

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Jon Swan & Save Forest Lake, et al.

No. 217-2020-CV-212

**SAVE FOREST LAKE'S
MOTION TO DISMISS**

Save Forest Lake and Jon Swan, by and through counsel, hereby move to dismiss this matter with prejudice. In support hereof, they state:

Introduction

“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.” “The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” We have long recognized that one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government. “No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny.”

Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government.

“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”

Connick v. Myers, 461 U.S. 138, 160–61 (1983) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1965), *Stromberg v. California*, 283 U.S. 359, 369 (1931), *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862, (1974) (POWELL, J., dissenting), and *Mills v. Alabama*, 384 U.S. 214, 218–219 (1966) (also citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270 (1964), A. Micklejohn, *Free Speech and Its Relation to Self-Government* 22–27 (1948)) (citations and quotations omitted for clarity).

Save Forest Lake and Jon Swan (together “Save Forest Lake”)¹ are engaged in a fundamental discussion about “the manner in which government is operated and should be operated.” *Id.* Save Forest Lake opposes a massive landfill project next to a North Country environmental and recreational treasure, Forest Lake, in Dalton, N.H. Every statement alleged by the Plaintiff to be defamatory is advocacy in a matter of public concern, and protected by the First Amendment to the U.S. Constitution and Pt. I, Art. 22 of the New Hampshire Constitution.

Not only does the Plaintiff have no case for defamation; it should have known better. This action is nothing more than an effort to quash, through the threat of litigation, free speech that the Plaintiff finds inconvenient and contrary to its interests. Save Forest Lake is entitled to dismissal of this case and an award of attorneys’ fees and costs for a nakedly vexatious action and abuse of process.

Standard of Review

I. The Plaintiff is a public figure and must prove actual malice.

The Plaintiff has conceded that it is a public figure, subject to the *New York Times Co. v. Sullivan* burden of proof standard. Complaint at ¶¶16-17; *see* 376 U.S. 279–80. But it is worth

¹ There is no separate corporate entity for “Save Forest Lake.” There is no board of directors and officers, no corporate registration, no other corporate form.

remembering the rationale that would make the Plaintiff a public figure in this case even if it had not conceded the point.

“In an effort to strike a balance between First Amendment freedoms and state defamation laws, [the courts accord] ... significance to the [public or private] status of each individual plaintiff. Under the taxonomy developed by the [United States] Supreme Court, private plaintiffs can succeed in defamation actions on a state-set standard of proof (typically, negligence), whereas the Constitution imposes a higher hurdle for public figures and requires them to prove actual malice. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 340 (2007) (quoting *Pendleton v. City of Haverhill*, 156 F.3d 57, 66 (1st Cir. 1998)).

“[Private i]ndividuals may become limited-purpose public figures when they ‘have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.’” *Id.* at 341 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). “Then, they ‘become[] a public figure for a limited range of issues.’ Courts make the limited-purpose public figure determination ‘by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.’” *Id.* (quoting *Gertz*, 418 U.S. at 351, 352). “Determining whether an individual is a public or private figure presents a threshold question of law, which is ‘grist for the court's—not the jury's—mill.’” *Id.* at 340 (citing *Nash*, 127 N.H. 214 , 222 (1985), (quoting *Pendleton*, 156 F.3d at 67).

The Plaintiff has thrust itself to the forefront of a particular, and heated, public controversy, to wit, whether or not to permit construction of a landfill in the area of a New Hampshire lake so beautiful it has a State Park on it. Complaint at ¶¶8-11. Indeed, as the applicant for the project and as operator of another landfill in nearby Bethlehem, the Plaintiff created the public controversy itself. Complaint at ¶12. As a public figure for the purpose of the

landfill project and the controversy surrounding it, the Plaintiff must show that an allegedly defamatory statement was a false assertion of fact, not opinion, and that “the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co.*, 376 U.S. at 279–80.

Thus, even if Save Forest Lake had made objectively verifiable false statements of fact with defamatory meaning—which it has not—Plaintiff’s burden of proof is substantially elevated and it must show that the Defendants knew the information was false when they published it. But in this case, the Court does not even need to address that issue because there is not a single actionable statement asserted by the Plaintiff.

Argument

The Complaint is fatally riddled with defects. The Plaintiff has described statements that are about third parties and so not “of and concerning” the Plaintiff. The Plaintiff has failed to spell out many of the actual quotes it alleges to be defamatory—robbing the Court and the Defendants of any ability to respond. The Plaintiff has alleged that statements that are self-evidently not defamatory (*e.g.*, “Alvarez considers himself at war with the Plaintiff (Complaint at ¶25)) to be defamatory. The Plaintiff has listed clear statements of opinion that do not pretend to be stating objectively verifiable facts. The Plaintiff has listed statements that turn on truthful public reporting and events recorded in the public domain. There is not a single actionable statement in the 60+ allegations made by the Plaintiff. This case is nothing more than an effort to crush a vociferous, well-organized and passionate public opposition to the Plaintiff’s landfill project in Dalton, New Hampshire. The Plaintiff’s case offends the First Amendment of the U.S. Constitution and Pt. I, Art. 22 of the New Hampshire Constitution. The Complaint should be dismissed and attorney’s fees awarded.

