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 Manos
v.	)	Magistrate Judge Baughman
JOHN DOE,	)	
Defendant.	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

PRELIMINARY STATEMENT

This libel suit stems from messages posted by John Doe, using the pseudonym "neutronb", on an Internet message board dedicated to public discussion concerning Plaintiff, SPX Corporation.

Doe's statements concerning SPX are neither defamatory nor actionable. On the contrary, they are archetypically the type of speech that must be protected – open and robust expressions of opinion concerning matters that are of vital concern to the public and the public weal. Given the current economic concerns facing our country, one would be hard pressed to imagine a more important subject of discussion and vigorous debate than the management (or mismanagement) of our publicly traded companies.

Nor has there ever been a more important forum to protect – Internet chat rooms. These new venues are the most open, democratic outlets for the "marketplace of ideas" ever to exist. They deserve the highest protection afforded under the law.

Defendant respectfully submits that this case must be dismissed for failure to state a claim upon which relief may be granted, for the simple reason that the statements at issue are not actionable as a matter of law. For the reasons set forth below, Plaintiff's lawsuit must be dismissed.

FACTS

A. The Parties.

Plaintiff SPX Corporation ("SPX") is a publicly traded company describing itself as a "global provider of technical products and systems, industrial products and services, and flow technology and service solutions." Plaintiff's Complaint, ¶ 2. SPX has business units throughout the United States, including an unspecified entity known as Stock Equipment Company located in Chagrin Falls, Ohio. Plaintiff's Complaint, ¶ 2.

Defendant John Doe, using the pseudonym "neutronb", posted two messages on an Internet message board dedicated to SPX. Plaintiff's Complaint, ¶ 3.

Nonparty Yahoo!, Inc. ("Yahoo!") is the host of the SPX message board. This message board provides a public forum "where internet (sic) users may discuss information about the company . . . The Yahoo! SPX message board is not affiliated with SPX." Plaintiff's Complaint, ¶ 6.

B. The Internet and The Yahoo! Message Boards.

The Internet presents a unique global medium for the exchange of ideas unlike any other. The Internet promises to transform the First Amendment "marketplace of ideas" from ideal to reality. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself

accepted in the competition of the market"). With a relatively small initial investment, any Internet user can bypass editors and publishers to speak directly to an audience of millions.

The United States Supreme Court has explicitly recognized the importance of the Internet as an outlet of free expression, describing it as "vast democratic fora" and "the most participatory form of mass speech yet developed" that "is entitled to the highest protection." *Reno v. ACLU*, 521 U.S. 844, 863 (1997). "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages . . . the same individual can become a pamphleteer." Id. at 853.

The democratic nature of discussion on the Internet means that the Internet speakers need not win the approval of the mainstream media in order to be heard—Internet speakers are free to define for themselves what topics are worthy of discussion. Almost inevitably, therefore, Internet discussions tend to be more lively and free-wheeling than discussions in the mainstream media, simply by virtue of the fact that they include more participants and more perspectives. Chat room conventions governing the tone and tenor of discussions also encourage the kind of debate idealized under the First Amendment, *i.e.*, debate that is "uninhibited, robust, and wide-open." *New York Times Co.*, 376 U.S. at 270.

Message boards like the one at issue here are typically devoted to the discussion of a particular company – in this case SPX. Discussion about the management and idle speculation about its future stock price, random musings about its prospects, and even "off-topic" trivia is common. *See Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184

(4th Cir. 1998). Board discussion resembles informal spoken conversation more than formal written conversation, and speed and spontaneity are prized so much that grammar, spelling and punctuation are often disregarded. Hyperbole, exaggeration and other emotional rhetoric are prevalent.

