THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 217-2020-CV-212

Casella Waste Systems, Inc.

v.

Jon Swan & Save Forest Lake, et al.

MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants) move for summary judgment. In support hereof, they submit the following memorandum. Incorporated herein is the Defendants' Statement of Material Facts, Affidavit of Jon Swan, and Appendix containing exhibits and publicly available documents, reports and materials.

Introduction

Defendants Mr. Swan and Save Forest Lake, his advocacy group, are engaged in a determined public effort to stop Plaintiff from constructing a massive landfill next to Forest Lake in Dalton, N.H. They have every right under our system of government to speak out against the project and to mobilize opposition. They have proven to be very effective at their advocacy. That, and no other reason, is why the Plaintiff in this case has filed this lawsuit. It is an effort to still and prevent the Defendants from the basic exercise of their First Amendment rights. That this case has gone on as long as it has is an embarrassment to the Constitution.

> "[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. Mieklejohn, Free Speech and Its Relation to Self-Government 22–27 (1948)) (citations and quotations omitted for clarity).

The Plaintiff has combed through the Defendants' thousands of public communications in opposition to Plaintiff's landfill and cherrypicked a handful of statements that it believes it can colorably paint as defamatory. They are, however, all protected comment and opinion on the facts of the sprawling political dispute arising from Plaintiff's landfill project. As such, they are the very essence of public debate and any restraint on them would be abhorrent to the freedom of speech guarantees under the United States and New Hampshire Constitutions. While it never

should have come to this point, the Defendants ask the Court to issue summary judgment in their favor, dismiss this case and award them attorney's fees and costs.

I. Standard of Review

1. Summary Judgment

In reviewing a motion for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law." *Dube v. N.H. Dep't of Health & Human Servs.,* 166 N.H. 358, 364 (2014); *see* RSA 491:8-a. "If [the Court's] review of that evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, then we will affirm the grant of summary judgment." *Dube*, 166 N.H. at 364.

2. 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. Statement of Material Facts at ¶1; Second Amended Complaint at ¶44 ("Complaint"); *see* 376 U.S. 279–80. But it is worth 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 v. Keene Pub. Corp.*, 127 N.H. 214 , 222 (1985) and 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. Statement of Material Facts at ¶¶1-2; Complaint at ¶¶11-13. Indeed, as the applicant for the project and as operator of another landfill in nearby Bethlehem, the Plaintiff created the public controversy itself. *Id.*; Complaint at ¶¶8-11. 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 statement 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; *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 at n. 6 (1974) ("In *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), the Court equated

reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'").

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 or had serious doubts as to its truth. In this case, every allegedly defamatory statement is a comment or opinion on publicly available facts. But even if construed as statements of fact, the Defendants made them with a good faith belief in their veracity, based upon publicly available information.

3. SLAPP Suits

This action is a strategic lawsuit against public participation ("SLAPPs"). The New Hampshire Supreme Court has described such lawsuits as follows:

> Strategic lawsuits against public participation (SLAPPs) are civil lawsuits filed against non-governmental individuals and groups, usually for having communicated with a government body, official, or the electorate, on an issue of some public interest or concern. SLAPPs are filed in response to a wide range of political activities including zoning, land use, taxation, civil liberties, environmental protection, public education, animal rights, and the accountability of professionals and public officials.
>
> SLAPPs seek to retaliate against political opposition, attempt to prevent future opposition and intimidate political opponents, and are employed as a strategy to win an underlying economic battle, political fight, or both. The SLAPP plaintiff's goal is not necessarily to "win" the lawsuit, but rather to deter public participation in the democratic process by chilling debate on public and political issues. This goal is realized by instituting or threatening multimillion-dollar lawsuits to intimidate citizens into silence.

Opinion of the Justs., 138 N.H. 445, 448–49 (1994). Unlike the large number of states that permit Anti-SLAPP legislation, New Hampshire Supreme Court concluded that our constitution does

not allow it. *Id*. at 450. Nevertheless, that is what this case is. The Supreme Court recognized the harm of such suits and made it clear that remedies for such suits still exist: "The opinion expressed herein is not intended to diminish our profound concern with abuse of the judicial system by lawsuits designed to intimidate citizens and exact a price for participation in the democratic process. Participants in the legal process bear responsibility for ensuring that suits are not instituted for any improper purpose or risk sanctions." *Id*. at 451.

Plaintiff has initiated and perpetuated this lawsuit in order to exact a cost on the Defendants for speaking out against Plaintiff's project. Plaintiff's claims of defamation are cherry-picked from thousands upon thousands of utterances in opposition to its landfill. Plaintiff knows that these statements are mere public comment but has filed this lawsuit anyway, surviving a motion to dismiss with artful de-contextualization of Defendants' words that suggests they are assertions of fact when they are not. To date Plaintiff has succeeded in staving off dismissal and perpetuating a costly lawsuit against its chief public opponent. The Plaintiff is generating a roadmap that can be used by any well-heeled plaintiff seeking to steamroll understandable and vocal public opposition to a project ill-suited for the location and environment. The Court needs to put a stop to it and ensure that the free speech rights of the citizens of New Hampshire are not trampled by plaintiffs using the courts as a weapon.

If ever there were a case that cried out for attorney's fees, whether under RSA 507:15, *Harkeem v. Adams*, 117 N.H. 687 (1977), or another theory, it is this one.

II. Argument

1. Defendants' statements about Plaintiff "scamming elderly residents of Dalton and Bethlehem" are satire, opinion or comment on a set of publicly known facts.

Defendants have made several posts on their Facebook and other public communication platforms analogous to this one, which the Plaintiff claims is "defamatory" because it satirically portrays the Plaintiff as a scammer of elderly residents—much like an elder services agency might do:

> (This is meant to be satirical but obviously very much based on local reality)
>
> 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 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 [sic] 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 of 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 the 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!

