IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LIFEMD, INC., JUSTIN SCHREIBER, and STEFAN GALLUPPI,

Plaintiffs,

v.

CHRISTIAN MATTHEW LAMARCO, CULPER RESEARCH, and JOHN/JANE DOES 2–10,

Defendants.

Civil Action No.: 2:21-cv-00640

Honorable William S. Stickman IV

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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INTRODUCTION

This is a defamation *per se* case arising out of a classic "short and distort" scheme to artificially drive down Plaintiff LifeMD, Inc.'s ("LifeMD") market value and injure the reputations of two of its co-Plaintiff executives. Through a purported investigative research report, Defendants widely published material false, misleading, defamatory, and disparaging statements that Plaintiffs engaged in fraud, a cover-up, insider dealing, abusive marketing, and consumer deception. The statements had their intended effect: LifeMD's stock price plummeted, the executives' reputations have been tarnished, and Defendants secured a quick and illegal financial windfall. To avoid accountability, Defendants now try to downplay and spin their statements to argue that they are constitutionally protected opinion. However, the content of the defamatory statements, express statements and implications of criminal acts, fraud, and other wrongdoing, as well as the context of those statements, confirm that the statements are purported statements of fact and therefore unprotected and actionable. Because Plaintiffs' claims are well pled, Defendants' Rule 12(b)(6) motion to dismiss should be denied.

FACTUAL BACKGROUND

Plaintiff LifeMD, Inc. (NASDAQ: LFMD), a Delaware corporation, is a leading telehealth company with direct-to-patient product and service offerings, including medication deliveries and virtual medical treatments from licensed providers. Compl. ¶¶ 10, 16. LifeMD's executives include Plaintiffs Justin Schreiber (Chairman & CEO) and Stefan Galluppi (CTO). *Id.* ¶ 22. Schreiber, a Puerto Rico resident, has extensive experience in both healthcare and finance and was LifeMD's largest investor before the company raised its first round of institutional capital, while Galluppi, a California resident, has over ten years of experience building technology platforms for direct-to-consumer marketing campaigns. *Id.* ¶¶ 11-12, 22. Defendant Christian Lamarco, a Pennsylvania resident, and his co-Defendant firm Culper Research are short-sellers

who author and publish anonymous "investigative investment research" reports to facilitate short selling and enrich themselves. *Id.* ¶¶ 13-14, 23, 29-31. Defendants John Does are unknown persons who worked with Lamarco and Culper Research to defame Plaintiffs. *Id.* ¶ 15.

On April 14, 2021, Defendants published on www.culperresearch.com and Twitter a purported investigative report entitled "LifeMD, Inc. (LFMD): Redwood Redux at RexMD" (the "Report"). *See id.* ¶ 32; *see also* ECF No. 1-2 (copy of Report). Among its false, misleading, defamatory, and disparaging statements about Plaintiffs, Defendants asserted as purported investigative findings that Plaintiffs perpetrated fraud, as well as a cover-up, tied to another company called Redwood Scientific; criminal conduct involving the use of unlicensed doctors; insider transactions at the expense of investors; and deceptive business practices in the areas of direct marketing and subscription billing. *See, e.g.*, *id.* ¶¶ 33, 43-44; Appendix 1 (the "defamatory statements"). The defamatory statements hit their mark:

LifeMD's stock price fell 24%. *Id.* ¶ 78. Quoting the defamatory statements, financial analysts published negative "investor alerts" about LifeMD, while lawyers published "class action notices" and then filed class lawsuits against LifeMD, while Schreiber and Galluppi were widely attacked as criminals and fraudsters on social media. *Id.* ¶¶ 34, 92, 98. By contrast, Defendants scored a quick financial windfall from their defamation and admitted short position in LifeMD. *Id.* ¶¶ 5, 81-89. On May 13, 2021, Plaintiffs filed the instant lawsuit for defamation, trade libel, and injunctive relief, and to hold Defendants accountable for the damages they have caused, which continue to this day as the company seeks to attract investors, recruit talent, and form strategic partnerships.

LEGAL STANDARD

Defendants do not address the legal standard for Rule 12(b)(6) and seek to argue the factual allegations rather than demonstrate they do not state a claim. To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). All well-pled allegations of material fact are taken as true and construed in a light most favorable to the non-movant. *See Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). The issue is not whether plaintiffs will ultimately prevail, but whether plaintiffs are entitled to offer evidence in support of their claims. *See Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155, 162 (3d Cir. 2017).