Most individuals post messages on the message boards under a pseudonymous "handle" or "screen name". Nothing prevents users from using their real names, but most choose to use nicknames. These typically colorful pseudonyms[1] protect the writers' identity from those who disagree with them. The use of pseudonyms also forces the audience to judge a speaker's arguments based on the words and their context, rather than the identity of the speaker. Moreover, many Internet users, like Defendant, take comfort in the fact that they are able to express their ideas freely, no matter how controversial, without fear of repercussions. Liability in this context could easily have the effect of chilling speech. This potential chilling effect is magnified by the ease with which plaintiffs can bring a defamation action for any online criticism.[2]

C. **The SPX Message Board.**

The Internet address for the SPX message board is http://messages.yahoo.com/?action=q&board=spx. Exhibit 1 to Plaintiff's Complaint informs us that the SPX message Board is active; there were just over 3,000 messages posted at the time the postings at issue in this case were printed.

---

[1] Some of the pseudonyms used by participants on the SPX chat board are "itchynsweaty", "accounts_deceivable", "just_2_cents" and "uptomyassinalligators".

[2] Plaintiffs have increasingly used the courts to breach Internet anonymity. Eleanor Abreu, EPIC Blasts Yahoo for Identifying Posters, The Industry Standard, ¶ 2 (Nov. 10, 1999); Bruce Keller and Peter Johnson, Online Anonymity: Who is John Doe, 5 BNA Electronic Com. And Law Rep. 70 (Jan. 10, 2000).

Every post on a Yahoo! finance chatboard, including the two at issue in this case, is automatically imprinted with the following cautionary statement:

> This board is not connected with the company. **These messages are only the opinion of the poster**, are no substitute for your own research, and should not be relied upon for trading or any other purpose.

See Exhibit 1 to Plaintiff's Complaint (emphasis added).

The messages on the SPX board are typical of those on other message boards; some users praise the company while others disparage it. And most messages contain colorful hyperbole and rhetoric, the type of statements that are routinely held to be nonactionable. For example, several users of the SPX board recently have discussed the company's financing and its use of Arthur Andersen as an accountant. On April 2, 2002, a pseudonymous writer known only as luv2talk22 wrote:

> Why did Blystone and Chuck Johnson, grandson of founder of Sealed Power/SPX and on Board of Director, sell their stock in December? Do they know something that we don't? Remember, Arthur Andersen is still their Auditor according to Annual Report.

See http://messages.yahoo.com/bbs?.mm=FN&action=m&board=7077928&tid=spw&sid=7077928&mid=3080, a true and correct copy of which is attached as Exhibit A for the Court's convenience.[3]

Another post confirms that message-board participants understand the nature of the forum. On March 23, 2002, a writer using the pseudonym "BooksNWorms" wrote:

[3] Exhibits A and B are provided to the Court to give context to the statements at issue. Defendant respectfully submits that they are not necessary to the consideration of this motion, but may, if the Court chooses, be considered without converting the Motion to Dismiss into a Motion for Summary Judgment. Courts may take judicial notice of matters of public record in considering motions under Rule 12(b)(6). *Anderson v. Simon*, 217 F.3d 472 (7th Cir. 2000); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015 (5th Cir. 1996). The court may also consider documents that are challenged by, and therefore incorporated into, Plaintiff's complaint. See *In re Donald J. Trump Casino Securities Litigation*, 7 F.3d 357 (3rd Cir. 1993)(court considered prospectus of company in dismissing securities fraud claim even though not attached to plaintiff's complaint).

> Anyone who buys or sells stock based on what they read on these message boards is foolish at best or a total moron at worst.

See http://messages.yahoo.com/bbs?.mm=FN&action=m&board=7077928&tid=spw&sid =7077928&mid=3070, a true and correct copy of which is attached as Exhibit B for the Court's convenience.

D. The Statements At Issue.

Neutronb posted two messages on the SPX Message Board on February 22, 2002. The first message, posted at 12:52 p.m., states:

> **TIMBER!!!!! ACCOUNTING FRAUD!!!!!!**
> by: neutronb
> Long-Term Sentiment: Strong Sell
>
> Get ready for and (sic) SEC and FBI probe.

Plaintiff's Complaint, Ex. 1, ¶ 8. The second message, posted one minute later, states:

> **SPX=Massive SEC and FBI Investigation**
> by: neutronb
> Long-Term Sentiment: Strong Sell
>
> Overleveraged, lots of insider selling, shit business and cooking the books.
>
> Price Target $30

Plaintiff's Complaint, Ex. 1, ¶ 8.

