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Representing Defendants Relentless, Inc. and Sean Kelly

IN THE COURT OF COMMON PLEAS FOR LANCASTER COUNTY

DONUTNV FRANCHISING, INC.,
Plaintiff

v.

RELENTLESS, INC. AND SEAN KELLY,
Defendants

Case No. CI-25-00737

**BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR JUDGMENT ON THE
PLEADINGS UNDER PA. C.S.A. § 8320.1**

Defendants Relentless, Inc. (“Relentless”) and Sean Kelly, by and through their legal counsel, submit this Brief in Support of their Motion for Judgment on the Pleadings Under Pa. C.S.A. § 8320.1.

I. BACKGROUND

A. FACTUAL BACKGROUND

Defendants Relentless and Mr. Kelly operate a website known as Unhappy Franchisee (the “Website”). (Compl. ¶ 2; Ans. ¶ 2). The Website is self-described as a “No-Nonsense Hype-Free Franchise Issues & Discussion Site.” (Compl. Ex. 1 at pg. 1). The Website displays posts that criticize franchisors (Compl. Ex. 1 at pgs. 1-7), quotes dissatisfied franchisees (Compl. Ex. 1 at pgs. 4-5), and posts information from franchisors’ publicly available Franchise Disclosure Documents required by the Federal Trade Commission (Compl. Ex. 2 at pgs. 1-8). With each post, the Website expressly

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states “[t]he franchisor, its employees and agents are invited to submit correction, clarifications, rebuttals or other opinions for immediate consideration.” (Compl. Ex. 1 at pg 7; Compl. Ex. 2 at pg. 8).

Plaintiff DonutNV Franchising, Inc. (“DonutNV”) is a franchisor with franchisees operating at over 100 locations in the United States. (Compl. ¶ 13; Ans. ¶ 13). Its franchises “essentially consists of a customized food truck which can be driven to factious locations and events within the franchisee’s sales territory, from which fresh donuts are made and sold along with beverages.” (Compl. ¶ 14; Ans. ¶ 14). DonutNV’s claims in this action arise from posts made about it as a franchisor on the Website. (Compl. ¶ 22).

DonutNV alleges that the Website shared the following statements:

1. A DonutNV franchisee was struggling to purchase Christmas gifts for his or her children (Compl. ¶ 22.A.);
2. The owners of DonutNV were flying to the Bahamas in a private jet (Compl. ¶ 22.A, D, and G);
3. DonutNV was destroying people’s lives and hurting people (Compl. ¶ 22.B.);
4. One-half of DonutNV franchisees were failing (Compl. ¶ 22.C.);
5. DonutNV was the victim of bad advisers (Compl. ¶ 22.E.);
6. DonutNV partnered with unscrupulous franchise promoters (Compl. ¶ 22.F.);
7. DonutNV was a money grab and a Ponzi scheme (Compl. ¶ 22.H.).

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The only statement by Mr. Kelly was that DonutNV was the victim of bad advisers. (*Compare* Compl. ¶ 22.E. *with* Compl. Ex. 1 at pg. 2). Each of the other statements are comments by an existing or former DonutNV franchisee. (*Compare* Compl. ¶ 22.A. *with* Compl. Ex. 1 at pg. 4; *compare* Compl. ¶ 22.A, D, and G *with* Compl. Ex. 1 at pg. 4; *compare* Compl. ¶ 22.B. *with* Compl. Ex. 1 at pg. 5; *compare* Compl. ¶ 22.C. *with* Compl. Ex. 1 at pg. 1; *Compare* ¶ 22.F. *with* Compl. Ex. 1 at pg. 3; *Compare* Compl. ¶ 22.H. at pg. 6).

