VIRGINIA:

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

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| ROGER W. WOODY,<br><br>Plaintiff,<br><br>v.<br><br>TERRY ELLEN CARTER, *et al.*,<br><br>Defendants. | ) | Case No. CL08003192-00 |

**DEMURRER TO COMPLAINT**

Defendant Terry Ellen Carter, by counsel, hereby demurs to plaintiff's Complaint. The grounds for this Demurrer are as follows:

Defendant Carter maintains an Internet website called ThinkChristiansburg.com, which addresses various issues of public concerns. Two articles on this website discuss a large pile of dirt on the property of plaintiff's company, Showcase Home Builders, and express the view that the dirt pile is an eyesore that should be removed. Based solely upon these constitutionally protected criticisms of the plaintiff and his dirt pile, the plaintiff – one of the region's largest real estate developers – accuses the defendant of business conspiracy, tortious interference, and insulting words. The allegations in the complaint do not state a claim for any of these causes of action.

I. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. The Complaint Fails to State a Claim for Tortious Interference

The elements of a claim for tortious interference with a business relationship are "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit

to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff." *Williams v. Dominion Technology Partners, L.L.C.*, 265 Va. 280, 289, 576 S.E.2d 752, 757 (Va. 2003). The Complaint fails to allege the first and second of these elements. Although the plaintiff claims to have lost "numerous" contracts, he does not specify any particular contract or business expectancy with which the defendants interfered. "Failure to allege any specific, existing economic interest is fatal to the claim." *Masco Contractor Services East, Inc. v. Beals*, 279 F.Supp.2d 699, 709 (E. D. Va. 2003). *See also Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F.Supp.2d 385, 391 (E.D. Va.2002) ("Because plaintiffs do not identify the specific business relationships with which defendant has interfered, plaintiffs' tortious interference claim fails.") Nor does the Complaint allege that the defendants had any knowledge of any such contract or business expectancy.

Moreover, "Virginia caselaw applying the tort of intentional interference with a business expectancy contains a fifth, unstated element to the prima facie case: a competitive relationship between the party interfered with and the interferor." *17th Street Associates, LLP v. Markel Intern. Ins. Co. Ltd.*, 373 F.Supp.2d 584, 699 (E.D. Va. 2005). Here, no such relationship is alleged. The defendants are not in the real estate business, but are simply citizens who comment on matters of public concern. Similarly, there is no "allegation that the defendant had some contact with the source of the plaintiff's alleged business expectancy." *Id.* The defendants did not seek out those who might purchase property from the plaintiff and dissuade them from doing so.

B. The Complaint Fails to State a Claim for Business Conspiracy Under Virginia Code §§ 18.2-499 and 500.

For similar reasons, the Complaint does not state a claim under Virginia Code §§ 18.2-499 and 500, which provide a cause of action against persons who conspire for the purpose of "willfully and maliciously injuring another in his reputation, trade, business or profession." With regard to this claim, the Complaint merely states in a conclusory fashion that the defendants publicly criticized the defendant "with the intent to intentionally and maliciously discredit and embarrass the Complainant and cause damages and financial losses to his businesses." But "business conspiracy, like fraud, must be pleaded with particularity, and with more than 'mere conclusory language.'" *GEICO v. Google, Inc.*, 330 F.Supp.2d 700, 706 (E.D. Va. 2004) (citing *Bay Tobacco, LLC v. Bell Quality Tobacco Products, LLC*, 261 F.Supp.2d 483, 499 (E.D.Va.2003)).

As with the tortious interference claim, the Complaint fails to specify any specific business or reputational interests that were harmed. Nor does the Complaint plead any facts to support the conclusory allegation that the defendants had the malicious intent to harm the plaintiff's business. *See GEICO*, 330 F.Supp.2d at 706 (dismissing claim under Va. Code § 18.2-499 because allegations were "not sufficiently specific to support the conclusory language that the parties entered into an agreement with the purpose of injuring GEICO in its business.")

