UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH M. SALVANI and JFS INVESTMENTS INC., Plaintiffs, -against- ADVFN PLC, a company incorporated under the laws of the United Kingdom, INVESTORSHUB.COM, INC., and JOHN DOE, known herein as "brkylnrusso," Defendants.	**No. 13 Civ, 7082 (ER)** **ECF Case**

PLAINTIFFS' JOSEPH M. SALVANI and JFS INVESTMENTS INC., RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MOTION TO DISMIS THE SECOND AMENDED VERIFIED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND/OR FOR THE FAULURE TO STATE A CAUSE OF ACTION

The Law Offices of Douglas R. Dollinger
& Associates
Douglas R. Dollinger
50 Main Street-Suite 1000
White Plains, New York 10606
Tel. 845.915.6800
Fasc. 845.915.6801
ddollingeresq@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS CONT.

TABLE OF AUTHORITIES

CASES:

STATUTES:

FEDERAL RULES OF CIVIL PROCEDURE:

FEDERAL REPORTS

Preliminary Statement

The matter before this Court presents principally a single question about the scope of federal securities laws and primary liability under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 ("Rule 10b- 5"), 17 C.F.R. § 240.10b-5.

Notwithstanding Defendants' general reliance on Rule 12(b) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") the arguments propose a single theory for dismissal of Plaintiffs' claims: 1) by a facial attack on the Second Amended Complaint ("SAC") for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1); and 2) for failure to state a claim under Rule 12(b)(6).

Resolution of the issue turns on the Court's determination of whether claims asserted in the SAC. **[DE 17 ¶¶2, 19.]** alleging that, iHub- ADVFN[1], as the webhost provider and secondary actors can be held jointly liable with Defendant brklynrusso as primary violators under §10(b) of the Exchange Act and Exchange Rule 10b-5 for the portion of false statements made or created and attributed to iHub at the time of publication and which have caused financial injury to Plaintiffs [2].

Statement of the Claims

Plaintiffs claim that as of August 2013 they were engaged in a contractual agreement with Code Smart Holdings, Inc., a publically traded OTCCB company

[1]Henceforth, all references to iHub are intended to include ADVFN for their joint and several liability.

[2]In the alternative Plaintiffs' arguments include supplemental jurisdiction under New York State Law pursuant 28 U.S.C. § 1367.

[Ticker "ITEN"]. The contract provided payment in monetary terms and ITEN Securities. **[DE 17 at ¶ 34].**

Plaintiffs alleged that defendants iHub was a primary violator of Federal Securities laws 10(b) and Securities Rules 10b-5 (a)-(c) for the reason that in the course of their business i-Hub provided a contractual-membership forum which they controlled and which provided a manipulative device allowing material misstatement of facts through affirmative statements and omissionS together with the statements of defendant brklynrusso which have caused damages to Plaintiffs in the value of the ITEN shares and contract. **[DE 17 at ¶ 34].**

The SAC alleges that the Defendant iHub is in the business of providing information related to the securities markets and has developed-created its own pre-defamatory banners attributable to them concerning comments on markets analysis and on individuals and entities where iHub failed to disclaim the membership Postings and otherwise ratified the Postings encouraging the comment-authorship of per-se defamatory Posts providing its membership with the message boards containing defamatory content-specific banner headings created by them such as "Most Shady OTC/PK, CEO's CROOK" "Fighting the Crooked CEO"s and/or the MM's that HELP THEM", "Crooks, Frauds, Liars, and Banksters", and "Crooked's Den of Self Actualization". **[DE 17 at ¶ 34].**

On or about September 5, 2013 at 10:30:33AM, Brklynrusso, who is a subscriber of, and known only to iHub posted the following on iHub's message board: titled "CodeSmart Holdings, Inc. (ITEN)" stating:

> **salvani was a former broker barred from the financial industry.** He now gets "consulting" jobs with OTC bulliten board co's that have no other means to raise money so he goes out w/ his cronies (brokers he knows)that promote the stock. How he gets paid? The brokers are given restricted stock which they subsequently sell **he gets paid off with cash in a bag.** The stock usually collapses w/ little value once they have exited. Just google Joe Salvani: **[Emphasis added.]**
>
> http://www.forbes.com/forbes/1998/0504/6109174s1.html he works with this group out on LI and a broker Daniel welsh or walsh from garden state securities who also get stock in all of salvanis deals. they get stock as an advisor for pretty much doing nothing....its a total joke and im shocked the sec hasn't knocked on their door yet.
>
> as for ITEM, 35k rev losing 2mil ayr w/ a 50mil mkt cap....you tell me if this is a real px at 4**? pump n dump at its best [Emphasis added.] [DE 17 ¶42.]**