II. Statements not “of and concerning” the Plaintiff are not actionable.

In an action for defamation, the Plaintiff must show that the allegedly defamatory words were spoken “of and concerning the plaintiff.” *Sturtevant v. Root*, 27 N.H. 69, 71 (1853). The following statements alleged by the Plaintiff to be defamatory, in addition to being personal judgment, speculation and interpretation, *see infra*, were not “of and concerning” the Plaintiff, but rather, an engineering firm, Horizon Engineering:

- April 4, 2019 ethics complaint, Horizon Engineering, “knowingly attempted to deceive the Planning Board, abutters, and public regarding an attempt by [plaintiff] to adjust property lines...” “constitutes professional malfeasance and possibly criminal conduct.” Complaint ¶39.²
- “using the engineering company’s professional position to mask the property owner and proposed purchasers intent to install a large 300+ sized [sic] piece of land carved out of a larger parcel, for a garbage landfill in a town with no zoning ordinances and skirting the abutting landowner notification process, which would include the NH Div. of Parks, is fraudulent and despite the failure of the attempt, should be addressed accordingly by those responsible for licensing and permitting.” Complaint ¶39(a).
- “This will surely lead to the subsequent contamination and destruction of wetlands and will constitute an environmental catastrophe which will forever alter the ecosystem over a wide area of the north country, create economic hardship for an areas which relies heavily on eco-tourism dollars from out of area vacationers, negatively impact the quality of life, health, and property values for so many area residents. This proposed garbage landfill surely cannot be allowed to progress, which is likely the reason for the attempted deception and subterfuge.” Complaint ¶39(c).

Because these statements were not made “of and concerning” the Plaintiff, they are not actionable in this case.

III. Plaintiff has failed to set forth the actual words it claims were defamatory.

“[G]ood pleading requires that the exact words spoken or written must be set out in the declaration *in haec verba*.” *Fuste v. Riverside Healthcare Ass’n, Inc.*, 575 S.E.2d 858, 862 (Va.

² All paragraph references herein are to the Complaint.

2003) (citation omitted); *Gendron v. St. Pierre*, 72 N.H. 400 (1903) (holding that “in declarations for slander there is an exception which requires the pleader to set out the words themselves.”); *Lorenz v. Towntalk Pub. Co.*, 261 S.W.2d 952, 953 (Mo. 1953) (“The complaint should set out, and purport to set out, the very words published ... The object, or one of the objects, of obliging a plaintiff to set forth in his complaint the very words complained against, is that the defendant may, if he desires it, by demurring, have the opinion of the court upon the actionable quality of the words.”); *Roth v. United Fed'n of Teachers*, 787 N.Y.S.2d 603, 609 (N.Y. Sup. Ct. 2004) (same, compiling case law). Vague and conclusory allegations that the Defendants have made defamatory statements do not permit the Court or the Defendants to determine whether the statements are capable of having a defamatory meaning, or are merely expressing “a subjective view.” See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (holding that subjective expressions, conjecture and interpretation are not actionable).

The Plaintiff includes the following allegations of defamation by Save Forest Lake or Mr. Swan without “stating with particularity” the actual words that are alleged to be defamatory:

- Misleading the public. ¶21(a).
- Trying to improperly influence a zoning vote. ¶21(b).
- Defendants made defamatory statements about the alleged impact that plaintiffs proposed new facility would have in Dalton, New Hampshire and the surrounding downs. ¶30.
- Defendants have falsely accused plaintiff of engaging in criminal, safety and ethical violations. ¶35.

As this Motion further argues, *infra*, each of these statements—even assuming they were accurate quotations—is not actionable due to not being defamatory, not being “of and concerning” the Plaintiff, for being mere opinion, or for being based upon truthful facts in the public domain. In this instance, however, they also cannot be sustained because they are

manifestly not the statements of the Defendant(s) but rather, the Plaintiff itself. Defendants are entitled to have the allegedly defamatory statements spelled out clearly by the Plaintiff, so that the Court can make an initial assessment of their defamatory nature—if any. Absent the actual quote, that objective is impossible. These allegations, therefore, are not actionable.