ARGUMENT

I. Choice of Law Rules Support Application of Pennsylvania Law

In a footnote, Defendants assert that New York law applies since LifeMD is based in New York and trades its common stock there. Motion to Dismiss ("Mot.") at 6 n.8. This is far too simplistic especially since LifeMD is a Delaware corporation, Schreiber is a Puerto Rico resident, Galluppi is a California resident, and Lamarco is a Pennsylvania resident, which warrants the inference that the Report was authored and published in Pennsylvania. Compl. ¶¶ 10-13.[1] In large

[1] When a court's jurisdiction is based on diversity of citizenship, the court applies the forum state's choice of law rules. *See Specialty Surfaces Int'l, Inc. v. Cont'l Cas. Co.*, 609 F.3d 223, 229 (3d Cir. 2010); *Rose v. Dowd*, 265 F. Supp. 3d 525, 530 (E.D. Pa. 2017). Under Pennsylvania's choice of law rules, the court conducts a two-step analysis. The court must first determine whether an actual conflict exists between the laws of two or more states. *See Rose*, 265 F. Supp. 3d at 530-31; *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 467 (E.D. Pa. 2010). If no conflict exists, the forum state's law governs; only where a real conflict exists does the court proceed to the second step of the analysis to determine whether the conflict is "true," "false," or "unprovided for." *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230 (3d Cir. 2007). An actual conflict exists if the "application of each state's substantive law produces a contrary result." *Mzamane*, 693

respect, there may be no conflict between Pennsylvania and New York law. *See Keating v. EquiSoft, Inc.*, No. 2:11-cv-0518, 2014 WL 4160558, at *6 (E.D. Pa. Aug. 22, 2014) ("The elements for a libel claim are similar under Pennsylvania and New York law.") (citing *Celle v. Filipino Reporter Enter. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)). But if there is a conflict, the Court should apply Pennsylvania law.[2] In all events, Plaintiffs have stated well-pled claims whether under Pennsylvania or New York law.

II. The Complaint States Well-Pled Defamation and Trade Libel Claims

The elements of a defamation claim are essentially the same in both Pennsylvania and New York: (i) a false and defamatory statement about plaintiff, (ii) published by defendant without privilege or authorization, (iii) to a third party who understood the statement as pertaining to plaintiff and understood the statement's defamatory meaning, (iv) resulting in harm to plaintiff. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir. 1990), *cert. denied*, 498 U.S. 816 (1990); *Dillon v. City of New York*, 261 A.D.2d 34, 38 (N.Y. 1st Dep't 1999). In both states, statements that falsely accuse another of crimes or otherwise impugn the integrity of one's business, profession, or trade are presumed defamatory, or defamatory *per se*. *See, e.g., Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp.2d 570, 580 (E.D. Pa. 1999); *Frederick v. Reed Smith Shaw & McClay*, No. 2:92-cv-0592, 1994 WL 57213 at *11-12 (E.D. Pa. Feb. 18, 1994); *Boule v. Hutton*, 328 F.3d 84, 94 (2d Cir. 2003). The elements of a trade libel claim are

F. Supp. 2d at 468. If the laws between the states are the same or "the same result would ensue under the laws of the forum state and those of the foreign jurisdiction," there is no conflict. *Id.*; *see also Hammersmith*, 480 F.3d at 230. Where no conflict exists in the laws between the states, a district court sitting in diversity "may 'refer interchangeably to the laws of the states whose laws potentially apply,' or rely solely on forum law." *Keating v. EquiSoft, Inc.*, No. 11-0518, 2014 WL 4160558, at *3 (E.D. Pa. Aug. 22, 2014) (citations omitted).

[2] Notably, Pennsylvania's constitution grants heightened protections to reputational interests. *See* Pa. Const. art. 1, §§ 1, 11; *see also, Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346, 351 (Pa. 1987) (recognizing the "special value placed on an individual's reputation in the Pennsylvania Constitution").

also the same in both states: (i) a false statement, (ii) publication, (iii) a malicious intent to cause pecuniary loss, and (iv) resulting pecuniary loss (or "special damages"). *See Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002) (citing Restatement (Second) of Torts § 623(A) (2002); *Angio-Med. Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 274 (S.D.N.Y. 1989). Defendants do not challenge that they authored and published the Report or that their statements disparaged and injured Plaintiffs. Rather, Defendants primarily, but incorrectly, argue their statements are nonactionable opinion. Mot. at 6-17.

A. The Defamatory Statements are Purported Statements of Fact

The hallmark test for whether a defamatory statement is actionable is whether the statement is "sufficiently factual to be susceptible of being proved true or false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). The content and context of the statement are relevant factors. *See Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153 (1993); *Joseph v. Scranton Times L.P.*, 959 A.2d 322, 334 (Pa. Super. 2008) (court "must consider the full context of the [statement] to determine the effect [it is] fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.") (citation omitted); *Byars v. School Dist.*, 942 F. Supp. 2d 552, 564 (E.D. Pa. 2013) (court "must look at the language of the communication, its implications and the context in which it was made, and determine how a reasonable person would interpret the statement"). Further, a defendant may be liable for what their statements insinuate, as well as what they explicitly state. *See Charles Atlas Ltd v. Time-Life Books Inc.*, 570 F. Supp. 150, 153 (S.D.N.Y. 1983) ; *Graboff v. Colleran Firm*, 744 F.3d 128, 136 (3d Cir. 2014) (defamation may be established by implication and insinuation).

