SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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PROMETHEUM, INC.,PROMETHEUM EMBER ATS, INC.,PROMETHEUM EMBER CAPITAL LLC

Plaintiffs,

- v -

MATTHEW BLUMBERG,

Defendant.

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INDEX NO. 160676/2024

MOTION DATE 06/12/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISSAL.

In this libel action, defendant moves pursuant to CPLR § 3211 to dismiss the complaint, arguing that the plaintiffs have failed to meet the heightened pleading standard of a libel claim under New York's anti-SLAPP statute. He also argues that under the anti-SLAPP statute he is entitled to reasonable attorney's fees as the action was brought without a substantial basis in fact and law.

BACKGROUND

Plaintiffs, Prometheum, Inc., Prometheum Ember ATS Inc., and Prometheum Ember Capital LLC (collectively "Prometheum") operate a platform on which investors trade cryptocurrency. According to plaintiff, its platform complies with United States Securities and Exchange Commission ("SEC") regulations (NYSCEF Doc No 1 at ¶¶ 1, 16 – 19). Prometheum claims the business was developed with the understanding that most cryptocurrencies meet the legal definition of "securities" and thus, should be subject to federal securities laws (*id*. at ¶ 2). Accordingly, Prometheum set out to create a platform that stayed within the bounds of federal

securities law within the largely unregulated cryptocurrency industry, and to obtain authorization of that platform from the SEC and the Financial Industry Regulatory Authority ("FINRA") (*id*. at ¶ 19 – 21).

In 2020, the SEC created the "special purpose broker–dealer" ("SPBD") designation to allow approved broker dealers the ability to perform all transaction functions regarding the trading of "digital asset securities" (*id*. at ¶ 22). In May of 2023, the SEC issued Prometheus the first SPBD license, approving the platform for the clearing, settlement and custody of digital asset securities (*id*. at ¶ 27 – 28).

Defendant, Matthew Blumberg, is the founder and CEO of non-party Left Curve LLC, a consulting firm specializing in the cryptocurrency market (*id*. at ¶ 33 – 38). Blumberg also hosts a podcast, *Decent Crypto*, where news and issues in the cryptocurrency industry are discussed (NYSCEF Doc No 1 ¶ 40). On November 6, 2024, seemingly in response to the presidential election results, Blumberg posted on his X (formerly Twitter) profile the following:

> The most satisfying thing of all
> Is that @PrometheumInc is completely f*cked now that daddy Gensler[1] is out
> All is right in the world

(NYSCEF Doc No 27 at p 7).

Blumberg then, answering a reply to a fellow X user asking what is Prometheum posted:

> Great question. They're the scammers who testified in front of congress reading the SEC's talking points in exchange for a sweetheart deal where they were the only ones able to get a broker dealer license to trade crypto securities (Coinbase has been trying in good faith for years)
>
> As a result they claim all crypto assets are securities and they run a securities exchange.

[1] Gensler refers to SEC Chairman, Gary Gensler under the previous presidential administration.

> It's the kind of scam you usually only see in developing countries. I'm pretty sure with the ETH/ETF[2] now they're actually operating an illegal unregistered commodities exchange. @CFTC you should look into this.
>
> Also not a lot of people know this but the founders are somehow randomly my cousins-in-law and I don't think they've even noticed I'm constantly talking sh*t about them here. One of them once bragged to me he thought they'd get acquired by Coinbase. They can s*ck it though because gensler couldn't deliver on his side of the bargain and now they're gigaf*cked since the SEC will no longer be a political weapon. Our country is healing.

(NYSCEF Doc No 1 at ¶ 46).

Prometheum alleges one cause of action for defamation per se, as against Blumberg based upon the statements in the X post. Prometheum alleges that the post defames the company by presenting false reasons as to why the company obtained the SPBD license, calling the company a "scam", referring to its founders as "scammers" and claiming that the company is "operating an illegal unregistered commodities exchange" (NYSCEF Doc No 1 at ¶ 48 – 49).