Statement of Material Facts at ¶5 (quoting January 16, 2020 post on Facebook); *see* Swan Aff. at Exhibit A, Plaintiff's Response to Request for Production 1 at CWS 0008-0009, App. at 4.

Satire is protected speech. *Farah v. Esquire Mag., Inc.*, 863 F. Supp. 2d 29, 39 (D.D.C. 2012), *aff'd sub nom. Farah v. Esquire Mag.*, 736 F.3d 528 (D.C. Cir. 2013) ([T]he First Amendment protects satire. As explained above, the Blog Post was satire on a matter of public concern. Such speech is protected by the First Amendment and cannot be the basis of a defamation claim.") (*citing*, *e.g., Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 53, 108 S.Ct. 876 (1988)). The tone, construction, and content of this post are vividly, objectively satirical. Not only that, but for anyone who did not get the joke, the post says as much right in the first line. *Id.* ("This is meant to be satirical but obviously very much based on local reality."). That should end the matter.

But even if this obviously satirical comment was misconstrued as a statement of fact, the facts are substantially true and the characterization of them is protected comment and opinion. It is true that Plaintiff reached out to an elderly resident of Dalton, Don Mooney, and asked him to figure out how Plaintiff could convey an offer of a "gift" of equipment valued at "$50-100k" to the Town of Dalton, "no strings attached." Statement of Material Facts at ¶6; see email exchange Metcalf (Plaintiff)-Moody, Exhibit B, App. at 5-6. Mr. Mooney then did so. Defendants' post reflects their sincerely held opinion that this was nothing more than an effort to bribe the Town of Dalton, and their belief that Mr. Mooney was roped into doing Plaintiff's dirty work in that regard. *See* Swan Aff. at ¶¶6-10. Similarly, a Bethlehem resident, Cliff Crosby, actively supported Plaintiff with signs and public advocacy—exactly the facts described in the Defendants satirical post. *See* Statement of Material Facts at ¶8; Exhibit DD, App. at 219-21.

Defendants' satirical post reflects their sincerely held belief and opinion that Mr. Crosby—and possibly others—are acting contrary to their own best interests at the behest of the Plaintiff.

2. Such opinions are not actionable. *Automated Transactions, LLC v. Am. Bankers Ass'n*, 172 N.H. 528, 538 (2019) ("The lack of precision makes the assertion 'X is a scam' incapable of being proven true or false.")(*quoting McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987). This is particularly so when the speaker sets forth the facts that motivated the expression of opinion, as occurred in this case. *Id*. at 539 ("The courts ... have consistently held that when a speaker outlines the factual basis for his or her opinion, he or she is not liable for defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is[.]") (*citing* Restatement (Second) of Torts § 566, cmt. c at 173, *Thomas*, 155 N.H. at 339 (explaining that defendant's statements were nonactionable because they were 'based completely' on disclosed facts) and *Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1093 (4th Cir. 1993) ('Because the bases for the ... conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related.')) (citations omitted from text for clarity).

3. Defendants' statements about Plaintiff filling its landfills with out-of-state trash are substantially true, hyperbolic and not defamatory.

Plaintiff's next assertion is that Defendants defamed Plaintiff by making the following February 12, 2020 Facebook post:

> Just got this news from NH DES! This will be interesting to watch as it unfolds, for sure. Dalton has certainly proven that it does not want Casella as a business partner.
>
> Casella may not have a home in NH sooner than we thought. NH has capacity for NH trash and the North Country Towns better start reaching out to AVRRDD/Mt. Carberry soon. Casella needs NH so it can continue to import

> trash from out of state, we do not need Casella and its poor management and bully tactics. Goodbye Casella!

Statement of Material Facts at ¶10; *see* Exhibit C, Pl. Response to Req. for Production 1 at 0003 (emphasis added), App. at 7.

The context of the post ("… this news…"), referenced and incorporated into the post itself, is that Plaintiff had withdrawn an application to expand its Bethlehem landfill. *Id.* There is nothing about this statement that is defamatory. First, importing trash from another state is not, on its face, an allegation capable of defamatory meaning. Second, that Plaintiff imports trash from out-of-state into its Bethlehem landfill is an *established fact*. *See* Statement of Material Facts at ¶¶11-12; Exhibits D (App. at 10) (59,874 tons of out-of-state waste in 2020) and E (App. at 26) (113,345 tons of out-of-state waste in 2019). Plaintiff's own reports to the New Hampshire Department of Environmental Services calculate the number of tons of waste Plaintiff's Bethlehem facility receives annually from in-state and out-of-state sources. *Id.*

Substantially true statements are not actionable. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 335, (2007), *as modified on denial of reconsideration* (Aug. 29, 2007) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true. In the law of defamation, truth is defined as substantial truth, as it is not necessary that every detail be accurate. In other words, literal truth of a statement is not required so long as the imputation is substantially true so as to justify the gist or sting of the remark.") (*quoting Faigin v. Kelly*, 978 F.Supp. 420, 425 (D.N.H. 1997)). Plaintiff imports out-of-state trash to its New Hampshire facility(ies). Statement of Material Facts at ¶¶11-12. Therefore, Plaintiff's claims regarding assertions about out-of-state trash must be dismissed.

4. Defendants' statements concerning the role of Plaintiff's zero-sort recycling program in the collapse of the international recycling market are hyperbolic, not defamatory and, to the extent they suggest that the zero-sort recycling program generates contaminated waste that cannot be recycled, substantially true.