1. *Statements About Redwood Scientific and Fraudulent Conduct*

Defendants state, imply, and insinuate that Plaintiffs Schreiber and Galluppi were "intimately involved" in a "wide ranging" and "material" fraud at Redwood Scientific and are now

doing the same at LifeMD. *See, e.g.*, Report at 2-3. Indeed, Defendants titled the Report "LifeMD, Inc. (LFMD): Redwood **Redux** at RexMD," *id.* at 1 (emphasis added), signaling that fraud at Redwood Scientific has continued at LifeMD. Defendants repeatedly state that "practices" at LifeMD "mirror" the fraud at Redwood Scientific. *See, e.g.*, *id.* at 2-3, 5, 10, 12. Further, Defendants assert that Plaintiffs concealed their "fraudulent" practices by removing references to Redwood Scientific from résumés, corporate presentations, and SEC filings. *See id.* at 3-5, 16 ("LifeMD has hidden past involvement in Redwood Scientific."). Defendants refer to Plaintiffs' so-called "cover-up" no fewer than four times throughout the Report. *See, e.g.*, *id.* at 2-5. These purported investigative findings about fraud and concealment by Plaintiffs Schreiber and Galluppi, previously with Redwood Scientific and now with LifeMD, are not offered as "opinion" but as purported factual statements.

2. *Statements About LifeMD's Physicians and Criminal Conduct*

Defendants state, imply, and insinuate that Plaintiffs "use" and "rely[ ]" on "unlicensed doctors" to "dispense" and "sell" "controlled substances." *See, e.g.*, *id.* at 2-3, 5. Defendants describe finding "highly problematic practices" in "LifeMD's two core businesses" (RexMD and ShapiroMD), *id.* at 6, making LifeMD "potentially . . . liable as an instrument to felony distribution of controlled substances." *Id.* at 2; *see also id.* at 5 ("Dispensing pills without a valid license is a felony offense."), 7 (LifeMD may be "complicit in felonious acts"). Despite only one physician's license suspension and DEA registration revocation, *see id.* at 6-7 (discussing Dr. Badii), Defendants repeatedly use plural terms like "doctors" and "physicians" to represent that Plaintiffs had more than one unlicensed physician. *See, e.g.*, *id.* at 2, 5-7, 10 ("use of unlicensed doctors to dispense pills"). These purported investigative findings about Plaintiffs' criminal activity and use of unlicensed physicians are not offered as "opinion" but as purported factual statements.

3. *Statements About Insider Enrichment and Self-Dealing*

Defendants state, imply, and insinuate that Plaintiffs "enriched themselves via related-party transactions," "using the Company as [their] personal piggy bank." *Id.* at 2, 15. Defendants identify LifeMD's contracts with other businesses as unlawful "insider" or "related-party" transactions that have left LifeMD's shareholders "holding the bag." *Id.* at 15-16. Defendants assert that Plaintiffs Schreiber and Galluppi have set out to "grift" shareholders to "enrich[ ] themselves." *Id.* at 15, 16. These purported investigative findings about Plaintiffs' insider dealings to victimize shareholders are not offered as "opinion" but as purported factual statements.

4. *Statements About Deceptive Business Practices*

Defendants state, imply, and insinuate that Plaintiffs operate a scam business "built on customer deception," "effectively dup[ing]" customers into "purchasing subscriptions[.]" *Id.* at 10, 12. Defendants describe Plaintiffs' business as a "scheme" driven primarily by "autobilling" and "autoshipping" that engages in abusive marketing practices "possibly in violation of TCPA laws." *Id.* at 2, 8, 10. These purported investigative findings about abusive marketing practices are not offered as "opinion" but as purported factual statements.

5. *Defendants' Statements About Plaintiffs are Actionable*

Contrary to Defendants' effort to downplay and spin their statements as "opinion," their statements are not "imaginative expression" or "loose, figurative, or hyperbolic language which would negate the impression" that Plaintiffs have committed illegal and fraudulent conduct. *See Milkovich*, 497 U.S. at 21. Defendants asserted that Plaintiffs committed and have since covered up fraud at Redwood Scientific, are repeating this fraud with LifeMD, are engaged in felony criminal conduct involving controlled substances by unlicensed doctors, are engaged in insider transactions to enrich themselves at the expense of shareholders, and operate a deceptive business that employs abusive and unlawful marketing tactics. Based on the words themselves, Defendants'

purported investigative findings are "sufficiently factual to be susceptible of being proved true or false." *Id*.