DonutNV also alleges that Defendants “extort money out of participants in the franchise industry....” (Compl. ¶ 3). They allege that they “recently became a victim of Defendants’ extortionate scheme but refused to give in to this blackmail....” (Compl. ¶ 4). They also allege Defendants’ conduct “smacks of bribery, extortion and blackmail.” (Compl. ¶ 20). DonutNV does not raise any claims against Defendants for conversion, extortion, blackmail, fraud, or any other cause of action alleging that they paid money to Defendants. (*See* Compl. ¶¶ 1-53).¹

B. PROCEDURAL BACKGROUND

With the filing of Defendants’ Reply to DonutNV’s New Matter to Defendants’ Counterclaim on May 12, 2025, the pleadings in this matter are closed. Defendants have filed their Motion for Judgment on the Pleadings Under 42 Pa. C.S.A. § 8320.1. This Brief is filed in support of Defendants’ pending motion.

¹ Any claims for extortion or blackmail would fail as a matter of law because they are criminal offenses, not civil claims. But DonutNV does not even attempt to raise such claims.

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II. ARGUMENT

Under Pennsylvania Rule of Civil Procedure 1034, judgment on the pleadings is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. “A motion for judgment on the pleadings is similar to a demurrer.” *Forbes v. King Shooters Supply*, 230 A.3d 1181, 1187 (Pa. Super. Ct. 2020).

The standard to be applied upon review of a motion for judgment on the pleadings accepts all well-pleaded allegations of the complaint as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

Id. When ruling on a motion for judgment on the pleadings, the court may reach conclusions of law based on statutory interpretation. *Booher v. Olczak*, 797 A.2d 342, 345-346 (Pa. Super. Ct. 2002) (ruling claims were barred by the statute of limitations).

A. DEFENDANTS ARE IMMUNE FROM DONUTNV’S TORT CLAIMS ARISING FROM DEFENDANTS’ SPEECH ON MATTERS OF PUBLIC CONCERN

Defendants are immune from DonutNV’s claims because Defendants were engaged in constitutionally protected speech on matters of public concern. Defendants should be granted an early judgment in their favor because the Uniform Public Expression Protection Act (the “UPEPA”), 42 Pa. C.S.A. §§ 8340.11, *et seq.*, is intended to put an early end to strategic lawsuits against public participation (“SLAPP lawsuits”) before they have a chilling affect on protected speech.

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1. Protected Public Expression is Immune from State Tort Claims

In 2024, the Pennsylvania legislature adopted the Uniform Public Expression Protection Act (the “UPEPA”), 42 Pa. C.S.A. §§ 8340.11, *et seq.*, to grant immunity to those engaged in protected public expression.² It noted that “[t]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of protected public expression.” 42 Pa. C.S.A. § 8340.12. The legislature further noted that “[t]his participation should not be chilled through abuse of the judicial process.” *Id.* To protect public expression, the UPEPA “grants immunity to those groups or parties exercising the rights to protected public expression.” *Id.* § 8340.12, § 8340.15.

The UPEPA builds upon the pre-existing constitutional protections for free speech on matters of public concern. “The Free Speech Clause of the First Amendment—“Congress shall make no law ... abridging the freedom of speech”—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.” *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (citation omitted). “Speech on matters of public concern is at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Section 7 of the Pennsylvania Constitution likewise protects the freedom of speech regarding any matter “proper for public investigation or information.” Pa. Const. Art. 1, § 7.

² Pennsylvania is one of thirteen states to have adopted such a protection law, with nine more states considering such legislation. Uniform Law Commission, Public Expression Protection Act, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1> (last accessed June 2, 2025).

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2. Defendants' Speech is Protected Public Expression

The UPEPA defines "protected public expression" as

A person's: . . . (3) exercise, **on a matter of public concern, of the rights of freedom of speech** or of the press, the right to assemble or petition or the right of association, guaranteed by: (i) the First Amendment to the Constitution of the United States; or (ii) section 7 or 20 of Article I of the Constitution of Pennsylvania.

42 Pa. C.S.A. § 8340.13 (emphasis added). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."

Atnight Media, LLC v. Stephanie Jo Trude, Case No. CV-2024-009083 at pg. 7 (Delaware Comm. Pl. April 17, 2025) (quoting *Snyder v. Phelps*, 562 U.S. at 453, cited in Pa. C.S.A. § 8340.13 Uniform Law Cmt. 9).³ Given the UPEPA's references to the United States Constitution and the Pennsylvania Constitution, what constitutes a matter of public concern should be read consistently with the caselaw interpreting those constitutional rights. *See also* 42 Pa. C.S.A. § 8340.13 Uniform Law Cmt. 9 ("The term 'matter of public concern' should be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court.").

