

# The State of New Hampshire

MERRIMACK COUNTY

SUPERIOR COURT

CASELLA WASTE SYSTEMS, INC.

v.

JON SWAN f/k/a JON ALVAREZ; FOREST LAKE ASSOCIATION;  
SAVE FOREST LAKE; DOE DEFENDANTS 1-20

Docket No.: 217-2020-CV-00212

## ORDER

The Plaintiff, Casella Waste Systems, Inc. (“Casella”), brings an action for damages and equitable relief against the Defendants, Jon Swan f/k/a Jon Alvarez and Save Forest Lake (collectively, the “Swan Defendants”), alleging the Swan Defendants engaged in a nearly year-long campaign to disparage Casella’s reputation by publishing and disseminating false statements of fact and tortiously interfering with Casella’s prospective economic interests. The Swan Defendants move to dismiss. Casella objects. For the following reasons, the Swan Defendants’ Motion to Dismiss is GRANTED in part and DENIED in part.

### **I. Standard**

In reviewing a motion to dismiss, the Court assumes the truth of all well-pleaded facts of the nonmoving party and construes “all reasonable inferences in the light most favorable” to the nonmoving party. Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). The Court need not, however, “assume the truth of statements . . . that are merely conclusions of law.” Clark v. N.H. Dep’t of Emp. Security, 171 N.H. 639, 645 (2019). The Court must therefore determine, as a threshold matter, whether the facts

alleged by the nonmoving party “constitute a basis for legal relief” when tested “against the applicable law.” Grand Summit Hotel Condo. Unit Owners' Ass'n v. L.B.O. Holding, Inc., 171 N.H. 343, 345 (2018). The Court may additionally consider documents attached to the nonmoving party's pleadings, documents the authenticity of which is not disputed, official public records, or documents sufficiently referred to in the Complaint. Ojo v. Lorenzo, 164 N.H. 717, 721 (2013).

## **II. Background**

Casella is a solid waste resource management company that maintains operations in New Hampshire, Maine, Vermont, Massachusetts, New York, and northern Pennsylvania. (Compl. ¶¶ 8, 11.) Through its subsidiaries and divisions, Casella provides a range of services, including waste management education and training, residential curbside collection, commercial and industrial waste removal, waste hauling services, “singlestream” or commingled recycling, food waste composting, and biosolid production. (Id. ¶ 8.) Casella also possesses materials recovery facilities, landfills, and regional transfer stations. (Id.) In addition, Casella operates municipally owned transfer stations on behalf of cities and towns. (Id.) Its operations in New Hampshire serve more than 50,000 households and 5,500 businesses, across 150 towns and cities. (Id. ¶ 11.)

North Country Environmental Services, Inc. (“NCES”), one of Casella’s subsidiaries, owns and operates a landfill in Bethlehem. (Id. ¶ 9.) The prior owner of the property operated a separate, unlined landfill on the property, which leached contaminants into groundwater, some of which drained into the Ammonoosuc River. (Id.) During the acquisition of the landfill, Casella excavated the entire unlined landfill

and placed the excavated waste in a new, double lined landfill cell built to comply with state and federal regulations. (Id.) Following removal of the waste, groundwater at many portions of the site has met drinking water quality standards for many years. (Id.) However, when spring water sampling began in the mid-1980s, the results routinely indicated the presence of volatile organic compounds (“VOCs”). (Id.) Since April 2005, there have been no detections of VOCs in the main spring. (Id.) Since April 2017, there have been no detections of VOCs in any of NCES’s springs. (Id.)

