SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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METROSEARCH RECOVERIES, LLC,

Plaintiff,

-against-

CITY OF NEW YORK, OFFICE OF THE NEW YORK CITY COMPTROLLER, and SCOTT STRINGER, NEW YORK CITY COMPTROLLER, in his individual and official capacity,

Defendants.

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DECISION AND ORDER
Index No. 158027/2016
Mot. Seq. No. 001

Hon. James E. d'Auguste

The motion filed by defendants City of New York ("City"), Office of the New York City Comptroller ("Comptroller's office"), and the New York City Comptroller Scott Stringer, in his individual and official capacity ("Comptroller"), (collectively, "defendants") seeking dismissal of the within action is granted. The Court also finds that the instant action is frivolous and therefore imposes monetary sanctions and attorneys' fees against plaintiff Metrosearch Recoveries, LLC ("Metrosearch").

Factual and Procedural History

In 2015, the Comptroller identified 1,056 workers that were entitled to a total of over $3,700,000 in wages that were illegally withheld in violation of the New York Labor Law ("Labor Law") relating to payment of prevailing wages. The Comptroller issued a press release publicizing the recovery of funds for individuals who were deprived of their legally entitled wages. A component of the electronic press release was a link to a list of individuals that the Comptroller determined were owed funds. The Comptroller also essentially asked members of the public that, if they knew any of these individuals, they should inform them that they are owed money:

"Thousands of hard-working individuals, many of whom are immigrants, have been cheated out of their rightfully-earned wages, but they may not know these funds exist. Help us get the word out about unclaimed wages – recovering thousands of dollars may only be a phone call or email away." NYSCEF Doc. No. 8 Ex. A. The process for claiming the funds was essentially effortless—complete a form and provide proof of identity. There was nothing about the process that required an attorney since the form was simple to fill out and no proceedings were required for payment of any funds.

On or about August 28, 2015, Metrosearch sent letters signed by Jerome Weinstock, its Director of Client Services, to the individuals owed funds. The letters misleadingly informed these individuals that Metrosearch was fulfilling a request made by the Comptroller and, having cloaked themselves in this quasi-authority, falsely stated that, to commence the process to secure funds owed, they were required to complete paperwork that granted Metrosearch a right to twenty percent of the funds recovered:

> What do you need to do now?
>
> **To begin processing your claim simply sign the attached form and return in the included addressed envelope.**

NYSCEF Doc. No. 8 Ex. C (emphasis in original). Moreover, the "Unclaimed Assets Recovery Services Form," sent out by Metrosearch for signature by these individuals, deceptively made the process appear complicated by (1) providing for the designation of an attorney, (2) stating that Metrosearch will assume responsibility for recovery of the funds, and (3) detailing a contingency fee arrangement that made it appear that these individuals would need to fight to secure payment of the funds. *Id.* Metrosearch likewise failed to disclose that Daniel Trenk, Esq. of Trenk & Trenk, LLC, the purported assigned counsel to claimants of funds, is the owner and president of Metrosearch. *Compare* NYSCEF Doc. No. 12 Ex. A, ¶ 1 (Trenk Aff.), *with* NYSCEF Doc. No. 8

Ex. C (Unclaimed Assets Recovery Services Form). Indeed, in one of the press articles that forms the basis of this suit, Metrosearch made it clear that legal action was never contemplated: "it definitely isn't worth the company's time to take them to court." NYSCEF Doc. No. 8 Ex. B (New York Post article dated September 2, 2015).

The Comptroller, who has statutory authority in Labor Law issues involving prevailing wages, was disturbed that Metrosearch was using his name to take advantage of workers who had already been wrongfully deprived of their hard-earned wages. The Comptroller's office sent Metrosearch a cease and desist letter that stated, in part:

> There are no expenses to the workers in securing these wages: the procedure is simple and administered entirely by the Comptroller's Office. We were therefore disturbed by Metrosearch's invocation of Comptroller Stringer's name and Office in Metrosearch's unscrupulous solicitation of workers, as evidenced by the attached letter and "Unclaimed Assets Recovery Services Form." The letter seeks to mislead workers into thinking they need an intermediary such as Metrosearch. Moreover, it misrepresents that Metrosearch (or Trenk & Trenk LLC) can "coordinate and administer your claim." *See* attached. This money is for the workers who earned it.