³ A true and correct copy of the April 17, 2025, unpublished opinion by Judge Kelly D. Eckel of the Delaware County Court of Common Pleas in *Atnight Media et al. v. Stephanie Jo Trude et al.*, is attached to this Brief as **Exhibit A**.

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Under the First Amendment to the United States Constitution, whether speech is protected because it addresses a matter of public concern “must be determined by the content, form, and context of a given statement, as revealed by the whole record.”

Connick v. Myers, 461 U.S. 138, 147-148 (1983).

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” *Connick, supra*, at 146, 103 S.Ct. 1684, or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” *San Diego, supra*, at 83-84, 125 S.Ct. 521. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-494, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).”

Snyder v. Phelps, 562 U.S. 443, 453 (2011). “This inquiry into the protected status of speech is one of law, not fact.” *Connick v. Myers*, 461 U.S. at 148 n. 7.

Speech need not be through traditional media channels or about governmental issues to be protected. In *Atnight Media, LLC v. Stephanie Jo Trude*, the plaintiffs’ claims arose from statements made by the defendants on podcasts hosted on YouTube and through online chat rooms with members of the public. *Atnight* at pg. 3. The defendants’ digital platforms, focused on true crime and criminal investigations, contained statements related to the case of a missing Tennessee child. *Id.* at pg. 3. Despite the digital nature of the content and the fact it focused on a particular criminal

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investigation, the court held that the defendants had engaged in protected public expression and were immune from the plaintiffs' tort claims. *Atnight* at pg. 8.

The Website's statements about DonutNV were protected public expression. Except for one statement by Mr. Kelly, the content of these statements are quotes from franchisees who were unhappy with DonutNV. In many ways, the Website provides franchisees an outlet for protected speech franchisees just as Glassdoor.com provides such an outlet for employees. It is in the public's interest for information about franchises to be available, especially for those individuals who are considering becoming franchisees. The law also recognizes prospective franchisees as needing protection, such as through the Federal Trade Commission ("FTC")'s Franchise Rule, 16 CFR Parts 436 and 437. Similarly, the FTC publishes its "Consumer's Guide to Buying a Franchise" specifically because the public should know about franchise conditions. *A Consumer's Guide to Buying a Franchise*, Federal Trade Commission, available at <https://www.ftc.gov/business-guidance/resources/consumers-guide-buying-franchise> (last accessed June 5, 2025).

The form and context of these statements further reinforce them as protected public expression. There is nothing in the statements that conceals the fact that these are disgruntled speakers. Nor that the Website is focused on "Unhappy Franchisees." Just like online reviews for any business, by context any reader expects to take such comments with a proverbial grain of salt. Moreover, based on DonutNV's own exhibits, the Website offers franchisors an opportunity to have a response posted. DonutNV claims only that it demanded statements be taken down, not that it submitted any

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response. And while not binding on this Court, a California court faced with the same issues held the Website was protected public speech in the context of dismissing a SLAPP lawsuit. *Golob v. Kelly*, Case SCUK-CVPO-2014-63543 (Mendocino Cty. California Super. Ct. May 21, 2014).⁴

Taking as true that Defendants were responsible for every statement shown in the exhibits to DonutNV's Complaint, as a matter of law such statements were on matters of public interest. Because were protected public expression, Defendants are immune from DonutNV's tort claims and judgment should be entered in Defendants' favor.

B. DONUTNV CANNOT PREVAIL ON ITS CLAIMS AGAINST DEFENDANTS

Even assuming arguendo that Defendants are not immune from suit (*see supra* Part II.A.), DonutNV still fails to allege a basis for its claims of tortious interference and defamation. Therefore, judgment should be entered in Defendants' favor on both counts of DonutNV's Complaint.