C. The Complaint Fails to State a Claim for Insulting Words Under Virginia Code § 8.01-45.

Virginia Code § 8.01-45 bears some resemblance to a claim for common-law defamation (which was not pleaded here), but it contains the additional element "that the words used must not only be insults, but they must also 'tend to violence and breach of the peace.'" *Allen & Rocks, Inc. v. Dowell*, 252 Va. 439, 441, 477 S.E.2d 741, 742 (Va. 1996). While, again, the

Complaint makes the conclusory allegation that the defendants' speech "tends to violence of and breach of the peace," none of the actual language cited in the body of the Complaint or its exhibits rises anywhere near that level.

The language complained of in the Complaint includes the following: (1) an anonymous post to ThinkChristiansburg.com stating that one of the photographs on the site "may well depict the future ghetto of NRV – even dense European row house communities have some ambience" (¶ 3b, Ex. 10); (2) descriptions of the dirt pile as "Mount Woody" (¶¶ 3b, 8); (3) a photograph of the dirt pile with the word "Woodyville" superimposed (*Id.*); (4) A website post stating that "One of Christiansburg's most notable landmarks, known in the neighborhood as Mt. Woody, has besmirched the landscape FOR YEARS" (¶9).

While these criticisms are no doubt unpleasant for the plaintiff, they are downright mild in comparison to other language that courts have held *not* to be "fighting words" that "tend to violence or breach of peace." *See, e.g., Diehl v. State*, 451 A.2d 115 (Md. 1982) ("F--k you, Gavin" addressed to a police officer did not constitute "fighting words"); *Rozier v. State*, 231 S.E.2d 131 (Ga. App. 1976) ("How about some pussy?" addressed to a sixteen-year-old girl, in the presence of her brother, did not constitute "fighting words").

Moreover, a cause of action under Code § 8.01-45 generally requires that the insulting language be directed at the plaintiff in a face-to-face confrontation that provokes an imminent danger of violence. For example, in *Thompson v. Town of Front Royal*, 2000 WL 329237 (W.D. Va. 2000), the plaintiff, an African American, alleged that his employer "criticized the work of white employees by saying, 'This is sloppy work. If this was a bunch of niggers I would expect this, but y'all are white.'" The court dismissed the claim, noting that the offensive language "cannot be construed as having been directed at a particular individual in a face to face

confrontation and as presenting a clear and present danger of a violent physical reaction." *Id.* at *4. [1]

In short, the language complained of does not constitute the sort of "insulting words" that may be expected to result in a breach of the peace, and cannot support a claim under Code § 8.01-45.

D. The Plaintiff does not have Standing to Raise Claims on Behalf of Showcase Home Builders, LLC.

The dirt pile complained of by the defendants was created not by Roger Woody in his individual capacity, but by his business, Showcase Home Builders, LLC.[2] Likewise, the damages claimed by the plaintiff are all losses sustained by Showcase Home Builders, LLC. Thus, the claims alleged belong to Showcase Home Builders, LLC, and not to Roger Woody, and he does not have standing to raise them.

## III. THE DEFENDANT'S SPEECH IS PROTECTED BY UNITED STATES AND VIRGINIA CONSITUTIONS, ANDCANNOT BE THE BASIS FOR CIVIL LIABILITY.

Finally, all of the plaintiff's claims must fail as a matter of law because they are based on speech that is protected by the First Amendment to the United States Constitution and Article 1, Section 12 of the Virginia Constituiton.

Virtually all of the speech on the ThinkChristiansburg.com website – the references "Mount Woody" and "Woodyville," the "new ghetto" remark – are constitutionally protected

[1] Mississippi's "actionable words" statute, which is virtually identical to Virginia's "insulting words" statute, has similarly been interpreted to apply only to "spoken words (not written), usually where there would be a face-to-face encounter, and, more importantly, no cooling-off time before a physical altercation occurred." *Isaacks v. Reed*, 537 So.2d 409 (Miss. 1988).