Plaintiff produced a post made by the Defendants on February 3, 2020, alleging it to be defamatory. In it, Defendants react to a Facebook post by the Plaintiff:

> This from Casella Waste Systems FB page. Note how once again, Casella Waste Systems (that self-titled "champion of the environment and sustainability") piggy-backs off of the efforts of OTHERS to REDUCE the amount of waste going into their landfills. This is a very unscrupulous company that only cares about the bottom line and not the environment. Otherwise, they would have been leading the way to reduce what we waste. *Their "Zero-Sort" single-stream recycling program helped collapse the Asian market with its high-rate of contamination ultimately leading to more recycling product being landfilled*. Of course, Casella's business plan solely focuses on profiting from what we waste. Just wish they'd be honest about that. 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. Unless, of course, they go back on their word, again and seek expansion there by trying to pic the Select Board. We'll see.

Statement of Material Facts at ¶13; Exhibit F, Pl. Resp. to Req. for Production 1 at 0007-8 (emphasis added), App. at 31. The emphasized portion is, apparently, the portion that Plaintiff deems to be defamatory.

The emphasized statement concerns a well-known public policy issue: the decision by China, which hitherto had absorbed large amounts of US recycling waste, to tighten its regulations regarding what level of recycling contamination will be acceptable. The Plaintiff described the issue as follows: "China Enacted the National Sword Program in 2017 to cut down the amount of 'carried waste' being sent into the country as an initiative to combat pollution. China has banned 24 types of materials that were previously entering their country as recyclables. The largest ban that has impacted the US recycling industry has been the ban on mixed paper (junk mail/scrap paper). For all other finished recyclables imported to China, the specifications

are not at a .5% contamination rate, reduced from the industry standard of 3%." *See* Statement of Material Facts at ¶17; Exhibit G, App. at 32, Plaintiff's marketing newsletter "Recycling Commodity Update May 2018."

Interviewed on this subject in the Portland Press Herald, Plaintiff reiterated, "China decided that it was going to set new standards for the import of recyclables and how much contamination they could contain. They chose a number of one-half of 1% or it would be rejected." Statement of Material Facts at ¶18; Exhibit H, App. at 35 (Plaintiff's press officer Joe Fusco quoted in article). Plaintiff has concluded, in its 2019 Annual Report, that "[t]he collapse of foreign recycling markets has temporarily made municipal recycling programs uneconomic." Statement of Material Facts at ¶16; Exhibit D at 000194, App. at 19. Plaintiff collects and disposes of unrecyclable material collected from recycling bins, at least in some cases, for a fee. Statement of Material Facts at ¶19; Exhibit H, App. at 33-34 (quoting local official's assertion that "Casella Waste Systems has been charging the city roughly $5,000 per month over the past year to dispose of unacceptable recycled material collected from recycling bins. These items have been contaminated with food waste, for example, or they are not allowed in the first place, such as electronics."). Plaintiff's recycling stream, according to its own literature, averages a 20% rate of contamination, some forty times higher than China permits under its National Sword Policy. Statement of Material Facts at ¶15; *see* Exhibit EE, App. at 222 ("The average contamination rate of incoming single stream material (such as "Zero-Sort" Recycling) is 20%."); *see id*. ¶17.

Defendant's statement that Plaintiff's recycling stream had a "high rate of contamination," in addition to being objectively unverifiable (e.g., what is a "high rate"),

appears to be reasonably supported by the Plaintiff's own statements. The Plaintiff has confirmed that its recycling stream has contamination levels some forty times higher than its major export customer, China, now permits. *See* Statement of Material Facts at ¶15. The suggestion by the Defendant that Plaintiff's high contamination rate "*helped collapse* (emphasis added) the Asian market" for recyclables is opinion and speculation - what does "helped collapse" mean? - based upon the fact that high levels of contamination in the imported recycling stream caused China to impose lower limits on the amount of contamination it would accept. *See* Statement of Material Facts at ¶17.

Speculation is not actionable. *Levin v. McPhee*, 119 F.3d 189, 197 (2nd Cir 1997). 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 at 197. "[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 v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). Suggesting that Plaintiff's high rate of contaminated recycling "helped collapse" the Asian market may be hyperbolic,[1] but it is still a "theory, conjecture or surmise." *See id.*

[1] It being objectively unverifiable. *See Automated Transactions LLC*, 172 N.H. at 538. Moreover, "Looking at the context of the [statement] as a whole, no reasonable [reader] would understand the reference to ["helping to collapse"] to amount to an accusation that [Plaintiff's lone single-stream recycling program had collapsed the Chinese recycling market]." *Id.* at 545.

Therefore, such statements are protected speech and the Plaintiff's claims regarding them must be dismissed.

5. Defendants' statements concerning an 8000-gallon spill of leachate from Plaintiff's Coventry VT landfill near the Black River in Coventry were not made with actual malice and were opinion based upon disclosed facts.

On December 27, 2019, Plaintiff distributed the following email to a public email list, which the Defendants then reposted and commented on:

> Dear All,
>
> We wanted to follow up on an incident that occurred early this morning in Coventry if you have not already learned of it.
>
> This morning an empty MBI transfer trailer jackknifed within the roadway just north of the Route 5/Route 100 intersection.
>
> The tractor and trailer was disabled due to black ice.
>
> While the driver was outside the truck deploying safety triangles a loaded leachate tanker travelling southbound on Route 5 whose driver could not stop the vehicle tried to maneuver the truck to safety and lost control. The loaded tanker not only hit the transfer trailer but the driver of the trailer as well. He was transported to the North Country Hospital.
>
> Needless to say the tanker was compromised and lost several fluids, including leachate from the tanker.