IV. Statements that are not defamatory, by their nature, are not actionable.

To be actionable, a statement must first be defamatory. It must be false, and it must “tend to lower the plaintiff in the esteem of any substantial and respectable group.” *Thompson v. Cash*, 119 N.H. 371, 373 (1979). The following statements, even if false (they are not, *see* Exhibits 1-10),³ are not defamatory:

- Casella does not recycle most of the materials placed in “zero-sort” recycling bins because they are contaminated such that they end up in a landfill (Feb. 14, 2020 social media). ¶17(b); Exhibit 10 (New Hampshire Business Review article discussing issues with the contamination of recycled materials); Exhibit 1 at 5; Exhibit 3 (article from Portland Press Herald with admissions from Casella concerning percentage of gathered materials from zero-sort recycling that are recyclable).
- “Casella’s ‘Zero-Sort’ single stream recycling practices, and ensuring higher rate of contaminants, is part of the reason why China and many 3rd world nations stopped

³ The Plaintiff implicitly and expressly references Save Forest Lake’s website and social media platforms, without specifying which portions of them the quotes come from. Therefore, the Court may consider Save Forest Lake’s website and social media platforms (including linked documents, reports and materials) in ruling on this motion to dismiss. *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010) (“The trial court may also consider documents attached to the plaintiff’s pleadings, or ‘documents the authenticity of which are not disputed by the parties ... official public records ... or ... documents sufficiently referred to in the complaint[.]’”) (citations omitted). From Save Forest Lake’s website and social media platforms, Save Forest Lake includes here—and incorporates fully herein by reference—Exhibit 1, Report of the Committee to Study Recycling Streams and Solid Waste Management in New Hampshire, N.H. General Court (November 1, 2019); Exhibit 2, “Friday Truck Accident Caused Leachate Spill in Coventry,” Smith, Robin, CALEDONIAN RECORD (Dec. 30, 2019); Exhibit 3, “City Working on Plan to Reduce Recycling Contamination,” Viles, Chance, PORTLAND PRESS HERALD (February 20, 2020); Exhibit 4, Summary of Violations, Litigation, Investigations and Disputes Involving Casella (with supporting documentation), Concerned Citizens of Cattauga County, Inc. (May 8, 2009); Exhibit 5, “High Readings for PFAS found in Montpelier and Newport wastewater plants,” Gribkoff, Elizabeth, VERMONT DIGGER (Feb. 5, 2020); Exhibit 6, “Capacity reached at Southbridge Landfill, capping to begin,” Lee, Brian, WORCESTER TELEGRAM (Dec. 29, 2018); Exhibit 7, Invoice, City of Concord (July 31, 2018); Exhibit 8, Contour Map, Horizons Engineering for North Country Environmental Services, Inc. (May 2019); Exhibit 9, Email of Rebecca Metcalf, NCES, Inc. to Town of Dalton and related Letter from Don Mooney); Exhibit 10, “Waste Watchers: As landfill space diminishes, New Hampshire faces a trash disposal crossroads,” Sanders, Bob, NEW HAMPSHIRE BUSINESS REVIEW (February 14, 2020).

accepting our ‘recyclables’ aka PLASTICS.” (Feb. 2020). ¶17(d); Exhibit 3; Exhibit 1 at 5; Exhibit 10.

These statements amount to speculation about Casella’s role in a simple, objectively verifiable market dynamic: the collapse of the market for recycled materials due to China’s National Sword policy, by which China tightened its standards on the degree of contamination that it would accept in foreign recycled material—much of which came from the United States. Exhibit 1 at 5 (“However, the recent collapse in prices of certain recycled material commodities, caused by China enacting stricter contamination standards through its National Sword policy, has made the economic viability of recycling less clear to municipalities, especially those that rely on single stream recycling and MRF processing.”).⁴ It is a well-established dilemma that “zero-sort” recycling results in the kind of contamination the triggers protective Chinese policies because users desire to “recycle everything possible because it is the right thing to do,” which the New Hampshire legislative Committee to Study Recycling Streams called “wish-cycling” or trying to recycle materials that cannot be recycled or are otherwise contaminated by oils, etc. *Id.* This is not defamatory information. It is a simple fact of the global market for recycling materials, of which Plaintiff is indisputably a part. It is a fact that, in the view of Save Forest Lake, disfavors a landfill nearby. But it is not a fact that should affect the reputation of Casella one way or the other.⁵

Furthermore, the following statements contain no defamatory meaning:

⁴ The reference to “contamination” is to the contamination of recycling materials that make them unprofitable or impossible to recycle. For example, a used pizza box cannot be recycled because its paper material is suffused with oils from the food; a yogurt container that was not completely washed out cannot be recycled without the further cost of additional washing, etc.; it is well known, through numerous news reports, that US recycling material was contaminated in this manner to a degree that large Chinese buyers no longer found it profitable to purchase the material, which crashed the recycling market. Exhibit 1 at 5. Casella itself admitted this issue with regard to its Westbrook, ME contract, in regard to which it conceded that only 20-30 of the 50 tons of material collected was recyclable. Exhibit 3.