Id. Ex. C (Letter from Katheryn E. Diaz, General Counsel to the Comptroller's office, to Jerome Weinstock, of Metrosearch, and Daniel Trenk, of Trenk & Trenk, LLC, dated September 2, 2015). The Comptroller also expressed his opinion to the press: "Metrosearch Recoveries is nothing more than a bunch of hustlers trying to shake down hard working New Yorkers. Let me make it clear: my office has zero tolerance for anyone who tried to cheat workers out of their wages[.] We are on to them and we are investigating them. This is your money and you can get it from us for free, no strings attached." While the full quote, as set forth in Metrosearch's memorandum of law in opposition to the motion to dismiss (NYSCEF Doc. No. 11, at 5), does not contain a citation, this Court located the article from which it derived. Erin Durkin, *City Controller Scott Stringer: Metrosearch Recoveries 'a bunch of hustlers'*, N.Y. Daily News (Sept. 3, 2015, 9:57 AM), http://www.nydailynews.com/news/politics/stringer-metrosearch-recoveries-bunch-hustlers-

article-1.2347167.[1] The Comptroller also apparently said that "workers can claim what they're owed without paying any fee." NYSCEF Doc. No. 8 Ex. B. Thereafter, Daniel Trenk sent correspondence to those individuals that completed the "Unclaimed Assets Recovery Services Form," notifying them that Metrosearch "will not be handling the claim for your wage refund" and, apparently for the first time, informed them that they "may contact the Comptroller's office directly at 212-669-8927 to inquire about [their] refund." NYSCEF Doc. No. 11 Ex. B.

On September 23, 2016, Metrosearch, a limited liability company that is not authorized to do business in New York,[2] commenced the instant proceeding asserting defamation and, surprisingly, given its stance that it has an absence of New York contacts, tortious interference with business relationships. In its complaint, Metrosearch asserted that the allegedly defamatory statement is that Metrosearch is a "bunch of hustlers trying to shake down hard working New Yorkers." NYSCEF Doc. No. 2, ¶ 30 (Verified Complaint). It also asserted that the Comptroller's statement that an "investigation" was underway falsely implied a factual statement that legal action was being taken against Metrosearch. *Id.* Metrosearch, nonetheless, admitted that an investigation was in fact conducted by the New York State Attorney General's Office, which "request[ed] the

[1] The Daily News article is neither annexed as an exhibit to nor cited to and was not thereby incorporated by reference in the pleadings or the motion papers, but given the fact that Metrosearch quoted from the article, even without attribution, the Court may consider the article in disposing of the instant motion. *See Lore v. N.Y. Racing Ass'n, Inc.*, 12 Misc. 3d 1159(A), at *3 (Sup. Ct. Nassau County 2006) ("In assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference.... and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." (alteration in original) (internal quotation marks omitted) (quoting *Pisani v. Westchester Cty. Health Care Corp.*, 424 F. Supp. 2d 710, 714 (S.D.N.Y. 2006)).

[2] This Court finds that Metrosearch is an unauthorized limited liability company doing business in New York and is therefore prohibited from maintaining this proceeding. This legal deficiency, however, is potentially curable. *See Basile v. Mulholland*, 73 A.D.3d 597 (1st Dep't 2010). Therefore, the Court does not grant relief on this ground. Nonetheless, the Court finds it is disingenuous for Metrosearch to solicit individuals who, in large part, are based in New York with claims that will be presented in New York, and then argue that they are not doing business in New York.

production of the solicitations and lists of individuals contacted for the purpose of recovering prevailing wage settlements." *Id.*, ¶ 33. Although Metrosearch mentions the Comptroller by name and title in its solicitations, it nonetheless asserted that the Comptroller's response to this specific act "did not relate to his public responsibilities as Comptroller and were not made during the course of performing his duties." *Id.*, ¶ 35. Finally, Metrosearch asserted that the allegedly "defamatory statements" (*id.*, ¶ 42) "resulted in the cancellation of these contracts and business relationships between individuals eligible to collect prevailing wage settlements and Metrosearch" (*id.*, ¶ 45), which constituted a tortious interference with its existing business relations (*id.*, ¶ 46).

