

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

**NORFOLK SUPERIOR COURT
CA NO: 12-01138**

**CLAY CORPORATION d/b/a CLAY
NISSAN NORWOOD, NORWOOD
SUBARU, INC., d/b/a/ CLAY SUBARU,
CLAY NISSAN OF NEWTON, INC.
d/b/a CLAY NISSAN OF NEWTON,
CLAY CHEVROLET, INC. d/b/a
CLAY CHEVROLET AND CLAY
HYUNADAI and SCOTT CLAY,
individually**

Plaintiffs

v.

**ADAM BROOK COLTER,
JONATHAN COLTER AND JAMES
LAFLAMME.**

Defendant

**DEFENDANTS' SPECIAL MOTION TO DISMISS AND SUPPORTING
MEMORANDUM, PURSUANT TO G.L. c. 231 § 59H**

Adam Brook Colter and Jonathan Colter request this Court dismiss the complaint in this matter, pursuant to G.L. c. 231, § 59H, and that they be awarded their reasonable attorney's fees in connection with their defense of this action.

MATERIAL FACTS and PROCEDURAL HISTORY

1. The corporate plaintiffs own and operate five automobile dealerships in Norwood and Newton, Massachusetts. See Exhibit A, Verified Complaint, ¶ 10.

2. Jill Colter (“Jill”), the sister of defendants Jonathon and Adam Colter (“Colters”), was employed by Clay Nissan in Norwood as a service advisor from May 2011 through June 5, 2012. Ex. A, ¶¶ 11-17.
3. Clay Nissan fired Jill after she returned from medical leave to recover from the side effects of chemotherapy and drugs administered to treat an inoperable brain tumor. Ex. A, ¶¶ 11-17; Exhibit B, Jill Colter MCAD charge.
4. In support of their sister, Adam and Jonathon Colter started a “Boycott Clay Nissan” Facebook page, www.facebook.com/boycottclaynissan, and a petition at change.com, www.change.org/petitions/help-fight-company-that-fired-a-woman-without-cause-who-is-fighting-stage-4-melanoma. Ex. A, ¶ 18.
5. The Facebook page was created to “educate the public” about what happened to Jill Colter and contained postings such as “Boycott Clay Nissan in Norwood. They have no heart. They fired a 47 year old woman with stage 4 melanoma without cause.” Ex. A, ¶ 22.
6. Facebook adds an online forum to all of its pages. Any Facebook member who views any given page may add comments in the page's forum.
7. On July 10, 2012, the plaintiff car dealerships filed a four count complaint against Jonathon and Adam Colter, alleging defamation and tortious interference with advantageous business relationships. The plaintiffs seek an order enjoining the

Colters from “publishing further defamatory statements about any of the Clay plaintiffs” and “picketing or promoting picketing based in whole or in part on any of the content contained within the Facebook Boycott.” Ex. A, 16-17.

8. The Colters filed an answer asserting that the First Amendment and the Massachusetts “anti-SLAPP” statute, G.L. c. 231, § 59H, protects their activities.
9. On or about July 26, 2012, Jill Colter filed with the Massachusetts Commission Against Discrimination a charge of unlawful discrimination against Clay Nissan. *See* Ex. B.
10. On August 13 and 14, 2012, the Court held an evidentiary hearing to determine whether to give the plaintiffs prejudgment relief, including a prejudgment attachment under Mass. R. Civ. P. 4.1 or 4.2, even though the plaintiffs failed to request an attachment when they filed their complaint. See docket sheet, attached as Exhibit C.
11. At the evidentiary hearing, the plaintiffs requested a prejudgment attachment in the amount of \$1,500,000.00, which they claim represents business they have lost or will lose as a result of the boycott and picketing organized by the Colters.

ARGUMENT

The Massachusetts “anti-SLAPP” statute, G.L. c. 231, § 59H, allows the defendants to seek dismissal of this complaint and an award of attorneys’ fees on the grounds that the plaintiffs’ claims are based on the Colters’ “right of petition under the Constitution of the United States or of the commonwealth.” G.L. c. 231, § 59H, attached as addendum.

Activities such as peaceful boycotting are among the “petitioning activities” protected by the state and federal constitutions. *Westinghouse Electric Corporation v. United Electrical, Radio & Machine Workers of America, Local 601*, 353 Pa. 446, 451 (1952); *AFL v. Swing*, 312 US 321, 325-326 (1941); “SLAPP suits target people for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and *engaging in peaceful boycotts and demonstrations*”(emphasis added)(citations omitted). *Duracraft Corp. v. Holmes Products Corp.* 427 Mass. 156, 161-62 (1998).