Following litigation between NCES and the Town of Bethlehem in 2012, NCES entered into a settlement agreement that had the effect of limiting the size of NCES’s landfill to sixty-one acres. (Id.) Although NCES owns land adjacent to the landfill, it cannot expand the landfill into those parcels without the town’s consent and an amendment to the town’s zoning ordinance. (Id.) The NCES landfill is projected to run out of its current capacity by the end of 2021. (Id.) Although NCES is in the process of seeking approval for a final expansion that would allow the landfill to operate until 2026, NCES opted to search for alternative sites to develop a new landfill. (Id. ¶¶ 9, 11.) In 2018, NCES entered into an option contract with two property owners to acquire over 1,000 acres of contiguous parcels in Dalton for the development of a second landfill. (Id. ¶ 11.) The property, however, is located beyond a ridge from Forest Lake State Park. (Id.) Jon Swan, who owns a home by the lake, became alarmed when he learned of the project and founded “Save Forest Lake,” an organization aimed at stopping the development of the NCES landfill in Dalton. (Id. ¶ 14.)

Casella notes that Mr. Swan has a history of fomenting controversy through extreme and provocative public statements. (Id. ¶ 12.) Prior to living in New

Hampshire, Mr. Swan allegedly held a contest on his talk radio show for best papier mâché pig made from the pages of the Quran, organized a “militia” in upstate New York, and posted a Facebook tribute to a pilot who flew a plane into a federal office building, killing himself and a federal employee. (Id.) NCES’s option parcel is not visible from Mr. Swan’s home, nor from the lake near his property. (Id. ¶ 13.) NCES maintains that any landfill NCES develops would be screened off from visibility from either of those locations. (Id.) Nevertheless, according to Casella, Mr. Swan has engaged in online, print, and spoken attacks on anyone who supports the NCES project. (Id. ¶ 14.)

On April 24, 2019, Mr. Swan filed an ethics complaint with the State Board of Land Surveyors against Horizons Engineering, a consulting firm engaged by Casella in connection with the proposed Dalton landfill, accusing it of fraudulently using its position to enable Casella to “skir[t] the abutting landowner notification process.” (Id. ¶ 39; Casella’s Obj. to Mot. Dismiss at 10.) Mr. Swan warned that development of the landfill would “surely lead to. . . an environmental catastrophe which w[ould] forever alter the ecosystem over a wide area of the [N]orth [C]ountry, create economic hardship [for the region]. . . [and] negatively impact the quality of life, health, and property values” of Dalton residents. (Compl. ¶ 39.) On a separate occasion, Mr. Swan allegedly published a photoshopped image of the landfill next to Forest Lake State Park, depicting the 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. (Id. ¶ 31.)

Moreover, in a May 28, 2019 letter to the editor of the Caledonian Record, Mr. Swan claimed that the location of the proposed landfill has “high ground that. . .

eventually drain[s] into the Connecticut and Ammonoosuc Rivers.” (Id. ¶ 34.) The letter also stated that “Bethlehem has some of the highest property taxes in the North Country as a result of [its] relationship with Casella” and that Casella is trying to “pack the Town of Bethlehem Planning Board” with supporters partial to Casella to facilitate the expansion of the Dalton landfill “against the will of [] voters.” (Id.) On June 29, 2019, Mr. Swan directly addressed Casella on social media, stating, “If you haven’t figured out by now that I’m at [expletive] war, you’ve not been paying attention.” (Id. ¶ 25.)

Mr. Swan and the Swan Defendants continued to make statements against Casella throughout July of 2019. For example, on July 5, 2019, the Swan Defendants posted a message on its website calling Casella “a predatory landfill company.” (Id. ¶ 24.) On July 7, 2019, they published a proposed letter to the editor, written by Mr. Swan, which read that although Casella “claim[s] to be a steward for the environment, [] the reality at each of [its] facilities speaks to the contrary.” (Id. ¶ 33.) On July 23, 2019, at a public hearing in Dalton that was reported in local news outlets, Mr. Swan claimed that the proposed landfill would release leachate that would contaminate groundwater and also affect surface water. (Id. ¶ 32.) In addition, the Swan Defendants wrote a letter to Attorney General Gordon MacDonald, alleging Casella had provided misleading information to Bethlehem residents concerning the quality of local drinking water and engaged in “unethical lobbying efforts” to “purposeful[ly] mislea[d] [Dalton] voters.” (Id. ¶ 38.) Finally, on July 31, 2019, Mr. Swan expressed his opinion to a reporter from the New Hampshire Union Leader that Casella is a “predatory out-of-state corporation that [seeks] to prey on [Dalton’s] vulnerability.” (Id.)