B. The Context of the Report Confirms Defendants' Statements Are Actionable

Beyond the words themselves, the overall context confirms that Defendants' statements were presented as grounded in fact. By calling themselves "Culper Research" and using an image of an American patriot, Defendants promoted themselves as a source to be trusted for valuable and helpful information, much like the Culper Ring did for General George Washington during the American Revolutionary War.[3] The professional-looking "Investigative Investment Research" document presents 19 pages of purported investigative research, with links to graphs, pictures, charts, screenshots, and an appendix, reflecting the purported factual reliability of the Report. Its introductory "Disclaimer" actually represents that the Report contains accurate and reliable information: "To the best of our ability and belief, **all information contained herein is accurate and reliable**, and has been obtained from public sources we believe to be accurate and reliable, and who are not insiders or connected persons of the securities covered herein or who may otherwise owe any fiduciary duty or duty of confidentiality to the issuer." Report at 1 (emphasis added). Rather than editorial commentary, the Report appears to an average reader to be well researched and thoroughly documented, conveying factual information. Readers, in fact, relied and acted on the Report. Quoting the defamatory statements, financial analysts published negative "investor alerts" about LifeMD, while lawyers published "class action notices" and then filed class lawsuits against LifeMD. Compl. at ¶¶ 34, 92.

[3] *See* https://en.wikipedia.org/wiki/Culper_Ring (describing the historical spy ring).

C. The Defamatory Statements Are Not Protected Opinion

By both content and context, Defendants' purported investigative findings were presented as statements of fact. Defendants offer a variety of arguments to contend otherwise—that the Report disclosed Defendants as short-sellers, contains some cautionary language, was published on an internet blog, and sometimes cited its sources. None of the arguments have merit, especially at the pleading stage.

Contrary to Defendants' argument, the fact that the Report disclosed Defendants' short-seller position does not mean that Defendants' purported investigative findings were not presented as fact. The Southern District of New York recently rejected this same argument. In *Amira Nature Foods, Ltd. v. Prescience Point LLC*, No. 1:15-cv-09655 (S.D.N.Y. Oct. 17, 2016), the defendant issued two research reports describing that plaintiff engaged in fraudulent activity. Like Defendants here, the short-seller defendant in *Amira* disclosed in the reports that it "had a short position and stood to profit" in the event plaintiff's stock price declined. Denying defendant's motion to dismiss, the Southern District of New York flatly rejected the argument that this disclosure signaled that the reports were expressions of opinion, finding instead that "a reasonable investor would have understood [the short-seller was] conveying provable facts about [the plaintiff]." *Id.*, Dkt. No. 66 (Hearing Tr. at 59); *accord* Dkt. No. 65 (Oct. 7, 2016 Order). The same is true here.

Contrary to Defendants' argument, the fact that the Report included cautionary language like "as is" and "without warranty of any kind" does not mean that Defendants' purported investigative findings were not presented as fact. Those legal-liability-type warnings say nothing about whether a statement is purported fact or opinion, as prefatory disclaimers and "exculpatory words" cannot "save the statements [at] issue from being defamatory." *ZAGG, Inc. v. Catanach*, No. 2:12-cv-04399, 2012 WL 4462813, at *3 (E.D. Pa. Sept. 27, 2012) (citing *Milkovich*, 497 U.S.

at 18); *Amira*, No. 1:15-cv-09655, Dkt. No. 66 at 59 ("Defendants cannot avoid liability simply by including a legal disclaimer[.]"). Indeed, "[i]t would undermine the law of defamation if speakers or authors could simply employ a talismanic word formula to absolve themselves of slander or libel." *Id.* (citing *Milkovich*, 497 U.S. at 18-19). Nor does language like "we think," "we believe," or "in our view" transform statements into protected opinion. "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Milkovich*, 497 U.S. at 18-19 (quotations and citations omitted); *see also Amira*, No. 1:15-cv-09655, Dkt. No. 66 at 59 ("Defendants cannot avoid liability simply by . . . sprinkling their reports with words that they believe connote opinion."). "[T]he statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'" *Eros Int'l. PLC v. Mangrove Partners*, 2019 WL 1129196, at *8 (N.Y. Sup. Mar. 8, 2019) (quoting *Milkovich*, 497 U.S. at 19).[4]

Contrary to Defendants' argument, the fact that the Report was published on the internet does not turn Defendants' statements into protected opinion. By Defendants' logic, no defamation could take place online.[5] But this is not the law. *See, e.g.*, *Hayashi v. Ozawa*, No. 1:17-cv-02558, 2019 WL 1409389, at *5 (S.D.N.Y. Mar. 28, 2019) ("in the modern media landscape, internet publications and blogs can engage in serious, fact-based reporting" just like traditional media formats); *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263 (S.D.N.Y. 2016) (denying defendant's motion to dismiss defamation claims arising from

[4] In *Eros*, the court expressly noted that dismissal of plaintiff's defamation claim "should not be read to suggest that a 'short and distort' scheme can never give rise to a viable claim of defamation simply because the alleged distortion is cloaked in the form of an opinion." 2019 WL 1129196, at *11 n.7.