That on or about September 5, 2013, Plaintiff Salvani discovered the Posting and on that day made a formal written demand of Defendant iHub.com informing them of the unlawfulness and per-se defamatory nature and content of the Posting demanding the Message-Posting be removed from the iHub.com. **[DE 17 ¶42.]**

On or about September 9, 2013, in violation of the stated terms of membership the webmaster for iHub.com, David Lawrence responded to Plaintiff Salvani's demand refusing or otherwise failing to remove the Message-Posting despite its per-se defamatory content requiring Salvani to obtain a Court order and further citing iHub.com's right "not to make value judgments on the veracity" of its' members' Message-Postings. **[DE 17 ¶42.]**

Shortly after the Posting the false rumors spread rapidly across Wall Street. The media and certain subscriber-based news services quickly picked up the Posting and further disseminated it throughout the marketplace. **[DE 17 ¶42.]**

Under the circumstances, by reason of the banner specific content and failure to disclaim, iHub has adopted and ratified the false information published about Plaintiff Salvani. iHub's forum presented-offered banner specific content which was directly attributed to them with the result being a market decline in the price of ITEN stock **[DE 17 ¶¶46-49.]**

The entirety of the statements without a disclaimer or retraction as demanded and as controlled by Defendants has caused damaged to Plaintiffs in the value of their ITEN securities resulting in a loss of value in Plaintiffs' property.

Notwithstanding the fact that brklynrusso allegedly created the underlying false posting it was these statements as adopted by iHub, coupled with the forum-environment and banner specific content attributable to them that investors relied upon. Under the circumstances iHub is a primary violator of Rule 10b-5 where as a secondary actor at the time of dissemination caused the injury to Plaintiffs.

Standard of Review

Fed R. Civ. P. 12(b)(1)

The inquiry on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) concerns whether the district court has the statutory or constitutional power to adjudicate the case. *See Makarova,* 201 F.3d at 113. A Plaintiff must make a preliminary

showing, however, such a showing is not meant to be overly burdensome, "allowing for subject matter jurisdiction so long as the 'the federal claim is colorable.'" *Cromer Fin. v. Berger*, 137 F. Supp. 2d 452, 467 (S.D.N.Y. 2001) (*quoting Savoie v. Merchants Bank,* 84 F.3d 52, 57 (2d Cir. 1996)); *see also Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 121 n.l (2d Cir. 1998).

In a close case, the factual basis for a court's subject matter jurisdiction may remain an issue through to trial, and, if and when doubts are resolved against jurisdiction, warrant dismissal at that time." (citations and quotations omitted).

Rule 12(b)(1) motions generally take one of two forms: (1) a facial attack on the sufficiency of the allegations in the complaint as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based. *Ruiz v. McDonnell,* 299 F.3d 1173, 1180 (10th Cir. 2002), *citing Holt v. United States,* 46 F.3d 1000, 1002-03 (10th Cir. 1995).

In reviewing a facial attack on the complaint as before the Court, a district court must accept the allegations in the complaint as true." 6*Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)) (internal citations omitted).

* * * *

Fed R. Civ. P. 12(b)(6)

When reviewing a Fed R. Civ. P. 12(b)(6), the court must "tak[e] all factual allegations in the [verified] complaint as true and constru[e] all reasonable inferences

in favor of plaintiffs." *Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Absolute Activist Value Master Fund LTD v. Ficeto*, 677 F.3d 60, 65 (2d Cir. 2012).).

In order to survive a 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) (quotations and citations omitted). 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.

A Rule 12(b)(6) dismissal "is inappropriate unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle [them] to relief." *Sec. Investor Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 68 (2d Cir. 2000) Dismissal is not warranted unless "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

* * * *

Subject Matter Jurisdiction Under the Exchange Act 10b and SEC Rule 10b-5

The issue of subject matter and SEC Rule § 10(b) has been made clear by our Supreme Court in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct 2869.