The Swan Defendants renewed their attacks on Casella in late 2019. Mr. Swan

wrote another letter to the editor of the Caledonian Record on November 20, 2019, painting Casella as a “corporate predator” who tried to influence Dalton voters by mailing information to local residents containing “blatant distortions of reality.” (Id. ¶ 29.) The letter went on to claim that Casella has engaged in “repeated site violations,” caused “air and noise pollution,” contributed to “unsightly heavy traffic,” polluted the Ammonoosuc River with per- and polyfluoroalkyl substances (“PFAS”), leachate, and dioxane, and has been a “litigious neighbor and overall bad business partner filling up . . . landfill space. . . with out of state trash.” (Id. ¶ 22, 29.) In addition, on November 24, 2019, the Swan Defendants claimed that Casella ships “millions of gallons of leachate to the Concord and Franklin [wastewater treatment facilities] despite [the facilities’] inability to treat [leachate] effectively before [dumping the toxin] into the Merrimack River[.]” (Id. ¶ 23.) Then, on December 4, 2019, they claimed once again that NCES “has been a bad business partner for the North Country” and published a video and transcript in which Casella’s C.E.O. was compared to Hitler and Casella to the Nazi Party. (Id. ¶¶ 17, 28.) On December 29, 2019, the Swan Defendants accused Casella of spilling 8,000 gallons of landfill leachate into the Black River in Vermont and of operating in violation of permitted hours during the incident. (Id. ¶¶ 20, 36.) The accusation further read that Casella “is a . . . company[ ] with a long history of violations,” including a “poor safety and performance record,” and that the Dalton landfill “represents billions of dollars for greedy Casella and [its] garbage empire.” (Id. ¶¶ 20, 24).

On January 1, 2020, the Swan Defendants again accused Casella of misleading the public, trying to improperly influence the zoning vote, engaging in a “very sneaky” lot

line adjustment, and causing a leachate spillage by operating outside permitted hours. (Id. ¶ 21.) On January 5, 2020, the Swan Defendants claimed that Casella committed “[w]orkplace safety [and] permit violations” and caused “environmental accidents at [its] current landfill[]” facilities. (Id. ¶ 20.) On January 16, 2020, the Swan Defendants published a message warning the “elderly and more vulnerable” to beware of a “scam” by “a waste management company” that “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[. . .]] [in an] attempt to influence public opinion regarding. . . [the] landfill development.” (Id. ¶ 19.) Finally, in February 2020, the Swan Defendants made the following additional statements:

- a. “Casella needs New Hampshire so it can continue its predatory exploitation of our resources for its own greed;”
- b. 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;
- c. [Casella] has “poor management and [employs] bully tactics;”
- d. “Casella’s ‘Zero-Sort’ single-stream recycling practices, and ensu[ing] higher rate of contamination, is part of the reason why China and many 3rd world nations stopped accepting our ‘recyclables’ aka PLASTICS;”
- e. [Casella] “is a very unscrupulous company that only cares about the bottom line and not the environment;” [and]
- f. “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” [. . .]

(Id. ¶ 17.) (citations omitted).

On April 14, 2020, Casella filed a Complaint with this Court for damages and equitable relief against the Swan Defendants, claiming the Swan Defendants’ publications constitute defamation and intentional interference with its prospective economic interests. (Compl. at 1.)

### III. Analysis

The Court first considers whether to dismiss Casella's claim for defamation. To establish defamation against a private person, the plaintiff must show that the defendant acted "intentionally or negligently in communicating defamatory material" and, if so, that the defendant (1) "kn[ew] that the statement [was] false and that it defames the other," (2) "act[ed] in reckless disregard of these matters," or (3) "act[ed] negligently in failing to ascertain" the truth. McCarthy v. Manchester Police Dep't, 168 N.H. 202, 210 (2015). When defamation is alleged against "a public official or public figure," however, the plaintiff "must prove that the statement was made with 'actual malice,' meaning 'with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.'" MacDonald v. Jacobs, 171 N.H. 668, 674–675 (2019).

