

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Docket #217-2020-CV-212

Jon Swan f/k/a Jon Alvarez, Forest Lake Association,
Save Forest Lake, Doe Defendants 1-20

**OBJECTION TO SWAN’S AND SAVE FOREST LAKE’S
MOTION TO DISMISS**

Plaintiff Casella Waste Systems, Inc. (“Casella”) objects to the motion to dismiss filed by Save Forest Lake and Jon Swan (the “Swan Defendants”). This objection rests on the following grounds.

I. Introduction

Relying in part on assertions of fact found nowhere in the complaint, defendants Jon Swan (f/k/a Jon Alvarez) and Save Forest Lake, an organization Swan created to oppose Casella’s proposed landfill in Dalton, New Hampshire, have asked the court to determine *as a matter of law* that the complaint is intended to stifle their free expression and that the malicious false statements they have made about Casella (such as equating its CEO to Adolf Hitler and the company to the Nazi Party, accusing Casella of “scamming” the elderly, asserting that Casella released 8,000 gallons of leachate into a river, and claiming that Casella’s single-stream recycling program contributed substantially to the collapse of the Asian recyclables markets) were merely “inconvenient,” “contrary to [Casella’s] interests,” “speculation,” “metaphorical,” “rallying cries,” “hyperbole,” or “facts in the public domain.” These bare characterizations fail to recognize, however, that speculation, metaphors, calls to arms, exaggeration, and assertions of fact in the public domain can be defamatory if they purport to assert facts that are false and the

person publishing them has the requisite mental state. On a motion to dismiss, with all of the allegations in the complaint construed in plaintiff's favor, it would be plain error to accept the gloss the Swan Defendants have attempted to place on their statements and dismiss plaintiff's complaint.

Casella agrees with the Swan Defendants that public comment on public figures about matters in the public eye is given heightened protection against defamation claims so that necessary social discourse is not impeded. This will inevitably result in public statements made out of negligence, ignorance, or misinformation that are false and harmful to a public figure but are not actionable. That protection is not absolute, however. Where a person falsely maligns another out of hatred or ill will with the purpose of harming the other's reputation or standing in the community and knows or recklessly disregards that the statements are false, there is no constitutional value at stake.

That is precisely the conduct Casella has alleged against the Swan Defendants.

Accordingly, the Swan Defendants' motion to dismiss must be denied.

II. Statement of Facts

Swan is an opponent of a landfill that Casella's subsidiary, North Country Environmental Services, Inc., has proposed to develop in Dalton, New Hampshire. Complaint at ¶¶11, 14.

Swan lives on Forest Lake near the 400-acre Forest Lake State Park. *Id.* at ¶13. The proposed landfill site is on an aggregation of properties of over 1,000 acres, some of which abut the state park. *Id.* at ¶11. There are active industrial uses on the aggregated parcels including extensive sand and gravel mining, asphalt production, logging, and a proposed drag strip. *Id.* None of the existing uses is visible from Forest Lake because there is a ridge between the lake and the

aggregated parcels. *Id.* at ¶13. The proposed landfill would likewise be screened from Forest Lake. *Id.*

Since learning about the proposed project Swan has opposed it, as is his right. After being in the waste management business for 45 years, Casella is accustomed to steadfast local opposition to waste management facilities, particularly landfills. Swan’s opposition to the Dalton project, however, has included a particularly extreme and virulent form of character assassination by falsehoods designed, as the complaint alleges, to damage Casella’s credibility and reputation and thereby discourage public officials and members of the public from doing business with Casella. *See, e.g., id.* at ¶¶17(f), 19(a), 22, 29(a), 36, 37, and 38(a). It may be emblematic of the times in which we live that bald-faced lies intended only to destroy reputations have become a standard part of public debate, but the law does not protect such statements, nor should it. And Swan has a history of extremist public actions and statements calculated to stir up hatred and fear against those he opposes. *Id.* at ¶12.

It is an integral part of plaintiff’s theory of liability in this case that the Swan Defendants concluded that they did not want to take the risk of losing a public debate on the merits of the Dalton landfill project and that for tactical reasons – and because such tactics are so familiar to Swan – they decided that they would disparage Casella publicly, continuously, and dishonestly to make the company a pariah.¹ *Id.* at ¶¶15, 47, 55, and *passim*. The Swan Defendants’ motion urges the court to *assume* that Casella is a bad actor and that it has brought this action to quell an effective opponent. Motion at 2. If the court assumes instead, as it must on a motion to dismiss, that Casella is a reputable company providing services that are essential to public health and the

¹ If anything, the Swan Defendants have stepped up the pace and hostility of their attacks on Casella since the company filed this lawsuit. Swan has even gone so far as to misappropriate the company’s name to create a website that promotes a book he claims to be writing about Casella that he has entitled “Bad Company.” *See* www.casellawastesystems.com.

environment and that the Swan Defendants have deliberately published statements about Casella that they know to be untrue simply to smear Casella, subject it to public condemnation, and discourage state and local governments and members of the public from dealing with it, it places the case in a very different light.