> "what 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, "refers to a tribunal's ' "power to hear a case." ' " *Union Pacific R. Co. v.*

> *Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Re- gion,* 558 U.S. ----, ----, 130 S.Ct. 584, 596, 175 L.Ed.2d 428 (2009) (quoting *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), in turn quoting *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief. See *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946)."

This Court has subject matter jurisdiction under 15 U.S.C. § 78aa to adjudicate the question of whether § 10(b) applies in this case.

Section 78aa provides:

> "The district courts of the United States ... shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." *Morrison*, 130 S. Ct. at 2877. **[Emphasis Added.]**

Morrison makes it clear that the questions concerning whether Defendants' activities apply to certain conduct is a "merits" question and not simply an issue of subject matter jurisdiction. *Morrison*, 130 S. Ct. at 2877.

In applying the forgoing legal principles the review in this case turns on the merits of the claim as guided by Fed. R. Civ. P. 12(b)6 applications and whether Plaintiffs' SAC states a cause of action under the 10(b) and 10b-5, and not whether the Court has the subject matter jurisdiction over the cause with the Court accepting the claims of the complaint as true and giving all reasonable inferences to Plaintiffs. *Absolute and Conboy, supra.*

Arguments

1. iHub is a Primary Violator Under the Exchange Act 10b and SEC Rule 10b-5

Based on the overall content of the statements Plaintiffs have presented colorable claims sounding in facts which show that defendant iHub's own banner headings and participation in the creation of brklynrusso statements was attributable to iHub as a primary violator for securities fraud at the time of publication and not simply an aider and abettor.

The distinction between primary liability under Rule 10b-5 and aiding and abetting is fundamental in this case for the reason that the Supreme Court has concluded that "the 1934 [Exchange Act] does not itself reach those who aid and abet a § 10(b) violation. *Central Bank v. First Interstate Bank,* 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

Notwithstanding the Supreme Court's holding that Rule 10b-5 liability does not extend to aiders and abettors, the Court acknowledged that "secondary actors" could, in some circumstances, still be liable for fraudulent conduct. *Id. at 191.*

The Court explained that "[a]ny person or entity, ... , who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met. *Id.*

This Circuit holds that a secondary actor can be held liable in a private damages action brought pursuant to Rule 10b-5(b) for false statements attributed to the secondary-actor at the time of dissemination.

A claim under §10(b) must allege a defendant has made a material misstatement or omission indicating an intent to deceive or defraud attributable to the defendant. *Central Bank, supra.*

Putting a working definition behind the Central Bank holding means a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). "Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b)." (quoting In re *MTC Elec. Techs. Shareholders Litig.*, 898 F. Supp. 974, 987 (E.D.N.Y. 1995).

The test used to determine a right to private securities litigation liability against secondary actors is set forth in *Shapiro v. Cantor*, 123 F.3d 717 (2d Cir. 1997). In applying a test the Second Circuit has adopted the bright line" analysis to distinguish between primary violations of Rule 10b-5 and aiding and abetting. The Court outlined the "bright line" approach, holding that "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement not attributed to that actor at the time of its dissemination." *Id.*

While the "[t]he mere identification of a secondary actor as being involved in a transaction, or the public's understanding that a secondary actor "is at work behind the

scenes" are alone insufficient . . . . [to] be cognizable, a plaintiff's claim against a secondary actor . . . . based on that actor's own 'articulated statement,' or on statements . . . . explicitly adopted by the secondary actor are actionable". *Lattanzio,* 476 F.3d at 155.

In this case the claims meet the bright line standard for the reason as alleged in the SAC the banner headings presented on the iHub Website are specific and attributable to iHub at the time of the postings dissemination with iHub being liable as a primary violator to Plaintiffs for their damages. **[DE 17 ¶42.]**

2. Plaintiffs have Pled Facts Establishing Liability Under the Exchange Act 10b and SEC Rule 10b-5

To maintain a private damages action under § 10(b) and Rule 10b-5, a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Stoneridge Inv. Partners,* 552 U.S. at 157 (citing *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 341-42 (2005). The SAC meets and exceeds the pleading requirement necessary to establish each of the foregoing elements.