Plaintiff's Complaint fails to specify which of the statements in these posts are either false or defamatory. For purposes of this Motion, it will be presumed that each statement contained in the two postings is at issue. Thus, a total of seven statements are at issue: 1) "TIMBER!!!!!"; 2) "Accounting Fraud!!!!!!"; 3) "Get ready for and (sic) SEC and FBI Probe" and "**SPX = Massive SEC and FBI Investigation**"; 4) "Overleveraged"; 5) "lots of insider selling"; 6) "shit businesses"; and 7) "cooking the books."

E. This Lawsuit.

Plaintiff filed this lawsuit on May 1, 2002 in the Cuyahoga County Court of Common Pleas, alleging that neutronb's statements on the chat board were defamatory. On May 7, 2002, SPX issued a subpoena to Yahoo! to determine the identity of, and other personal information about, neutronb. SPX issued the subpoena without notice to the court or any defendant.

Yahoo! refused to respond to Plaintiff's initial subpoena, prompting Plaintiff to file a concurrent lawsuit in California, in order to issue a subpoena in California, Yahoo!'s principal place of business. Yahoo! notified Doe of this subpoena, and Doe filed a Motion to Quash in California. Plaintiff failed to respond to the Motion to Quash, and instead dismissed the California action before the court in California could rule on the Motion to Quash. SPX renewed its efforts to discover Doe's identity here in Ohio forcing Doe to remove SPX's case to this Court and seek a protective order. Specifically, on May 21, 2002, Doe filed a Motion to Quash a subpoena directed to Yahoo!

On July 1, 2002, this Court correctly reserved ruling on Doe's Motion to Quash, stayed discovery, and invited Defendant Doe to file a Motion to Dismiss.

ARGUMENT

I. Plaintiff's Complaint Is Particularly Suited For Dismissal Under Rule 12(b)(6) Because The Issue Of Whether A Publication Is Actionable Is A Question Of Law For The Court To Decide.

Whether a particular statement is actionable as libel is a question of law for the court to decide. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 705 (1986); *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666, 669 (1983).

Because of the potential chilling effect a lawsuit can have, early dismissal of libel claims is particularly important. The Ohio Supreme Court has stated:

> Summary procedures are especially appropriate in the First Amendment area . . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.

Dupler v. Mansfield Journal Co., 64 Ohio St. 2d 116, 120, 413 N.E.2d 1187, 1191, *cert. denied,* 452 U.S. 962 (1981). Indeed, courts often dismiss libel suits on the pleadings where it determines that the law precludes recovery. *See, e.g., Vail,* 72 Ohio St. 3d 279, 283, 649 N.E.2d 182, 186 (affirming dismissal of libel suit because statements at issue were protected opinion); *Surace v. Wuliger*, 25 Ohio St. 3d 229, 234, 495 N.E.2d 939, 943-944 (1986) (affirming dismissal of libel case even though the court of appeals had preferred waiting for a motion for summary judgment).

II. The Specific Context And Subject Matter Of Defendant's Allegedly Defamatory Statements Make Plaintiff's Complaint Particularly Suitable For Dismissal Under Rule 12(b)(6).

Criticism about corporate management and financial analysis is rarely actionable, and cases involving these subjects are particularly suited to dismissal on the pleadings. *See, e.g., Biospherics v. Forbes*, 151 F.3d 180 (4th Cir. 1998); *Jefferson County School District v. Moody's Investor Services*, 988 F. Supp. 1341 (D. Colo. 1997); *Morningstar v. Los Angeles Superior Court,* 29 Cal. Rptr. 2d 547 (Cal. Ct. App. 1994); *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 649 (D. Md. 1992) . These cases recognize that financial analysis is inherently speculative and that criticism of management should not be constrained by defamation claims.