DISCUSSION

Defendant argues that the case must be dismissed because plaintiffs have failed to meet the heightened pleading standards imposed by New York's ant-SLAPP statute. He argues that because the alleged defamatory comments were about a matter of public interest, plaintiffs must demonstrate that the suit has a "substantial basis in law" at the pleading stage. He then argues that plaintiffs cannot show that defendant knowingly made a false statement of fact, that the comments consisted of unactionable opinion and that some of the terms used in the post were unactionable hyperbole. Plaintiffs argue that even if the anti-SLAPP heightened pleading applies they have alleged a proper cause of action.

[2] ETH/ETF refers to the SEC's decision to approve the futures exchange-traded funds ("ETF") of the cryptocurrency Ether ("ETH") (NYSCEF Doc No 20).

I. Anti-SLAPP / Failure to State a Cause of Action

CPLR § 3211(g) states:

> A motion to dismiss based on [CPLR § 3211(a)(7)], in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in [Civil Rights Law § 76-a], shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

Defendants "moving for dismissal [under CPLR 3211(g)] need not establish a dispositive procedural or substantive defense on the merits of the action, as otherwise required under other provisions of CPLR 3211, but rather, need only establish that the true nature of the action is one within the scope of anti-SLAPP" (*VIP Pet Grooming Studio, Inc. v Sproule*, 224 AD3d 78, 83 [2d Dept 2024]). "The actual burden of proof as to the action's meritoriousness is thereupon shifted in the context of anti-SLAPP immediately to the plaintiff" (*id*.).

Further Civil Rights Law § 76-a states:

> In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Whether the heightened pleading standard applies is dependent on whether the claim "is an action involving public petition and participation as defined in [Civil Rights Law § 76-a]" (CPLR § 3212[g]). Civil Rights Law § 76-a defines "an action involving public petition and participation" as "any communication in a place open to the public or a public forum in connection with an issue of public interest." It goes on to state "'Public interest' shall be

construed broadly, and shall mean any subject other than a purely private matter" (Civil Rights Law § 76-a[d]). "In order to fulfill the anti-SLAPP law's stated purpose of protecting public petition and participation, the 2020 amendments provide that 'public interest' shall be broadly construed to embrace matters of political, social, or other concern to the community" (*Reeves* 218 NYS3d at 27 [internal quotation marks omitted]). In order for the burden to shift to plaintiffs, defendant need to only show that the disputed statements were made to the public or in a public forum, and were concerning an issue of public interest (*id*.).

Once it is established that the action is within the scope of the anti-SLAPP law, the substantial basis standard applies. "[T]he 'substantial basis' standard applicable under CPLR 3211(g) is more exacting than the liberal pleading standard applicable to ordinary CPLR 3211(a)(7) motions" (*Reeves v Associated Newspapers, Ltd.*, 218 NYS3d 19, 30 [1st Dept 2024]). When reviewing a "motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), [courts] must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every reasonable inference, and determine only whether the facts, as alleged fit within any cognizable legal theory" (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 85-86 [1st Dept 2024] [internal quotations omitted]). "By contrast, a court reviewing the sufficiency of a pleading under CPLR 3211(g) must look beyond the face of the pleadings to determine whether the claim alleged is supported by substantial evidence" (*Reeves*, 218 NYS3d at 30).