1. Tortious Interference Requires Allegations of Improper Conduct Not Present in the Complaint.

DonutNV cannot establish a claim for tortious interference.

To establish a claim for tortious interference with a contractual relationship, a party must show: (1) the existence of a contractual relationship between the complainant and a third party; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of privilege or justification on

⁴ A true and correct copy of the court's opinion in *Golob v. Kelly*, is attached as **Exhibit B** to this Brief.

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the part of the defendant; and (4) the occasioning of actual damage as a result of defendant's conduct.

Rice Drilling B, LLC v. Scott, 2024 PA Super 195, 325 A.3d 663, 677 (Pa. Super. Ct. 2024), reargument denied (Nov. 13, 2024) (citation and quotation omitted).

DonutNV's tortious interference claim fails out of the gate because DonutNV has not identified a single contractual relationship that was disrupted. DonutNV merely makes the conclusory statements that it "has been contacted by current and potential franchisees, and franchise brokers" (Compl. ¶ 26), that it "has contractual or prospective relationships with third parties" (Compl. ¶ 32), and that "[a]ll prospective contractual relationships were reasonably likely to occur" (Compl. ¶ 36). None of these statements identifies a contractual relationship that was terminated or a prospective contractual relationship that failed to coalesce. *Chester Upland Sch. Dist. v. Rossi*, 275 A.3d 1117, 1129 (Pa. Commw. Ct. 2022) (rejecting tort claim as lacking necessary facts including what was paid and by whom); *Foster v. UPMC South Side Hosp.*, 2 A.3d 655, 666 (Pa. Super. Ct. 2010) (rejecting claim where there was no delineation between existing and prospective, no dates or other specifics, and no factual basis to infer reasonable probability of contracts).

Similarly, DonutNV fails the fourth element because there are no facts that it sustained an injury. DonutNV alleges only that it "has been contacted" by third parties about the Website. (Compl. ¶ 26). They do not allege that any existing contract was terminated because of the Website. Nor do they identify any prospective contract that

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was about to be signed until a third party saw the Website. There is also no indication of any dollar amount lost, if any, because of lost contractual relationships.

Even assuming the factual allegations in DonutNV's Complaint are true, DonutNV cannot establish the required elements for tortious interference. DonutNV's conclusory statements that there was interference, without any factual support, are insufficient for DonutNV's claims to survive.

2. Defamation Requires Factual Allegations of False and Defamatory Statements.

DonutNV's defamation claim cannot be established based on the facts in the pleadings. To state a claim for defamation, a plaintiff must prove:

(1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion.

Forbes v. King Shooters Supply, 2020 PA Super 70, ¶ 38, 230 A.3d 1181, 1187 (Pa. Super. Ct. 2020). "When relevant to the defense, the defendant has the burden of proving (1) the truth of the defamatory communication; (2) the privileged character of the occasion on which it was published; and (3) the character of the subject matter of defamatory comment is of public concern." *Id.* Expressions of opinion alone cannot trigger defamation liability. *See Lewis v. Philadelphia Newspapers, Inc.*, 833 A.2d 185, 191 (Pa. Super. Ct. 2003). "It is not enough that the victim of the statements be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his

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standing in the community of respectable society.” *Blackwell v. Eskin*, 916 A.2d 1123, 1125 (Pa. Super. Ct. 2007) (quotation and citation omitted). “Whether the contested statements are capable of defamatory meaning is a question of law for the court.” *Id.*

DonutNV cannot establish that any of Defendants made any defamatory statements. Only one statement was actually made by Mr. Kelly – that “DonutNV franchise founders Alex Gingold & Amanda Gingold are, I suspect, victims of bad advisers.” (Compl. Ex. 1 at pg. 2). This is an opinion, not an objective fact that can be proven or disproven. No jury could find that this statement “grievously fractured” DonutNV’s reputation. At most, it would be damaging to the reputation of the unnamed advisors of the owners of the company.