⁵ Further, if “Zero-Sort Recycling” is a defamatory epithet, then Casella has elected to defame itself as it characterizes its processes as “Zero-Sort.”

- Alvarez considers himself “at war” with plaintiff. ¶25.
- “If you haven’t figured out by now that I’m at [expletive] war, you’ve not been paying attention.” (June 29, 2019 social media posting). ¶25(a).

In these statements, Defendant Jon Swan, in addition to characterizing himself and not the Plaintiff, is making a metaphorical analogy for his opposition to Plaintiff’s project. Plaintiff may not like the characterization, but these are not the kind of statements that “tend to lower the plaintiff in the esteem of any substantial and respectable group.” *Thompson*, 119 N.H. at 373. Similarly, the following statements are nothing more than factual assessments of Mr. Swan’s vehement opposition to Plaintiff’s project:

- Alvarez has expressly stated he is trying to disrupt plaintiff’s existence and future business and facilities in New Hampshire. ¶26.
- Defendant has engaged in efforts to prevent plaintiff’s subsidiary NCES from obtaining an expansion permit for its Bethlehem facility. ¶27.

Next, there is nothing defamatory about the statement:

- “Let’s kick [plaintiff] OUT of NH!” (Dec. 4, 2019 online). ¶28(a).

It makes no verifiable assertion of fact concerning the Plaintiff and does not “tend to lower the plaintiff in the esteem of any substantial and respectable group.” *Thompson*, 119 N.H. at 373.

The following statements combine a subjective judgment about the nature of Plaintiff’s business and what is best for the New Hampshire North Country, then make rallying cries—which cannot be construed as a verifiable factual statements—and which contain nothing defamatory:

- “NCES has been a bad business partner for the North Country and an expansion for them to import more trash is not what we need. Close it down when it reaches Stage V capacity in April 2020. NO STAGE VI EXPANSION!” ¶28(b).

- “It is time to close the NCES landfill in Bethlehem. New Hampshire does not need Casella Waste Systems and its greedy practice of importing out of state trash in order to increase its own profitability.” ¶29(b).

With respect to Save Forest Lake’s “photoshopped view from Forest Lake depicting a landfill rising over one hundred feet above the ridgeline between the site and the lake,” in addition to being protected hyperbole, *see Pease*, 121 N.H. at 64, such a photograph is not making a verifiable statement of fact. How large the Plaintiff’s pile of garbage might someday become in the future is entirely speculative. Furthermore, it is not defamatory, unless the Plaintiff’s business itself would “tend to lower the plaintiff in the esteem of any substantial and respectable group.” *See* Complaint ¶31; *Thompson*, 119 N.H. at 373.

Finally, the argument that the statement “[Plaintiff’s proposed landfill occupies] high ground that drains into both Forest Lake and Alderbrook, both of which eventually drain into the Connecticut and Ammonoosuc Rivers” is defamatory is nonsense. Complaint ¶34(a). Save Forest Lake may or may not be able to read a topographical map correctly, but contour lines, in and of themselves, do not “tend to lower the plaintiff in the esteem of any substantial and respectable group.” *Thompson*, 119 N.H. at 373; *see* Exhibit 8 (topographical map showing contour lines that can be interpreted to determine the relative elevations of the proposed landfill and Forest Lake).

V. Statements of opinion are categorically protected by the First Amendment.

We now come to the heart of the matter. Speech expressing an opinion, or “personal judgment,” is vigorously protected, particularly on an issue of public concern. *Grey v. St. Martin’s Press*, 221 F.3d 243, 248 (1st Cir. 2000). “When the defendant’s statements, read in context, are readily understood as conjecture, hypothesis, or speculation, this signals to the reader that what is said is opinion, and not fact.” *Levin v. McPhee*, 119 F.3d 189, 197 (2nd Cir

1997). “[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” *Haynes*, 8 F.3d at 1227. Even caustic epithets are protected. *Pease v. Telegraph Pub. Co., Inc.*, 121 N.H. 62, 64 (1981) (finding that epithet “journalistic scum of the earth” was “no more than rhetorical hyperbole, a vigorous epithet used by those who considered the plaintiff’s journalism deplorable ... and not an assertion of fact.”).

The Plaintiff sets forth more than 60 instances of alleged defamation in this case. Of these, half are naked opinion and not actionable. They are grouped, as follows, into thematic categories:

Casella is predatory, greedy, and unscrupulous

These statements are “a subjective view, an interpretation” *Haynes*, 8 F.3d at 1227, or “rhetorical hyperbole, a vigorous epithet,” *Pease*, 121 N.H. at 64, both protected as opinion. Similarly, conjecture such as speculation about Casella’s motives and intentions is opinion. *Haynes*, 8 F.3d at 1224; *Levin*, 119 F.3d at 197.