Here, defendant has met his initial burden to apply the heightened anti-SLAPP protections to this case. First, defendant's comments were made on a public forum. While plaintiffs note that defendant apparently made his X profile private after receiving a communication from plaintiffs regarding the post, the post was initially made on defendants

public account on a website which is designed to be a public forum for expressing opinion (*Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26 [1st Dept 2022] [Yelp.com considered a public forum]). Further, the content of the post contains matters of public concern. Prometheum's founders testified before Congress regarding cryptocurrency regulation, a topic evidencing the active political debate concerning it, in particular considering the change in presidential administration. Further, while the parties have a personal connection, in that defendant's mother introduced Prometheum Co-CEOs to defendant due to his interest in cryptocurrency, the comments defendant made on his X profile were about issues impacting the cryptocurrency marketplace and plaintiffs role in that marketplace, which is one of "political, social, or other concern to the community" (*Reeves*, 218 NYS3d at 27). Accordingly, the burden now shifts to plaintiffs to demonstrate that the claim has a "substantial basis."

II. Basis for the Defamation Claim

Ordinarily, "[t]he elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). "A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct" (*id.*). However, where as here the anti-SLAPP statute applies, "the claims pleaded must have a substantial basis in law, which requires such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Smartmatic USA Corp. v Fox Corp.*, 213 AD3d 512, 512 [1st Dept 2023]) The "[l]egislature's intention to import the 'substantial evidence standard' as the measure of the 'substantial basis' standard is clear" and thus "the practical test … [is] whether the allegations and evidence presented would require

submission to a jury as a question of fact" (*Reeves*, 232 AD3d at 23). Further, "the plaintiff bears the burden of establishing by clear and convincing evidence that defamatory false statements were made with [*actual malice*, that is] knowledge of their falsity or with reckless disregard to whether the statements were true or false" (*Singh v Sukhram*, 56 AD3d 187, 194 [2d Dept 2008]).

Plaintiff alleges that defendant made several defamatory statements in his X post. First defendant's statements that plaintiffs were "scammers" and were operating a "scam you usually only see in developing countries." Second, defendant's statement that "I'm pretty sure with the ETH ETF now they're actually operating an illegal unregistered commodities exchange." And, third the statement, "They're the scammers who testified in front of congress reading the SEC's talking points in exchange for a sweetheart deal where they were the only ones able to get a broker dealer license to trade crypto securities", allegedly implying that plaintiffs Co-CEOs had an under the table deal with the SEC chair to testify in exchange for approval of plaintiff's SPBD license.

a. Non-Actionable Opinion

Defendant argues that the allegedly defamatory statement in the X post is non-actionable opinion and thus, incapable of being proven false which would require dismissal of the defamation claims.

"[O]nly statements of fact can be defamatory because statements of pure opinion cannot be proven untrue" (*Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014]). "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean" (*Davis v Boeheim*, 24 NY3d 262, 269 [2014]). There are two forms of pure opinion. "It may be a statement of

opinion which is accompanied by a recitation of the facts upon which it is based, or it may be [a]n opinion not accompanied by such a factual recitation so long as it does not imply that it is based upon undisclosed facts" (*id*.). "[A]n opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, ... is a 'mixed opinion' and is actionable" (*id*.).

To determine whether a statement is pure opinion the following factors must be considered:

> (1) whether the specific language in issue has a precise meaning which is readily understood;
>
> (2) whether the statements are capable of being proven true or false; and
>
> (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact

(*Mann v Abel*, 10 NY3d 271, 276 [2008]).

First, as for the statements in which defendant refers to plaintiffs as "scammers" and a "scam," statements which "amount[] to no more than name-calling or a general insult" are not actionable in defamation action (*Klepetko v Reisman*, 41 AD3d 551, 552 [2d Dept 2007]). Plaintiffs argue that because of the trade in which it operates that, words like "scammer" and scam" move past "name-calling" or "general insults" as it impugns the basic integrity of a financial platform (*see Liberman v Gelstein*, 80 NY2d 429, 436 [1992] ["charges against a clergyman of drunkenness and other moral misconduct affect his fitness for the performance of the duties of his profession, although the same charges against a business man or tradesman do not so affect him"]). However, considering the broader public debate over the controversial role of the cryptocurrency industry at large (*see Berdeaux v OneCoin Ltd.*, 561 F Supp 3d 379, 390

[SDNY 2021] ["As a new and ever-developing concept, and with new cryptocurrencies popping up like dandelions, cryptocurrencies have evaded significant regulation, raising the risk for fraud and other misconduct"]), insults like "scammer" cannot be said to be so particularly damaging to plaintiff as to attach liability to defendant.