3. Plaintiffs' 10(b) Reliance and their Fraud-on-the-Market Claims Are Colorable

By way of their Motion Defendant iHub argues that the Court lacks subject matter jurisdiction for the reason that even if the factual statements are taken as true the complaint lacks the facial sufficiency necessary to create the relationship between

the proof needed to maintain a cause of action involving material misrepresentations, scienter and reliance on the misrepresentation claimed, loss causation, economic loss, corrective disclosure and material risk so as to produce a violation of Rules § 10(b) and 10b-5 and damages attributable to them.

4. Where Defendants Intentionally Created Banner Headings of a Per–Se Defamatory Nature Plaintiffs Need Not Plead Direct Reliance on the Misstatements in an Open and Developed Market

Plaintiffs invoke the presumption of reliance doctrine based on the fraud-on-the-market theory adopted in Basic, 485 U.S. at 241-42, 108 S. Ct. 978 (reliance of investors on misrepresentations is presumed where market for securities is open and developed)[3].

Defendant in support of their arguments point to the lack of any **direct reliance** claims on any material misrepresentations asserted by Plaintiffs and generally dismiss the Plaintiffs' fraud-on-the-market theory arguing that ITEN is an OTC stock which does qualify as a securities regulated under the Securities laws and Regulations invoking the defenses that Rules § 10(b) and 10b-5 are inapplicable to their conduct.

[3] And, "where the success of a fraud does not require an exercise of violation by the plaintiff, but instead requires an exercise of volition by other persons, there need be no showing that the plaintiff himself relied upon the deception.") (citing *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 797 (2d Cir. 1969), *cert. denied, 400* U.S. 822 (1970)); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 635 (2d Cir.) ("Whatever need there may be to show reliance in other situations [citing *List* and other cases], we regard it as unnecessary in the limited instance when no volitional act is required and the result of a forced sale is exactly that intended by the wrongdoer."), *cert. denied,* 389 U.S. 970 (1967).

Defendants present two cases in support of the argument where "this Court has already distinguished the OTCBB from well-developed markets" *Alki Partners, L.P. v. Vatas Holdgin GmbH*, 769 F. Supp. 2d 468, 493 (S.D.N.Y. 2011), further citing that "the Court is unaware of any court holding that the OTCBB…meet[s] this…standard.") and *Burke v. China Aviation Oil (Singapore) Corp., Ltd.*, 421 F. Supp. 2d 649, 653 (S.D.N.Y. 2005) (same) **[DE 19 .]**

Defendant ignores however, that the SEC has successfully argued that reliance is satisfied where the case involves securities traded on the over-the-counter securities market. *SEC v. Ficeto,* No. 11 Civ. 1637 (GHK), 2011 U.S. Dist. LEXIS 150141, at *31 (C.D. Cal. Dec. 20, 2011) (holding *Morrison v. National Australia Bank Ltd.,* 130 S. Ct. 2869 (2010)."did not purport to overturn the universally accepted principle that § 10(b) applies with equal force to market manipulation on national exchanges and the domestic over-the-counter market"). *Morrison v. National Australia Bank Ltd.,* 130 S. Ct. 2869 (2010).

In the cases cited by Defendants those courts were likely unaware of the Ficeto holding:

> 'The Exchange Act's stated purpose is '[t]o provide for the regulation of securities exchanges *and of over-the-counter markets* operating in interstate and foreign commerce[.]" Securities Exchange Act of 1934,48 Stat. 881 (1934) (emphasis added) cited in (Ficeto). The Act's Senate Report likewise noted the "unorganized 'over-the-counter' markets" that the bill addressed and that it was "vitally necessary" to provide the Commission with authority "to subject [over-the-counter markets] to regulation similar to that prescribed for transactions on organized exchanges." S.Rep. No. 73–792, at

> 6 (1934). Thus, the textually grounded purpose of the Act is to treat securities traded on the domestic over-the-counter market (for example, via the OTCBB and Pink Sheets) similar to securities traded on national exchanges, having drawn no distinction in articulating the need to regulate both." (Ficeto).

Based on the holding in Ficeto and the Congressional intent referenced therein, the Court should find that the OTCBB is an open and well developed market covered by the Exchange Act and that Plaintiffs may rely on the presumption of reliance doctrine.

a. Plaintiffs Have Properly Pled Loss Causation:

Notwithstanding, Defendants claimed lack of specific allegations related to the loss causation facts at play in this case, the Second Circuit refrains from specifying a pleading stringency for loss causation, and instead states that "loss causation is a fact-based inquiry and the degree of difficulty in pleading will be affected by circumstances[.]" *Lentell v. Merill Lynch & Co.,* 396 F.3d 161, 173 (2d Cir. 2005)). Moreover, "[…] if the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss." *Emergent Capital v. Stonepath Group Inc.,* 343 F.3d at 197." Id. 173.