Statement of Material Facts at ¶20; Exhibit I, Pl. Resp. to Req. for Production 1 at CWS 00011-12, App. at 36-37. The location of the spill was near the junction of Routes 5, 14 and 100, a short distance from the Black River, in the town of Coventry, VT. *Id.*; *see* Statement of Material Facts at ¶21; Exhibit J, App. at 39; Exhibit K, App. at 41.

Commenting on the reposted email in their own Facebook post, the Defendants said, "This so-called environmental steward has apparently managed to dump 8000 gallons of leachate from its Coventry landfill into the Black River, which ultimately feeds into Lake

Memphremagog (a source of drinking water for many) early on Friday Dec. 27 at around 3 am (seemingly a violation in itself as work is not supposed to begin until 6 am). Now do we need this at Forest Lake? I think not." Statement of Material Facts at ¶23; Exhibit I, App. at 36. Plaintiff has filed this action asserting that these words falsely assert that the Plaintiff's leachate was spilled *into* the Black River, when later studies confirmed that the leachate had not found its way into the nearby river.

The Plaintiff's claims must be dismissed because (a) the facts upon which the Defendants relied in making the statement were included in the statement; (b) the Defendants' statement was one of opinion or conjecture; and (c) the Defendants' updated their communications as new facts became publicized, to wit, that Vermont state clean-up crews had confirmed that the leachate never made its way into the Black River.

First, the facts upon which the Defendants based their conjecture were not merely included in the Defendants' post so that the public could see what their comment related to—they were first produced *by the Plaintiff itself*. Statement of Material Facts at ¶20. "When the speaker discloses the facts upon which he bases his statement, 'no reasonable reader would consider the term anything but the opinion of the [speaker] drawn from the circumstances related.'" *Automated Transactions LLC*, 172 N.H. at 534 (*quoting Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) and *citing Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995)). These facts admit that the trucks spilled leachate at the near the junction of Routes 5 and 100, a location that is directly adjacent to the Black River. Therefore, it was reasonable for the Defendants to express apprehension that the spill of 8,000 gallons of leachate might bleed into the Black River just a stone's throw away.

Second, and most importantly, as public reporting updated the facts relating to the spill of 8000 gallons of leachate from Plaintiff's Coventry, VT landfill, Defendants updated their own communication accordingly. Statement of Material Facts at ¶24 (quoting a December 30, 2019 post from the Defendants that quoted a news report, published that day, stating that "[d]etails were not available Sunday about how much leachate… spilled from the truck's cracked tank… or whether any reached the Black River."); Exhibit L, App. at 44. On December 31, 2019, when the Caledonian Record published an article under the headline, "Leachate Spill Did Not Reach the Black River, DEC Official Says," *see* Statement of Material Facts at ¶25, Exhibit M, App. at 45, the Defendants expressed relief, publicly and clearly:

> Thank goodness, talk about a close call and a lot of nasty stuff! Now let's see what kinds of violations DEC comes up with. COVENTRY—An estimated 8,000 gallons of leachate from the landfill in Coventry spilled from a breached tanker truck early Friday morning in an accident that left one man seriously injured. The leachate, liquid that is drained from within the liners of the landfill on Airport Road, contaminated soils around Route 5 where the accident occurred but did not reach the nearby Black River, said Shawn Donovan, spill manager for the Vermont Department of Environmental Conservation.

Statement of Material Facts at ¶26; *see* Exhibit L (referencing and attaching Caledonian Record articles), App. at 44. Thus, the Defendants reacted to the public facts available to them at the time of each post and calibrated their posts accordingly.[2] This is the *opposite* of the kind of recklessness or knowing malice that Plaintiffs must prove to prevail in a defamation claim under the binding *New York Times standard*. *New York Times Co.*, 376 U.S. at 279–80 (Plaintiff must show that an allegedly defamatory 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."); *Nelson*

[2] There is no evidence that *the Plaintiff* even knew that its leachate had not made it to the Black River from the nearby spill site until the Vermont authorities had made their determination.

Auto Ctr., Inc. v. Multimedia Holdings Corp., 951 F.3d 952, 958 (8th Cir. 2020) ("Failure to recognize a mistake or ambiguity and its potential consequences is not evidence of a reckless disregard for the truth.") (finding no actual malice when news website updated story with correct facts as they became known).

6. Defendants' statements concerning the pollution, or potential for pollution, of the Ammonoosuc River by the Plaintiff's existing or potential landfill are substantially true, fairly reported, and expressions of conjecture.

Plaintiff has produced a statement by the Defendants that it alleges to be defamatory. The statement, which follows, includes a hyperlink to a video clip introducing a civil action against the Plaintiff by the Conservation Law Foundation and others:

> Video from 2018 announcing the lawsuit vs. Casella/NCES over violating the Federal Clean Water Act. The lawsuit alleges illegal discharges of pollutants from the companies' Bethlehem landfill into the Ammonoosuc River. *A drainage channel at the landfill, operated by NCES, collects landfill pollutants and discharges those pollutants into the Ammonoosuc River, without a discharge permit as required by the federal Clean Water Act*. Casella and NCES sought to have the case dismissed on three grounds: that Community Action Works and Conservation Law Foundation did not have standing to bring suit; that the discharges from the drainage channel to did not require a Clean Water Act permit; and that Casella is not a proper defendant. U.S. District Court Judge Paul Barbadoro denied the Motion to dismiss on all three grounds.

Statement of Material Facts at ¶27; *see* Exhibit EE, App. at 223 (emphasis added to portion highlighted by Plaintiff as defamatory).