- Plaintiff is “greedy” and “predatory.” ¶24.
- “Casella needs New Hampshire so it can continue its predatory exploitation of our resources for our own greed.” ¶17(a).
- Plaintiff is a “true community predator ... proven to be a bad neighbor and a corporate bully. Garbage profiteers!” (Dec. 24, 2019 social media posting). ¶17(g).
- Casella is a “predatory out-of-state corporation that sought to prey on our vulnerability.” (Jan. 31, 2019 article in the Union Leader). ¶24(b).
- Plaintiff is a “predatory landfill company.” (July 5, 2019 social media posting). ¶24(c).
- Plaintiff is a “corporate predator” who tried to “influence the vote on zoning in the Town of Dalton with their blatant distortions of reality in their numerous mailers sent to voters.” ¶29(a).

- Plaintiff “is a very unscrupulous company that only cares about the bottom line and not the environment.” (Feb. 3, 2020 social media posting). ¶17(e).
- “...we know a landfill in Dalton represents billions of dollars for greedy Casella and their [sic] garbage empire.” (Dec. 29, 2019 social media posting). ¶24(a).
- “It is time to close the NCES landfill in Bethlehem. New Hampshire does not need Casella Waste Systems and its greedy practice of importing out of state trash in order to increase its own profitability.” ¶29(b).
- “We do not need Casella and its greed. On the contrary, Casella needs NH to continue to profit from importing trash. ¶29(c).

Casella is incompetent, poorly run, and a bully

These statements are “a subjective view, an interpretation” *Haynes*, 8 F.3d at 1227, or “rhetorical hyperbole, a vigorous epithet,” *Pease*, 121 N.H. at 64, both protected as opinion. Similarly, conjecture such as speculation about Casella’s motives and intentions is opinion. *Haynes*, 8 F.3d at 1224; *Levin*, 119 F.3d at 197.

- Plaintiff has “poor management and bully tactics.” (Feb. 12, 2020 social media posting). ¶17(c).
- “We do not want this poorly-run garbage profiteer and polluter anywhere near Forest Lake and we look forward to their expulsion from Bethlehem in or before 2023.” (Feb. 3, 2020 social media posting). ¶17(f).

Casella is fascistic

Assuming, without conceding, that the Plaintiff’s allegation is accurate, equating a person or company with Adolph Hitler and Naziism is typical “rhetorical hyperbole, a vigorous epithet,” *Pease*, 121 N.H. at 64, both protected as opinion.⁶ Similarly, conjecture such as speculation

⁶ See “[The Creator of Godwin’s Law Explains Why Some Nazi References Don’t Break His Internet Rule](#),” Ohlheiser, Abby, WASHINGTON POST (August 14, 2017)(referencing Godwin’s Law) (last visited May 19, 2020).

about Casella's motives and intentions is opinion. *Haynes*, 8 F.3d at 1224; *Levin*, 119 F.3d at 197.

- On or about April 7, 2020, Alvarez published a video and transcript in which he equated Casella with the National Socialist German Workers (or "Nazi") Party and its chief executive officer with Adolf Hitler." ¶18.

Casella is dishonest and manipulative

These statements are "a subjective view, an interpretation" *Haynes*, 8 F.3d at 1227, or "rhetorical hyperbole, a vigorous epithet," *Pease*, 121 N.H. at 64, both protected as opinion.

Similarly, conjecture such as speculation about Casella's motives and intentions is opinion.

Haynes, 8 F.3d at 1224; *Levin*, 119 F.3d at 197.

- Warning the "elderly and more vulnerable" that "a waste management company had persuaded a town elder, via email, to put his reputation on the line by presenting and apparently fictitious offer of riches to the town government, with 'no strings attached' (yes he sadly fell for that one) without the realization that this could be deemed as an attempt to influence public opinion regarding a very unpopular landfill development." ¶19(b).
- Warning the "elderly and more vulnerable" to be aware of "a waste management company" engaging in a 'scam,' "at a significant cost to both [a citizen's] finances and reputation" for encouraging a continued relationship[.] ¶19(a).
- Misleading the public. ¶21(a).
- Trying to improperly influence a zoning vote. ¶21(b).
- Engaging in a "very sneaky" lot-line adjustment. ¶21(c).
- Plaintiff is trying "to pack the Town of Bethlehem Planning Board" to seek further expansion in a town "Against the will of the voters." ¶34(c).
- "unethical lobbying efforts." ¶38, ¶38(a).
- "filled with falsehood, misinformation and needs to be investigated." ¶38(a).