The SAC expressly addresses the change in price, Plaintiffs' allegations are consistent and provide claims in support of all of the elements required to satisfy the 10(b)-10b-5 and the intervening events. **[DE ¶¶ 1-76.]**

Defendants mistakenly argue that the reliance plausibly causing the damages and sale by Plaintiffs alleged in the SAC is claimed to be the result of what Brklynrusso posted on the iHub Board and that it was impossible to rely on the posting as Plaintiff knew better. **[DE 17.]**

Clearly, the claim is not that the Plaintiff relied himslf on the false information which caused the damages and the ITEN stock price to fall, this is Defendants' theory not Plaintiffs'. By maintaining their own theory of the case, Defendants are left to speciously and freely argue that the lack of "Corrective Disclosure" and "Materialization of the Risk" were absent in support of the claims for market adjustment to show a loss.

This, however, is not the theory of Plaintiffs' case. Plaintiffs allege that Defendants intentionally developed and published pro-se defamatory statements on the iHub Boards causing other investors to sell off their shares of CodeSmart thereby plunging the price of the stock and causing the loss to the Plaintiffs. Plaintiffs' theory, a theory universally accepted by the courts allows Plaintiffs to prove loss causation differently than how the Defendants stated in their Memorandum.

Moreover, any claim requiring Plaintiffs to meet the corrective disclosure or materialization of risk standards is marred in the control of the postings attributable to iHub. Plaintiffs requested that corrective action be taken and Defendant iHub refused to provide any type of retraction or even a disclaimer. **[DE 17¶¶57-58.]**

The Court's attention is directed to *In re Omnicom n Group, Inc. Securities Litigation*, where that court held:

> "Use of the term . . . . 'Loss causation' may . . . . refer to the requirement that the wrong for which the action was brought **is a but-for cause or cause-in-fact** of the losses suffered, also a requirement for an actionable Section 10(b) claim. Dura Pharms., 544 U.S. at 342, 125 S.Ct. 1627; see also 15 U.S.C. § 78u-4(b)(4) . . . . In short, **plaintiffs must show 'a sufficient connection between [the fraudulent conduct] and the losses suffered**.' Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 157 (2d Cir.2007).3 This requirement exists . . . . to protect them against those economic losses that misrepresentations actually cause.' Dura Pharms., 544 U.S. at 345, 125 S.Ct. 1627." In re Omnicom Group, Inc. Securities Litigation, 597 F.3d 501 (2d Cir.2010)." **[Emphasis added.]**

The Second Circuit applies a two-part loss causation test, requiring that the **loss be foreseeable** and that the intended misrepresentation be **within a zone of risk** concealed.

"We have described loss causation in terms of the tort-law concept of proximate cause, i.e., 'that the damages suffered by plaintiff must be a foreseeable consequence of any misrepresentation or material omission,' *Emergent Capital*, 343 F.3d at 197 (quoting *Castellano v. Young & Rubicam*, 257 F.3d 171, 186 (2d Cir.2001)); [...]

Put another way, a misstatement or omission is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged[.] See *AUSA Life Ins. Co. v. Ernst & Young,* 206 F.3d 202, 238 (2d Cir.2000) (Winter, J., dissenting)." *Lentell v. Merill Lynch & Co.,* 396 F.3d 161, 173 (2d Cir. 2005).

There can be little doubt iHub intended to create the banner headings and content specific boards without disclaiming the postings and ratified or adopted posting; the banner heading and content specific boards are within the zone of risk

created where the statements were material and were the proximate cause of the Plaintiffs' loss. At the very least the matter is a question of fact and not a question of law. **[DE .]**

b. Loss Foreseeability Has Been Properly Alleged:

To prove that the loss was foreseeable, the Plaintiffs have alleged that Defendants could reasonably foresee that inviting and developing content headings expressing a criminal nature that was defamatory per-se to the targeted victim and subsequently published on a board dedicated to a particular stock caused a sell-off of that stock and thereby caused a financial loss to Plaintiffs who own that stock.