To determine whether a statement communicates defamatory material, the Court examines "whether the [statement] was reasonably capable of conveying the particular meaning ... ascribed to it by the plaintiff" and "whether that meaning is defamatory in character." Boyle v. Dwyer, 172 N.H. 548, 554 (2019). A statement is defamatory in character where it holds the plaintiff "up to contempt, hatred, scorn or ridicule, or tend[s] to impair [the plaintiff's] standing in the community." Id. A "statement of opinion" is not defamatory, "unless it may reasonably be understood to imply the existence of [a] defamatory fact as the basis for the opinion." Automated Transactions, LLC v. Am. Bankers Ass'n, 172 N.H. 528, 532 (2019) (emphasis added). Accordingly, the Court interprets statements of "rhetorical hyperbole," which cannot be construed as factual assertions, to constitute non defamatory statements of opinion. Id. at 533. Whether a statement of opinion implies the existence of a defamatory fact is a question of law for

the Court to determine “in the context of the publication taken as a whole.” Id.

Casella argues that the Swan Defendants intentionally or negligently published false and defamatory statements of fact regarding Casella. (Compl. ¶¶ 45, 50.) It “agrees with the Swan Defendants” that the appropriate standard is the “heightened protection against defamation” afforded to public figures, but argues its claim must survive the Motion to Dismiss even under that heightened standard. (Casella’s Obj. to Swan Defs.’ Mot. Dismiss at 2.) The Swan Defendants argue that their statements regarding Casella’s involvement in New Hampshire were statements of opinion that cannot be reasonably understood to imply the existence of any defamatory facts.

Assuming the truth of Casella’s allegations and all reasonable inferences therefrom, the Court concludes that Casella has sufficiently pleaded facts giving rise to recovery for defamation. The Court finds a number of alleged statements of fact would at least tend to “impair [Casella’s] standing in the community,” if not directly hold Casella “up to contempt, hatred, scorn or ridicule.” Dwyer, 172 N.H. at 554. These include that Casella scammed elderly residents of Dalton, did not recycle most of the materials placed in “zero sort” bins, filled local landfills with out-of-state trash, illegally spilled 8,000 gallons of leachate into the Black River in Vermont, polluted the Ammonoosuc River, operated outside of permitted hours, sought to improperly influence the vote of the Bethlehem Planning Board, conspired with Horizons Engineering to avoid compliance with regulatory requirements, and improperly treated millions of gallons of leachate which were emptied into the Merrimack River. Even if the Swan Defendants were unsure of their truth or falsity, publishing such statements in view of their potentially damaging effect to Casella’s reputation could amount to a “reckless

disregard” for the harm they may cause. MacDonald, 171 N.H. at 675. Accordingly, if, as Casella alleges, each of the statements is in fact false, then the above representations are potentially defamatory because they are false statements of fact which the Swan Defendants made either knowing of their falsity or with reckless disregard for their defamatory nature. McCarthy, 168 N.H. at 210.

The Court concludes that the bulk of the remaining statements are either strongly worded opinion or rhetorical hyperbole, which are not actionable for defamation under Automated Transactions, 172 N.H. at 532. For example, the allegation that the Swan Defendants published a video comparing Casella’s C.E.O. to Hitler or Casella itself to the Nazi Party cannot reasonably be understood to imply the existence of any particular defamatory fact. Id. From Casella’s allegations alone, it is left entirely unclear to the viewer what actions taken by Casella’s C.E.O. or circumstances in Casella’s control make the comparison appropriate. Similar conclusory assertions, such as that Casella is “predatory,” “greedy,” a “bad business partner,” or even a poor “steward [of] the environment,” do not reasonably imply any underlying fact that conveys a defamatory meaning. Id. The Court is satisfied, therefore, that “in the context of the publications taken as a whole,” such assertions constitute non defamatory statements of opinion. Id. at 533. Accordingly, Casella fails to allege facts supporting a claim for defamation with respect to conclusory assertions of opinion made by any of the Swan Defendants.