On December 5, 2016, defendants moved for dismissal of the complaint and the instant motion was fully briefed. On June 7, 2017, the Court provided Metrosearch an unaccepted opportunity to withdraw the action based upon the undersigned's view that it is frivolous.[3] This decision follows.

Discussion

I. Defamation

The elements of a defamation action are (1) the publishing of a false statement to a third party; (2) without authorization or privilege; (3) which constitutes fault, judged at a minimum negligence standard; (4) that causes special harm or amounts to defamation per se. *Dillon v. City of New York*, 261 A.D.2d 34, 37-38 (1st Dep't 1999). In evaluating whether a statement is defamatory, "the words must be construed in the context of the entire statement or publication as a whole, tested against the average reader, and if not reasonably susceptible of a defamatory

[3] On June 7, 2017, the parties appeared before this Court in relation to defendants' instant motion to dismiss. Metrosearch's counsel was informed that this Court viewed the instant action as frivolous and provided Metrosearch with an opportunity to withdraw the lawsuit prior to rendering a decision on the motion. Counsel then withdrew as attorney of record (*see* NYSCEF Doc. Nos. 18-22), while Metrosearch, via Daniel Trenk, Esq., indicated that it would continue to pursue this action.

meaning, they are not actionable and cannot be made so by strained or artificial construction." *Id.* at 38; *see also Aronson v. Wiersma*, 65 N.Y.2d 592, 594 (1985); *Silsdorf v. Levine*, 59 N.Y.2d 8, 12-13 (1983). Whether words are defamatory present a question of law, and courts will not strain to find defamation where none exists. *Dillon*, 261 A.D.2d at 38-39 (citing *Cohn v. Nat'l Broad. Co.*, 50 N.Y.2d 885, 887 (1980)). Notably, "loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Id.* at 38; *see also Gross v. New York Times Co.*, 82 N.Y.2d 146, 152-53 (1993).

Since the first element of the defamation analysis requires the publication of a false statement, it has often been said that "[t]ruth provides a complete defense to defamation claims." *Dillon*, 261 A.D.2d at 39. The only arguably factual statement made by the Comptroller was that an "investigation" was underway, which is admittedly true. In fact, the Comptroller's investigation resulted in the issuance of cease and desist correspondence. NYSCEF Doc. No. 8 Ex. C. Moreover, even if the Comptroller was referencing another governmental agency, Metrosearch admits in its own pleading that it was contacted by the New York State Attorney General's Office "requesting the production of the solicitations and lists of individuals contacted for the purpose of recovering prevailing wage settlements." NYSCEF Doc. No. 2, ¶ 33 (Verified Complaint). There is no basis for equating, as Metrosearch argues, the Comptroller's use of the word "investigation" with the existence of a pending "legal action." Accordingly, to the extent Metrosearch takes issue with the Comptroller's statement that Metrosearch was under investigation, this statement is not defamatory because it is true.

