, but instead, the Article summarizes the pleadings and holdings of pending or prior lawsuits where Mr. Edalat was a litigant. Direct references to the findings or testimony taken in a lawsuit are not the author's opinions or "rhetorical hyperbole" because they are statements that can be proven true or false by the court proceedings. Thus, any statements discussing Paul Edalat's prior court dealings or disciplinary actions taken against him are not protected opinions and could be reasonably proven true or false because each statement is grounded in verifiable events.

Statement 9 is capable of being proven true or false because it can be confirmed at trial whether, in fact, the FDA adopted new rules for evaluating COVID tests, whether the CEOs referenced in the Article did in fact have "legal entanglements" or a "criminal past" and whether

the companies they ran "sold [COVID] tests."[1] Thus, Statement 9 is not a protected opinion and is debatable as true or false.

Statement 10 through Statement 13 describe how, if at all, Vivera verifies the accuracy of their tests, the company's level of transparency with consumers on their website, and the manufacturing process of Vivera's tests as compared to FDA standards. Each of these statements could "reasonably be considered as conveying factual information" about Vivera and therefore, are not protected speech. *See Yeagle v. Collegiate Times*, 255 Va. 293, 295 (1998). Further, the veracity of each statement could be verified or disproven through trial evidence.

In Statement 14, Vivera contends that its chief medical officer, Mr. McGlogan, was misquoted, when the Article recites Mr. McGlogan's response, when asked about the test's efficacy, as, "It's all FDA confidential. We have a great test, that's all I can say.'" Vivera does not dispute that communications between Vivera and the FDA are in fact "confidential" or that Mr. McGlogan supports the company's test. Instead, Vivera argues that Statement 14 is defamatory because it is the result of "selective quotation" that implies Vivera is withholding information. However, without a meaningful debate as to the truth of any part of the statement, the statement carries no defamatory meaning. *See Jordan v. Kollman*, 269 Va. 569, 576 (2005) ("A plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel"). Thus, Statement 14 fails under the first prong of the analysis and is not actionable.

C. Defamatory Sting

In addition to determining whether a statement carries sufficient defamatory meaning, the Court must also determine whether each statement has "'the requisite defamatory 'sting' to one's reputation,' which is the second prong of the threshold to be established as a matter of law." *Handberg v. Goldberg*, 297 Va. 660, 667 (2019) (quoting *Schaecher*, 290 Va. at 92.). Defamatory statements that carry the requisite harm, must be such that "[r]eptuation must be affected to a magnitude sufficient to render one odious, infamous, or ridiculous, or subject to disgrace, shame, scorn or contempt." *Schaecher*, 290 Va. at 101. To determine whether a statement is capable of such a meaning, the court must consider the plain and natural meaning of the statement and how the statement is "understood by courts and juries as other people would understand them, and according to the sense in which they appear to be used." *Carwile v. Richmond Newspapers*, 196 Va. at 7 (1954).

Statement 1 concerning Mr. Edalat's social media and hiring practices does not conclusively "sting" Vivera's reputation because it could be construed in multiple ways depending on the opinion of the reader. It is not clear that readers would view a professional athlete on an advisory board as a shameful hiring practice and therefore damage Vivera's reputation. Some readers may view professional athletes on an advisory board or a company's CEO as a "jet-setting

[1] Although Statement 9 does not explicitly mention Vivera or Mr. Edalat, Vivera maintains sufficient standing under this statement because the phrase "CEOs of companies with past legal entanglements" in conjunction with describing how these CEO's direct the company's business processes clearly meant to identify both Paul Edalat and his connection to Vivera's business of selling COVID tests.

executive" in a positive light. Thus, Statement 1 is not actionable, and therefore the demurrer is sustained as to this statement.

Statements 2 through 8 refer to actions that Mr. Edalat was accused of by others in a court proceeding, all of which occurred before Mr. Edalat's position as Vivera's CEO. These statements do not directly injure Vivera's reputation, rather, they simply "embarrass" Vivera by highlighting the misfortunes of their CEO. Thus, Statements 2 through 8 are not actionable.

