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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 14-00799A

NOTICE SENT
11-04-14
J/MW
T.J.J.
M.C.
T.S.V.
J.F.R.
R.C.&R.
B.D.L.
A.D.R.

KILNAPP ENTERPRISES, INC. d/b/a REAL CLEAN,

vs.

MASSACHUSETTS STATE AUTO DEALERS ASSOCIATION, INC.[1] & others[2]

## MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

### INTRODUCTION

This action arises from statements made by defendants regarding an investigation by the federal Department of Labor into practices relating to persons who perform automobile detailing services. The plaintiff has asserted claims of defamation, commercial disparagement, tortious interference with advantageous business relationships, and violations of the Lanham Act and of G. L. c.93A §§ 2, 11. Before the court is the defendants' motion to dismiss all claims. For the reasons that will be explained, the motion will be allowed.

### BACKGROUND

For purposes of the present motion, the Court accepts as true all well-pleaded factual allegations of the complaint, but disregards conclusions and characterizations asserted therein.

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[1]The complaint identifies this defendant by this name, including "Inc.," but describes it as an "unincorporated association" that is not registered with the Secretary of the Commonwealth. Whether MSADA is a legal entity subject to suit is a question not presently before the Court. Similarly, the present motion does not raise the question whether the alleged conduct of MSADA occurred in trade or commerce for purposes of G. L. c. 93A, although counsel alluded to that issue at argument.

[2] Fisher & Phillips LLP and Joseph W. Ambash.

See *Sisson* v. *Lhowe*, 460 Mass. 705, 706 (2011); *Welch* v. *Sudbury Youth Soccer Ass'n*, 453 Mass. 352, 354 (2009); *Eyal* v. *Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). The Court also considers documents that are appended to or referenced in the complaint, or on which the claims rely. See *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Harhen* v. *Brown*, 431 Mass. 838, 839-40 (2000), citing *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996).

The operative complaint here is the Real Clean's Amended Verified Complaint, filed on May 7, 2014. That pleading appends certain materials that the plaintiff appended to its original complaint, but leaves out one such document, a letter dated January 2, 2014, from Stephen Gordon, Real Clean's attorney at that time, to defendant Massachusetts State Auto Dealers Association (MSADA). The Gordon letter is before the Court as an exhibit to the original complaint. The amended complaint refers to it at paragraphs 39 and 40, and defendant Ambash's responding letter, which plaintiff has appended to the amended complaint, refers to it throughout. The Court therefore treats the Gordon letter as among the materials properly considered in connection with the present motion.

The factual allegations of the amended complaint, considered together with the Gordon letter and the other materials appended, provide the following factual background. The plaintiff, Kilnapp Enterprises, Inc. (doing business as Real Clean), describes itself as "a broker for automobile detailing and reconditioning between service providers and automobile dealerships." Real Clean, according to its description, "connects" dealerships with "independent contractors" who provide the actual detailing and reconditioning services. Real Clean alleges that it is "one of the largest – and quite possibly <u>the</u> largest – broker of automobile detailing and reconditioning

services in New England."

In 2013, the United States Department of Labor (DOL) initiated an investigation into potential violations of wage and hour laws by Real Clean and others in the auto detailing business. The DOL investigation of Real Clean focused on whether it had improperly classified the individuals performing the detailing services as independent contractors, rather than employees of Real Clean, and therefore owed them overtime pay. DOL, according to the Gordon letter, "advised Real Clean that the DOL felt that Real Clean owed many individual detailers overtime pay." Real Clean management and counsel met with DOL in April of 2013, and provided materials refuting DOL's findings. From that time through at least the date of the Gordon letter, DOL brought no enforcement action against Real Clean. DOL did, however, according to the Gordon letter, visit dealers, including some who are Real Clean customers and some who are not. DOL assessed amounts it claimed to be due from the dealers, some of whom have paid the assessments.

Defendant MSADA is a trade group that represents the interests of car and truck dealers in the Commonwealth. Among other activities, MSADA publishes articles and presents seminars to promote its members' compliance with federal and state laws and regulations. Most of Real Clean's Massachusetts-based clients are members of MSADA. Defendant Joseph Ambash is an attorney at defendant Fisher & Phillips LLP who assists MSADA on employment matters.

On November 13, 2013, MSADA published a newsletter featuring an article written by Ambash, entitled "Alert: DOL Cracking Down on Dealers Using Real Clean." The same article also appeared on MSADA's website, where it was entitled "DEALER ALERT: U.S.

