IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SPX CORPORATION dba STOCK EQUIPMENT COMPANY	)	Case No. 1:02 CV 919
Plaintiff,	)	Judge John M. Manos
-vs-	)	Magistrate Judge William H. Baughman
JOHN DOE,	)	**BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
Defendant.	)	

INTRODUCTION

> **Fraud**: Deceit, deception, artifice, or trickery operating prejudicially on the rights of another, and so intended, by inducing him to part with property or surrender some legal right. 23 Am J. 2d Fraud § 2. Anything calculated to deceive another to his prejudice and accomplishing the purpose, whether it be an act, a word, silence, the suppression of truth, or other device contrary to the plain rules of common honesty. 23 Am J. 2d Fraud § 2.

Ballentine's Law Dictionary, 3d ed.

In these days of Enron and WorldCom financial debacles, jittery investors are wary that the next accounting scandal may strike their own pocketbooks. As the Securities and Exchange Commission has noted, many of these investors turn to the Internet to protect and enhance their portfolios. But the SEC warns investors that Internet bulletin boards are being used as a vehicle to perpetrate fraud, stating, "While some messages may be true, many turn out to be bogus – or even scams." Internet Fraud: How to Avoid Internet Investment Scams, at

www.sec.gov/investor/pubs/cyberfraud.htm. The SEC further warns that miscreants "can use a variety of Internet tools to spread false information, including bulletin boards . . . ." Id.

While the conventions of discourse on financial bulletin boards tolerate a great deal of loose, figurative language, there are occasions when the language of a message will denote it as being factual. This is such an occasion. Defendant John Doe's postings insinuate that he was privy to inside information about the company, for he states that SPX was engaged in "accounting fraud," was the subject of a "massive investigation" by the SEC and the FBI, was "overleveraged," and was "cooking the books." A poster who tries to cloak himself in an aura of factual accuracy must face the consequences when the audience does in fact rely on his posts as stating actual facts.

"Fraud," as the definition above makes infinitely clear, is an allegation of criminal misconduct. Doe's allegation of fraud, like his other statements, is a fabrication, pure and simple. Doe's motives for posting such false statements of fact will be unveiled during discovery. Perhaps he is a disgruntled employee (or ex-employee) seeking to destabilize SPX's stock price. Perhaps he sought to manipulate the stock price for his own short-term financial gain. Whatever his motives, it is undeniable that he disseminated falsities that were intended to be read by an audience interested, as the SEC has noted, in news and information (read "facts") about the financial viability of a publicly traded company.

John Doe's facts are provably false. And Ohio law permits the target of such specious allegations to seek recourse in the courts. Accordingly, Doe's motion to dismiss must be denied.

STATEMENT OF FACTS

On March 1, 2002, SPX filed this lawsuit in state court against John Doe alleging defamation as a result of John Doe's internet publication of untruthful statements concerning

SPX. John Doe published false factual statements—that SPX is involved in an SEC and FBI investigation, that SPX cooks its books, and engages in accounting fraud—using the Yahoo! internet name "neutronb."

On May 1, 2002, the action was filed in state court, but the Complaint could not be served because John Doe's identity was unknown. On May 6, 2002, SPX issued a state court subpoena to Yahoo! directing Yahoo! to provide SPX with the true identity of John Doe. On May 7, 2002, Yahoo! responded with a letter, which states that that Yahoo! would respond to the subpoena unless John Doe filed a motion to quash. (A copy of the letter is attached as Exhibit 2 to SPX's Brief in Opposition to Motion to Quash.)

Although John Doe had not been served with the Complaint, attorneys representing John Doe removed this case to federal court on May 15, 2002. On May 22, 2002, John Doe moved to quash the third party subpoena directed at Yahoo! and also moved for a protective order preventing SPX from learning John Doe's true identity. Following briefing on John Doe's motion to quash, the Court invited John Doe to file a motion to dismiss, and ordered that discovery be stayed.

For the reasons set forth more fully below, John Doe's motion to dismiss should be denied, and his motion to quash should similarly be denied.