The second element in the defamation analysis addresses whether a statement is made without authorization or privilege. In this instance, the Comptroller's statements are protected by both absolute and qualified privileges. In analyzing the applicability of the Comptroller's absolute

privilege to provide the complained of remarks, the Court takes into consideration "the guiding principle in determining the availability of this privilege must be the relationship between the speaker's fulfillment of his public duties and the circumstances of his speech." *Clark v. McGee*, 49 N.Y.2d 613, 620 (1980). An official "is absolutely immune from liability for allegedly defamatory remarks related to his responsibilities and made during the course of the performance of his duties." *Id.* at 619. The Comptroller was not conducting a preemptive news conference warning of the dangers of companies that seek to obtain a percentage of funds held by the government when identifying the existence of unclaimed prevailing wage settlements to these individuals. Rather, the Comptroller was addressing specific misconduct by Metrosearch that not only misleadingly cloaked its activities in the Comptroller's name, but also falsely informed these individuals that they were required to give a percentage of the funds to Metrosearch in order to obtain recovery of their illegally deprived prevailing wages. The Comptroller's public duties with respect to securing illegally withheld prevailing wages and returning such funds to defrauded workers, as well as the attendant circumstances of Metrosearch's targeting of individuals in an expansive geographic region, justified the Comptroller holding a press conference. The Comptroller was performing the duties of his office, and acting in the public interest, by informing members of the public of Metrosearch's potentially fraudulent or misleading statements. *See Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 365-66 (2007). The mere fact that in some circumstances a privilege was not found during a press conference is of no consequence. *Cf. Cheatum v. Wehle*, 5 N.Y.2d 585, 594 (1959) ("No legal or moral duty was fulfilled by the defendant in advising private citizens that plaintiff was guilty of negligence or deliberate sabotage, because the audience could do nothing about it in any event, and hence there was no qualified privilege."). It is for the Court to determine whether the forum is appropriate given the circumstances and thus, in some

circumstances, a privilege may be warranted when allegedly defamatory statements are made during a press conference. Here, the purpose of the press conference was that the Comptroller was seeking to reach individuals for whom he did not have direct contact information in order to inform these individuals that their illegally withheld wages were available to them. This speaks to the reason behind the Comptroller's initial press release to ascertain the help of the general public. *See Clark*, 49 N.Y.2d at 621 ("Surely, there exist a number of situations in which a high public official might well be required to make a public statement as a part of his public obligations."). Accordingly, the Court finds that the Comptroller's statements are protected by absolute privilege.

Next, in addressing the applicability of a qualified privilege to the Comptroller's statements, the Court finds that they were fairly made by him "in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." *Rosenberg*, 8 N.Y.3d at 365 (quoting *Toker v. Pollak*, 44 N.Y.2d 211, 219 (1978)). In his press conference, the Comptroller specifically addressed Metrosearch's attempt to obtain financial gain by using false or otherwise misleading representations to individuals who were already illegally deprived of their wages. Apparently recognizing that the Comptroller's statements easily fit within the parameters of a qualified privilege, Metrosearch seeks to avoid its application by baldly asserting that the Comptroller's remarks were made with malice or reckless disregard for their alleged falsity, which would bring a defamatory statement outside the scope of a qualified privilege.[4] "Malice in this context has been interpreted to mean spite or a knowing or

[4] The existence of actual malice is only an exception to a qualified privilege. Absolute privileges have no such exception and, indeed, it has been remarked that, when applicable, its application is essentially a license to defame. *Brooks v. Anderson*, 18 Misc. 3d 1109(A), at *8 (Sup. Ct. Bronx County 2007) (citing *Liberman v. Gelstein*, 80 N.Y.2d 429 (1992); *Stukuls v. State of New York*, 42 N.Y.2d 272 (1977)).

reckless disregard of a statement's falsity." *Id.* (citing *Liberman*, 80 N.Y.2d at 437-38).[5] Yet, there is no basis for concluding, as Metrosearch speculates, that the Comptroller had any motive for making the complained of statements other than his legitimate opposition to Metrosearch's activities as detailed above. The Comptroller's statements relate to his statutory duty to ensure that the workers who were illegally deprived wages could collect those wages in their entirety. Moreover, "[i]f the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant also despised plaintiff." *Liberman*, 80 N.Y.2d at 439 (emphasis omitted). As stated above, the Comptroller was furthering the public interest when making the allegedly defamatory statements and therefore the statement was not made with malice. *See id.* ("[A] triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the publication.'" (citation omitted)). Since no malice exists, given the circumstances in which the Comptroller's statements were made, the Comptroller's statements are protected by a qualified privilege.