As the Plaintiff and its counsel well know, the post, including the allegedly defamatory portion, is a general summary of the facts and issues in *Toxics Action Center & Conservation Law Foundation v. Casella Waste Systems, Inc.*, No. 1:18-CV-393, U.S. District Court for New Hampshire. *See* Statement of Material Facts at ¶28; Exhibit N (Complaint), App. at 55-58. The Complaint alleges that a drainage channel collects leachate from the Bethlehem landfill and discharges it into the Ammonoosuc River, polluting the river with iron, manganese and 1,4

Dioxane, a carcinogen. *Id.* Defendants' post fairly and accurately reports on that public court filing and goes on to note Plaintiff's objections to the lawsuit in the same post.

Accurate reporting of public proceedings and documents is protected under New Hampshire law, even if what is reported is allegedly defamatory. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 327 (2007) (fair report privilege "applies to the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern ... if the report is accurate and complete or a fair abridgement of the occurrence reported.") (citing *Hayes v. Newspapers of NH*, 141 N.H. at 466). The inquiry "does not focus upon truth about the events that either underlie or are the subject of the official action or proceeding. In other words, 'accuracy for fair report purposes refers only to the factual correctness of the events reported and not to the truth about the events that actually transpired.'" *Id.* (*citing Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003).

A passing comparison of the Toxics Action Center/CLF Complaint with the Defendants' post summarizing it reveals that it is fair and accurate. The Complaint itself goes into exhaustive detail about the drainage channel and the undesirable effects of the Plaintiff's landfill. *See*, *e.g.*, Exhibit N, App. at 58 (*e.g.*, "63. On each of the dates listed in Paragraphs 61 and 62, iron and manganese concentrations downstream from the Drainage Channel were higher than those upstream from the Drainage Channel.", "64. The presence of iron, manganese and 1,4-dioxane in the Drainage Channel is attributable, and indicative of, the presence of landfill leachate and/or contaminated groundwater from the Landfill and/or the Unlined Waste Disposal Space."). The plaintiffs in *Toxics Action Cente*r asked the federal court to (a) declare that Plaintiff was in violation of the Clean Water Act by discharging pollutants from the Drainage Channel to the Ammonoosuc River, (b) enjoin the Plaintiff to cease all unauthorized pollutant discharges into

the Discharge Channel or the Ammonoosuc River, (c) remedy the harm to the environment, (d) assess a civil penalty, and (e) award attorney's fees and costs. Exhibit N, App. at 75.

In this light, the Defendants' post stating that "The lawsuit alleges illegal discharges of pollutants from the companies' Bethlehem landfill into the Ammonoosuc River. A drainage channel at the landfill, operated by NCES, collects landfill pollutants and discharges those pollutants into the Ammonoosuc River, without a discharge permit as required by the federal Clean Water Act" is a fair and accurate summary of the content of the legal action. Statement of Material Facts at ¶27.

The Defendants' comment on February 16, 2020, on its Facebook post, similarly references a public report concerning PFAS in the rivers of Michigan. *See* Statement of Material Facts at ¶29, Exhibit O, App. at 78. The statement attached a link to a Michigan news article entitled, "PFAS is in fish and wildlife. Researchers prowl Michigan for clues." *Id.* Defendants commented, "Something to keep in mind as DES decides whether or not to permit a 2nd PFAS-emitting mega-dump upstream of the Ammonoosuc River and Littleton." *Id.* Among the many pollutants that have been identified by or at the behest of N.H. DES in the test wells relating to the Plaintiff's Bethlehem landfill are 1,4-dioxane, PFAS, Arsenic, Bromide, Barium, Iron and Manganese. Statement of Material Facts at ¶30, Exhibit P, App. at 98-110, 118.[3]

The Vermont state environmental agency has made similar findings in relation to leachate from Plaintiff's Coventry, VT landfill. Statement of Material Facts at ¶31, Exhibit Q, App. at 131-32 ("The metals [(arsenic, manganese, nickel)] with statistical GES exceedances are

[3] Defendants' statement is not defamatory even if the levels of detected substances are within acceptable limits—whatever those might be—because the assertion was that Plaintiff's landfills were producing these substances which the Defendants believed to be harmful.

common naturally-occurring compounds in Vermont groundwater. However, the standards exceedances are generally greater in magnitude in the down-gradient wells, reflecting impacts from the unlined landfill and/or impacts from changes in the redox regime as groundwater travels the long distance beneath the lined phases. The VOC's and/or PFAS with statistical GES exceedances between landfills and downgradient of Unlined Areas A&B are likely the result of migration of leachate from the Unlined landfill Areas A&B."), App. at 142 (identifying PFAS in leachate from the Coventry landfill, App. at 147-49 (summarizing upward trends of, *e.g.*, PFAS, Arsenic, Manganese, Nickel, Chloride in ground and surface water).

Therefore, the Defendants' opinion that the Plaintiff's Bethlehem landfill risks the kind of pollution that the news article from the State of Michigan described was supported by substantial facts. Even assuming an assertion of fact underlies the opinion, it is an assertion of fact that appears to be essentially correct: Plaintiff's landfills produce all manner of pollutants that need to be tracked and tested regularly, including PFAS. The Defendants have to be more than just wrong about those facts for these statements to be actionable. They have to have *known* the statements were not true or acted with recklessness as to the truth or falsity of the statements. *New York Times*, 376 U.S. 279–80. Neither is the case here, where it appears that the statements in question were true at least to some degree. As conjecture based upon publicly available facts that support the Defendants' statements, those statements are protected opinion.

7. Defendants' statements concerning the 3AM timing of the truck accident near the Black River and the supposition that this was outside of permitted operating hours are speculation supported by facts.

Plaintiffs claim defamation for Defendants' statement: "Fully loaded, 8000 gallon MBI leachate truck leaving the Casella Waste Systems landfill in Coventry VT before 3am in icy

conditions, surely outside the permitted hours of operation." *See* Statement of Material Facts at ¶32; Exhibit R, App. at 159. The statement was made by the Defendants in a December 31, 2019 Facebook post with an attached, incorporated newspaper article from the VT Digger concerning the crash. This is not an actionable statement and should be dismissed.