ARGUMENT

A. STANDARD OF REVIEW ON A MOTION TO DISMISS

In considering a motion to dismiss pursuant to Rule 12(b)(6), the district court is limited to evaluating whether the plaintiff's complaint sets forth allegations sufficient to make out the elements of a cause of action. Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Gazette v. City of Pontiac, 41 F.3d 1061, 1064 (6th Cir. 1994). A court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In a libel action, courts must "assess 'the common meaning ascribed to the words by an ordinary reader' in order to determine whether an allegedly libelous statement is a false statement of fact." McKimm v. Ohio Elections Commission, 89 Ohio St. 3d 139, 145 (2000), quoting Vail v. Plain Dealer Publishing Co., 72 Ohio St. 3d 279, 282 (1995).

B. UNDER OHIO LAW, DEFAMATORY STATEMENTS ARE ASSESSED FROM A READER'S PERSPECTIVE, AND FALSE STATEMENTS OF FACT ARE ACTIONABLE AS DEFAMATION.

To recover in a defamation action, a plaintiff must demonstrate four elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence by the publisher; and (4) either the actionability of the statements regardless of special harm or the existence of special harm caused by the publication. Jackson v. City of Columbus, 194 F.3d 737, 757 (6th Cir. 1999).

False statements of actual facts about a plaintiff are actionable as defamation. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988); Celebrezze v. Dayton Newspapers, Inc., 41 Ohio App. 3d 343, 346 (1988). To determine whether speech is non-actionable opinion or actionable fact, a court must consider the totality of the circumstances. Vail v. Plain Dealer Publishing Co., 72 Ohio St. 3d 279, 282 (1995). Specifically, the court should consider the specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. Id., citing Scott v. News-Herald, 25 Ohio St. 3d 243, 250 (1986).

In a glaring omission of binding precedent, Doe's Motion to Dismiss fails to cite the Ohio Supreme Court's most recent pronouncement of what may constitute an actionable statement of fact versus a non-actionable opinion. In McKimm v. Ohio Elections Commission, 89 Ohio St. 3d 139, 145 (2000), Ohio's high court re-emphasized that "the law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement." In other words, whether Doe believes he was merely engaged in "idle speculation" or "random musings" (see Motion to Dismiss at 4) is wholly irrelevant. Ohio's test for distinguishing a statement of fact from opinion depends on the reasonable *reader's* perception of the statement, *not* on the perception of the author. McKimm, 89 Ohio St. 3d at 144, citing Vail, 72 Ohio St. 3d at 282-82.

As much as John Doe may wish to run from his postings today, the law in Ohio will not permit him. Time and again Ohio courts have refused to let authors off the hook for publishing falsehoods, however haphazardly they were made. McKimm is an excellent example. There, a political candidate distributed a campaign brochure promoting his candidacy and criticizing his opponent, an incumbent trustee for Jackson Township. The brochure included a cartoon drawing depicting the trustee holding a bundle of cash that was passed to him underneath a table. The trustee alleged that the drawing indicated that he had accepted money under the table, or solicited a bribe or kickback in return for awarding an architectural contract. See McKimm, 89 Ohio St. 3d 139.

The Ohio Supreme Court had little problem agreeing with the lower courts that "the average reader would view the cartoon as a false factual assertion that [the trustee] accepted cash in exchange for his vote to award the unbid construction contract." McKimm, 89 Ohio St. 3d at 145. The cartoon depicted "passing money under the table," which the Court said "connotes an

illegal transaction made for personal gain" and "unambiguously depicted [the trustee] of engaging in unlawful activity." Id. This analysis reflects more than 60 years of jurisprudence in Ohio. See Schoedler v. Motometer Gauge & Equipment Corp., 134 Ohio St. 78 (Ohio 1938) (statements such as "What has become of the checks?" and "The money is our money, where is it?" "infer a charge of embezzlement" and hence were actionable as defamation).

The McKimm court's analysis flows logically from the United States Supreme Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). In Milkovich, the Court assessed allegedly libelous statements in a newspaper's sports column concerning a high school wrestling coach's testimony before a common pleas court. The title of the column stated that the high school "beat the law with the 'big lie.'" Other statements in the column suggested that lies were told during the proceedings, such as the phrase, "If you get in a jam, lie your way out." The coach sued the newspaper and columnist, alleging that these and other statements in the column accused him of committing the crime of perjury. Id. at 21. The Supreme Court concluded that the average reader of the column would be left with the impression that the wrestling coach committed perjury (even though the word "perjury" never appeared in the column). Id. Noting that there is no "wholesale defamation exemption for anything that might be labeled 'opinion,'" the Court emphasized that where an allegation (such as perjury) can be proven as true or false, it is actionable. Id. at 18, 19.