The motion to dismiss relies on multiple assertions of fact that are not contained in the complaint and are therefore not properly before the court. These assertions include:

- That the statements plaintiff alleges to be false are in fact true. Motion at 4, 7.
- That the statements made by defendants were about the manner in which government is operated. *Id.* at 2.
- That the complaint seeks to quash defendants' opposition and was brought for vexatious purposes. *Id.* at 2, 4, 20.
- That plaintiff "thrust itself into" and created the controversy about which defendants have made their statements. *Id.* at 3.
- That the defendants made at least some of the statements in reliance on "public reporting" that is "truthful." *Id.* at 4, 16-18.
- That the statements defendants made about Horizons Engineering were not also about Casella. *Id.* at 5.
- That it is "objectively verifiable" that single-stream recycling contributed to the collapse of Asian recycling markets.² *Id.* at 7-8.

² This assertion is also beside the point in terms of the complaint's sufficiency because the statement made by defendants is that *Casella's* single-stream recycling program contributed to the collapse of the Asian markets. Complaint at ¶17(d). Defendants' exposition on the alleged forces leading to China's implementation of National Sword has no bearing on whether their statement about Casella was defamatory.

- That defendants’ photoshopped depiction of a landfill looming above Forest Lake must be taken as both hyperbole and speculation and not as a representation of how the landfill would appear from Forest Lake. *Id.* at 10.
- That defendants’ representation that Casella plans to construct a landfill that will drain into Forest Lake and the Connecticut and Ammonoosuc Rivers is simply about interpretation of topographic contours and not a defamatory statement that Casella plans to discharge pollutants into public waters. *Id.*
- That some of defendants’ statements are supported by facts in the public domain or “news reports or public records actually referenced by Save Forest Lake in or near the assertion.” *Id.* at 16.

The Swan Defendants also attempt to use the fact that the complaint quotes from some posts they made online to render *everything* they have posted online subject to the court’s consideration on the motion to dismiss. *Id.* at 7 n.3 and 17-18. This would mean that the court may treat a motion to dismiss (on which the issue is the legal sufficiency of the allegations of the complaint, *see post* at 6-7) as a motion for summary judgment (on which the defendant is entitled to provide evidence – supported by affidavit – to contradict the allegations of the complaint, RSA 491:8-a, II).

According to the Swan Defendants, “[t]here is not a single actionable statement in the 60+ allegations made by the Plaintiff.” Motion at 4. To accept this conclusion, however, the court would have to find as a matter of law that it is not defamatory to assert falsely about a business that it is akin to one of the most infamous and genocidal regimes in history under the

leadership of a man who was likely the most reviled authoritarian racial supremacist of all time³, that it exploits and defrauds the elderly, that it engages in profiteering (*i.e.*, opportunistic price gouging), that it preys on the communities in which it does business, that it is dishonest and untrustworthy, that it was responsible in some measure for the closure of Asian markets to American recyclables, and that it violates environmental laws and rules by discharging contaminants into the region's waterways. Complaint at ¶¶17(d), 17(f), 17 (g), 18, 19(a), 19(b), 21(c), 24(b), and 36. The court would also have to disregard the ample allegations in the complaint establishing the Swan Defendants' deep-seated antipathy toward Casella and the lengths to which they will go to win their "war" on Casella. *Id.* at ¶¶25, 25(a), and 28(a). It is plaintiff's theory that this enmity motivated the Swan Defendants to publish these defamatory statements with actual malice, *i.e.*, knowing or recklessly disregarding the fact that they were false. And because Casella is a limited public figure, only defendants' defamatory statements about the proposed landfill project require plaintiff to allege actual malice.

Because the complaint alleges facts that establish all of the elements of defamation against a public figure the motion to dismiss for failure to state a claim must be denied.

III. Argument

A motion to dismiss "*must fail* if the facts as pleaded by the plaintiff and all reasonable inferences drawn therefrom would constitute a basis for legal relief." *Williams v. O'Brien*, 140 N.H. 595, 597 (1995) (emphasis supplied). The court must "rigorously scrutinize the complaint to determine whether, *on its face*, it asserts a cause of action" by testing the facts in the complaint

³ In Winston Churchill's words, "[I]nto that void after a pause there strode a maniac of ferocious genius, the repository and expression of the most virulent hatreds that have ever corroded the human breast – Corporal Hitler." W.S. Churchill, *The Second World War*, v. I (*The Gathering Storm*), Houghton, Mifflin Co. (1948) at 11. It is both telling and troubling that the defendants characterize as "typical" hyperbole their assertion that Casella and its CEO are equivalent to the Nazis and Hitler. Motion at 12.

against the applicable law. *Id.* (emphasis in original). The standard a court must use is “whether or not the plaintiff’s allegations are reasonably susceptible of a construction that would permit recovery.” *Leonard v. Schneider*, No. 217-2019-CV-00507, 2019 WL 5059104, at *3 (N.H. Super. Oct. 7, 2019). The court must “assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff.” *Legacy Global Sports, LP v. St. Pierre*, No. 218-2019-CV-198, 2020 WL 2027401, at *2 (N.H. Super. Apr. 27, 2020) (citation and internal quotations omitted). Further, the court “must treat all well-pleaded facts in a Complaint as true, and construe all reasonable inferences therefrom in favor of the plaintiff.” *Solito v. Direct Capital Corp.*, No. 219-2017-CV-00411, 2018 WL 1789877, at *1 (N.H. Super. Apr. 11, 2018). The court may consider “documents sufficiently referred to in the complaint,” *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted; emphasis supplied), but the supreme court has never held that a reference in the complaint to a document or post on a website opens the door to consideration of other documents or posts on the same site on a motion to dismiss. Hence, the court may not consider the materials cited in footnote 3 and attached as exhibits to the motion to determine the sufficiency of the allegations of the complaint.