The Court now turns to Casella’s claim for “tortious interference with prospective economic interests.” (Compl. at 1.) The Court applies “the Restatement (Second) of Torts to actions for tortious interference with. . . existing or prospective contractual relations.” See National Empl. Serv. Corp. v. Olsten Staffing Serv., 145 N.H. 158, 162

(2000). “One who intentionally and improperly interferes with another's prospective contrac[t]. . . is subject to liability” for the pecuniary harm resulting therefrom.

Restatement (Second) of Torts § 766B. To establish tortious interference with prospective economic interests, the plaintiff must establish that (1) it “had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and improperly interfered with this relationship; and (4) the plaintiff was damaged by such interference.” See Hughes v. N.H. Div. of Aero., 152 N.H. 30, 40–41 (2005) (describing generally the tort of interference with contractual relations). To determine “[w]hether the alleged conduct is ‘improper,’” the Court must conduct an “inquiry into the mental and moral character of the defendant's conduct.” City of Keene v. Cleaveland, 167 N.H. 731, 738 (2015). A defendant’s interference “is not improper when the interference [with] contractual relations fosters a social interest of greater public import than is the social interest invaded.” Id.

Casella argues that Mr. Swan personally “sought to interfere tortiously” in its “prospective economic advantage” to build the landfill in Dalton by exercise of its option contract. (Compl. at 1.) In Count II of its Complaint, Casella argues the defamatory nature of Mr. Swan’s allegations resulted in “harm to its reputation,” directly limiting its ability to obtain “credit” and resulting in “loss of business.” (Compl. ¶¶ 56–57.) The Swan Defendants move to dismiss, generally construing both Counts of Casella’s Complaint “to state claims of defamation” and arguing the Complaint is devoid of factual support for any of Casella’s “vague and conclusory legal assertions.” (See e.g., FLA’s Mot. Dismiss ¶¶ 1, 3.)

The Court concludes Casella does not sufficiently allege facts giving rise to a

claim of tortious interference with a prospective economic advantage. First, although Casella generally alleges harm resulting from the Swan Defendants' purported interference, Casella does not say whether such harm resulted from any deterioration in its business relationship with the Dalton property owners. The option contract in Dalton, therefore, cannot constitute the "prospective economic advantage" with which the Swan Defendants allegedly interfered. See Hughes, 152 N.H. at 40–41 (To recover for tortious interference with contractual relations, "the plaintiff [must have been] damaged by such interference."). Second, beyond generally alluding to a drop in its credit reputation and loss of business, Casella does not specifically allege any other individual examples of "existing or prospective contractual relations" with which the Swan Defendants may have interfered. The Court accordingly cannot find any allegations that the Swan Defendants knowingly interfered with a particular "economic relationship. . . the defendant[s] knew of," such that Casella suffered any damages. See id. The Court concludes that Casella's claim for tortious interference with a prospective economic advantage must be dismissed.

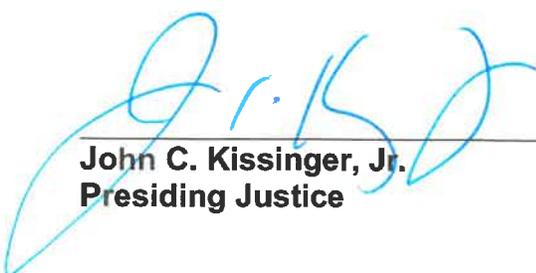
#### **IV. Conclusion**

For the foregoing reasons, the Swan Defendants' Motion to Dismiss is GRANTED in part and DENIED in part as to Casella's claim for defamation and GRANTED as to Casella's claim for tortious interference with a prospective economic advantage.

**SO ORDERED.**

Date

8/7/2020

  
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**John C. Kissinger, Jr.**  
**Presiding Justice**

Clerk's Notice of Decision  
Document Sent to Parties  
on 08/10/2020