Under this framework, Ohio courts routinely have found allegations of wrongdoing actionable as defamation. In North Coast Cable Limited Partnership v. Hanneman, 98 Ohio App. 3d 434 (1994), for example, a former employee of a cable television company criticized the company's application for a cable franchise both before the city of Cleveland's Public Utilities Committee and in a radio broadcast. In the broadcast, the employee said, "Well I think [the

committee's] intent is to make [the company] be truthful about its dealings with the city . . . ." In reversing the trial court's dismissal of a libel claim, the appellate court concluded that this statement "implies that [the company] was untruthful in its franchise negotiations with the city" and that "a reasonable factfinder could conclude that the statements by [the employee] assert that the company lied to the city to obtain the cable franchise." Id. at 441.

In Sneary v. Baty, 128 Ohio App. 3d 142 (1998), a neighbor complained about efforts of property owners to build a used-car lot on recently purchased property. The neighbor distributed letters characterizing the owners and township trustees as liars and criminal conspirators who engaged in "deception" in order to get a zoning clearance for the car lot. Applying the totality of the circumstances test enunciated in Vail, the appellate court reversed the trial court's granting of summary judgment for the defendants, finding that the allegations of "deception" and lying were verifiable as true or false and were presented to readers as a recitation of fact. Id. at 146-47.

Federal courts throughout the country have reached similar results. See, e.g., Flamm v. American Assoc. of University Women, 201 F.3d 144, 152 (2d Cir. 2000) (reversing district court's grant of defendant's motion to dismiss over statement in directory of attorneys that lawyer was an "ambulance chaser;" appellate court held that the phrase implies that the lawyer engaged in unethical solicitations and hence was an actionable statement of fact); Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977) (affirming jury verdict for plaintiff airline executive who was accused of compiling "fictitious" and "phony" schedules, and of "lying" to customers; appellate court held that the statements amounted to "false representations of fact" and not merely "exaggerations for effect"); Scheidler v. National Organization for Women, Inc., 751 F. Supp. 743, 745 (N.D. Ill. 1990) (denying motion to dismiss complaint over statements made at a press conference that plaintiff, a pro-life doctor, "burned and bombed clinics" and

"aided and abetted" clinic bombings; court held that, under Milkovich, statements were "sufficiently factual to be susceptible of being proved true or false").

State courts also have permitted libel claims to go forward where allegations of wrongdoing were at issue. See, e.g., Gross v. New York Times Co., 623 N.E.2d 1163, 1169 (N.Y. 1993) (reversing grant of summary judgment to defendant newspaper over allegation that plaintiff medical examiner was "corrupt," created "misleading" autopsy reports, and was guilty of "possibly illegal" conduct; court held that such statements "cannot be treated as mere rhetorical flourish or the speculative accusation of an angry but ill-informed citizen made during the course of a heated debate"); Rajneesh Foundation Int'l v. McGreer, 737 P.2d 593, 594 (Ore. 1987) (reversing appellate court's dismissal of defamation claim over statement in newspaper letter-to-the-editor that accused lobbyist of "spreading fear through outrageous lies;" court held language constituted a statement of fact and not opinion); Good Government Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 572, 576 (Cal. 1978) (affirming denial of defendant's motion for summary judgment over statements in newsletter that defendant "extorted by blackmail;" court held that whether the libelous remarks would be understood as mere opinion must be determined by the jury); Edwards v. Hall, 285 Cal. Rep. 810, 820, 234 Cal. App. 3d 886, 903 (Cal. Ct. App. 1991) (reversing grant of summary judgment to defendant over allegation that head of local civil rights organization was an "extortionist;" court held that "extortionist" was actionable as defamation and not mere hyperbole when read in context); Florida Medical Center, Inc. v. New York Post Co., Inc., 568 So. 2d 454, 459 (Fla. Ct. App. 1990) (reversing dismissal of libel action over statement in newspaper column – by a writer who was giving a first-hand account of his experience – that plaintiff medical center conspires with others to "rob the

insurance company;" appellate court held that that phrase "accuses the hospital of dishonesty" and is actionable).