- There should be a law against the “purposeful misleading of voters by a company when there is financial gain to be realized by such lobbying.” ¶38(b).
- “misleading information relative to the groundwater at their [sic] NCES facility in Bethlehem relative to drinking water standards.” ¶38(b).
- April 4, 2019 ethics complaint, Horizon Engineering, “knowingly attempted to deceive the Planning Board, abutters, and public regarding an attempt by [plaintiff] to adjust property lines...” “constitutes professional malfeasance and possibly criminal conduct.” ¶39.
- “using the engineering company’s professional position to mask the property owner and proposed purchasers intent to install a large 300+ sized [sic] piece of land carved out of a larger parcel, for a garbage landfill in a town with no zoning ordinances and skirting the abutting landowner notification process, which would include the NH Div. of Parks, is fraudulent and despite the failure of the attempt, should be addressed accordingly by those responsible for licensing and permitting.” ¶39(a).
- “This will surely lead to the subsequent contamination and destruction of wetlands and will constitute an environmental catastrophe which will forever alter the ecosystem over a wide area of the north country, create economic hardship for an areas which relies heavily on eco-tourism dollars from out of area vacationers, negatively impact the quality of life, health, and property values for so many area residents. This proposed garbage landfill surely cannot be allowed to progress, which is likely the reason for the attempted deception and subterfuge.” ¶39(c).
- Casella “claims to be a steward for the environment but the reality at each of their [sic] facilities speaks to the contrary.” (July 7, 2019). ¶33.

Casella’s landfill will be a massive problem

In addition to not even being a statement about the Plaintiff, an image of a landfill towering over the tree line is either conjecture or typical “rhetorical hyperbole,” *Pease*, 121 N.H. at 64; *Haynes*, 8 F.3d at 1224; *Levin*, 119 F.3d at 197 (speculation and conjecture are not actionable).

- Alvarerz published a photoshopped view from Forest Lake depicting a landfill rising over one hundred feet above the ridgeline between the site and the lake when, in fact, the proposed landfill would be screened from the lake and its surrounding homes. ¶31.

Casella is a bad partner and having a relationship with Casella causes problems

“[C]onjecture, hypothesis [and] speculation” are not actionable. *Levin*, 119 F.3d at 197.

The following statements are speculative:

- “Casella’s ‘Zero-Sort’ single stream recycling practices, and ensuring higher rate of contaminants, is part of the reason why China and many 3rd world nations stopped accepting our ‘recyclables’ aka PLASTICS.” (Feb. 2020). ¶17(d). (speculation about why China invoked its National Sword policy and shut down the market for North American recyclables).
- “NCES has been a bad business partner for the North Country and an expansion for them to import more trash is not what we need. Close it down when it reaches Stage V capacity in April 2020. NO STAGE VI EXPANSION!” ¶28(b). (speculation and conjecture about the disadvantages of entering into a partnership, business or otherwise, with Casella).
- Defendants made defamatory statements about the alleged impact that plaintiffs proposed new facility would have in Dalton, New Hampshire and the surrounding towns. ¶30. (speculation about what the impacts of Casella’s landfill would be on the local community).
- “Time for the North Country to dump Casella.” ¶34. (subjective view based on speculation about how the partnership would affect communities).
- “Bethlehem has some of the highest property taxes in the North Country as a result of their [sic] relationship with Casella.” ¶34(b). (conjecture about why taxes are high).

None of these assertions are meant to be objective verifiable fact. They are expressions of viewpoint, interpretation, outrage, speculation and conjecture. Neither the Plaintiff nor the Court has any place imposing civil liability for speech that expresses an opinion on a controversial public question. *See Grey*, 221 F.3d at 248.

VI. **True statements and opinion statements based upon facts in the public domain are protected by the First Amendment.**

An action for libel does not lie where the information at issue is in the public domain and anybody with sufficient interest can review it to determine whether they agree with the

statements the plaintiff claims are defamatory. *Pease*, 121 N.H. at 66. At least twelve statements alleged by the Plaintiff to be defamatory are based upon facts readily available in the public domain or referenced specifically in connection with the comments themselves.

For example, on December 29, 2019 at approximately 3:00 o'clock in the morning, a tanker truck transporting liquid leachate from Casella's Coventry VT landfill to another location rolled over on VT Route 5, near the Black River in Coventry, Vermont. Exhibit 2. This happened. It is a fact. It was in relation to this spill that the following assertions from Plaintiff were made:

- December 29, 2019, defendants falsely accused plaintiff of spilling 8,000 gallons of landfill leachate into the Black River in Vermont in statements posted online and falsely accused plaintiff's employee of operating in violation of permitted hours during this incident. Complaint ¶20.
- "criminal charges should be brought forth, why on earth is a leachate truck leaving the Coventry landfill, OWNED AND OPERATED by [plaintiff], at 3AM in the morning [sic]..." (Jan 2 2020) ¶36.
- Plaintiff is a "bad company, with a long history of violations," and a "poor safety and performance record." (Dec. 29, 2019 social media posting). ¶20(a).