First, in fact, the use permit issued by the State of Vermont establishes the operating hours of the Plaintiff's Coventry, VT landfill as 7:00 AM to 4:00 PM, weekdays, and 7:00 AM to 11:30 AM on Saturdays. Statement of Material Facts at ¶33; Exhibit CC, App. at 212. Trucks, per the permit, may queue starting at 6:00 AM. *Id*. It is irrefutable that 3:00 AM is outside that range. Again, the Defendant must both *be wrong* and *know* that he is wrong but say the statement regardless. *New York Times*, 376 U.S. 279–80. It was not intentionally false or reckless for the Defendants to assume that the operating hours that bound users of the facility also bound truckers bringing leachate from the facility.

Second, it is not an assertion of fact. It is speculative: "surely outside the permitted hours of operation" speculates that a 3AM transport of polluting leachate must be outside the permitted hours of operation. Objectively speaking, this seems like reasonable speculation—3AM is outside most everyone's business hours. But by its own terms, the statement does not venture a guess as to what the permitted operating hours are—it merely speculates that 3AM might be outside those hours. Whether reasonable or not, speculation is not actionable. *Levin v. McPhee*, 119 F.3d at 197.

The speculative statement that Plaintiff was moving leachate at 3AM, "surely outside the permitted hours of operation," is not actionable. Claims of defamation relating to it need to be dismissed.

8. Defendants' statements regarding the collaborative effort of Horizons Engineering, the Plaintiff and Mr. Ingerson, the property owner selling Plaintiff the land to construct its proposed landfill, to effect a lot line adjustment are opinion concerning known facts.

The Plaintiff takes issue with the Defendants crying foul over a lot line adjustment that Plaintiff and its agents proposed to the Town of Dalton. As set forth in the Statement of Material Facts, the Plaintiff and its agents submitted a lot-line adjustment proposal to the Town of Dalton that would carve a bell-shaped lot out of a series of lots owned by Mr. Ingerson's company, JW Chipping, Inc. Statement of Material Facts at ¶¶36-38; Exhibit T, App. at 163. Defendants (and others) objected to the lot line adjustment because it would create a new lot inside JW Chipping, Inc.'s existing land.

On the plan, where existing Lots 2.1, 33 and 3 all abut the State of New Hampshire's Forest Lake State Park, Dalton Tax Map 408, Lot 6, the proposed configuration would create a new Lot 2.1 with a boundary fifty feet inset from, and parallel to, the State Park boundary. Statement of Material Facts at ¶38; Exhibit T, App. at 163. The land between the new Lot 2.1 and the State Park would be conjoined to adjacent Lots 33 and 3, and the new Lot 2.1 would no longer abut the State Park or certain other property owners. *Id.*

Since JW Chipping, Inc.'s existing land abutted the New Hampshire Forest Lake State Park, the lot line adjustment would create a buffer of JW Chipping, Inc. land between the Plaintiff's proposed lot and the State of New Hampshire's State Park lot, as well as lots of other abutters. *Id.* This would, arguably, sever the abutting relationship between the Plaintiff's landfill lot and the State Park, as well as other abutters—arguably removing any obligation on the part of the Plaintiff to provide notice for regulatory permitting purposes.

Defendants objected strongly to the proposed lot line adjustment, explaining *exactly* why they were expressing that opinion:

> I am writing to file an ethics complaint against Mr. Eric Pospesil and his engineering/surveying company, Horizons Engineering located in Franconia, N.H. At the April 3rd 2019 Town of Dalton Planning Board meeting, Mr. Pospesil and his company, representing Casella Waste Systems, knowingly attempted to deceive the Planning Board, abutters, and public regarding an attempt by Casella Waste Systems of Rutland VT to adjust property lines for 300+ acres of land, intended to become a garbage landfill, in such a way as to avoid having to notify abutting landowners, including the NH Dept of Parks as the land in question borders Forest Lake State Park. An attempt was made to create a 50 foot border of land encompassing the proposed landfill site, which said border would remain in the name of the seller, Douglas Ingerson, Jr., this allowing Casella Waste Systems to proceed with plans for the development of the garbage landfill without notification of said abutters.

Statement of Material Facts at ¶34; Exhibit S, April 24, 2019 Facebook Post, Pl. Responses to Request for Production 1, App. at 161.

Defendants' assertions about the Plaintiff's motives in this statement are speculation and opinion. *Levin v. McPhee*, 119 F.3d at 197. Defendant's conclusions about the effect of the proposed lot line adjustment on Plaintiff's notice obligations under the law for various permitting requirements is supposition and surmise. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d at 1227. The Defendants' opinions that the proposed lot line adjustment was an attempt to circumvent statutory notice requirements for abutting municipalities, a deception, unethical, unscrupulous, malfeasance, a knowing attempt to mislead, and any other conclusion the Defendants might have voiced are protected and based on facts spelled out clearly and unambiguously in the same communication. *Automated Transactions, LLC*, 172 N.H. at 539 (statements of opinion based on disclosed facts not actionable); *see* Statement of Material Facts at ¶36.

Plaintiff has no cause of action for these statements and they should be dismissed.

9. Defendants' statements concerning their opinion that the Plaintiff was "packing the [Bethlehem Planning] board" are opinion based upon public facts, as well as being not defamatory to begin with.

Plaintiff alleges that the following statement, made May 28, 2019 on Facebook, is defamatory: "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." Statement of Material Facts at ¶39; Exhibit U, Plaintiff's Responses to Request for Production 1 at CWS 00038, App. at 164.