The plaintiff in *Biospherics*, for example, had been the subject of scorn in a column published in Forbes Magazine under the headline, "Sweet-Talking Guys." The column stated that Biospherics' stock price was based on "hype and hope" and that "investors will sour on Biospherics when they realize that Sugaree [its main product] isn't up to the company's claims." *Biospherics*, 151 F.3d at 182. The court found the language not to be actionable, in part because the "tenor of the article . . . suggests that it reflects the writer's subjective and speculative supposition." *Id.* at 184.

The fact that Defendant's statements were made on an Internet chat board also make this case particularly suitable for dismissal. Although relatively few courts have evaluated allegations of defamation in the context of the Internet, a recent opinion from the Northern District of California is instructive. *See Nicosia v. De Rooy*, 72 F. Supp.2d 1093 (N.D. Calif. 1999). In considering the general context of the allegedly defamatory statements, the court in *Nicosia* found that in the context of a heated debate on the Internet, "readers are less likely to view statements as assertions of fact." *Id.* at 1101. The court continued:

> Moreover, in the context of the heated debate on the Internet, readers are more likely to understand accusations of lying as figurative, hyperbolic expressions.

Id. at 1106.

III. Defendant Is Entitled To Dismissal Of Plaintiff's Defamation Claim Because The Statements Challenged Are Constitutionally Protected Opinion.

The Ohio Supreme Court has ruled that "the Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the

press." The Court first recognized this protection in *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), and later reaffirmed it in *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279, 281, 649 N.E.2d 182, 185 (1995). Most recently, the court held that the "opinion privilege" applies to private citizens as well as to the media. *Wampler v. Higgins*, 93 Ohio St. 3d 111, 752 N.E.2d 962, syllabus of the court (2001).

In Ohio, a "totality of the circumstances" test is used to determine whether a statement is fact or opinion. *Vail*, 72 Ohio St. 3d at 282, 649 N.E.2d at 185. Under this test, courts should consider "the specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared." *Id.* This is not a bright-line test; instead, the standard is fluid. The facts of each case must be analyzed in the context of the general test. "Each of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented." *Id.* The determination of whether allegedly defamatory language is opinion or fact is a question of law to be decided by the court. *Id.* at 280, 649 N.E.2d at 184.

Applying this test, every statement neutronb made in his two messages on the SPX message board is protected expression of opinion.

1. The Specific Language Used.

When analyzing the specific language used to determine whether statements are fact or opinion, courts should look at "'the common usage or meaning of the allegedly defamatory words themselves.'" *Wampler v. Higgins*, 93 Ohio St. 3d at 127, 752 N.E.2d at 978, *quoting Ollman v. Evans*, 750 F.2d 970, 979-980 (C.A.D.C. 1984). Courts must "determine whether the allegedly defamatory statement has a precise meaning and thus is

likely to give rise to clear factual implications," or, conversely, if it is "'loosely definable' or 'variously interpretable' [and therefore] cannot in most contexts support an action for defamation. Readers are considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning.'" *Id.* at 127-128, 752 N.E.2d at 978.

Allegations of criminal conduct often fall into the latter category. Such terms often convey a meaning very different from their technical legal definitions. *See Thuma v. Hearst Corp.,* 340 F. Supp. 867, 871-872 (D. Ma. 1972) (newspaper article quoting father of teenage boy shot and killed by police referring to shooting as "cold-blooded murder" was "clearly hyperbole, expressing the father's most vehement feeling that the shooting was completely unnecessary," and did not convey charge of premeditated murder).

Similarly, in *Greenbelt Cooperative Publishing Assoc. v. Bresler*, the United States Supreme Court ruled that the term "blackmail" used in a report about heated city council debates would not have been understood to mean criminal conduct. "On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U.S.6, 13, 90 S. Ct. 1537, 1542, 26 L. Ed.2d 6 (1970). *See also National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 94 St. Ct. 2770, 41 L. Ed2d 745 (no implication of criminal conduct by use of the term "traitor" in defining a "scab"); *Renner v. Donsbach*, 749 F. Supp. 987, 994-995 (W.D. Mo. 1990) (statements about physician being "no better than a murderer" did not charge

physician with crime but were "nothing more than rhetorical hyperbole and vigorous epithets").

