

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 SUPPLEMENTAL MEMORANDUM OF LAW
REGARDING AUTOMATED TRANSACTIONS, LLC**

Defendant Save Forest Lake, by and through counsel, submits the following brief analysis of *Automated Transactions LLC v. American Bankers Association*, 178 N.H. 528 (2019), for the Court’s consideration:

The Court has stated an intention to rely upon *Automated Transactions* as a guideline for evaluating Plaintiff’s claims in this case, and Defendant’s Motion to Dismiss. *Automated Transactions* comprehensively supports Save Forest Lake’s Motion to Dismiss. *Automated Transactions* reaffirms the basic principles that underpin Save Forest Lake’s Motion to Dismiss on facts that are very similar to the facts alleged by Plaintiff in this case.

Automated Transactions involved claims of defamation by an ATM manufacturer against the American Bankers Association and others, based on statements by them—in industry education workshops and legislative hearings, among other public venues—that the Plaintiff was a “patent troll.” *Id.* at 535.

Reference to Contextual Documents

It is noteworthy at the outset that the Supreme Court in *Automated Transactions* was able to interpret the allegedly defamatory statements in their context because the Plaintiff in

Automated Transactions actually appended copies of the statements to its complaint, permitting the Court to make a prima facie determination as to whether the statements of opinion were made upon disclosed facts. *Id.* at 537, 542 (citing powerpoint presentation and legislative testimony appended to Complaint for context of allegedly defamatory statements). Based on that context, the Supreme Court upheld the trial court's dismissal of the Complaint in *Automated Transactions* because the statements of opinion were supported by disclosed facts.

In this case, by contrast, the Plaintiff has not even identified with precision the provenance of the allegedly defamatory statements made by Save Forest Lake. *See, e.g.*, Complaint at ¶¶17, 19, 37 (all identifying the source of the quote vaguely as "social media" or "online" on a certain date). This is a significant problem. As the Supreme Court's analysis demonstrates, statements in context permit the Court to evaluate whether they were made on the basis of disclosed facts. *Automated Transactions*, 178 N.H. at 543. Plaintiff tries to take advantage of its own failure to correctly identify the source of the allegedly defamatory statements by suggesting that the Court must take the statements at face value, in isolation. It is for that reason that the Court can and must review, based on the references in the Complaint, Save Forest Lake's social media posts on Facebook and its website.(which were linked within Save Forest Lake's Motion to Dismiss). If the Court does so, it will have to conclude that every allegedly defamatory statement of opinion based on undisclosed facts is actually supported by a practical library of facts, all set forth on Save Forest Lake's website, or, often, linked directly to the allegedly defamatory statement itself.

Readers of the allegedly defamatory statements on Save Forest Lake's website and social media platforms can turn directly to the factual sources and summaries motivating Save Forest Lake's statements of opinion, and can decide for themselves whether Save Forest Lake's opinion

is correct or not. As just one example, Exhibit 9 to Save Forest Lake's Motion to Dismiss contains an email from Plaintiff's public relations manager to an elderly resident of Dalton, suggesting a "no strings attached" gift of \$50,000-100,000 to the town from the Plaintiff's charitable arm in connection with the landfill review. It also attaches the notes of that person from his testimony before the Town's land use board, in which he references the proffered gift and advocates for the landfill project to be approved. *Id.* Based on these facts—all disclosed on Save Forest Lake's website for readers to review at their discretion—Save Forest Lake labeled the Plaintiff's offer of money "unethical," a "scam," and an effort to take advantage of the town's elderly voters. *See* Complaint at ¶19. Plainly, Save Forest Lake's characterization of that effort is entirely opinion. Supported by disclosed or undisclosed facts or not, these are not assertions capable of objective verification.

But even if the alleged statements were construed to incorporate factual assertions by implication, the facts were duly referenced and included on Save Forest Lake's social media platforms and were referenced by the statements themselves. The Court cannot allow the Plaintiff to under-support its own allegations and then argue that Save Forest Lake had not disclosed the facts associated with its opinions. So, the Court should either dismiss the Complaint for failure to identify the provenance of the allegedly defamatory statements (denying the Court and the parties the ability to evaluate whether they were supported by disclosed facts or not) or simply reference Save Forest Lake's social media platforms, such as its Facebook site, and its website. *See Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010) (trial court may consider "documents sufficiently referred to in the complaint" when evaluating a motion to dismiss).

If the Court takes even a cursory glance at Save Forest Lake's assertive electronic advocacy campaign against the Plaintiff's landfill, it will see that none of the statements alleged in the Complaint are anything other than opinions in support of that effort. Save Forest Lake's website and social media platforms contain only commentary and advocacy concerning the fulsome catalogue of source materials available on the website concerning the Plaintiff, its regulatory and litigation history, and the permitting process with regard to the proposed Dalton landfill. The alleged statements are nothing more than this. This is fundamentally political speech, on a public controversy, and the Court must dismiss this case.

Expressions of Opinion

On the merits, *Automated Transactions* requires the dismissal of all claims based on assertions by Save Forest Lake that the Plaintiff is "predatorial," operates "a scam," is "untrustworthy" or a "bad business partner," is "unethical," or is acting like Adolph Hitler. The law described in *Automated Transactions* could not be clearer in holding that such statements are incapable of objective verification and are quintessential expressions of opinion or rhetorical hyperbole. *Automated Transactions*, 178 N.H. at 533 (citing, e.g., *Milkovitch v. Lorain Journal Co.*, 497 U.S. 1 (statements of "imaginative expression" or "rhetorical hyperbole" are not actionable), *Piccone v. Bartels*, 785 F.3d 766, 772 (1st Cir. 2015) ("Where an expressive phrase, though pejorative and unflattering, cannot be objectively verified, it belongs squarely in the category of protected opinion."), *Catalfo v. Jensen*, 657 F. Supp. 463, 468 (D.N.H. 1987) (finding statement that plaintiff was "sleazy" to be expression of opinion because, even assuming the word carried the definition "marked by low ethical standards, ... it is [not] capable of verification" because "[e]thical standards are inherently subjective")).

The Court's reliance on *Automated Transactions* should lead ineluctably to the dismissal of Plaintiff's case.

Respectfully Submitted,

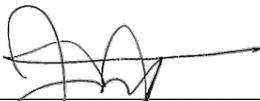
SAVE FOREST LAKE & JON SWAN

By their Attorneys,

ORR & RENO, P.A.

Date: July 16, 2020

By:



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CERTIFICATION OF SERVICE

I, Jeremy D. Eggleton, do hereby certify that this Motion was served on the parties of record in this matter on July 16, 2020, via the Court's electronic service system.

/s/ Jeremy D. Eggleton