[5] Defendants understate the Report by characterizing it as a post on "Culper's personal investment analysis blog." *See* Mot. at 10. Unlike a personal blog though, the Report was published without attribution on Defendants' professional-looking website with legal disclaimers, terms of service, copyright protection, and a "Contact Us" submission form. *See* https://culperresearch.com/ (last visited: July 29, 2021).

statements about plaintiff and its software products published on defendant's website); *Amira*, No. 1:15-cv-09655, Dkt. No. 51 (Amended Compl. ¶¶ 43, 104); Dkt. No. 65 (denying defendant's motion to dismiss defamation claims arising from "investment research reports" published on the Internet); *Simoni v. Swan*, No. B290682, 2019 WL 5485209, at *5 (Cal. Ct. App. Oct. 25, 2019) ("the mere fact that a statement appears on a review website and uses fiery rhetoric does not establish, as a matter of law, the statement is nonactionable opinion.").

Contrary to Defendants' argument, the fact that the Report cites various sources (which actually do not support the defamatory statements) does not turn Defendants' statements into protected opinion. Rather, because the Report cites various sources, a reader would be even more likely to view Defendants' purported investigative findings as highly credible and reliable. Further, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19; *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985) (if the facts underlying a defamatory opinion "are false, the Constitution does not protect the opinion.") (citing Restatement (Second) of Torts § 566A (1977)). Likewise, opinions that purport to rely on unstated or undisclosed facts, or which falsely misrepresent or grossly distort the facts upon which they are supposedly based, are deemed "mixed opinions" and are actionable. *See Chalpin v. Amordian Press*, 128 A.D.2d 81, 85 (N.Y. 1st Dep't 1987) (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986)) (citations omitted). Defendants engaged in such gross distortion.

Defendants' disparaging statements that Plaintiffs committed fraud at Redwood Scientific and are doing the same at LifeMD are not warranted by evidence that Redwood Scientific was sued by the FTC, that Schreiber owned Redwood Scientific stock, or that Plaintiff Galluppi was Redwood Scientific's CTO. Defendants' disparaging statements that Plaintiffs covered up their

participation in Redwood Scientific's fraud are not warranted by evidence that Plaintiffs do not identify Redwood Scientific in LifeMD materials or LinkedIn profiles. Defendants' disparaging statements that LifeMD uses "unlicensed doctors" in violation of criminal law are not warranted by evidence that one doctor had his license suspended and another was mistakenly identified as being licensed in California rather than Massachusetts. Defendants' disparaging statements that Plaintiffs have enriched themselves and injured shareholders through improper insider transactions are not warranted by evidence in LifeMD's 2019 Form 10-K disclosing what were legitimate transactions. Finally, Defendants' disparaging statements that Plaintiffs have engaged in abusive marketing practices are not warranted by cherry-picked, unverified consumer complaints or by the mere existence of a subscription billing model.

Defendants cite, and selectively quote from, a handful of New York cases for their arguments. But nothing in these or other cases establish any exemption from defamation liability for short-sellers or investment analysts. *See Eros*, 2019 WL 1129196, at *11 n.7 ("The foregoing should not be read to suggest that a "short and distort" scheme can *never* give rise to a viable claim of defamation simply because the alleged distortion is cloaked in the form of an opinion.") (emphasis in original). The cases simply hold, based on their unique facts, that plaintiff had not stated a claim under New York law. Importantly, the facts in those cases are not analogous to those here, as the statements in those cases were published in an opinion context. They appeared in op-ed or comment sections of news articles. *See Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F. Supp. 3d 287, 295-96 (E.D.N.Y. 2015) (decided on summary judgment); *Egiazaryan v. Zalmayev*, 880 F. Supp. 2d 494, 507 (S.D.N.Y. 2012); *Brian v. Richardson*, 87 N.Y.2d 46, 48, 52-53 (1995). Or they were "posted on online forums that generally traffic in

sharing financial opinions." *Eros*, 2019 WL 1129196, at *8.[6]

In all events, if there is any doubt, all inferences must weigh in Plaintiffs' favor at the pleading stage. *See Livingston v. Murray*, 417 Pa. Super. 202, 208 (1992) (citations omitted); *Pelagatti v. Cohen*, 536 A.2d 1337, 1345 (Pa. Super. Ct. 1987); *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014) ("If upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action."); *see also* Restatement (Second) of Torts, § 566, Comment c, § 614, Comment d ("[I]f, in the opinion of the court, the question is one on which reasonable men might differ, it is for the jury to determine which of the two permissible views they will take.").