Moreover, the conclusory assertions set forth by Metrosearch in its complaint are insufficient to defeat defendants' prima facie showing of a qualified privilege. In a well-reasoned opinion, the Hon. Carol Edmead found that conclusory assertions of malice are "ineffective to overcome the privilege." *Stryker Sec. Grp., Inc. v. Elite Investigations Ltd.*, 2014 WL 883644, at *8 (Sup. Ct. N.Y. County Jan. 15, 2014). Specifically, Justice Edmead stated:

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[5] The Court recognizes that there are two types of malice: common law malice and actual malice. Common law malice requires the statement to be made with "spite or ill will," whereas actual malice requires the speaker to have knowledge that the statement was either false or made in reckless disregard of whether it was false with a high degree of awareness that the statement was likely false. *Liberman*, 80 N.Y.2d at 437-38. Here, however, Metrosearch fails to offer any indication that the Comptroller's statements were made with malice under either definition. As to common law malice, the Court looks to "the speaker's motivation for making the defamatory statements." *Id.* at 439. With regard to actual malice, "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action." *Id.* at 438.

> At the outset, assuming the truth of [plaintiffs'] contentions, as this court must, [plaintiffs] fail to overcome the presumption afforded to [defendant]. The pleadings contain nothing more than conclusory allegations that [defendant] made the alleged defamatory statements with malice. The only support for this claim lies in arguments made by [plaintiffs'] counsel in the memorandum of law in opposition, which is speculative and fails to overcome [defendant's] *prima facie* showing. And, the undisputed evidence indicates that [defendant] had an alternate reason for making the statements.

Id. Similarly, Metrosearch's attempt to cure the conclusory assertions contained in its complaint with arguments made in opposition to the instant motion is insufficient and does not meet the requisite pleading standard. While Metrosearch speculates in its opposition papers that the Comptroller's statements were made as part of "a baseless smear campaign against Metrosearch in order to elevate his own political capital in fulfillment of his mayoral ambitions" (NYSCEF Doc. No. 11, at 8) or that, as allegedly inferred in the complaint, the Comptroller "was motivated solely by the goal of driving out a private entity actually capable of locating workers and uniting them with unclaimed prevailing wage settlements and, in the process, depriving the City treasury of millions of dollars in dormant funds" (*id.* at 9), such speculation does not overcome the Comptroller's prima facie showing of a qualified privilege. Since the Comptroller's statements are protected by either an absolute or a qualified privilege, they are nonactionable.

In any event, despite Metrosearch's protestations that the Comptroller "made unsolicited statements to the press imputing criminality and illegality to [its] entirely lawful and legitimate business operations" (NYSCEF Doc. No. 11, at 10), the Comptroller's statements to the press were nonactionable statements of pure opinion. In order for a statement to be defamatory, it must consist of a false statement of fact. *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014). A statement of pure opinion is not actionable for two reasons: (1) only statements containing facts can be proven false, and (2) statements of opinion are deemed privileged and cannot be the subject of a defamation action, no matter how offensive the statement may be. *Id.* at 268-69. A statement of pure opinion

is either a statement "accompanied by a recitation of the facts upon which it is based" or, if not accompanied by the facts, the statement constitutes opinion so long as "it does not imply that it is based upon undisclosed facts." *Id.* at 269 (quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986)). "Whether a particular statement constitutes an opinion or an objective fact is a question of law." *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). The factors to be considered when distinguishing between fact and opinion are:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact.

Davis, 24 N.Y.3d at 270 (alteration in original) (quoting *Mann*, 10 N.Y.3d at 276).