The same is true of language critical of certain business practices. In *Wampler v. Higgins*, for example, the Ohio Supreme Court held that a letter to the editor accusing a landlord of forcing a tenant out of business by charging "exorbitant rent" and describing the landlord as a "ruthless speculator" were nonactionable expressions of the author's opinions. *Id.* at 128, 752 N.E.2d at 979. Although the Court found the challenged statements "plainly pejorative in tone," the language was "inherently imprecise and subject to myriad subjective interpretations." *Id.* It explained, "The letter conjures a vast array of highly emotional responses that will vary from reader to reader. None is similar to the typical examples of punishable criminal or disciplinary conduct." *Id., quoting Vail,* 72 Ohio St. 3d at 283, 649 N.E.2d at 186.

a. "Accounting Fraud!!!!!!" And "cooking the books."

Here, "Accounting Fraud" and "cooking the books" do not convey serious accusations of specific criminal activity. These terms are vague, broad and loosely used to convey a warning about this company. Accounting fraud can mean anything from aggressive accounting to bookkeeping irregularities to white-collar criminal activity. See Sauer, *Financial Statement Fraud: the Boundaries of Liability Under Federal Securities Laws*, 57:3 The Business Lawyer 955 (May 2002). "Cooking the books" is a typically colorful epithet meant to create emotional reaction in a reader, from disgust to caution to utter disbelief. Like the term "Accounting Fraud", it does not convey a specific factual claim.

The message conveyed by the punctuation should not be lost in the analysis. The specific term used in neutronb's message was "Accounting Fraud!!!!!!" – six exclamation points. This is a clear signal to any reasonable reader that the message is hyperbole.

b. "Get ready for and (sic) SEC and FBI Probe" and "SPX= Massive SEC and FBI Investigation"

These statements, like the others, convey no accusation of any specific criminal conduct. Indeed, the very language used conveys a clear message that the author is predicting – *i.e.*, rendering an opinion – that some loosely defined investigation may occur in the future.

These statements, again like the others, also clearly signal that the message is intended as hyperbole. The message is not just that an investigation is about to occur, it is a "massive" investigation, by not one but two separate federal agencies.

c. "TIMBER!!!!!" "shit businesses" and "overleveraged"

The statements "TIMBER!!!!!," "shit business" and "overleveraged" are clearly statements of opinion. All convey subjective beliefs concerning SPX and its business. While these statements are not flattering, they are classic examples of language that can only be identified, on its face, as opinion.

c. "lots of insider selling"

Of all of the statements at issue, this is the only one that could arguably convey a specific meaning, but for the context in which it was made. For that reason it merits particular attention. The term "insider selling" refers to the fact that employees, and particularly officers of the company, have been selling their shares. It can and should be distinguished from "insider trading," which is arguably a term of art that sometimes, but

not always, refers to an insider buying to selling stock based upon non-public information. Insider selling is not a crime. Insider trading is.[4]

The specific language used here is not defamatory. The accusation is that there is "lots" of insider selling. And although "insider selling" sometimes conveys a specific meaning, in this case it is clearly an expression of opinion. A "lot" to one investor may seem trivial to another. Whether there is too much or not enough "insider selling" is necessarily a statement of opinion, and not actionable.

2. **Verifiability.**

The second factor of the *Scott/Vail* test concerns whether the statements are verifiable, or "objectively capable of proof or disproof, for 'a reader cannot rationally view an unverifiable statement as conveying actual facts.'" *Wampler*, 93 Ohio St. 3d at 129, 752 N.E.2d at 979, *quoting Ollman*, 750 F.2d at 981. "An obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits of no method of verification." *Id.*

a. **"Accounting Fraud!!!!!!" And "cooking the books."**

These terms, as discussed above, convey the possibility of a wide range of unspecified practices. As Sauer observes in his article concerning Financial Statement "Fraud", there is an almost limitless array of mechanisms that can constitute financial fraud. Moreover, Sauer observes, there is "legitimate subjectivity [concerning] the line