To prevail on a claim for defamation, the plaintiff must establish that the defendant “failed to exercise reasonable care in publishing, without a valid privilege, a false and defamatory statement of fact about the plaintiff to a third party.” *Indep. Mech. Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110, 118 (1993). The status of the plaintiff as a private or public figure dictates the standard by which that plaintiff must prove his case; private figures may prevail in a defamation action 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.”⁴ *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 340 (2007) (citation omitted).

“Actual malice,” in the context of a defamation claim, means the defendant made the statement with “knowledge that the statement was false or with reckless disregard of whether it was false or not [sic].” *MacDonald v. Jacobs*, 171 N.H. 668, 674-75 (2019) (brackets and citation omitted). If actual malice can be proven, there is negligible constitutional value to the contested speech. *See Chaplinsky v. State of N.H.*, 315 U.S. 568, 571-72 (1942) (certain “well-defined and narrowly limited classes of speech,” such as “the libelous” and “insulting or ‘fighting’ words,” “have never been thought to raise any constitutional problem,” as they are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”); *see also Garrison v. State of La.*, 379 U.S. 64, 75 (1964) (“[c]alculated falsehoods” are also “no essential part of any exposition of ideas” and are of slight social value such that the benefit derived from them is outweighed by social interests (*citing Chaplinsky*)).

“Actual malice” for defamation purposes is not synonymous with “common law malice,” which is “ill will or intent to harm” that concerns the defendant’s “attitude toward the plaintiff,” *Thomas*, 155 N.H. at 328. That does not mean that common law malice is irrelevant in a

⁴ The Swan Defendants appear to consider Casella a limited public figure because it allegedly inserted itself into a matter of public controversy by proposing a landfill in Dalton. Motion at 3. Casella agrees that it is a limited public figure even though it disputes the Swan Defendants’ theory that Casella thrust itself into the public eye. Indeed, it was defendants who created a controversy in response to the prospect of Casella’s development of a landfill, and now they maintain that the controversy of their making provides them greater latitude to defame Casella. In any event, its status as a limited public figure would require Casella to show actual malice only with respect to defendants’ defamatory statements about Casella in connection with the landfill project. *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (for a limited public figure “as to a particular episode or subject, “only the statements about the person *in that context* require a showing of actual malice” (emphasis added)). As discussed *post* at 17-18, the Swan Defendants have made defamatory statements about Casella that are unrelated to the Dalton landfill proposal.

defamation case. The Swan Defendants' open hostility toward Casella is among the circumstantial evidence that would ultimately be considered to determine whether they acted recklessly or with a "high degree of awareness of [the] probable falsity" of their statements. *Nash v. Keene Pub. Corp.*, 127 N.H. 214, 223 (1985) (ellipses and citation omitted). Indeed, determining whether the defendant was aware or in "serious doubt" of the falsity of his statements will "usually depend in some part on an assessment of the defendant's own credibility" and "state of mind," the latter of which will often rest on circumstantial evidence.

Id.

Many of the allegations of the complaint that the Swan Defendants argue are not defamatory are included in the complaint to establish defendants' extreme contempt and hatred for Casella and hence their motive to methodically attack Casella's reputation with statements of fact that they knew to be or were recklessly false. Motion at 9, 11-12. Such evidence has been persuasive in other cases as a factor with other circumstantial evidence to establish actual malice. *See, e.g., Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 186-87 (2nd Cir. 2000) (public figure plaintiff met burden of proving actual malice when defendant newspaper published an article stating a judge had found plaintiff "negligent" in a defamation action when, in fact, the judge had only denied the plaintiff's motion for summary judgment; jury could reasonably find actual malice based in part on "objective circumstantial evidence" of the parties' animosity and the defendant's testimony).

Finally, a defendant has committed defamation *per se* when the defendant's statement defames the plaintiff by accusing him of engaging in "activities that would tend to injure him in trade or business." *Lassonde v. Stanton*, 157 N.H. 582, 593 (2008). This includes publication of words which "impute to another conduct constituting a criminal offense chargeable by

indictment or information either at common law or by statute and of such a kind as to be characterized as morally reprehensible. . . .” *Jones v. Walsh*, 107 N.H. 379, 380 (1966).

Rather than squarely confront the elements of a defamation claim, the Swan Defendants have organized their motion around the self-serving characterizations to which they have attempted to assign the complaint’s allegations. Casella responds to each of these categories in turn.