Defendants seeking relief under the anti-SLAPP statute bear the initial burden of showing that the claims against the defendants are “based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.” *Fustolo v. Hollander*, 455 Mass. 861 (2010) (citing *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167-168 (1998)) (internal quotations omitted). “Once a party...establishes that challenged claims against it are based solely on petitioning activity, the burden shifts to the nonmoving party to show by a preponderance of the evidence that the moving party's petitioning activity was devoid of any reasonable factual

support or any arguable basis in law, and that the moving party's activities caused actual injury to the responding party." *Keegan v. Pellerin*, 76 Mass.App.Ct. 186, 189 (2010).

In this case, the plaintiffs' claims are based entirely on statements made by the defendants in their efforts to organize a Clay Nissan boycott and picketing, activities protected by the anti-SLAPP statute. The relief requested by the plaintiffs in their complaint underscores the point: an order enjoining the Colters from "publishing or causing to be published any statement that asserts a. Clay terminated Jill Colter because she had cancer, b. has an employment policy that is discriminatory against cancer patients, c. is unethical or immoral, d. violated the law by terminating an employee without cause" and "picketing or promoting picketing based in whole or in part on any of the content contained with the Facebook Boycott." As the sole basis for plaintiffs' defamation claim are statements made by defendants (and others) in the online forum of the Boycott Clay Nissan page, the plaintiffs' claims have no substantial basis other than or in addition to the defendants' petitioning activities.

Even if the Court determines that the defendants are not protected by the statute because they are not exercising their "own" right to petition, their activities are still protected because they are advocating on behalf of their sister Jill, who has petitioned the government directly by filing a charge of discrimination against Clay Nissan with the MCAD. A party's exercise of its right to petition includes "any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any governmental proceeding," such as the MCAD, an administrative agency of the Commonwealth charged with investigating and adjudicating claims of discrimination. A defendant is entitled to the protection of the statute when advocating on behalf of another

party who is petitioning the government. In *Plante v. Wylie*, the Appeals Court held that an attorney advocating on behalf of clients was protected by the statute where his clients were exercising their right to petition the government. *Plante v. Wylie*, 63 Mas. App. Ct. 151 (2005). On the other hand, a paid expert witness was not entitled to the protection of the statute because he was not seeking redress on his own or petitioning on behalf of another. *Kobrin v. Gastfriend*, 443 Mass. 327 (2005). Nor was a newspaper reporter entitled to the protection of the statute where she claimed she was objectively reporting a developer's plans. *Fustolo v. Hollander* 455 Mass. 861 (2010). Jill Colter exercised her right to petition the government by filing a charge of illegal discrimination with the MCAD on about July 26, 2012. Her brothers have been advocating for her by trying to raise public awareness concerning her termination from Clay Nissan by organizing a boycott and picketing of Clay dealerships. The Colters' activities, whether considered as an exercise of their own right to petition within the protection of the state or U.S. Constitution, or support for their sister's right to petition the government, are protected by the anti-SLAPP statute.

The plaintiffs cannot meet their burden of showing that the defendants' petitioning activity is devoid of any reasonable factual support or any arguable basis in law. The Colters' claim that Jill was fired because she had cancer is supported by the undisputed facts that she was terminated by Clay Nissan soon after returning from medical leave, and was not given a legitimate reason for her termination. These facts are sufficient to make out a violation of the Fair Employment Practices Act, G.L. c 151B, which makes it unlawful to discriminate against an employee on the basis of a disability

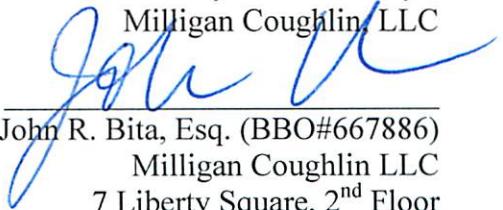
support and an arguable basis in law for their claims that Jill was wrongfully terminated as a response to either her illness or related medical leave.

Nor can the plaintiffs meet their burden of showing that they have suffered “actual injury” where their claim of lost business is entirely speculative. At the evidentiary hearing held on August 13 and 14, 2012, the Clay dealerships’ chief financial officer testified that the dealerships had lost money in July, but admitted that any connection between the loss and the defendants’ boycott site was entirely speculative, and could have been caused by a cyclical drop in sales attributable to a number of factors, including the time of the year, the economy, or competition from other car dealers. The CFO also admitted that the dealerships had lost money in three of the previous five months in 2012 preceding the creation of the Boycott Clay Nissan Facebook site in June 2012. The plaintiffs therefore cannot meet their burden of showing that they suffered “actual injury.”

CONCLUSION

For the foregoing reasons and authorities cited, Jonathan and Adam Colter request the complaint against them be dismissed in its entirety, and that they be awarded their reasonable costs and attorney’s fees, pursuant to G.L. c. 231, § 59H.

ADAM BROOK COLTER &
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By their Attorneys,
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