In this instance, the Comptroller's statement at issue is that "Metrosearch Recoveries is nothing more than a bunch of hustlers trying to shake down hard-working New Yorkers. My office has zero tolerance for anyone who tries to cheat workers out of their wages." Here, the Comptroller's statement falls into the category of pure opinion as it is a subjective moral evaluation that "readily falls within the ambit of what the average reader would understand to be the [speaker's] opinion rather than fact." *Chalpin v. Amordian Press*, 128 A.D.2d 81, 84 (1st Dep't 1987). The Comptroller's choice of words includes colloquial phrases that have been held to be "hyperbolic" or "'loose' statements that don't reasonably convey the specificity that would suggest that [defendant] or his agents were seriously accusing [plaintiff] of committing [a] crime." *McNamee v. Clemens*, 762 F. Supp. 2d 584, 604 (E.D.N.Y. 2011) (applying New York law) (citing cases); *see also Galasso v. Saltzman*, 42 A.D.3d 310, 311-12 (1st Dep't 2007) (holding that the subjective context and facts underlying the statements at issue constituted opinion and the statements were not actionable as a matter of law); *Gross*, 82 N.Y.2d at 155 ("Indeed, it has already

been held that assertions that a person is guilty of 'blackmail,' 'fraud,' 'bribery' and 'corruption' could, in certain contexts, be understood as mere, nonactionable 'rhetorical hyperbole' or 'vigorous epithet[s].'" (alteration in original)) (citing cases). Since the Comptroller's statements in the article are accompanied by a recitation of the facts, they constitute nonactionable statements of pure opinion.

Moreover, to the extent that Metrosearch argues the Comptroller's statements are actionable mixed opinion because they are not accompanied by all of the facts at hand, this argument fails. A statement of mixed opinion is a statement that implies it is based upon facts that may justify the opinion, but are unknown to other individuals who read or hear the statement. *Davis*, 24 N.Y.3d at 269. A mixed opinion is actionable not because of the false opinion itself, but because the statement implies "that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person" or entity discussed. *Id.* (alterations in original) (quoting *Steinhilber*, 68 N.Y.2d at 290). Yet, in its attempt to categorize the Comptroller's statements as mixed opinion, Metrosearch neglects to mention that the article containing the statements at issue sets forth the facts upon which the Comptroller expressed his opinion. Additionally, the Comptroller's office sent Metrosearch a cease and desist letter setting forth the Comptroller's position, which substantially mirrored the position he articulated at the press conference. Considering the Comptroller's statements "in the context of the entire communication and of the circumstances in which they were spoken," the statements do not reasonably imply to the reader that they were based upon any undisclosed facts. *See Steinhilber*, 68 N.Y.2d at 290; *Frechtman v. Gutterman*, 115 A.D.3d 102, 106 (1st Dep't 2014). Indeed, Metrosearch sets forth this argument in a conclusory manner that fails to suggest any other reasonable interpretation of the Comptroller's statements. Thus, Metrosearch's argument that the

Comptroller's statements are mixed opinion lacks merit. Since the Comptroller's statements constitute pure opinion, rather than fact or mixed opinion, they cannot be the basis for Metrosearch's defamation claim.

Finally, on the point of defamation per se, no claim has been properly asserted. In certain instances, "[a] false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business or profession." *Mayer v. Riordan*, 55 Misc. 3d 1203(A), at *9 (Sup. Ct. N.Y. County Mar. 2, 2017) (Edmead, J.) (quoting *Geraci v. Probst*, 61 A.D.3d 717, 718 (2d Dep't 2009)). Although the complaint contains conclusory allegations that the Comptroller's statements harmed Metrosearch's reputation and interfered with its business by deterring individuals from conducting business with the company, the complaint does not "cite to specific instances where [its business] was effected by the statements." *Id.* The only individuals specified as having been impacted by the Comptroller's actions are the handful of people who had already signed forms as requested by Metrosearch. Moreover, as noted above, the statements complained of are not defamatory and are otherwise protected by privilege. Accordingly, Metrosearch's cause of action for defamation also fails for this reason.