A. Defendants have misapprehended the import of the statements “of and concerning” Horizons Engineering.

The Swan Defendants assert that their statements concerning Horizons Engineering, a consultant engaged by Casella in connection with the proposed Dalton landfill, are not actionable because they are not “of or concerning” Casella. Motion at 5 (discussing Complaint at ¶¶39, 39(a), and 39(b) ⁵). The Swan Defendants ignore, however, that the complaint alleges that the defendants accused Casella of collaborating with Horizons to “knowingly attempt[] to deceive the Planning Board, abutters, and the public” about its lot line adjustment. Complaint at ¶39. Casella is not seeking to vindicate Horizons’ rights; it is asserting that the defendants’ statement and innuendo that Casella participated in a deception of a regulatory body and the public is false and defamatory as to Casella.

B. Casella has alleged dozens of examples of verbatim defamatory statements.

The Swan Defendants argue that four paragraphs in the complaint do not “‘stat[e] with particularity’ the actual words that are alleged to be defamatory” and cite authorities for the proposition that a complaint for defamation must state “the very words published” that are complained against so “the court can make an initial assessment of their defamatory nature.” Motion at 6-7 (citing authorities). They cite only one New Hampshire case in support of this

⁵ The motion incorrectly cites this statement as “Complaint ¶39(c),” but no such subparagraph exists.

argument, *Gendron v. St. Pierre*, 72 N.H. 400 (1903), and that case is distinguishable from this one. The New Hampshire Supreme Court concluded in *Gendron* that an allegation for slander was “bad” because it was “general” and insufficiently “allege[d] the substance or effect of the language used,” rather than the words themselves. *Id.* at 401.

There is no similarity between the generalities in *Gendron* and the specificity of the complaint before this court. Thirty-nine paragraphs or subparagraphs in the plaintiff’s complaint contain direct quotations from statements published or otherwise disseminated by the Swan Defendants (Complaint at 6-13); ironically, the Swan Defendants acknowledge this fact in their motion. *See* Motion at 11 (observing that the complaint includes “more than 60 instances of alleged defamation”). The allegedly defamatory statements are not generally summarized or referred to in oblique terms; in several instances, these statements include the verbatim text that was defamatory or illustrative of the Swan Defendants’ actual malice and refer to the date on which they were published and the medium of publication (*e.g.*, submission to local newspaper, social media post, etc.). *See, e.g.*, Complaint at ¶¶17(g), 20(b), 34, and 34(c). Even where allegations do not contain the verbatim text of the Swan Defendants’ statement, they include reference to the date and source of publication to direct the defendants to their own publication history. *See, e.g., id.* ¶32. Other paragraphs called out in the Swan Defendants’ motion are merely introductory summaries of the specific allegations that follow in sequence in the complaint. *See id.* at ¶¶30 and 35.

New Hampshire is a “notice pleading jurisdiction,” which means the complaint “must do no more than set the general character of the action and put the court and counsel on notice of the nature of the controversy.” *Legacy Global Sports*, 2020 WL 2027401, at *2 (*quoting Pike Indus. v. Hiltz Constr.*, 143 N.H. 1, 4 (1998) (quotations omitted)). The complaint in this case plainly

places the Swan Defendants on notice of the claims; otherwise they would not have been able to attempt to respond substantively to them in their motion to dismiss as they have.

C. *Construed in the light most favorable to Casella, and not as the Swan Defendants would explain them away, the complaint's allegations contain multiple defamatory statements by the Swan Defendants.*

The Swan Defendants attempt to sanitize the defamatory statements in the complaint by depicting them in the light most favorable to themselves. The motion is replete with such blithe descriptions of the statements as mere “rhetorical hyperbole” or “expressions of viewpoint.” See, *e.g.*, Motion at 10, 13, 15. Only if the court were to determine as a matter of fact that these characterizations are accurate could it rule in defendants’ favor. The Swan Defendants cite no authority, however, that a court considering the sufficiency of the allegations of a complaint may determine whether a statement that is made in the form of an assertion of fact is nonetheless mere exaggeration or opinion. In fact, the law is to the contrary. *Mountain Springs Water Co. v. Mountain Lakes Vill. Dist.*, 126 N.H. 199, 201 (1985) (court must not consider “factual defenses” or justifications requiring factual determinations on a motion to dismiss for failure to state a claim). There is, moreover, no evidence before the court on which it can resolve, for example, whether an assertion that Casella is “predatory” is intended to be taken literally as fact or is meant to be hyperbole or opinion. Defendants’ glib assertion that it is the latter is the flimsiest of grounds on which the court can make a factual ruling and would be reversible error under the legal standards governing motions to dismiss.