[4] If neutronb had accused SPX of insider trading he would have an absolute defense based upon truth – SPX's former director of taxes recently entered into a consent decree with the SEC to settle charges that he made insider trades ahead of SPX's hostile takeover of Echlin, Inc., and agreed to pay $320,474. *SEC v. Sedlacek*, Case No. 00 CV 7399, U.S. Dist. Ct. S.D.N.Y. Although not necessary to the disposition of this case, the Court can take judicial notice of these public proceedings.

between aggressive accounting and violative conduct. ... Sauer, 57 The Business Lawyer 955, 957.

A successful shareholder suit, or additional claims against SPX's now defunct audit firm, might prove the truth of these statements. But their inherent subjectivity makes proof positive, one way or the other, difficult if not impossible under ordinary circumstances.

b. **"Get ready for and (sic) SEC and FBI Probe" and "SPX= Massive SEC and FBI Investigation"**

As discussed above, these statements are predictions of future events; by their nature they are not verifiable. They are necessarily opinion. Who knew five months ago, after all, that Enron would collapse, Arthur Andersen would be convicted of felonies, WorldCom would declare bankruptcy, the founder of Adelphia and his son would be led away in handcuffs, and a Republican-dominated Congress would consider, let alone pass, aggressive business regulations? Who would have guessed that Martha Stewart, of all people, would come under scrutiny for insider trading? Predictions may or may not come true. The point here, however, is that predictions, no matter how absurd, far-fetched or pejorative, are not actionable as defamation.

c. **"TIMBER!!!!!" "shit businesses" and "overleveraged" and "lots of inside selling"**

These are classic examples of standardless statements not amenable to objective proof or disproof. Each one does little more than raise questions: Does "Timber!!!!!" mean the whole company is collapsing, or merely that some of its product lines are

sagging? "Overleveraged" and "lots of inside selling" are relative concepts. Does a debt-to-equity ratio of 5 to 1 mean a company is "overleveraged"? Because there is no set standard by which to measure the "truth" of these statements, they are, by their nature, opinion.

3. General Context.

The third inquiry under the *Scott/Vail* totality-of-the-circumstances test is consideration of the "immediate context" in which the allegedly defamatory statement appears. "[T]he language surrounding the averred defamatory remarks may place the reasonable reader on notice that what is being read is the opinion of the writer." *Wampler*, 93 Ohio St. 3d at 130, 752 N.E.2d at 980.

In *Wampler*, the Court found the subject letter to the editor a "vague polemic" in which the author "sought to 'ventilate' his personal frustrations and opinions" rather than "set forth any verifiable statements of fact." *Wampler*, 93 Ohio St. 3d at 130, 752 N.E.2d at 980. Similarly, in *Scott*, the Court found that the defendant sports columnist made no "attempt to be impartial" in his article about a public school superintendent's testimony at a hearing about a fracas at a high school wrestling match. It concluded that "while [the defendant's] mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept [his] statements as an impartial reporting of perjury." *Scott*, 25 Ohio St. 3d at 253, 496 N.E.2d at 708.

Relevant to this inquiry is whether the "author represents that he has private, first-hand knowledge which substantiates the opinions he expresses . . . ." *Scott*, 25 Ohio St. 3d at 251, 496 N.E.2d at 707, *quoting Ollman*, 750 F.2d at 979. In *Wampler*, the Court found further support for the unverifiability of the challenged statements in the fact that

the defendant provided no supporting references in his letter for any of the disparaging remarks. *Wampler*, 93 Ohio St. 3d at 129-130, 752 N.E.2d at 980.

As in *Scott*, any reader of neutronb's two posts "would be hard pressed to accept [the] statements as an impartial reporting" concerning any of the seven statements at issue. Two apparently hurried notes were posted (with exclamation points and typographical errors intact) within a minute of each other. There is no suggestion or hint that the author has inside information, or is basing his opinions on any facts known only to him. The context of these posts clearly conveys that they are no more than expressions of opinion.