[2] The Complaint states that Roger Woody "trade[s] as" Showcase Home Builders. (¶ 1.) Documents from the State Corporation Commission indicate that he is the sole member of a business registered as "Showcase Home Builders, LLC."

expressions of opinion and parody. "Pure expressions of opinion, not amounting to 'fighting words,' are protected by the First Amendment of the Constitution of the United States and Article 1, § 12 of the Constitution of Virginia." *Fuste v. Riverside Healthcare Ass'n, Inc*., 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003). "[S]peech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action." *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998). "Whether an alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by a court instead of a jury." *Fuste*, 265 Va. at 132-33, 575 S.E.2d at 861.

The only actual statement of fact mentioned in the complaint is the remark that "Mount Woody" has "besmirched the landscape FOR YEARS," which the plaintiff alleges is false because the pile of dirt has only been in existence for "a few months." (The *Roanoke Times* article attached to the Complaint as Exhibit 11, states that the pile "has been growing since January 2007," well over a year.) But "[s]light inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially' true. . . . A plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel." *Jordan v. Kollman*, 269 Va. 569, 576, 612 S.E.2d 203, 207 (2005).[3]

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[3] The plaintiff also claims that photographs on the website "were falsely designated and published to lead the public to believe that the construction sites were a part of the site of the completed townhomes." (¶ 8.) In fact, however, the most that was said about the photographs was that they depicted views that *may* be *visible* from the townhomes. (Exhibit 9.) Similarly, the plaintiff claims that the *Roanoke Times* "depicted the ["Woodyville"] photograph as of recent origin even though the photograph was taken several months ago." (¶ 3b.) But the newspaper article (Exhibit 10) does not say anything about when the photograph was taken.

The constitutional protection of defendants' speech about the plaintiff is further heightened by the fact that the plaintiff – as established by the allegations in the Complaint – is a public figure. *See* Complaint ¶ 1 (Plaintiff "has constructed a number of developments within the Town of Christiansburg . . . . Showcase Home Builders is a three time award winner of Builder of Integrity . . .); *Id.* ¶ 2 ("Complainant has relied on his good name and reputation for integrity in conducting his businesses. . . ") A public figure is required to prove not only that the speech at issue is false, but that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). As noted above, the only statement alleged to be false is that the dirt pile has existed "for years"; the Complaint does not allege knowledge or reckless disregard as to the alleged falsehood.

Moreover, while most of the Virginia cases refer to defamation actions, constitutionally protected speech of type complained of here may not be the basis for any civil action. For example, in *Hustler Magazine v. Falwell*, 845 U.S. 46 (1988), the Supreme Court held that under the First Amendment, a magazine's highly offensive parody of a famous minister could not support a claim of intentional infliction of emotional distress. The same reasoning applies to business torts. In *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Supreme Court held that the defendant's organization of a boycott supported by speeches and nonviolent picketing could not be the basis for an award of damages for malicious interference with the plaintiff's business. "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." 458 U.S. at 918. *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (reversing injunction against leaflets critical of real estate broker's alleged 'blockbusting'

and ‘panic peddling’ activities); *Gaylord Entertainment Co. v. Thompson*, 958 P.2d 128 (Okla. 1998) (Newspaper editorials were pure, constitutionally protected speech, and therefore could not be the basis of tortious interference claim); *Eddy's Toyota of Wichita, Inc. v. Kmart Corp*., 945 F.Supp. 220 (D. Kan. 1996) (Expressions of opinion cannot be the basis for tortious interference claim.)

## CONCLUSION

In a country that places paramount value on the freedom of speech, citizens should not have to fear multi-million dollar lawsuits as the price of voicing their opinions on matters of public concern. The defendant respectfully requests that the Court grant her demurrer and dismiss the case.

Respectfully submitted,

TERRY ELLEN CARTER

By:_____

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of May, 2008, I served a true and correct copy of the foregoing document by U.S. Mail, postage prepaid, addressed as follows:

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