The same is true of the Swan Defendants’ statements that Casella engaged in criminal misconduct. The allegations from the complaint under this “thematic category” include the Swan Defendants’ statements that Casella engaged in multiple criminal and unethical business activities, including profiteering (Complaint at ¶17(f)); “scam[ming]” the elderly (*id.* at ¶¶19(a)

and (b)); dishonesty in zoning and election-related matters (*id.* at ¶¶21(c), 29(a), 38(c), and 39); “unethical lobbying efforts” (*id.* at ¶¶38(a) and (b)); and recklessly or purposely discharging contaminants to at least three rivers, the Ammonoosuc and Merrimack Rivers in New Hampshire and the Black River in Vermont (*id.* at ¶¶20, 22, 23). According to the Swan Defendants these assertions are merely a “subjective view” and opinion about the company’s “motives and intentions.” Motion at 13. Nothing in those statements alerts the reader, though, that they are opinion of any kind. On their faces, the statements are assertions of fact that Casella engaged in illegal or unethical activities. *Cf., e.g.*, RSA 631:9, I(b)(2) (imposing criminal penalties on a person for “induc[ing] an elderly, disabled, or impaired adult” against that person’s will to “perform services for the profit or advantage of another”); RSA 641:3, I(b) (person guilty of misdemeanor if he or she makes a false statement with a purpose to deceive a public servant in performance of that official function); RSA 485-A:13 (prohibiting unpermitted discharge of pollutants to surface waters and groundwater).

Whether a statement is “rhetorical hyperbole” or a “vigorous epithet” (Motion at 13) depends in part on whether it can “reasonably be interpreted as factual assertion[.]” *Automated Transactions, LLC v. American Bankers Ass’n*, 172 N.H. 528, 533 (2019). If it cannot be interpreted in this way it is not actionable. *Id.* The Swan Defendants urge the court to find that several of the statements they made about Casella cannot be interpreted as assertions of fact. These include:

- The Swan Defendants’ statement that Casella “scam[med]” elderly citizens for its own benefit (Motion at 13, citing Complaint at ¶¶19(a) and (b)); and

- The Swan Defendants’ statement to the Attorney General’s Office that Casella engaged in “unethical lobbying efforts” (Motion at 13-14, citing Complaint at ¶¶38(a) and (b)).

These statements – and others set forth in the complaint – are facially assertions of fact. If the defendants intended them only as hyperbolic or as epithets that intent was not evident from or communicated in the statements themselves. The Swan Defendants’ after-the-fact incantation of “rhetorical hyperbole,” “vigorous epithet,” and the like does not change the language they chose to use when attacking Casella.

“Whether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance.” *Thomas*, 155 N.H. at 338-39. Here, the Swan Defendants offer no specific grounds on which the court can convert statements that are asserted as facts into something other than factual. Just as “[n]o mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself,” *Thomson v. Cash*, 119 N.H. 371, 373 (1979) (quotation and citation omitted), it stands to reason that no self-serving construction of the publication offered by the defendant on a motion to dismiss can purge a defamatory meaning that is plain in the publication itself.

The Swan Defendants could have qualified the statements they made about Casella as opinion or exaggeration, but that would have diminished the intended impact of the statements. The Swan Defendants deliberately framed their statements about Casella as fact to inflict the greatest harm possible on its reputation. Having now been called to account for defamation, the defendants should not be heard to characterize their statements in a way they could have characterized them when they published them.

D. Statements of fact couched or masquerading as opinion are not categorically protected by the First Amendment.

Contrary to the Swan Defendants' assertion in their motion, statements of opinion are not "categorically" immune to defamation actions. A "statement of opinion is not actionable [in a defamation action] *unless* it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." *Thomas*, 155 N.H. at 338 (emphasis supplied). Whether such a statement can be read as "being or implying an actionable statement of fact [for the purposes of a defamation claim] is a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole." *Id.* at 338-39 (addressing court's review in context of a summary judgment motion). The Swan Defendants ignore this principle in their motion.

The Swan Defendants categorize multiple allegations in the complaint as "opinions" and therefore not actionable. These allegations, however, are unambiguously framed as statements of fact. For example, the Swan Defendants stated that:

- Casella 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." Motion at 11, quoting Complaint ¶29(a).
- Casella "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," which the Swan Defendants further described as a "scam." Motion at 11, quoting Complaint at ¶¶19(a) and (b).
- Casella tried to "improperly influence a zoning vote." Motion at 13, quoting Complaint at ¶21(b).

- Stating that the proposed Dalton landfill will “surely lead to the subsequent contamination and destruction of wetlands.” Motion at 14, quoting Complaint at ¶39(b).

The court must draw reasonable inferences in favor of the plaintiff, not the moving party, *Legacy Global Sports*, 2020 WL 2027401, at *2, and thus it must conclude that these statements and others like them in the complaint are exactly what they appear to be on their face, statements of fact.

E. The Swan Defendants cite no authority for the proposition that repeating a defamatory statement that has found its way into the “public domain” is not itself defamatory.