4. **Broader Social Context – Genre**

The fourth consideration under the *Scott/Vail* test is the broader context of the allegedly defamatory remarks. "'Some *types of writing or speech by custom or convention* signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.'" *Wampler*, 93 Ohio St. 3d at 131, 752 N.E.2d at 981 (adding emphasis), *quoting Ollman*, 750 F.2d at 983. This factor focuses "on the unmistakable influence that certain 'well established *genres* of writing will have on the average reader.'" *Id.*

Indeed, the Ohio Supreme Court has recognized that the context in which statements appear – both internally and externally – can make an otherwise actionable statement an obvious expression of opinion. In *Scott*, the Court held that, even though the specific language at issue conveyed an accusation of perjury, and that statement was objectively

verifiable, the context of the article, a sports page, was "a traditional haven for cajoling, invective, and hyperbole." The Court stated,

> On balance, however, a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion. Moreover, the allegations that Milkovich or Scott 'lied' based upon the erroneous quote by Meyer would appear to fall into the area of law where '...we protect some falsehood in order to protect speech that matters.'

Id., quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S. Ct. 2997, 3007, 41 L. Ed.2d 789 (1974).

Similarly, The Ohio Supreme Court held in *Wampler* that the fact that the statements at issue appeared in a letter to the editor weighed in favor of applying the opinion privilege. It explained, "Letters to the editor, though at times intemperately worded, are integral to the 'robust and uninhibited commentary on public issues that is part of our national heritage.' . . . The 'vituperative wording' of these letters serves to warn readers that, in contrast to the factual news articles appearing elsewhere in the paper, the letters are part of a 'social forum for personal opinion.'" *Id.* (citations omitted).

The context of the statements at issue in this case weighs heavily in favor of finding that all of the statements at issue are protected opinion. The forum in which the statements were published – an Internet chatroom – clearly conveys to any readers that the statements are "cajoling, invective, and hyperbole." The Web pages on which the statements were published explicitly proclaim that the statements are "opinion"; and if there is any doubt about readers' perceptions, it is put to rest by the March 23, 2002 post from BooksNWorms:

> Anyone who buys or sells stock based on what they read on these message boards is foolish at best or a total moron at worst.

Although the Internet is relatively new, the nature of the forum is not. The Yahoo! chatboards bear a striking resemblance to the op-ed pages of newspapers; the posts are very much like letters to the editor, only there is no "editor" to screen the posts. It is, if anything, *more* "integral to the robust and uninhibited commentary on public issues that is part of our national heritage." 93 Ohio St.3d at 131. As in *Scott*, it is both a place where readers *expect* to see opinion, and a place deserving special protection, even if it means that we "protect some falsehood to protect speech that matters."

All four of the *Scott/Vail* factors require the conclusion that the speech at issue is opinion. Neutronb has a right, protected by the separate and independently sufficient provisions of the Ohio Constitution, to express his opinions concerning SPX. SPX may not like those opinions, but it has no right to silence them.

CONCLUSION

For all of the foregoing reasons, neutronb respectfully submits that Plaintiffs' Complaint must be dismissed pursuant to F.R.C.P. 12(b)(6), because Plaintiff has failed to state a claim on which relief may be granted.

Respectfully submitted,

David B. Webster (0053411)
E-mail: dbw@websterlaw.com
Beth Brandon Webster (0050446)
E-mail: bbw@websterlaw.com
Laura E. O'Neill (0072704)
E-mail: leo@websterlaw.com
WEBSTER & WEBSTER LLP
1220 West 6th Street, Suite 600
Cleveland, Ohio 44113
(216) 566-1144 Telephone
(216) 566-1221 Facsimile

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Dismiss has been served by regular U.S. Mail, postage prepaid, this 31st day of July, 2002 upon the following:

James R. Wooley, Esq.
Terry M. Brennan, Esq.
Baker & Hostetler, LLP
3200 National City Center
1900 East 9th Street
Cleveland OH 44114-3485

One of the Attorneys for Defendant