All the other statements were made by **DonutNV franchisees** and were specifically reported as such. (*Compare* Compl. ¶ 22.A. *with* Compl. Ex. 1 at pg. 4; *compare* Compl. ¶ 22.A, D, and G *with* Compl. Ex. 1 at pg. 4; *compare* Compl. ¶ 22.B. *with* Compl. Ex. 1 at pg. 5; *compare* Compl. ¶ 22.C. *with* Compl. Ex. 1 at pg. 1; *Compare* ¶ 22.F. *with* Compl. Ex. 1 at pg. 3; *Compare* Compl. ¶ 22.H. at pg. 6). Whether the franchisees’ statements are truthful is inapposite. Defendants accurately report what is stated to them, and nowhere in its Complaint does DonutNV allege that Defendants fabricated it quotations. (*See* Compl. ¶ 3).

Moreover, no jury could find that these other statements (*see supra* Part I.A.) by DonutNV’s franchisees were defamatory. For example, is unreasonable to believe that DonutNV’s reputation was “grievously fractured” by statements that its owners flew to the Bahamas in a private jet. It is hardly shocking or offensive that successful business

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owners engage in travel by private jet. Many of the remaining statements are opinions, not false factual statements. The first (franchisees struggling to purchase Christmas gifts), third (destroying lives and hurting people), fourth (franchises were failing), fifth (advisers were bad), and sixth (promoters were unscrupulous) statements are all opinions.

Even assuming that Defendants made every statement identified in DonutNV's Complaint, no reasonable fact-finder could determine that DonutNV proved all necessary elements of defamation.

C. DEFENDANTS ARE ENTITLED TO ATTORNEY'S FEES AND PUNITIVE DAMAGES UNDER THE UPEPA

Under 42 Pa. C.S.A. § 8340.12, Defendants are entitled to recover attorney's fees resulting from Plaintiff's pursuit of claims aimed at suppressing protected speech. For the reasons stated above, Defendants are immune from DonutNV's claims because they were engaged in protected public speech. (*See supra* Part II.A.) Plaintiff's meritless allegations have forced Defendants to incur unnecessary legal expenses in defending this action. Such conduct also satisfies the criteria for an award of punitive damages under 42 Pa. C.S.A. § 8320.1(b)(3) and serves to deter similar baseless litigation targeting protected public expression.

DonutNV's bad faith effort to suppress Defendants' speech is evident from their Complaint. DonutNV's Complaint is laced with vexatious, impertinent allegations that do nothing to advance their claims and serve only to blacken Defendants' reputation. DonutNV's only two causes of action are tortious interference and defamation. They

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make no claim that they paid any money to Defendants or took any action in reliance on Defendants' actions. Nevertheless, they throw Defendants under the proverbial bus by stating that Defendants: (1) "extort money out of participants in the franchise industry...." (Compl. ¶ 3); (2) run an "extortionate scheme" (Compl. ¶ 4); and (3) act in a way that "smacks of bribery, extortion and blackmail" (Compl. ¶ 20). DonutNV similarly seeks to paint itself as a 'white knight' by stating that it became a "victim" and "refused to give in to this blackmail, despite defendant Kelly's attempted intimidation...." (Compl. ¶ 4). None of these allegations bears any relevance to the claims of tortious interference or defamation. Nor could they form a basis for a claim because blackmail is a criminal offense, not a civil cause of action. DonutNV knows that it is immune from defamation claims for statements made in litigation and are using it as an opportunity to damage Defendants' reputation.

III. CONCLUSION

Defendants request the entry of judgment in their favor and against Plaintiff as stated in their Motion for Judgment on the Pleadings Under 42 Pa. C.S.A. § 8320.1, along with an award of attorney's fees and punitive damages.

Date: Jul 15, 2025

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CERTIFICATE OF COMPLIANCE

I certify this filing complies with the provisions of the *Public Access Policy of the United Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: Jul 15, 2025

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CERTIFICATE OF SERVICE

I certify that I am this day serving the Brief in Support of Defendants' Motion for Judgment on the Pleadings Under Pa. C.S.A. § 8320.1 by email sent to:

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