Here, as pled the Plaintiffs' SAC alleges that the Defendants failed to disclaim, and intentionally developed-created its own per-se defamatory banners encouraging the comment-authorship, ratifying and otherwise expressly adopting per-se defamatory posts by its members allowing postings to be made using message boards created by them and containing content-specific banner headings such as "Most Shady OTC/PK, CEO's CROOK" "Fighting the Crooked CEO"s and /or the MM's that HELP THEM", "Crooks, Frauds, Liars, and Banksters", and "Crooked's Den of Self Actualization". [**DE 17** at ¶ 34].

Under the circumstances, iHub's conduct was intentional-foreseeable and an adoption of the posting without a disclaimer and/or correction action taken to the statements that "**salvani was a former broker barred from the financial industry .**

. . he gets paid off with cash in a bag . . . [and that] **this is a real . . . pump n dump at its best [Emphasis added.] [DE 17 at ¶ 38].**

The SAC clearly provides that brklyrusso's comments were invited, developed, adopted and ratified by the Defendant iHub where the trading volume for shares of CodeSmart Holdings, Inc. increased dramatically and the stock price fell by almost twenty-five percent in two days of trading. (**DE 17** at ¶¶ 46-49).

The loss to the Plaintiffs included the decreased value of the shares held by the Plaintiffs as well as the loss in value of the contracts that were not performed between Coldsmart Holdings, Inc. and the Plaintiffs as a result of the posting.

Plaintiffs therefore contend that based on these facts the court should find that Plaintiffs can satisfy the "foreseeability of the loss" element of the test.

c. <u>"Zone of Risk" or Same "Subject" Test</u>

The second part of the Second Circuit's loss causation test is the "zone of risk" or same "subject" test. *Lentell v. Merill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005). In *Lentell*, the court defined the "zone of risk" test as: "[A] misstatement or omission is the "proximate cause" of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by a disappointed investor." *<u>AUSA Life Ins. Co. v. Ernst & Young</u>, 206 F.3d 202, 238 (2d Cir.2000) (Winter, J., dissenting)* cited *Lentell.)*

The court also defined the "subject" approach: "[T]o establish loss causation, 'a plaintiff must allege that the subject of the fraudulent statement or omission was the

cause of the actual loss suffered,' *Suez Equity Investors, L.P. v. Toronto-Dominion Bank,* 250 F.3d 87, 95 (2d Cir.2001) (emphasis added) cited in *Lentell.*

Defendants argue that that the conduct complained of did not have the effect of causing shareholders to refrain from market sales. **[DE 19.]** However the argument offered is misplaced. The facts in the instant case are distinct from the facts in *Dura* and its progeny in that this is not a case where the Defendants' misstatements were made in order to mislead investors into buying or holding onto their stock while the risk remained concealed. To the contrary, the Defendants misstatements were made in order to mislead investors into selling off their stock while the truth that would have prevented the sell-off remained concealed.

Under the latter, the zone of risk is not concealed and thus the Defendants argument that Plaintiffs cannot prove loss causation under the Second Circuit's test. However, to accept this argument would be to suggest that there is a difference in causation between telling an audience in a crowded movie house that there isn't a fire when there actually is and telling the audience there is a fire when there actually isn't.

In the instant matter, the court must therefore look to the "subject" test and consider whether the subject of the fraudulent statement, that the Salvani was a disbarred broker involved in a "pump and dump" scheme, was the cause of the actual loss suffered by the Plaintiffs.

Plaintiffs have sufficiently pleaded reliance and loss causation and have shown the court that these claims are neither frivolous nor insubstantial. Plaintiffs have not

asserted 10(b) and 10(b)(5) claims merely for the purpose of manufacturing subject matter jurisdiction as the Defendant claims. These claims are colorable and this Court has jurisdiction over them. Therefore the SAC should not be dismissed for lack of subject matter jurisdiction Fed R. Civ. P. 12(b)1 or for failure to state a cause of action Fed. R. Civ. P. 12(b)6.

5. Plaintiffs' Section 9(a)(4) Claim is Colorable

Defendants contend that "where a plaintiffs' Section 10(b) claim fails, their Section 9(a)(4) claim also "necessarily fails." [**DE 17.**] In support of their claim they argue that a 10(b) cause of action "requires no additional proof of acts" but they assert that there exist a higher burden of proof beyond 10(b) when compared to subsection 9(a)(4).