Since this Court finds that the Comptroller's statements are true, protected by either an absolute or a qualified privilege, or constitute pure opinion, Metrosearch's claim for defamation lacks any basis and must be dismissed.

II. Tortious Interference Claims

Metrosearch also asserts two causes of action pertaining to tortious interference: tortious interference with existing business relations and tortious interference with prospective business relations. The sole underlying basis for these claims alleged by Metrosearch in its pleading is the Comptroller's alleged defamation of the company. NYSCEF Doc. No. 2, ¶¶ 42-46, 49-51. This

Court finds that Metrosearch's conclusory allegations are insufficient to support either cause of action.

A claim for tortious interference with business relations "applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant." *WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 257 (1st Dep't 1992). A party must prove the following elements in order to prevail on a claim for tortious interference with business relations: (1) "that it had a business relationship with a third party;" (2) that the defendant knew of that relationship and intentionally interfered with it;" (3) "that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort;" and (4) "that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dep't 2009). Moreover, "[d]efamation is a predicate wrongful act for a tortious interference claim." *Id.*

However, a claim for tortious interference with prospective business relations must meet a "more culpable conduct" standard. *Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 585 (2d Dep't 2015). "This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party." *Id.* The term "wrongful means" has been interpreted to "include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Id.* at 586 (quoting *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980)). Therefore, the defendant's conduct must equate to "a crime or an independent tort, as conduct that is neither criminal nor tortious will

generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective business relations." *Id.*

As noted above, the sole independent tort asserted by Metrosearch to exist is defamation. Since this Court has dismissed Metrosearch's claim for defamation as a matter of law, Metrosearch's tortious interference claims must also be dismissed because no underlying or independent tort has been alleged. Additionally, because this Court has found that the Comptroller's statements were not made solely out of malice, as related to the defamation claim, Metrosearch fails to satisfy the third element of a tortious interference claim.

Moreover, because Metrosearch does not allege any particularized or specific business relationships with which the Comptroller's statements interfered, Metrosearch's generalized assertion that the Comptroller's statements "permanently disrupt[ed] all of [Metrosearch's] legitimate business operations" (NYSCEF Doc. No. 2, ¶ 19) is insufficient to state a claim for tortious interference with business relations and, therefore, the claim must be dismissed. *See White v. Ivy*, 63 A.D.3d 1236, 1238 (3d Dep't 2009). *Contra Amaranth LLC*, 71 A.D.3d at 48 ("Because the complaint does not rely merely on generalized reputational harm, we find that it sounds in tortious interference."). In the same vein, Metrosearch's characterizations of the Comptroller's statements as "censorious," "malicious," "defamatory," and "slanderous" are also wholly conclusory. *See* NYSCEF Doc. No. 2, ¶¶ 14, 16, 19-21. While Metrosearch's memorandum of law in opposition to the instant motion specifies eight contracts that were cancelled as a result of the Comptroller's statements, this does not remedy the deficiency in Metrosearch's pleadings. Although Metrosearch may have had contracts with any or all of the over one thousand individuals identified by the Comptroller as being owed illegally deprived wages, the broad assertions in its pleadings do not satisfy the first and second elements of a tortious interference claim.

Further, any allegations that the Comptroller's purported interference caused injury to Metrosearch's relationship with a third party are also baseless as no such business relationships were specified in the complaint. Even if Metrosearch had to cancel business contracts with eight individuals, Metrosearch's business was not wrongly harmed by the Comptroller's statements, but because Metrosearch engaged in its own misconduct. There is no tort that the Comptroller engaged in by notifying the public of Metrosearch's misconduct, particularly when any authorizations that had already been signed were executed by individuals who were given false or misleading information. For this reason, Metrosearch's claim for tortious interference with prospective business relations also fails. As Metrosearch has failed to demonstrate the existence of any of the elements of a claim for tortious interference with business relations or tortious interference with prospective business relations, both claims are hereby dismissed.