D. Plaintiffs Need Not, But Do, Plead Actual Malice

Defendants further argue that Plaintiffs' claims should be dismissed for failure to plead actual malice. Mot. at 17-18. This argument is misplaced for at least two reasons: first, Plaintiffs are not "public figures" required to plead actual malice; second, Plaintiffs have nonetheless adequately pled actual malice.

[6] The cases cited by Defendants are also distinguishable in other respects. In many, the statements called for an investigation, which was "understood as claims to be investigated rather than assertions of fact." *See Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 2012 WL 3569952, at *11 (N.Y. Sup. Aug. 16, 2012) (letters sent to a "select audience" of securities regulators, financial journalists, and auditors); *Eros*, 2019 WL 1129196, at *10 (statements understood "as an allegation to be investigated, rather than as a fact"); *Yangtze River Port v. Hindenburg Research*, 2020 WL 905770, at *7 (N.Y. Sup. Feb. 25, 2020) ("assertion as an allegation to be investigated, rather than as a fact"); *Egiazaryan*, 880 F. Supp. 2d at 512 ("the[se] charges were included not necessarily to convince the reader of the plaintiff's dishonesty but rather to demonstrate the need for an investigation"); *Brian v. Richardson*, 87 N.Y.2d 46, 53 (1995) ("[T]he repeated charges were included in the article not necessarily to convince the reader of plaintiff's dishonesty but rather to demonstrate the need for an investigation that would establish the truth or falsity of the charges."). In others, the statements contained express statements of opinion or extreme rhetorical and hyperbolic language. *See Eros*, *supra* at *10 ("0% investment advice, 100% personal opinions"); *Egiazaryan*, *supra* at 507 ("epithets, fiery rhetoric, [and] hyperbole" which further highlighted nonactionable opinion); *Sabratek Corp. v. Keyser*, No. 1:99-cv-08589, 2000 WL 423529, at *1, *6 (S.D.N.Y. Apr. 19, 2000) ("that guy . . . is a fraud," "this guy . . . is a dirty liar," and "the biggest pathological liar in the world"); *Brian*, *supra* at 53 (statements were "rife with rumor, speculation and seemingly tenuous inferences" which served as "clues" to the reader that the article "was something less than serious, objective reportage").

1. *Plaintiffs Are Not Public Figures Required to Plead Actual Malice*

In an effort to argue Plaintiffs are public figures and therefore must plead actual malice, Defendants improperly go outside the pleadings.[7] The Court can reject Defendants' argument for this reason alone. Moreover, Plaintiffs are not public figures, limited or otherwise, required to plead actual malice. The fact that LifeMD is publicly traded or that Schreiber and Galluppi have publicly supported LifeMD does not determine whether plaintiffs are public figures under defamation law. Rather, the inquiry is whether the defamation plaintiff is so well known to be a "household" name whose statements and interests are followed with "great interest"—known as a general-purpose public figure—or the plaintiff is in a category of persons that has "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"—known as a limited-purpose public figure. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (limited purpose public figure); *American Future Sys., Inc. v. BBB of E. Pa.*, 923 A.2d 389, 401 (Pa. 2007) ("a limited purpose public figure . . . is an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'") (quoting *Gertz*, 418 U.S. at 351); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 498 (E.D. Pa. 2010) (household name).

Here, nothing pled in the Complaint, or for that matter, included in Defendants' motion, points to Plaintiffs as holding "household" general-purpose names or as having injected themselves into a public debate on a controversial issue. In the latter instance, more would be required of Plaintiffs beyond having "participated in public investor earnings calls, video

[7] The inquiry into whether a defamation plaintiff is a public figure is a highly particularized and fact-sensitive analysis. *See Shadle v. Nexstar Broad. Grp., Inc.*, No. 3:13-cv-02169, 2014 WL 3590003, at *7 (M.D. Pa. July 21, 2014) (citing *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 923 A.2d 389, 404 (2007)). The factual matters alleged in footnote 13 of Defendants' Motion to Dismiss (claiming that the individual Plaintiffs are limited-purpose public figures) also fall outside the pleadings and should not be considered. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

interviews, and press releases regarding LifeMD's finances, platform, and prospects." Mot. at 17 n.13. *See Lee v. City of Rochester*, 663 N.Y.S.2d 738, 742-45 (Sup. Ct. Monroe Cty. 1997), *aff'd*, 677 N.Y.S.2d 848 (4th Dep't 1998) (evidence of plaintiff's "high-profile effort to promote his business" did not make him a public figure where there was "no public controversy attend[ing] plaintiff's self-promotion efforts"); *Computer Aid, Inc. v. Hewlett–Packard Co.*, 56 F. Supp. 2d 526, 536 (E.D. Pa. 1999) (despite being "one of the largest and most influential corporations in the world," Hewlett-Packard was not a limited-purpose public figure because it did not voluntarily thrust itself into a public controversy). Otherwise, any public company and their executives and spokespersons would automatically become public figures required to prove actual malice in defamation cases.