These cases reveal that accusations of wrongdoing are actionable in a wide variety of contexts, including contexts where readers or listeners would expect a speaker to be giving opinions. The contexts include opinionated newspaper columns (Milkovich and Florida Medical Center), local newsletters Good Government Group), and press conferences about abortion rights (Scheidler). Indeed, the Ohio Supreme Court held that messages (in a *cartoon*, no less!) are actionable even in the context of a political campaign, a scenario in which citizens are *most* apt to expect vituperative attacks and aggressive mudslinging. See McKimm, 89 Ohio St. 3d at 145. Simply put, if a statement would naturally and presumably be understood by those to whom it is published as accusing one of a crime, the words are actionable. See 35 Oh. Jur. Defamation and Privacy § 10 (3d ed.).

By contrast, the contexts in which Ohio courts have held statements to be non-actionable opinion are narrow. Vail, for instance, involved a newspaper columnist who described a political candidate as engaging in "an anti-homosexual diatribe" and fostering "homophobia." Vail, 72 Ohio St. 3d at 283. Such phrases, the court held, "can hardly be defined with crystal clarity. Each term conjures a vast array of highly emotional responses that will vary from reader to reader." Id. In Wampler v. Higgins, 93 Ohio St. 3d 111, 128 (Ohio 2001), the court analyzed a charge in a letter to the editor that a landlord charged "exorbitant rent" and was a "ruthless speculator." Such terms, the court correctly held, were "inherently imprecise and subject to myriad subjective interpretations." Id. Perhaps most surprising is Doe's heavy reliance on the Ohio Supreme Court's decision in Scott v. News-Herald, 25 Ohio St. 3d 243 (Ohio 1986). Four years after Scott was decided, the United States Supreme Court, in Milkovich, had the occasion

to review the same statements at issue in Scott, albeit as to a separate plaintiff. And the United States Supreme Court held that the statements found to be opinion in Scott were actionable as verifiably false statements of fact. Compare Scott, 25 Ohio St. 3d at 251-52 with Milkovich, 497 U.S. at 21.

C. JOHN DOE'S ACCUSATIONS THAT SPX CORP. IS ENGAGED IN "ACCOUNTING FRAUD," IS UNDER A "MASSIVE INVESTIGATION" BY THE SEC AND FBI," IS "OVERLEVERAGED," AND IS "COOKING THE BOOKS" WOULD BE UNDERSTOOD BY READERS AS STATEMENTS OF FACT AND ARE VERIFIABLY FALSE.

In an era when companies such as Enron make front-page news by engaging in accounting fraud that ultimately results in SEC and FBI investigations, statements like those made by John Doe cannot be construed as mere "hyperbole" or opinion. Indeed, John Doe advocates a wholesale exemption for statements that appear on financial message boards, for if an allegation of "fraud" is not actionable, then nothing is. As the case law above demonstrates, however, accusations of criminal conduct routinely form the basis for viable libel claims even if they appear in a medium where a reader would expect opinion. And under the framework enunciated by the Ohio Supreme Court in McKimm and Vail, there is no doubt that Doe's posting are actionable.

1. Doe's Language Specifically Alleges That SPX Corp. Has Engaged In Criminal Activity, And The Allegations Are Provably False.

Doe would have his court believe that his postings were "idle speculation" and "random musings." See Motion to Dismiss at 4. On the contrary, his statements are anything but. In stark language devoid of any qualifications, Doe accuses SPX Corp. of "ACCOUNTING FRAUD!!!!!!" The use of exclamation points (rather than, say, question marks) is used to drive home the fact that SPX is engaged in illegal activity, and investors ought to beware. "Fraud," it goes without saying, is an allegation of criminal conduct. As defined in Ballentine's Law

Dictionary, "fraud" includes actions of "deceit, deception, artifice, or trickery." Ballentine's Law Dictionary, 3d ed. Where such stark accusations are made, courts have permitted claims for defamation to go forward. See, e.g., Sneary, 128 Ohio App. 3d at 146-47 (in reversing trial court's grant of summary judgment for defendants, appellate court held that an allegation of "deception" among property owners and township trustees was actionable); North Coast Cable Limited Partnership v. Hanneman, 98 Ohio App. 3d 441 (allegation that cable company was "untruthful" in negotiations with city over cable franchise held to be actionable).