In cases like this, "where the underlying facts are disclosed" or available in the public domain, "it becomes even more clear that the writer or publisher is merely speculating." *Grey*, 221 F.3d at 250-51; *Pease*, 121 N.H. at 66.

The following allegations are also all supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion:

- Casella does not recycle most of the materials placed in "zero-sort" recycling bins because they are contaminated such that they end up in a landfill (Feb. 14, 2020 social media). ¶17(b).
- "Casella's 'Zero-Sort' single stream recycling practices, and ensuring higher rate of contaminants, is part of the reason why China and many 3rd world nations stopped accepting our 'recyclables' aka PLASTICS." (Feb. 2020). ¶17(d).

- Warning the “elderly and more vulnerable” that “a waste management company had persuaded a town elder, via email, to put his reputation on the line by presenting an apparently fictitious offer of riches to the town government, with ‘no strings attached’ (yes he sadly fell for that one) without the realization that this could be deemed as an attempt to influence public opinion regarding a very unpopular landfill development.” ¶19(b).
- “[W]orkplace safety, permit violations & multiple accidents at their current landfills serve as predictors of what is expected from them in Dalton.” ¶20(b).
- “YET ANOTHER example of [plaintiff’s] poor management of YET ANOTHER of their landfills in recent months.” (Jan. 1, 2020 social media posting). ¶21.
- Defendants falsely stated online on November 20, 2019 that plaintiff has “repeated site violations, air and noise pollution, PFAS, leachate, dioxane in the Ammo[noosuc River], unsightly heavy traffic, litigious neighbor and overall bad business partner filling up NH landfill space with out of state trash...” ¶22.
- [P]laintiff ships “millions of gallons of leachate to the Concord and Franklin [wastewater treatment facilities] despite their inability to treat it effectively before it is emptied into the Merrimack River[.]” ¶23.
- Location of landfill has “high ground that drains into both Forest Lake and Alderbrook, both of which eventually drain into the Connecticut and Ammonoosuc Rivers.” ¶34(a).
- “negligence and worker safety violations” (Jan 2, 2020 social media posting). ¶37.

Amongst the materials collected by Save Forest Lake on its website are: a news story from the Portland Press Herald in which Casella admits that only 20-30 of every 50 tons of collected material can actually be recycled (Exhibit 3) (facts supporting ¶¶17(b), 17(d)); Exhibit 1 at 5 (supporting ¶¶17(b), 17(d)); Exhibit 4 (a summary of Casella’s history of litigation and administrative enforcement actions for violations, and community complaints by the Concerned Citizens of Cattaraugus County, Inc., a New York organization) (facts supporting ¶¶20(b), 21, 22, 37); Exhibit 5 (an article from the Vermont Digger detailing high PFAS and other pollutant findings in towns that accept landfill leachate for processing)(facts supporting ¶22); Exhibit 6 (an

article concerning litigation in Massachusetts over toxic contamination from a Casella facility) (supporting ¶22); Exhibit 7 (invoice from the City of Concord for leachate processing) (supporting ¶23); Exhibit 8 (a topographical map of the location created by Casella’s own engineering firm) (supporting ¶34(a)); and Exhibit 9 (notes from resident of Dalton, Don Mooney, detailing what he believed to be a good deal for the Town from the Casella project, but which Save Forest Lake clearly (and permissibly) felt was nothing more than a public relations effort to buy goodwill). This is a non-exhaustive, indeed, a superficial summary of the wealth of public records, news reports, and substantiating documentation contained on the Save Forest Lake website and Save Forest Lake’s social media platforms that support its rigorous public advocacy.

These materials are all public record. They exist in the public domain. They are news articles or summaries concerning public lawsuits, administrative actions, letters, public documents and reports that “anybody with sufficient interest can review . . . to determine whether they agree with the statements the plaintiff claims are defamatory.” *Pease*, 121 N.H. at 66. Moreover, Save Forest Lake made no effort to hide these factual predicates when it made its comments and interpretive statements. They are set forth on its website in organized clarity and they are frequently the source of commentary on Save Forest Lake’s social media platforms. *See* <https://saveforestlake.com/file-page> (containing public records); <https://saveforestlake.com> (detailing news reports for Black River-adjacent spill, news articles about PFAS and other lawsuits, violations, elevated toxicity findings in Bethlehem, N.H. and Southbridge MA, both towns with a Casella landfill, etc.); <https://www.facebook.com/DumpCasella/> (social media site

with links to all source materials relating to posted statements and comment) (all last visited May 17, 2020).⁷

Any person interested in the issues at hand could consult the source materials that led Save Forest Lake to make the assertions it did. If this kind of advocacy is found by the Court to be actionable, it would cast a pall on determined, organized public advocacy concerning any controversial project. That is inconsistent with the First Amendment, which requires Courts to ensure that the fundamental right to free speech has “breathing space.” *See Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) (emphasizing the particular interest of those who report on public figures and issues).