DEPARTMENT OF LABOR CONTINUES AUDITS OF AND ACTIONS AGAINST DEALERS & REAL CLEAN." The article included the following text:

> We have learned that the Department of Labor has approached several dealers in the past couple of weeks and demanded payment of overtime for detailers working for Real Clean (Kilnapp Enterprises). . . . This is a serious situation for dealers who have relationships with Real Clean, and it will only get worse. As we have previously reported, the DOL has been visiting dealerships for months, demanding to interview dealership employees and Real Clean employees. Their primary objective has been to tie the dealerships to Real Clean, in order to claim that the dealership is a "joint employer" of the Real Clean personnel. After the DOL completes its investigation . . . the DOL schedules a "closing conference" and demands backpay and overtime it claims is owed both to any dealership employees who were improperly paid, as well as to employees of Real Clean. . . . The DOL claims that the Real Clean contractors are not independent, but are "jointly" employed by the dealer and either Real Clean or the contractor."

A section of the article entitled "What Should Dealers Do?" discusses options available:

> Real Clean has indemnification agreements with some dealers. It has indicated that it will consider offering indemnification agreements to all of its dealers. Real Clean is asking the dealers not to agree to pay the DOL, but instead to let Real Clean defend them. . . . Dealers can pay the DOL and end their relationship with Real Clean if they feel the risks are too great. In connection with that, they can demand reimbursement by Real Clean or consider offsetting any amounts paid against monies due to Real Clean. If a dealer ends its relationship with Real Clean, the dealer can hire detailers directly, and pay them properly as employees of the dealership. Alternatively, a dealer can engage the services of another outside company to provide detailing services. . . . This situation is very complicated. Each dealer should consult with counsel to help determine the best course of action for your dealership.

By his letter to MSADA dated January 2, 2014, Gordon, sought to "set the record straight regarding MSADA's unfair and inaccurate attack on my client." He acknowledged that "it is indeed true that the U.S. Department of Labor has been looking into auto detailing services nationwide" for compliance with wage and hours laws, but asserted that "the issues are by no means limited to or targeting Real Clean and its dealership customers." He implored MSADA to "publish the truth" concerning "DOL's 'audit'" or "review" of Real Clean. The truth, according

to Gordon, was that:

> Real Clean operates as a broker, putting automobile detailing companies together with automobile dealers. The individuals actually detailing automobiles are employees of the independent companies for which Real Clean acts as a broker. They are not dealership employees and they are not Real Clean employees. . . . Last winter, the U.S. Department of Labor conducted a review of Real Clean's independent contractors and advised Real Clean that the DOL felt that Real Clean owed many individual detailers overtime pay. . . . In April, 2013 . . . Real Clean's senior management and . . . counsel met with the DOL and presented the DOL with, literally, a book refuting the "findings" of the DOL audit. In addition, . . . Real Clean offered to engage an outside CPA firm . . . to review the employment practices of Real Clean's contractors and to report on them directly to the DOL . . . The DOL rejected Real Clean's proposal and, since that time, has brought no enforcement action against Real Clean and has not in any way refuted any of the information in the book Real Clean presented.

Gordon went on to acknowledge that "[d]ealers who are Real Clean customers have been vistied by the DOL," pointing out that "[d]ealers who are not Real Clean customers have also been visited by the DOL." He went on,

> Some dealers visited by the DOL have been presented with assessments based on the same flawed DOL assumptions. Some have paid because the amounts are too small to fight over. Despite requests, none have allowed Real Clean to defend them. . . . Your members need to know that proper employment practices for auto detailers is a national, industry wide issue, not just a Real Clean issue.

Ambash responded to the Gordon letter on behalf of MSADA, by letter dated January 8, 2013. He reported that MSADA had learned from its members that DOL was investigating dealers, "focused particularly on their relationship with Real Clean," and that "DOL maintains that both Real Clean and the individual dealers are 'joint employers' of the employees of the detailers who are brokered to dealers by Real Clean. The MSADA has informed its members of the DOL's investigation, not only of Real Clean but of detailing relationships in general." Ambash acknowledged the differing views of the correctness of DOL's position, but pointed out

that "DOL is pressuring dealers to agree to pay overtime and other back pay amounts allegedly due by the detailing companies to the detailers." MSADA's "only interest," Ambash asserted, "is in making sure its members understand their risks and obligations and educating them about options available to them."