Second, as for defendant's statement that "I'm pretty sure with the ETH ETF now they're actually operating an illegal unregistered commodities exchange," within the broader context of the post this too is unactionable opinion. When plaintiff is referring to "ETH ETF" he is referring to the SEC's decision to approve the futures exchange-traded funds ("ETF") of the cryptocurrency Ether ("ETH"), which many analysts believe conclusively establishes Ether as a non-security commodity (NYSCEF Doc No 20). It appears that defendant is expressing a belief that because plaintiff had been approved as a securities exchange, but not a commodities exchange, that plaintiffs were violating federal regulation by allowing trading of ETH on their platform. Applying the *Mann* factors, and considering, that there are ongoing and active debates over how both individual cryptocurrencies, and cryptocurrencies at large should be classified, and what law they should be regulated under, defendant's statements and apparent belief that cryptocurrencies should remain classified as commodities, represents an unactionable opinion because defendant's readers would likely understand that this is his opinion based on a active debate in the cryptocurrency community.

Finally, as for the statement "They're the scammers who testified in front of congress reading the SEC's talking points in exchange for a sweetheart deal where they were the only ones able to get a broker dealer license to trade crypto securities," "[t]he culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a freewheeling, anything-goes writing style" (*Sandals Resorts*

Intern. Ltd. v Google, Inc., 86 AD3d 32, 43 [1st Dept 2011]). "[I]t is necessary to view allegedly defamatory statements published on the Internet within the broader framework on which they appear, taking into account both the tenor of the chat room or message board in which they are posted" (*id*. at 44). As such, readers on social media sites do not "not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts" (*id*. at 43-44).

Here, the broader context of the statement implies that defendant believes that plaintiffs received a *quid pro quo* deal with the SEC to receive the SPBD license in exchange for offering favorable testimony to Congress. Applying the *Mann* factors, the first two factors are in favor of the plaintiffs. The statement would be easily understood by defendant's readers, and it is capable of being proven true or false.

However, the third and in this case dispositive factor is in favor of the defendant. It is highly unlikely that anyone reading defendants' X post would come away with the conclusion that defendant is speaking with authority or with knowledge of unstated facts. While, plaintiffs argue that because defendant also references his personal relationship with plaintiffs' founders and co-CEOs that this may lead readers to believe that defendant has some insider knowledge and take his statements as fact, the post does not reference or suggest any sort of insider access.

Accordingly, the allegedly defamatory post consists of unactionable opinion and plaintiffs' complaint will be dismissed.

III. Attorney's Fees

Civil Rights Law § 70-a(1)(a) states "costs and attorney's fees shall be recovered upon a demonstration, … that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial

argument for the extension, modification or reversal of existing law." Having found that plaintiff's action involves a public petition, and that the plaintiff has failed to establish that its defamation claims have a substantial basis in fact or law, defendants are entitled to reasonable attorney's fees associated with defending this action.

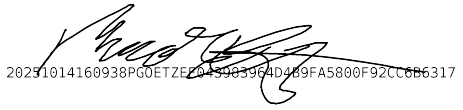
Accordingly it is,

ORDERED that defendant's motion to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that pursuant to Civil Rights Law § 70-a(1)(a) defendant is entitled to his reasonable attorney's fees associated with this action; and it is further

ORDERED that defendant shall submit an affirmation in support of his request for reasonable attorneys' fees within 20 days of entry of this order via NYSCEF and via e-mail to SFC-Part47-Clerk@nycourts.gov ; and it is further

ORDERED that any opposition to the request shall be submitted within 10 days thereafter.



10/14/2025
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**