True controversial issues for public figure status require some "real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Waldbaum v. Fairchild Publ'g, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980); *Elliott v. Donegan*, 469 F. Supp. 3d 40, 49 (E.D.N.Y. 2020); *Mzamane*, 693 F. Supp. 2d at 499. These circumstances are not here. Even pushing back publicly against defamatory charges is not the same as injecting oneself into a public debate on a controversial issue. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 (1979) (plaintiff was not limited-purpose public figure where "[i]t would be more accurate to say that [he] was dragged unwillingly into the controversy"); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure"); *Calvin Klein Trademark Trust v. Wachner*, 129 F. Supp. 2d 248, 252 (S.D.N.Y. 2001) (defendants' public denials of allegedly defamatory claims "do not constitute their 'injecting' themselves into a public controversy").

2. *Plaintiffs Nevertheless Plead Actual Malice*

Plaintiffs have nevertheless alleged facts sufficient to show actual malice. To wit, Plaintiffs

allege that Defendants knew their defamatory statements were false or recklessly disregarded their truth. *See, e.g.*, Compl. ¶ 2 (alleging Defendants knowingly spread materially false and misleading information about Plaintiffs), ¶ 41 (alleging "Defendants knew, or were recklessly indifferent to the fact" that the defamatory statements were false), ¶ 104 (alleging Defendants made the false statements "intentionally, maliciously, and with knowledge of their falsity" or with reckless disregard for their truth or falsity). Plaintiffs also expressly allege that Defendants acted "with malicious motives" out of a "desire to damage Plaintiffs and decrease LifeMD's share price for their own personal gain[.]" *Id.* ¶ 40. Such conduct is evidence of actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 692-93 (1989).

Plaintiffs allege other indicia of actual malice. Defendants published an anonymous Report on an anonymous website in an effort to avoid scrutiny and liability. Compl. ¶¶ 27-28. Defendants have a history of posting false and fraudulent reports about other companies as part of similar short-and-distort schemes. *Id.* ¶¶ 29, 31. Defendants failed to check readily available public records, including the docket and filings in *Federal Trade Commission v. Cardiff, et al.*, 5:18-cv-02104 (C.D. Cal. 2018), that would show Plaintiffs were not involved in the alleged fraud at Redwood Scientific. *Id.* ¶¶ 42, 51-53. Defendants intentionally misled readers of the Report by presenting information about LifeMD's products, services, and financial condition inaccurately and out of context. *Id.* ¶ 45. These allegations are more than sufficient to state a claim of defamation made with actual malice. *See Herbert v. Lando*, 441 U.S. 153, 160, 164 n.12 (1979); *Palin v. New York Times Co.*, 940 F.3d 804, 816 (2d Cir. 2019); *Shadle*, 2014 WL 3590003, at *9; *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007). And this makes sense at the pleading stage because it is rare that a defendant will have already admitted making a knowingly false statement. *See Herbert*, 441 U.S. at 170.

E. Plaintiffs Need Not, But Do, Plead Special Damages

Finally, Defendants' argument that Plaintiffs' claims should be dismissed for failure to plead special damages, *see* Mot. at 19-20, should be rejected for at least two reasons.

First, Plaintiffs have alleged defamation *per se*. *See, e.g.*, *Frederick v. Reed Smith Shaw & McClay*, No. 2:92-cv-0592, 1994 WL 57213 at *11-12 (E.D. Pa. Feb. 18, 1994) (false statements imputing criminal conduct are defamatory *per se*); *Campanella v. County of Monroe*, 853 F. Supp. 2d 364, 371 (W.D.N.Y. 2012) (citing *Epifani v. Johnson*, 882 N.Y.S.2d 234, 242 (2009)) (same); *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp.2d 570, 580 (E.D. Pa. 1999) (under Pennsylvania law, language imputing fraud or lack of integrity in one's profession is actionable *per se*); *Boule v. Hutton*, 328 F.3d 84, 94 (2d Cir. 2003) (quoting *Ruder & Finn Inc. v. Seaboard Surety Co.*, 52 N.Y.2d 663, 670 (1981)) (statements impugning business integrity are defamatory *per se* under New York law). As such, special damages need not be shown. *See Celle*, 209 F.3d at 179 (quoting *Davis v. Ross*, 754 F.2d 80, 82 (2d Cir. 1985)); *Beverly Enter., Inc. v. Trump*, 182 F.3d 183, 187 n.1 (3d Cir. 1999) (citing *Baird v. Dun & Bradstreet*, 285 A.2d 166, 171 (Pa. 1971)). *See Joseph v. Scranton Times L.P.*, 129 A.3d 404, 429 n.10 (Pa. 2015) ("[c]onsistent with Restatement (Second) of Torts § 569, Pennsylvania case law holds that proof of special harm, *i.e.* monetary damages, is not a prerequisite to recovery in a defamation libel matter") (citing *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011)); *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 472-74 (Pa. 1984) (holding that "a plaintiff in libel in Pennsylvania need not prove special damages or harm in order to recover; he may recover for any injury done his reputation and for any other injury of which the libel is the legal cause.").