Indeed, Rule 10b-5 allows for a lower standard of proof than does subsection 9(a)(4). *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1162 (5th Cir. 1982), rev'd on other grounds, 460 U.S. 1007 (1983)).

"Subsection 9(a)(4), as privately enforced through subsection 9(e), requires a (1) misstatement or omission (2) of material fact (3) made with scienter (4) for the purpose of inducing a sale or purchase of a security (5) on which the plaintiff relied (6) that affected plaintiff's purchase or selling price. [The court] thus perceive that the implied cause of action under Rule 10b-5(b) and the express remedy of subsection 9(a)(4) differ in at least three respects, scienter, intent to induce a purchase or sale, and causation." See *Chemetron* at 1161, 1162.

a. Scienter:

"While Rule 10b-5 permits recklessness to fulfill its scienter requirement [...] section 9(a)(4) and (e) and its legislative history do not permit [a court] to loosen its scienter requirement by permitting recklessness to suffice." *See* S.Rep.No.792, 73d Cong., 2d Sess. 17 (1934), *reprinted in* 5 *Ellenberger & Mahar, Item 17; H.R.Rep.No.*1383, 73d Cong., 2d Sess. 20 (1934), *reprinted in 5 Ellenberger & Mahar*, Item 18 cited *in* Chemetron at 1162.

The Court's attention is directed to the SAC's specific language concerning iHub's intent. Plaintiffs never exclusively allege that Defendants' conduct was solely reckless, in fact the opposite is true, the allegations are and the facts support the Defendants conduct was intentional. **[DE 17 ¶¶ 5,6,27, 94,98, 103 and 115.]**

Plaintiffs allege that brklyrusso intentionally posted the defamatory statements causing the sell-off of CodeSmart stock and that iHub intentionally and knowingly ratified and adopted the posting after refusing to remove it once Salvani notified iHub of its per se defamatory nature. **[DE 17¶50.]** And, for the reason that the allegations involve intentional awareness, the conduct complained of satisfies the scienter requirement.

b. Intent to Induce:

"While one may intend to do a fraudulent act thereby fulfilling Rule 10b-5(b)'s scienter requirement, the intent that that act *induce a purchase or sale* is a distinct and more specific requirement." Chemetron at 1162. Plaintiffs claim that Defendants' intent was to

induce a sell-off of CodeSmart stock and have provided the timeline of events coinciding with the declining price of the shares in factual support of this claim. [**DE 17 ¶¶47-48.]**

The Court should find this sufficient to satisfy the requirement of the act to "induce a purchase or sale", acts which are be attributed to iHub by reason of its conduct and awareness of the activities of brklyrusso.

c. Causation:

Subsection 9(a)(4)'s causation standard is also a higher standard, but again Plaintiffs have met their burden. The Plaintiff's purchase or sale price must be "affected" by the conduct complained of, while "the causation requirement is satisfied in a Rule 10b-5 case if the misrepresentation *touches upon* the reasons for the investment's decline in value.' *Huddleston v. Herman*, 640 F.2d at 549 (emphasis added)." *Chemetron* at 1162.

The distinction here, is that the Plaintiffs allege that by reason of the material misstatements, iHub invited, made, developed, ratified and adopted the Post which "affected" the price of CodeSmart stock. Indeed, Plaintiffs provided the facts which directly support the 9(a)(4) causation standard.

Plaintiffs have met the burden for their 10(b) claims and the 9(a)(4) claim therefore the Court should find the 10(b) and 9(a)(4) claims are colorable.

d. Plaintiffs' Claims are Plausible:

Defendant argues that Plaintiffs lack a legitimate basis for asserting claims under the Exchange Act because Plaintiffs have no knowledge about these issues and the SAC contains no factual allegations concerning John Doe's possible sale or

purchase of CodeSmart shares. **[DE 19]**. The facts are to the contrary, Plaintiffs SAC alleges that "Plaintiffs are informed and believe that brklynrusso was and/or is a paying member of iHub.com and an investor with CodeSmart who can and did post the per- se defamatory statement concerning Plaintiff Salvani intending to injure Salvani and manipulate ITEN's stock price in the market by reason and use of the defamatory per-se banners attributable to iHub at a time where they failed to disclaim the comments and fully knowing and intending that the post would be read by serious investors, traders and other securities professionals." [**DE 17** at ¶ 39].