Doe's second posting goes further than his first. He writes that "SPX=Massive SEC and FBI Investigation." The equal sign is familiar to most any reader. Doe is signifying that SPX is *currently* under a "massive" investigation by government authorities. Doe even tells the reader the reasons for the investigation, namely, that SPX is "overleveraged" and is "cooking the books." Just as a cartoon that implied that money was "passing under the table" to a political candidate is actionable (see McKimm, 89 Ohio St. 3d at 145), so too are statements such as "overleveraged" and "cooking the books."

To be sure, Doe's postings contain some opinion. For example, Doe's postings contain the following recommendation: "Long-Term Sentiment: Strong Sell." SPX concedes that this "sentiment" is non-actionable opinion. And the word "Timber" is, indeed, figurative. But a reasonable reader might ask: Upon what is Doe's opinion based? Well, Doe tells the reader. He recommends selling SPX stock because of "accounting fraud," because the SEC and FBI are conducting a "massive . . . investigation," because SPX is "overleveraged," and because SPX is "cooking the books." When this case goes to trial, SPX will prove to the jury that it has not and is not "overleveraged" or "cooking the books" or engaged in "accounting fraud."

2. Doe's Postings Were Made In A Context In Which Interested Investors Could Glean Information To Inform Their Investing Strategies.

No less an authority than the Securities and Exchange Commission acknowledges that many investors do, in fact, rely upon financial bulletin boards to guide their investment strategies. See Internet Fraud: How to Avoid Internet Investment Scams, at www.sec.gov/investor/pubs/cyberfraud.htm. But because some advice is a scam, the SEC feels incumbent to warn potential investors. Id. See also Michael Moss, CEO Exposes, Sues Anonymous Online Critics, Wall St. J., July 7, 1999, at B1 ("Serious investors find merit in the boards . . . 'Looking at and monitoring the boards is something a prudent analyst has to do,'" quoting Howard Capek, a stock analyst at Warburg Dillon Read, New York); Matthew Heimer, Herd on the Net, Brill's Content (May 1999) (discussing the influence and popularity of Internet financial bulletin boards, including Raging Bull, Silicon Investor, and Yahoo! Finance);

Doe's postings convey the message that he has inside information about wrongdoing at SPX, and warns readers accordingly. In this context, he must be held accountable. As one court has noted:

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of misuse cannot be ignored. . . . Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing wrongdoers from hiding behind an illusory shield of purported First Amendment rights.

In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 34-35, 2000 Va. Cir. Lexis 220, *19-20 (Va. Cir. Ct. 2000), rev'd and remanded on other grounds, 261 Va. 350, 542 S.E.2d 377 (Va. 2001). See also Immunomedics, Inc. v. Jean Doe, 342 N.J. Super. 160, 167, 775 A.2d 773, 777-78 (N.J. Super. Ct. 2001) ("Individuals choosing to harm another or violate an

agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment.").

That the Internet has produced a plethora of freewheeling speech does not mean that all such speech may go unchecked. Opinion writers in different genres routinely are held accountable when they make false statements of fact about others. See, e.g., Milkovich, 497 U.S. at 21 (commentary on newspaper sports page about truthfulness of coach's statements to state authorities held actionable); McKimm, 89 Ohio St. 3d at 145 (political cartoon implying candidate accepts bribes held actionable).

New rules regarding defamatory speech are not necessary merely because a new medium has emerged. Indeed, Internet communications travel through a medium more pervasive than print journalism, and for this reason they have tremendous power to harm reputation. The stock market trades on information, and negative information can shift stock prices very quickly. Anonymous posters such as John Doe here can use the power of the Internet to inflict serious harm on a corporation. They can pollute the information stream with defamatory falsehoods, which may in turn influence other investors to question a corporation's credibility or financial health. The Internet provides millions of individuals with nearly cost-free access to influence investment choices. With that freedom comes responsibility. And it is irresponsible to post false, defamatory messages that injure a corporation. Such is the case here. See, generally, Lyrissa Barnett Lidsky, Silencing John Joe: Defamation and Discourse in Cyberspace, 49 Duke L.J. 855 (Feb. 2000).

CONCLUSION

For the foregoing reasons, plaintiff SPX Corp. respectfully requests that defendant John Doe's Motion to Dismiss be denied.

Respectfully submitted,

/s/ Terry M. Brennan
James R. Wooley (0033850)
Terry M. Brennan (0065568)
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2002, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Terry M. Brennan
Terry M. Brennan