First, the suggestion that anyone might be "packing the board" in furtherance of their interests is not capable of defamatory meaning. There is no assertion in this statement that Plaintiff was acting illegally or doing anything unlawful. Certainly, it is the Defendants' opinion that "packing the board" with Plaintiff's supporters would not be representative of the will of the people of Bethlehem, but that is not the same as being illegal, unlawful, or impermissible. Many developers would presumably want to "pack the board" by helping to elect pro-development members. If Plaintiff can legally "pack the board" with its supporters, employees, or advocates, then it is free to try. For their part, the Defendants are free to highlight these efforts to the voting public. The statement is not defamatory.

Second, it is a characterization of a set of public facts and, as such, protected opinion. In 2013, the Town of Bethlehem appointed Plaintiff's landfill manager, Kevin Roy, to be an alternate on the Planning Board. Statement of Material Facts at ¶40; Exhibit V, Blechl, Robert, "Bethlehem: Landfill Manager Appointed as Planning Board Alternate," Caledonian Record (June 18, 2013), App. at 165. In 2018, James Martin, a current or former employee of Plaintiff at the Bethlehem landfill, ran for a Planning Board position with the public support of a pro-landfill

action group named "Believe in Bethlehem." *See* Statement of Material Facts at ¶41; Exhibit W, Believe in Bethlehem Facebook post, March 10, 2018, App. at 169. "Believe in Bethlehem" received direct financial and other support from the Plaintiff, and, according to news reports, used a physical address at Plaintiff's Saco, ME, Northeastern regional office. Statement of Material Facts at ¶42; Exhibit X, Blechl, Robert, "Bethlehem: Casella-Funded Group Proposes Landfill Expansion," Caledonian Record (Nov. 14, 2017), App. at 170.

Based on these facts, Defendants' assertion that Plaintiff was seeking to "pack the board" is a protected characterization or opinion. The Defendants can opine that Plaintiff's efforts to support the election or appointment of people favorable to the Plaintiff's objectives, to a board with decision-making power over whether those objectives can be realized, is "packing the board." If they cannot, then it is not too far to say that free speech on public debates no longer exists.

Furthermore, the Defendants would have to be not only wrong, but knowingly wrong or recklessly wrong about those facts. Framed in that light, the opinion-nature of the statement emerges most clearly. The assertion that Plaintiff is trying to "pack the board" is incapable of objective verification. *See Automated Transactions, LLC*, 172 N.H. at 533-34 ("An important criterion for distinguishing statements of opinion from statements of fact is verifiability, i.e., whether the statement is capable of being proven true or false.").

10. Defendants' statements about shipping leachate to public water treatment systems.

Plaintiff asserts that statements by the Defendants concerning its practice of shipping leachate to public wastewater treatment facilities, and their questionable ability to fully treat the leachate before discharge, are defamatory. For example, Plaintiff alleges that the following

statement Defendants made in a November 24, 2019 Facebook post is defamatory: "PA and landfill and WWTP [(Waste Water Treatment Plant)] runoff … May 2019. How much longer will NH allow for Casella to ship its millions of gallons of leachate to the Concord and Franklin WWTP's despite their inability to treat it effectively before it is emptied into the Merrimack River?" Statement of Material Facts at ¶43; Exhibit Y, Plaintiff's Responses to Request for Production 1 at CWS 00032, App. at 174.

The statement in question includes a link to a story from the Pittsburgh (PA) Post-Gazette, "Pa. Attorney General to investigate landfill runoff problems in Westmoreland County." Statement of Material Facts at ¶44; App. at 175. In the article, published May 23, 2019, the writer describes how the Pennsylvania Attorney General obtained an injunction to terminate the treatment of landfill leachate at a Westmoreland County wastewater treatment plant because it threatened to discharge harmful materials into the Monongahela River. *Id.*; App. at 175-77. Defendants' response was to rhetorically ask the State of New Hampshire how long it would continue to permit the Plaintiff to ship leachate to public waste-water treatment facilities when, as evidenced by the news article, other states were taking steps to prevent that practice due to its harmful environmental impact. Statement of Material Facts at ¶43. This is opinion, rhetoric and persuasion, and thus protected. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d at 1227.

The underlying facts are also true. Plaintiff ships, more or less, four approximately 8,000 gallon trucks of leachate to the Concord (NH) and Franklin (NH) wastewater treatment facilities daily. Statement of Material Facts at ¶46; Exhibit AA (samples of reports for both treatment facilities produced by Plaintiff in response to Requests for Production of Documents), App. at 188, 198. This amounts to, as Defendants asserted, "millions of gallons of leachate" being

treated at public wastewater treatment facilities annually before discharge into—in both cases—the Merrimack River.[4]

While this is a common practice, studies have raised questions about whether public wastewater treatment facilities adequately can treat the numerous pollutants suspended in the landfill leachate. *See* Statement of Material Facts at ¶45, Exhibit Z, Nov. 13, 2015, "Landfill Leachate Released to Wastewater Treatment Plants and Other Environmental Pathways Contains a Mixture of Contaminants Including Pharmaceuticals," App. at 178, 180; Statement of Material Facts at ¶47, Exhibit BB, Dereli, Clifford and Casey, "Co-treatment of leachate in municipal wastewater treatment plants: Critical issues and emerging technologies," 51 Critical Reviews in Environmental Science and Technology 1079-1128 (April 20, 2020) (abstract), App. at 204 (noting that "Co-treatment of leachate in municipal wastewater treatment plants (WWTPs) is a commonly practiced method for leachate management. However, changing characteristics of leachate and more stringent discharge limits in WWTPs have led to questions about sustainability of co-treatment."). It is protected speech for Defendants to raise these questions and assert that the State of New Hampshire should consider acting to prevent the discharge of leachate into public wastewater treatment facilities and public waters, just as the Pennsylvania Attorney General did.