On January 9, 2014, the day after his letter, Ambash presented a seminar for MSADA members entitled "Critical Human Resources Issues for Auto Dealers, Including DOL Audits & Real Clean." According to the bulletin announcing the seminar, it would "cover comprehensively the ongoing controversy of the U.S. Department of Labor actions against dealers utilizing Real Clean (Kilnapp Enterprises) for detail work." The bulletin reported that "the overzealous U.S. Department of Labor has approached several Massachusetts dealers in the past couple of weeks and demanded payment of overtime for dealers working for Real Clean (Kilnapp Enterprises)."

Real Clean brought this action on March 10, 2004, and filed its amended complaint dated May 7, 2014.[3] The amended complaint alleges that Ambash and MSADA have made their statements with malice, for the purpose of generating business for Ambash and his law firm, and that, as a result of the statements and Ambash's advice, dealerships have severed their relationships with Real Clean, causing it to lose revenue. Based on these allegations, the complaint sets forth five substantive counts, each against all defendants: Violation of the Lanham Act, 15 U.S.C. § 1051 (count I); violation of G. L. c. 93A, §§ 2, 11 (count II);

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[3] In addition to the facts set forth *supra*, the amended complaint alleges "[u]pon information and reasonable belief," that "DOL has assessed Real Clean for hundreds of thousands of dollars." Such assertions, in which the plaintiff apparently lacks sufficient confidence to allege as fact, do not contribute to the plausibility of the claims. See *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008).

commercial disparagement/trade libel (count III); tortious interference with an advantageous business relationship (count IV); and defamation (count V). Defendants move to dismiss all counts for failure to state a claim on which relief may be granted, pursuant to Mass. R. Civ. P. 12(b)(6).[4]

## DISCUSSION

To survive a motion to dismiss, a complaint must set forth "'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. at 636, quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). Although a complaint need not set forth detailed factual allegations, a plaintiff is required to present more than mere labels and conclusions, and must raise a right to relief "above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555. Defendants contend that the complaint fails to state a plausible claim for relief on any of the legal theories asserted, because each of those theories requires falsehood, and the Gordon letter establishes the truth of defendants' statements. Defendants further contend that all of the statements alleged were protected by the litigation privilege. The Court agrees with defendants on the first point, and therefore will not reach the second.

To prevail in a claim for defamation, a plaintiff "must allege facts sufficient to show that the defendants published a statement, of and concerning the plaintiff, that was both defamatory and false." *Dulgarian* v. *Stone*, 420 Mass. 843, 847 (1995) (citations omitted). Similarly, claims for commercial disparagement and violation of the Lanham Act require the plaintiff to prove that

[4]Count VI seeks injunctive relief based on the claims in the other counts. The Court denied a motion for preliminary injunction by order entered March 25, 2014.

defendant made a false statement or representation. See *HipSaver, Inc.* v. *Kiel*, 464 Mass. 517, 522 (2013) (commercial disparagement claims "seek to impose liability on a defendant for harm sustained by a plaintiff as a result of the publication of a false statement about the plaintiff to others"); *Genzyme Corp.* v. *Shire Human Genetic Therapies, Inc.*, 906 F. Supp. 2d 9, 14 (D. Mass. 2012), quoting *Cashmere & Camel Hair Mfrs. Inst.* v. *Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir. 2002) (one of "the elements of a Lanham Act false advertising claim [is that] 'the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product'").[5] A statement that is substantially true, even if inaccurate in some minor respect, cannot support a claim under any of these theories. See *Milgroom* v. *News Group Boston, Inc.*, 412 Mass. 9, 12-13 (1992); *Reilly* v. *The Associated Press*, 59 Mass. App. Ct. 764, 770 (2003). In evaluating the truth of a statement, the Court considers the communication in its entirety and the context in which it was published, as well as "[t]he emotions, prejudices and intolerance of mankind." *Ingalls* v. *Hastings & Sons Pub. Co.*, 304 Mass. 31, 33 (1939).