Second, even if required, Plaintiffs have alleged special damages. Plaintiffs alleged that the defamatory statements caused a drop in LifeMD's stock price. Compl. ¶ 78 ("In the immediate aftermath of the publication of the false statements and libel in the Report, the price of LifeMD's

shares decreased $2.84, or 24%, to close at $9.00 per share on April 14, 2021, and it continues to plummet."). In addition to the reputation harm and emotional distress they have suffered, Schreiber and Galluppi as LifeMD shareholders have likewise suffered substantial economic loss. *Id.* ¶¶ 77-78, 89. These allegations are more than sufficient to plead special damages. *See Matherson v. Marchello*, 100 A.D.2d 233, 235 (N.Y. 2d Dep't 1984) ("special damages" consist of the loss of anything having economic or pecuniary value "which must flow directly from the injury to reputation caused by the defamation[.]").[8]

Fundamentally, Defendants miss the point on damages. Plaintiffs do not seek damages for short selling generally, and the Complaint is not an attack on short sellers. Instead, Plaintiffs seek damages against Defendants arising out of their "materially false, misleading, defamatory, and disparaging information" about Plaintiffs "in order to secure a quick and illegal financial windfall." Compl. ¶¶ 1-6. Although Defendants want to argue causation, any factual dispute over the fact or extent of damage caused by Defendants should be reserved for summary judgment and trial. *See Joseph*, 129 A.3d at 429 (whether defamation plaintiff has proven causation is "normally a question of fact"); *Boehm v. Riversource Life Ins. Co.*, 117 A.3d 308, 328 (Pa. Super. 2015) ("The determination of damages is a factual question to be decided by the fact-finder.").

III. Plaintiffs Withdraw the Injunctive Relief Claim but Maintain the Remedy

In accordance with the Court's Order Setting Briefing Schedule of July 12, 2021 and Chamber Rule II.B, Plaintiffs voluntarily withdraw the Third Cause of Action (Permanent Injunctive Relief) and will file a notice of such withdrawal. Plaintiffs maintain, however, their

[8] Plaintiffs also identify economic damages from the defamation and trade libel. *See, e.g.*, Compl. ¶¶ 92-93 (two putative shareholder class action lawsuits—both of which incorporated the claims contained in the defamatory Report—have been filed against LifeMD, requiring Plaintiffs to incur significant defense costs); ¶¶ 76, 94-95 (alleging loss of potential investors, investigation and defense costs, damage to contractual and bank partners, media and public relations expenses, and so on). No more is required of Plaintiffs at the pleading stage, including any dollar "itemization," as Defendants contend. Mot. at 19.

request for relief in the form of a narrow injunction against Defendants to remove, retract, and not repeat the defamatory and disparaging statements. *See M3 USA Corp. v. Hart*, No. 2:20-cv-05736, 2021 WL 308162, at *19 (E.D. Pa. Jan. 29, 2021) (dismissing count for injunctive relief without prejudice to plaintiff seeking injunctive relief if warranted); *Chachkes v. David*, No. 1:20-cv-02879, 2021 WL 101130, at *14 (S.D.N.Y. Jan. 12, 2021) (similar).

CONCLUSION

Defendants published a defamatory *per se* hit piece accusing Plaintiffs of false factual allegations: fraud, a cover-up, insider dealing, and running a deceptive business. Defendants made these accusations intentionally and maliciously as part of their well-orchestrated "short-and-distort" scheme. The accusations damaged Plaintiffs' reputations and business interests, including an artificial drop in LifeMD's stock price, meritless lawsuits, and ongoing damage to the company's reputation among institutional investors, individual investors, and prospective employees, vendors and partners. Because Plaintiffs' defamation and trade libel claims are well pled as set forth above, Defendants' Rule 12(b)(6) motion should be denied.

Respectfully submitted this 2nd day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2021, I filed a true and correct copy of the foregoing document via the Court's CM/ECF electronic filing system, which then caused the same to be served upon all parties and attorneys of record.

/s/ Jessica G. Lucas
Jessica G. Lucas, Esq.