Relying principally on *Pease v. Telegraph Pub. Co., Inc.*, 121 N.H. 62, 66 (1981), the Swan Defendants contend that publication of “facts” in the “public domain” cannot be a basis on which to impose liability for defamation. Motion at 15-16. In *Pease* a person wrote a letter to the editor of a newspaper describing a “journalistic smear” of the president of the University of New Hampshire allegedly perpetrated by the plaintiff in articles he had written. In the letter, the author referred to the plaintiff as the “journalistic scum of the earth.” *Id* at 64. The court determined that this letter “disclosed the factual basis” on which the writer formed his opinion and noted that the plaintiff’s articles were “in the public domain” and available to anyone who wanted to read them. *Id.* at 66. Accordingly, in that case, the “facts” relied upon for the opinion were disclosed, and the “opinion does not imply other facts” and thus was not libelous. *Id.*

Here, the allegations of the complaint say nothing about the sources the Swan Defendants may have relied upon in making the statements about Casella. To attempt to fill that gap the Swan Defendants attach ten unauthenticated “exhibits” to the motion. As noted above, none of these exhibits is referred to in the complaint and therefore cannot be considered on a motion to dismiss. *Ante* at 7. Beyond that, even if the exhibits were authenticated and could be considered

on a motion to dismiss, they do not demonstrate that the facts defendants asserted about Casella were in the public domain.

Paragraph 17(d) of the complaint, for example, refers to a specific comment Swan made on social media, stating as a fact that Casella's Zero-Sort recycling practices specifically contributed to changes in the recyclables market. Objection ("Obj.) Exhibit A. Exhibits to the Swan Defendants' motion related to this allegation concern the fate of recycling materials in New England, rather than the specific statements Swan made on that same subject matter.

The Swan Defendants' reliance on *Pease* is misplaced. In *Pease*, the challenged statement specifically referenced articles written by the plaintiff about a specific topic, and thus the readers of that statement knew exactly what to review in the public domain to determine whether they agreed with the author's opinion about those articles. Here, the Swan Defendants argue their statements are subject to the same protections simply because there are materials in the "public domain" and generally on the Save Forest Lake website *concerning the same subject matter*. That is not the holding of *Pease*, however. The following examples reveal the fallacy in defendants' reasoning:

- No source is cited for the statement of fact that Casella "scam[med]" the elderly (Motion at 17; Obj. Exhibit B). The Swan Defendants argue that Exhibit 9 to their motion is among the "substantiating documentation" that Casella defrauded the elderly, but that document simply contains notes from a Dalton resident about a proposed investment from Casella.
- The false statement of fact that Casella ships out leachate "despite [its] inability to treat it effectively before it is emptied into the Merrimack River" was posted on

social media with a link to an article about leachate disposal at an unrelated landfill in Pennsylvania. Motion at 17; Obj. Exhibit C.

- The statement that Casella is responsible for “negligence and worker safety violations” was posted with a link to a Vermont Public Radio article that makes no mention of any such violations. Motion at 17; Obj. Exhibit D.
- Other statements, such as those set forth in ¶¶21 and 34(a) of the complaint, were letters to the editor written by Swan himself. Motion at 17; Obj. Exhibits E and F.

These statements are entirely unlike the assertions at issue in *Pease*. They do not disclose a specific source that the reader can turn to in order to form his or her own opinion, nor do they consist of obviously subjective statements such as “journalistic scum of the earth.” There is a vast difference between patent name-calling and asserting as fact something that the publisher knows to be false. In essence, the Swan Defendants maintain that if information on the subject of the defamatory statement is somewhere in the vastness of the public domain then the statement is not actionable. That is not the law.

F. The Swan Defendants’ request for attorney’s fees rests on their bare, unproven, and untrue assumption that Casella commenced this action for an improper purpose.

To cap off their show of indignation at being held accountable for their gratuitous slurs against Casella, the Swan Defendants have asked the court to award attorney’s fees. The only basis on which they have sought fees is their equally gratuitous assumption that Casella commenced this action to interfere with their free expression. In fact, the complaint does not seek to silence the Swan Defendants. It seeks only recover damages for the deliberately defamatory statements the defendants have made about Casella and enjoin such intentional

falsehoods in the future. Presumably, the Swan Defendants are able to engage in vigorous public debate without intentionally or recklessly lying about Casella.

There is nothing in the record to support the assertion that this action is vexatious. As demonstrated above, what prompted this litigation was the Swan Defendants' lies about Casella. The plaintiff has sought relief from the court consistent with well-established principles of law. There is simply no basis for an award of fees.

For the reasons set forth in this objection, the plaintiff respectfully asks that the court deny the Swan Defendants' motion to dismiss the complaint.

Respectfully submitted,

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By Its Attorneys,

Date: 6/5/2020

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically through the court's ECF system upon counsel of record and all other parties who have entered electronic service contacts in this case.

Date: 6/5/2020

/s/ Bryan K. Gould
Bryan K. Gould, Esq.

EXHIBIT A



Jon Swan

February 13 · 🌐



"It's not like we're doing something technically wrong, but it's a lot of plastic, and it's a lot of cheap plastic," said Chi Delta sorority sustainability chair Kristina Strommer '22.

Ms. Strommer, this is the future of YOUR planet we're talking about...you kids better wake up and pull your heads out of your arses! It's 2020 and you kids are still using red Solo cups? Come on...and all of that single-use convenience is being landfilled, so don't fool yourselves, Dartmouth. And please, don't think Casella is going to save you from what's happening to our environemnt. Casella's "Zero-Sort" single-stream recycling practices, and ensuing higher rate of contamination, is part of the reason why China and many 3rd world nations stopped accepting our "recyclables" aka PLASTICS. So, next time you kids see red Solo cups swirling around in the Great Pacific Garbage Patch, or read about PFAS contamination in your city's water supply, that's on you. Hope you had fun!