11. Defendants' statements that Plaintiff "weaponized the legal system" against him are pure opinion.

[4] Given that there is no dispute that Plaintiff trucks thousands of gallons of leachate to New Hampshire public wastewater treatment facilities daily, the criticism in Defendants' statement is seemingly directed toward the public wastewater treatment facilities that treat leachate and release it into the Merrimack River. This is not even a statement about the Plaintiff.

Plaintiff alleges that the Defendants defamed Plaintiff by posting on June 7, 2021: "When Casella weaponizes the legal system: A sad reality, meant to silence those who oppose them." Statement of Material Facts at ¶48; Exhibit GG, Plaintiff's Supplemental Response to Request for Production 1; App. at 224. The post included a link to a copy of a stalking petition filed against Mr. Swan by Vanessa Cardillo, girlfriend of Doug Ingerson, owner of the land that Plaintiff intends to buy and construct a landfill on. *Id.*

Clearly, the statement that Plaintiff "weaponizes the legal system" against those who oppose it is protected opinion. The statement is not objectively verifiable. *See Automated Transactions, LLC*, 172 N.H. at 533-34 ("An important criterion for distinguishing statements of opinion from statements of fact is verifiability, i.e., whether the statement is capable of being proven true or false."). But it is certainly reasonable imaginative expression of what this Motion argues: that the Plaintiff has used this action not to protect its supposed reputation but to silence the Defendants.

The Plaintiff will likely try to argue that, as to its legal action, such a statement is protected speech, but as to the Cardillo stalking petition, it is defamatory because there is no evidence available to prove that Plaintiff engineered Ms. Cardillo's stalking petition. But the statement does not expressly say that. It is merely: "When Casella weaponizes the legal system: A sad reality, meant to silence those who oppose them." Statement of Material Facts at ¶48.

Regarding Ms. Cardillo's stalking petition, though, it was filed the day before the annual Dalton Town Meeting, concerning alleged conduct that had occurred months before, at which Mr. Swan was going to canvass voters because he was on the ballot for an elected office. Statement of Material Facts at ¶49; Swan Aff. at ¶¶59-60. Mr. Swan was able to have the

petition amended by the Court to permit him to attend the Town Meeting. *Id.* Subsequently, after the merits hearing, the Petition was dismissed outright because, at all times, according to the judge Mr. Swan was engaged in protected speech:

> Per the statutory definition of course of conduct, such course of conduct shall not include constitutionally protected activity, nor shall it include conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person. While Defendant did post videos of Plaintiff online, these videos were made during a public town meeting. Other people also videotape these meetings and broadcast or post them online. There was no testimony that Defendant threatened the safety of the Plaintiff or that he committed any other acts included in the definition of course of conduct. The case is DISMISSED.

Statement of Material Facts at ¶49; Exhibit HH (Order of July 2, 2021, No. 451-2021-VV-00017, 1st Cir.-Dist. Div.-Lancaster).

Ms. Cardillo is, or was, the girlfriend of Doug Ingerson, the owner of the property on which Plaintiff wanted to construct a landfill. Statement of Material Facts at ¶48. Mr. Swan's and Defendants' opinion that Ms. Cardillo's petition was motivated by those political concerns surrounding the Plaintiff's landfill, rather than any actually offensive conduct by Mr. Swan, is protected opinion. Mr. Swan's implicit supposition that Plaintiff and the Petitioner stood to benefit, financially or otherwise, if the stalking petition were permitted to continue—barring him from a critical town meeting at which he was on the ballot—and therefore that the petition was part of a "weaponization of the legal system" meant to silence him, was protected opinion. E.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d at 1227; *see Automated Transactions, LLC*, 172 N.H. at 533-34.

Conclusion and Request for Relief

The totality of this action was intended to silence the Defendants and prevent them from continuing their successful public advocacy against the Plaintiff's landfill. While the Court—

correctly—dismissed three quarters of the alleged defamatory claims, permitting the Plaintiff to continue to litigate on a set of additional statements which have the thinnest possible relationship to statements of fact has embroiled the Defendants in exactly the kind of costly legal activity that chills free speech.

As the Court can see from this analysis, none of the statements alleged by the Plaintiff to be defamatory are factual. They are opinions based on facts that are either publicly available, or set forth directly in the allegedly defamatory communications themselves. If the Plaintiff is permitted to continue to litigate this matter, constitutionally protected speech – public opposition to controversial projects – will be a thing of the past. The Plaintiff wants to narrow the focus of the Court on micro-nuances and parsed clauses to try to find defamation. But the big picture in this case is that the Defendants are engaged a lengthy, vociferous, public campaign of protected speech. If the Court permits the Plaintiffs to set that aside and focus on a few cherry-picked statements out of the thousands upon thousands issued by the Defendants concerning the Plaintiff's landfill, then there simply is no protection in New Hampshire for speech on matters of public concern. The costs to the Defendants are the same whether they have to litigate over half-a-percent of their statements or all of them. There are no assertions here, and none in the public record, that justify perpetuating this defamation case.

The Court should dismiss this matter and award attorney's fees for the patent effort silence the Defendants.

Respectfully Submitted,

SAVE FOREST LAKE & JON SWAN

By their Attorneys,

ORR & RENO, P.A.

Date: April 14, 2022 By: */s/ Jeremy D. Eggleton*

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CERTIFICATION OF SERVICE

I, Jeremy D. Eggleton, do hereby certify that a copy of the foregoing was forwarded, this day, to counsel of record, via the Court's electronic service system.

/s/ Jeremy D. Eggleton

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