Lastly, even if the alleged statements are construed to be verifiable statements of fact, and false, the Plaintiff has not pled with sufficient particularity any facts suggesting that Save Forest Lake published them with knowledge or reckless disregard of their falsity. The statements at Complaint ¶¶16-17 concerning Save Forest Lake’s and/or Jon Swan’s state of mind are conclusory assertions, nothing more. *ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993) (stating that on a motion to dismiss for failure to state a claim, the trial court will not assume the truth of allegations that are not well-pleaded, including conclusions of fact and principles of law).

Conclusion and Request for Relief

“Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present [advocacy campaign], as an expression of

⁷ Save Forest Lake strongly encourages the Court to review the online platforms here cited and linked, which are implicitly incorporated into the Plaintiff’s Complaint. The Court will find a reasoned, dedicated, thoroughly researched and presented opposition to a landfill project.

grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.” *New York Times Co. v. Sullivan*, 376 U.S at 270 (citation omitted).

This Motion sets forth and addresses every alleged statement made by the Defendant(s) that the Plaintiff believed was defamatory, some 60+ statements. Not one statement was actionable given the protections of the First Amendment and Pt. I, Article 22 of the New Hampshire Constitution. For these reasons, this case should be dismissed.⁸

In addition, the Court should consider awarding attorney’s fees pursuant to *Harkeem v. Adams*, 117 N.H. 687 (1977). There can be little doubt that the purpose of this action was to quash political speech and advocacy concerning an issue of significant public controversy. Save Forest Lake has waged a lengthy and determined campaign to stop a landfill from being constructed near a pristine North Country lake. This lawsuit was an effort to bring that opposition to a halt. The allegations made are incompatible with New Hampshire law, something the Plaintiff or its attorneys should have known. This was the very definition of vexatious litigation. Plaintiff’s “obdurate pursuit of ... fruitless litigation showed a callous disregard for the rights of the [Defendants], and resulted in a needless drain upon the resources

⁸ Two further procedural notes. **First:** Plaintiff also makes allegations about “1-20 Doe Defendants” who are, ostensibly, directors and officers of Save Forest Lake. Save Forest Lake has no corporate form and no such directors and officers. Regardless, the statements made by Save Forest Lake that are attributed to Jon Swan, or others, are not actionable to begin with and the case should be dismissed on the merits. To the extent that other unnamed parties are part of this action, there is no allegation that any person other than Jon Swan, or any party other than Save Forest Lake, made allegedly defamatory statements. Therefore, any other parties—named or to-be-named—should be dismissed, as no other party than Jon Swan or Save Forest Lake is alleged to have made allegedly defamatory statements. For parties other than Jon Swan or Save Forest Lake, the Plaintiff failed utterly to state a claim for defamation. **Second:** the Plaintiff has filed this action on Merrimack County Superior Court, when Casella has no office there, the locus in quo is in Coos County, and all the potential Defendants are based in Coos County. It appears that the proper venue for this matter—if it survives this Motion to Dismiss—is Coos County Superior Court. Save Forest Lake and Mr. Swan reserve their rights to assert, as one of their affirmative procedural defenses, that Merrimack County Superior Court is an improper venue for this case.

of the judicial system of this state. The award of attorney's fees against the defendant department in the instant case was proper.” *Harkeem*, 117 N.H. at 698.

WHEREFORE, Save Forest Lake and/or Jon Swan request that the Court:

- A. Dismiss this action; and
- B. Award attorney’s fees and costs; and
- C. Grant such other and further relief as the Court deems just and equitable.

Respectfully Submitted,

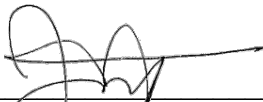
SAVE FOREST LAKE & JON SWAN

By their Attorneys,

ORR & RENO, P.A.

Date: May 19, 2020

By:



Jeremy D. Eggleton, Esq. (N.H. Bar No. 18170)
45 South Main Street, Suite 400
P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318
jeggleton@orr-reno.com

CERTIFICATION OF SERVICE

I, Jeremy D. Eggleton, do hereby certify that this Motion was served on the parties of record in this matter on May 19, 2020, via the Court’s electronic service system.

/s/ Jeremy D. Eggleton