The Second Circuit, in *Arista Records LLC v. Doe 3*, held that the plausibility standard set forth in *Bell Atlantic v. Twombly* US 425 F. 3d 99 applies to all civil actions, see *Ashcroft v. Iqbal*, 129 S.Ct. at 1953, and does not prevent a plaintiff from "pleading facts alleged `upon information and belief' where the facts are peculiarly within the possession and control of the defendant, see, e.g., *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir.2008), or where the belief is based on factual information that makes the inference of culpability plausible, see *Iqbal*, 129 S.Ct. at 1949 ('A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.')." *Arista Records LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010).

Here, the identity of Defendant John Doe a.k.a. brklynrusso is peculiarly within the possession and control of Defendant iHub, and Defendant brklynrusso's

information regarding his investment in CodeSmart is peculiarly within the possession and control of brklynrusso.

In satisfaction of its pleading requirements, Plaintiffs have provided specific facts in the SAC alleging that brklynrusso was an iHub member - evidenced by his ability to post on their boards; that iHub invited, developed, ratified and adopted brklyrusso's posting stated above by, among other things, the creation of their banner headings and failure to disclaim the postings or refusing to remove the posting after being notified by the Plaintiff of its defamatory nature where iHub had the choice to do so in applying its own membership rules; and that the price of CodeSmart shares dramatically declined immediately following the posting. **[DE 17¶¶47-48.]**

Based on these facts alone, the Court can draw the reasonable inference that Plaintiffs' claims express Defendants' plausible liability for the Exchange Act and SEC Rule claims. And, under the circumstances, in line with this Circuit's holdings in *Arista Records*, supra. Plaintiffs are not prevented from pleading facts alleged "upon information and belief" and have asserted a legitimate basis for asserting their claims.

6. Plaintiffs' State Law Claims Do Not Substantially Predominate Over Their Exchange Act Claims

Defendants contend that the Court should decline to exercise supplemental jurisdiction in this case claiming the state law claims substantially predominate over the federal claims under 28 U.S.C. §1367(c)(2), arguing the claims are only

appendages to the state claims and that the state claims constitute the "real body of the case".

a. The Claims are Related to the Same Case or Controversy:

This Court has original jurisdiction for the reason that a federal question exists in this matter and "[e]xcept as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 18 U.S.C. 1367 (a).

Here, the defamatory statement invited, made, ratified and adopted by the Defendants were also the operative material misrepresentations in the 10(b), 10(b)(5) and 9(a)(4) federal claims. Consequently, the material misrepresentation-defamatory statement-posting is essential to satisfying elements of both the federal and state claims thereby making those claims related and part of the same case in controversy.

And, the Second Circuit holds that "where at least one of the subsection 1367(c) factors is applicable, a district court should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote the values articulated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715]: economy, convenience, fairness, and comity." *In Re Methyl Tertiary Butyl Ether Products Liability Litigation*, 613 F. Supp. 2d 437 (S.D.N.Y. 2009).

Defendants in good faith cannot claim that separating Plaintiffs' case into federal and state courts would promote any of the values in *Gibbs*, therefore, even if the Court found that Plaintiffs' state claims predominate the federal claims, it still should not decline to exercise supplement jurisdiction.

7. The Communications Decency Act 47 U.S.C. §230 Does Not Apply

Finally, while Defendants' footnote "3" suggests a defense that the Communications Decency Act 47 U.S.C. §230 would apply as an absolute bar to an action against them for the posting, the argument is unpersuasive as the defense does not extend to matters attributable to iHub's own conduct as a primary violator of the Exchange Act 10(b) or SEC Rule 10b-5.

Conclusion

WHEREFORE, Plaintiffs respectfully request that the Court deny the Defendants Motion in its entirety.

Respectfully submitted,

DOUGLAS R. DOLLINGER, ESQ., P.C. (5922)
Douglas R. Dollinger, Esq.-
New York Bar No. 2354926
50 Main Street, Suite 1000
White Plains, New York 10924
Tel. 845.915.6800
Facs. 845.915.6801
E-mail ddollingeresq@gmail.com
Attorneys for Plaintiff