Ever heard of a dishwasher and re-usable plastic cups, kids?



THEDARTMOUTH.COM

Cups, Cans and Competitions: Greek Life and Sustainability

The Dartmouth, America's oldest college newspaper. Founded 1799

👍🙄 6

2 Comments 3 Shares

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Lucy S Golden "The numbers are staggering: According to Dartmouth sustainability office intern Sophia Greszczuk '22, the average Greek house at Dartmouth goes through 11,400 pong cups and 2,200 cans of Keystone a week. Over one term, that adds up to 114,000 cups and 22,000 beer cans."

A lot of staggering going on for sure. Something kinda pathetic about this.

Like · 10w



Pat Rod multiply by ??????

Like · 10w

EXHIBIT B



Save Forest Lake

January 16 · 🌐

(This is meant to be satirical but obviously very much based on local reality)

From the Forest Lake Protective Bureau:

Scam Alert!

Please talk to your friends and loved ones, especially the elderly and more vulnerable, so they don't fall victim!

An investigator learned of two different scams just this week!

The first was perpetrated on an elderly citizen in the Town of Bethlehem. It seems that a waste management company had convinced him over the past 8 months that going door to door in that town, along with posting signs throughout, at a significant cost to both his finances and reputation, would somehow convince the residents of that town that a continued relationship would that company would somehow be of benefit to the town. Please be sure to keep an eye on your loved ones so that they don't fall victim to this as well!

The second case involved an elderly citizen in the Town of Dalton. There, too, 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. "Confusion" on the part of the elderly victim was cited by the waste management company representative when approached by investigators.

Please be sure to monitor the activities, including email and social media accounts, of your elderly loved ones to protect them from such scams in the future, particularly those centered around requests by waste management companies seeking advocates to lobby the public on their behalf. This has become a favorite of waste management companies, most of whom are worth hundreds of millions of dollars and have employees capable of doing their own dirty work.

Thank you!



5 Comments 2 Shares



Most Relevant ▾

Write a comment...



 **Brian Kenison** Has this been reported to the authorities and is the proper investigation being conducted. There's a digital footprint that can easily be traced.

Like · Reply · 18w



 Author

Save Forest Lake It's meant to be satirical, but obviously very much based on fact. The 2 landfill proponents are grown men, albeit older in years, but from what I have seen fully aware of just who they were getting involved with. And, as we've seen recently, both unceremoniously dumped by those for whom they advocated.

Like · Reply · 18w

 **Rob Christie** well said.

Like · Reply · 18w



 **Brian Kenison** Funny I don't know how I missed that first sentence.

Like · Reply · 18w



 Author

Save Forest Lake I had to add it based on your post...realized your new to our group and it dawned on me that the reference might be missed, sorry.

Like · Reply · 18w

Write a comment...

EXHIBIT C



Save Forest Lake

November 24, 2019 · 🌐



PA and landfill and WWTP runoff...May 2019.

How much longer will NH allow for Casella to ship its millions of gallons of leachate to the Concord and Franklin WWTPs despite their inability to treat it effectively before it is emptied into the Merrimack River?



POST-GAZETTE.COM

Pa. Attorney General to investigate landfill runoff problems in Westmoreland County

👍 🙄 😞 4

👍 Like

💬 Comment

➦ Share



Write a comment...



EXHIBIT D



Jon Swan ▶ Seneca Lake Guardian, A Waterkeeper Affiliate



January 2 · 🌐

How's this from that "Steward of the Environment" Casella Waste Systems? Nearly a week since the accident at their Coventry, VT landfill, which released 8000 gallons of toxic leachate into the surrounding soil and work to clean up is resuming? Love the urgency! Relatively warm weather over the past week...what could possibly go wrong?

Note how Casella Waste Systems, once again, does not accept ANY responsibility since VP Joe Fusco tells us they don't own either of the 2 trucks involved. Of course they don't, they were mostly like MBI trucks. Casella does OWN the LEACHATE as it's from THEIR facility! Yeah, this is just the type of company we want operating a landfill next to Forest Lake! NOT!

Criminal charges should be brought forth, why on earth is a leachate truck leaving the Coventry landfill, OWNED AND OPERATED by Casella Waste Systems, at 3AM in the morning, and in such conditions? It's not like the landfill facility is a 24-hour self-storage facility. Criminal charges should be brought forth for negligence and worker safety violations. This is a terrible company.

P.S. We want to see photos of the 2 trucks from the scene of the accident.
[#SaveForestLake](#) [#DumpCasella!](#)





VPR.ORG

State Plans To Resume Leachate Cleanup Thursday From Truck Spill In Coventry



2



Like



Comment



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EXHIBIT E



Jon Swan

January 1 · 🌐



Leachate Truck Accident

To the Editor:

On the morning of December 27th, 2019, we learned that a fully-loaded 8000 gallon MBI leachate truck leaving the Casella Waste Systems landfill in Coventry, VT, before 3am in icy conditions, was involved in an accident with another garbage tractor trailer near the Black River, surely outside of the permitted hours of operation for the landfill. This terrible environmental accident is YET ANOTHER example of Casella Waste system's poor management of YET ANOTHER of their landfills in recent months. We just learned of violations earlier this year at the Bethlehem landfill for inadequate ground cover (DES site visit 8/15/19), as reported by the Caledonian. Do we want MORE of this for the North Country?