Real Clean contends that the articles and the seminar bulletin are false and misleading in that they (1) refer to Real Clean "employees" and "personnel," although Real Clean maintains that the detailers are not its employees; (2) state that DOL has attempted to tie Real Clean to dealerships under a joint employer theory, when in fact DOL has attempted to tie dealerships to the contract entities who actually employ the detailers; (3) describe the DOL audit of Real Clean

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[5]A Lanham Act claim also requires a relationship of competition between the parties, which Real Clean does not allege. See *Genzyme Corp.* v. *Shire Human Genetic Therapies, Inc.*, 906 F. Supp. 2d at 14-15; see generally, *Jenzabar, Inc.* v. *Long Bow Group, Inc.*, 82 Mass. App. Ct. 648 (2012).

as "continuing" even though the audit ended months earlier; (4) suggest that DOL is investigating only dealers associated Real Clean; and (5) imputes to Real Clean fraudulent, deceitful, dishonest, and/or misleading conduct.[6]

When the article and bulletin are each read as a whole, in relation to the facts conceded in the Gordon letter, it is apparent that none of these theories supports Real Clean's claims. To the contrary, each of the cited statements, to the extent that it actually appears in any of the documents, is substantially true. As to the first contention, the article does refer to "detailers working for Real Clean," and in one instance, "employees of Real Clean." It expressly states, however, that the status of the detailers as employees of either the dealers or Real Clean is the subject of DOL's "claims." In context, it is clear that neither the articles nor the bulletin assert any contention by Ambash or MSADA that the detailers are employees of Real Clean; rather, they report DOL's claim to that effect. The Gordon letter confirms that DOL has in fact so claimed.

As to Real Clean's second contention, the Gordon letter concedes that DOL has asserted liability against dealers for wages due to the detailers. Whether that liability would be based on the theory that the dealers are joint employers with Real Clean, or that they are joint employers with entities that function as intermediaries between Real Clean and the individual detailers, is a distinction unlikely to be of significance to any dealer reading the statements. The potential for liability for detailers obtained through Real Clean would be the reader's concern, not the precise identity of the entity alleged to share liability. The statements are thus substantially true in this

[6]The affidavit of Erik Wahlberg, appended to the amended complaint, on which Real Clean relies heavily in its opposition to the present motion, asserts essentially the same contentions, but adds no facts pertinent to the claims of liability.

respect. See *Reilly*, 59 Mass. App. Ct. 770. As to Real Clean's third contention, any inaccuracy with respect to the timing of the DOL investigation is similarly immaterial. Although the Gordon letter asserts that DOL had last communicated with Real Clean in April of 2013, it does not suggest, nor does the complaint allege, that DOL has at any time closed its investigation of Real Clean, or that it has conceded any error in its position. From the perspective of dealers reading the statements, what would matter is DOL's visits to them – which Real Clean does not suggest have ended – not the timing of DOL's investigation of Real Clean.

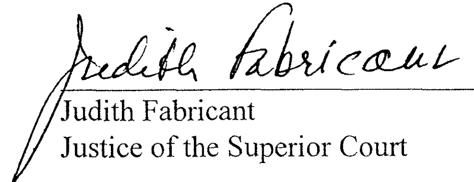
As to the fourth and fifth contentions, the articles and bulletin simply do not say what Real Clean attributes to them. The thrust of the article is that DOL has targeted dealers in Massachusetts who obtain detailing services through Real Clean. That statement, according to Gordon, is accurate. Indeed the complaint itself alleges that Real Clean is "quite possibly the largest broker of automobile detailing and reconditioning services in New England," so that an investigation of practices in the detailing industry would inevitably target those who deal with Real Clean. The article and bulletin say nothing either way regarding dealers who obtain detailing services from other sources. As to any deceitful conduct, if anything the bulletin says the opposite, characterizing DOL as "overzealous." Overall, the complaint fails to allege any falsehood, and the claims of defamation, commercial disparagement, and violation of the Lanham Act must fail.

The claim of tortious interference requires a slightly different analysis, but ultimately fails for essentially the same reason. Among the essential elements of such a claim is that the defendant acted for an improper motive and by an improper means. See *Blackstone* v. *Cashman*, 448 Mass. 255, 260 (2007). The only motive alleged against any defendant is that Ambash and

his firm sought to market their legal services. Such a motive is not improper. See *United Truck Leasing* v. *Geltman*, 406 Mass. 811, 817 (1990) (no improper motive where defendant intended only to benefit himself and his customer financially, and not to hurt the plaintiff). What remains, then, is the improper means of falsehood, which, as discussed *supra*, the factual allegations do not support. The c. 93A claim, as pled, depends on the underlying claims, and therefore fails with them. The Court concludes, therefore, that the complaint fails to state a claim on which relief may be granted.

**CONCLUSION AND ORDER**

For the foregoing reasons, Defendants' Motion to Dismiss is **ALLOWED**.



Judith Fabricant
Justice of the Superior Court

November 3 , 2014