Statement 9 which states that "even companies led by CEOs with a history of legal entanglements–including at least one with a criminal past–can sell tests" carries the requisite defamatory sting. In context, this statement is part of the overarching theme of the Article, which is to highlight that the companies discussed in the Article are not to be trusted by consumers. Broadly, this type of statement directed as a cautionary warning would not severely "harm" a company's reputation. However, unlike Statements 2 through 8, which describe Mr. Edalat's ostentatious personal life, the pointed accusation that Vivera's manufacturing procedures are directly controlled by "criminal" actors could damage a company's reputation, especially during a pandemic when consumers are dependent on a company marketing crucial healthcare devices. Thus, this Statement is actionable and the demurrer to this statement should be overruled.

Similarly, Statement 10's assertion that Vivera failed to post accuracy numbers on its website, despite the FDA requiring all companies to reveal their test accuracy numbers to the agency, carries the requisite defamatory sting. Although the Article does not state that companies are required to post their accuracy numbers publicly, by further implying within the same statement that Vivera's chief medical officer was "reluctant to answer" as to the test's accuracy, the statement not only implies that Vivera is not transparent with the public but also insinuates that Vivera circumvented FDA requirements. Reading Statement 10 in its full context with the Article, the implication that Vivera is not transparent and does not follow FDA protocols could lower the company's reputation to the community, especially during the COVID-19 pandemic where anxieties related to the dissemination of misinformation were at its height. Statement 10 is therefore actionable.

Statement 11 states that Vivera "makes the claim" their test is for diagnostic use, despite another testing company recanting such a claim, but that Vivera also includes an FDA disclaimer on its website explicitly stating that the tests should not be used for diagnostic use. This statement, absent more inflammatory language, does not maintain the requisite sting to harm Vivera's reputation. While the statement may imply that Vivera is contradictory, unlike Statement 10 where there is an implication that Vivera violates FDA requirements, Statement 11 clearly states that Vivera posted an FDA disclaimer on its website in compliance with the FDA requirements. Thus, Statement 11 does not rise to the level of defamatory sting required to show harm to Vivera's reputation and is not actionable.

Statement 12, which asserts that Vivera has "ties to the world of dietary and health supplements", does not harm Vivera's reputation. Vivera does not dispute its CEO's involvement in the dietary supplement industry. Read in its ordinary meaning, Statement 12 does not carry any

"sting" which would lead to the conclusion that a company's relationship to dietary supplements either implies that the company is "unqualified" to manufacture COVID-19 tests or negatively affects the company's reputation. The Court finds that Statement 12 is not actionable.

Statement 13 describing the company's testing features and how these features interact with FDA manufacturing standards does not harm Vivera's reputation. A quote from their CEO that Vivera is viewed as a manufacturer by the FDA does not "harm" a company's reputation. In fact, Vivera labels itself as a manufacturer in its pleadings. Statement 13 is therefore also not actionable.

The Court does not address Statement 14's defamatory "sting" because, as discussed above, I hold it does not meet the first prong of the analysis and is therefore not actionable.

CONCLUSION

For these reasons, the demurrer as to Statements 1 through 8 and Statements 11 through 14 is sustained. The demurrer as to Statements 9 and 10 is overruled. An order memorializing this decision is attached.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court

Enclosure

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Vivera Pharmaceuticals INC, Plaintiff, v. Gannett Satellite Information Network LLC et al., Defendant.	)	**CL-2023-8320**

ORDER

THIS CAUSE came before the Court upon the Defendant's Demurrer on October 13th, 2023.

For the reasons stated in the attached letter, it is **ADJUDGED, ORDERED,** and **DECREED** that the Defendant's Demurrer as to Statements 1 through 8 and Statements 11 through 14 is **SUSTAINED** without leave to amend. The Demurrer as to Statements 9 and 10 is **OVERRULED**.

ENTERED this 31st day of January, 2024.

[redacted]

Judge Robert J. Smith

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.