Are we to take Casella Waste Systems at their word that their proposed, "state-of-the-art" landfill at Forest Lake would be highly engineered and highly regulated, and would not contaminate the lake, as Casella Waste Systems maintained in their "Dalton Facts" literature sent to Dalton voters this past summer? (see their literature on the front page of the SFL website for yourself). This is just one more reason why we feel a landfill at Forest Lake is a terrible idea, from a terrible company with a terrible performance record, at a terrible location, and doing so puts not only the environment that we all love and enjoy at great risk, but the inhabitants of Whitefield and Dalton as well, since 90 garbage haulers and leachate trucks are estimated to travel to and from the proposed site at Chick's Sand and Gravel on Route 116 thru the town center of Whitefield. No thanks!

We simply cannot trust Casella Waste Systems and their corporate-speak as they call themselves "stewards of the environment" while their performance record speaks to the contrary. We do not want to be partners with a company that misleads people, as they tried to do to influence the zoning vote this summer in Dalton, or even their very sneaky, failed "lot-line adjustment" request to the Town of Dalton Planning Board on April 3, 2019. They even stated on WMUR that they would "improve the lake"! This company, as we've learned from their dealings in Bethlehem, simply cannot be taken at their word and should be judged more so on their performance. We do not want a landfill at Forest Lake and it's up to all of us to fight back, to speak up, and to protect our home in the North Country from this threat to our environment and our way of life.

Please talk to your friends, neighbors, and elected officials, let them know about the environmental accident involving a leachate truck from the Casella-

EXHIBIT F



Save Forest Lake

May 28, 2019 · 🌐



To Caledonian Record:

"Dear Editor:

This letter goes out to all of our North Country neighbors. The residents of Dalton have submitted a petition calling for a vote to empower the Town of Dalton with emergency temporary zoning, in hopes to thwart an attempt by Casella Waste Systems to create their 2nd garbage landfill in the North Country. This not-yet proposed landfill would be only 7 miles away from Casella's current one in Bethlehem and it abutts Forest Lake and the State Park off of Route 116. The location is the worst imaginable, with high ground that drains into both Forest Lake and Alderbrook, both of which eventually drain into the Connecticut and Ammonoosuc Rivers. With options to purchase nearly 1900 acres over a 25 year period, that's a lot of future expansions by Casella Waste Systems! What could possibly go wrong with that scenario? The regional impact on the North Country will be devastating, with increased traffic congestion, risks to pedestrian safety, and air and noise pollution as garbage haulers roar thru the Towns of Carroll, Whitefield, Littleton, Franconia, Sugar Hill, and Bethlehem en route to Douglas Drive on Route 116. We ask that you lend your voice to ours and join us in opposition to this terrible idea.

However, we must also stand united with our neighbors in Bethlehem who voted against any further expansion of the Casella-run landfill in their town. The residents of that town do not want Casella as a neighbor anymore. Why is that? How much has been spent battling them in court? We know Bethlehem has some of the highest property taxes in the North Country as a result of their relationship with Casella. So much for the tax benefit of having Casella as a neighbor, as some pro-Casella sorts like to tout. Do we want that? No! Dalton doesn't need a bully as a business partner, who will sue the town every time we try to exert our influence in a way they disagree with. We also know Casella is trying to pack the Town of Bethlehem Planning Board in an attempt to try, yet again, and against the will of the voters, to seek further expansion in that town. They have proven to be a bad business partner, a bad neighbor, and a bully with deep pockets. It's time to "Dump Casella" in the North Country, period.

We must defend the natural resources and beauty of the North Country for the generations to come. This is what makes our mountains, woods, lakes, and rivers a vacation destination for so many. Do we want to see all of that compromised and polluted? Our fresh air gone? The residents of Bethlehem have voted, and soon the voters of Dalton will have the same opportunity, to

tell Casella "No More!". Look elsewhere for your future dumping grounds! It is imperative and our duty to protect the North Country for the generations that will follow. Please, contact YOUR local, state, and federal representatives and tell them you oppose a 2nd Casella-run garbage landfill next to Forest Lake. We stand with the citizens of Bethlehem and THEIR decision to close their landfill. We are ALL in this together. We defeated the Northern Pass together, we can defeat Casella together. It's time for the North Country to Dump Casella!

Jon Swan

Organizer, Save Forest Lake
Please Help Us To Save Forest Lake!
<http://www.SaveForestLake.com>

Dump Casella!
Do not allow this proposed development to scar the beautiful landscape of the North Country for generations to come"



SAVEFORESTLAKE.COM

please have your neighbors & Friends sign our petition!!

Does This Look Like A Good Spot For A Landfill?

 2

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