Finally, in its opposition papers, Metrosearch attempts to argue, for the first time, that the cease and desist letter constitutes an improper means of interfering with its business relationships. Putting aside the procedural infirmity of raising a new factual basis for the two tortious interference causes of action contained in its pleadings, the Comptroller, however, had a legitimate basis for sending Metrosearch said letter, and the act of sending the letter to Metrosearch did not amount to a crime or an independent tort. Nor does Metrosearch plead any specific allegations that the cease and desist letter was sent solely out of malice. *See M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488, 490 (2d Dep't 1995) (dismissing the complaint as defective for asserting conclusory allegations without any factual support with respect to actual malice). Since the standard for tortious interference with prospective business relations is an even higher standard that Metrosearch must meet, this claim fails as well. In no way did the Comptroller's statements interfere with Metrosearch's business by any wrongful means, as defined above, or for the sole

purpose of harming Metrosearch. *See Law Offices of Ira H. Leibowitz*, 131 A.D.3d at 586 (dismissing a claim for tortious interference with prospective business relations as the assertions in the pleadings "do not, without more, allege that the [defendants'] acts constituted a crime, or an independent tort, or that the [defendants] acted solely for the purpose of harming [plaintiff]"). While the definition of wrongful means contains civil suits and criminal prosecutions, neither type of action was pending at the time that the Comptroller's office sent the cease and desist letter. For the above reasons, both tortious interference claims must be dismissed.

III. Sanctions

The Court appreciates that no individual or entity likes to be on the receiving end of negative statements. Nonetheless, the legal standards for defamation and tortious interference claims are well established in New York. It should have been readily apparent to Metrosearch, which, as noted above, is owned by a New York licensed attorney, Daniel Trenk, that its claims completely lacked merit. Even so, this Court had an appearance scheduled in this matter to convey that a decision was going to be issued dismissing the case and notified them that sanctions may be imposed because the lawsuit is frivolous. Thus, the Court provided Metrosearch with an ample opportunity to withdraw the case without the negative repercussion of being sanctioned. Although its original counsel has withdrawn from representation, Metrosearch, an entity not licensed to do business in New York, has proceeded forward with the instant litigation claiming that its New York targeted business activities were damaged. Pursuant to 22 NYCRR 130-1.1(a),

> a court may award to any party fees and costs resulting from frivolous conduct, i.e., conduct that is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; . . . [or that is] undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or . . . asserts material factual statements that are false."

Place v. Chaffee-Sardinia Volunteer Fire Co., 143 A.D.3d 1271, 1272 (4th Dep't 2016) (alterations in original) (quoting 22 NYCRR 130-1.1(c)). Further, courts consider whether "'the circumstances under which the conduct took place,' and whether 'the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party'" in order to determine when conduct should be deemed frivolous. *Id.* (quoting 22 NYCRR 130-1.1(c)). Under the circumstances, the Court imposes a $5,000 sanction against Metrosearch, but not its previous counsel, as the law firm withdrew from representation in this lawsuit when the frivolity of the suit was brought to its attention. In addition, defendants are entitled to their reasonable attorneys' fees in securing the dismissal of this action. The amount of attorneys' fees will be determined by a special referee who will consider the matter and prepare a report with recommendations to be submitted to the Court.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is granted and the action is hereby dismissed; and it is further,

ORDERED that Metrosearch Recoveries, LLC is hereby sanctioned by this Court in the amount of $5,000, and shall deposit said amount with the County Clerk (Room 141B), together with a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance; and it is further,

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 55 and opposing counsel within thirty (30) days after service of a copy of this order with notice of entry; and it is further,

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against Metrosearch Recoveries, LLC in the aforesaid sum; and it is further,

ORDERED that the amount of attorneys' fees that defendants may recover against the plaintiff Metrosearch Recoveries, LLC is referred to a Special Referee to hear and report; and it is further,

ORDERED that counsel for defendants shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[6] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of this Court.

Dated: October 2, 2017

Hon. James E. d'Auguste, J.S.C.

[6] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.