

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Docket #217-2020-CV-212

Jon Swan f/k/a Jon Alvarez, Forest Lake Association,  
Save Forest Lake, Doe Defendants 1-20

**OBJECTION TO MOTION FOR CLARIFICATION AND RECONSIDERATION**

Plaintiff, Casella Waste Systems, Inc. (“Casella”), objects to the motion for clarification and reconsideration filed by defendant Save Forest Lake<sup>1</sup> (“SFL”). This objection rests on the following grounds.

**I. Introduction**

In the guise of a request for clarification and reconsideration, SFL has (1) quarreled with the court’s order rather than identify anything that the court overlooked or misapprehended, (2) sought relief not requested in the motion to dismiss, (3) made arguments it failed to make in the motion to dismiss, and (4) invited the court to create anti-SLAPP common law despite an Opinion of the Justices determining that a proposed statute that would have regulated alleged SLAPP in the same fashion would violate the New Hampshire Constitution.

SFL’s motion is premised on the proposition that on a motion to dismiss a defamation action it is the court’s duty to examine each allegation in the complaint in isolation and excise those allegations that do not – standing alone – constitute actionable defamation. It cites no law for this extraordinary contention. SFL made the tactical decision in its motion to dismiss to characterize as allegedly defamatory all of the statements in the complaint that Mr. Swan made

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<sup>1</sup> Defendant Swan did not seek clarification or reconsideration.

about Casella. Having employed this indiscriminate tactic, SFL should not now be heard to insist that the court do what SFL failed to ask the court to do in the first instance.

At bottom, SFL's argument is a political one, relying as it does upon anti-corporate prejudice as a substitute for reasoned consideration of plaintiff's claims under the law. The courts must remain proof against such appeals if the rule of law is to be maintained. Because the court's order rests upon a sound application of the law to the allegations of the complaint, it does not require clarification or reconsideration, and SFL's motion should be denied.

## **II. Statement of Facts**

In their motion to dismiss, the defendants sought dismissal of the entire complaint. They did so by identifying every statement in the complaint attributable to SFL and Defendant Swan, grouping them into categories devised by defendants, and citing law that statements in such categories are not actionable for defamation. Motion to Dismiss ("MTD") (5/19/2020) at 5-19. Defendants did not, however, do what they would now have the court do. They did not address each such statement individually and move for dismissal of (or seek to strike) each one. By taking the collective approach defendants sought the tactical advantage of concealing the actionable defamatory statements among a debris field of statements that plaintiff never alleged are defamatory.

It is no exaggeration to say that over the past year and a half defendants have published hundreds of statements about Casella. The statements recited in the complaint are only a representative sampling. *See* Complaint at ¶17. As plaintiff noted in its objection to the motion to dismiss, many of the statements cited in the complaint were included to establish defendants' contempt for Casella and their motive to defame the company. *Obj. to MTD* (6/5/2020) at 9. Many of those statements are on their face not defamatory (e.g., that Swan is "at war" with

Casella (Complaint ¶¶25 and 25(a)); that the defendants want to “kick [plaintiff] OUT of NH” (Complaint ¶28(a) (emphasis in original)); defendants oppose a Casella subsidiary in Bethlehem, New Hampshire (Complaint ¶28(b)). Defendants nonetheless included every such statement in one or more of the categories that they argued are not actionable. *See* MTD at 20 (“This Motion sets forth and addresses every alleged statement made by the Defendant(s) that the Plaintiff believed was defamatory, some 60+ statements. Not one statement was actionable . . .”).

Defendants’ categorical approach to the complaint did not provide the court with a basis to dismiss individual statements within it. The relief sought in the motion to dismiss was the dismissal of all statements within given categories. *Id.* at 20. Rather than accept defendants’ framework, however, the court identified nine statements in the complaint that are actionable as defamatory and concluded that the bulk of the remaining statements are purely defendants’ opinions or exaggerations. Order (8/10/2020) at 9-10. The court therefore broke the defendants’ statements into two categories, those that are actionable and the bulk of the remainder that are not. Because defendants had not sought dismissal of individual statements the court’s order did not address each one.

Now, under the rubric of “clarification,” defendants ask the court for relief never sought in the motion to dismiss. For the first time<sup>2</sup> they request that the court comb through the complaint and strike any statements that are not actionable. They also seek “reconsideration” of the court’s ruling that nine of defendants’ statements are actionable but do not identify any

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<sup>2</sup> It is worth noting that defendants could have filed a reply in support of their motion to dismiss but chose not to do so. Further, the defendants had an opportunity to be heard on the arguments they now raise in their motion for clarification and reconsideration, either in their original motion, during the July 8, 2020 hearing on the motion, or in their supplemental memorandum submitted after the hearing to address the application of the *Automated Transactions* case to this matter. They did not do so.

oversight or misapprehension on the court's part. Because SFL has sought new relief instead of clarification and reargument instead of reconsideration, its motion must be denied.

### **III. Argument**

#### *a. Motion for Clarification*

The court's order on the motion to dismiss does not require clarification. It identified nine statements from the complaint that may "giv[e] rise to recovery for defamation" and "at least tend to impair Casella's standing in the community, if not directly hold Casella up to contempt, hatred, scorn, or ridicule." Order (8/10/2020) at 9 (quotations, brackets, and citation omitted). The court further determined that the "bulk of the remaining statements are either strongly worded opinion or rhetorical hyperbole" and thus not actionable for defamation. *Id.* at 10.

While SFL purports to seek "clarification" of the order, the alleged lack of clarity is actually just a consequence of how defendants framed their motion. SFL chose to seek dismissal of the complaint as a whole by grouping statements from the complaint that are facially not defamatory with statements that are, characterizing those statements as a group, and seeking dismissal based on that characterization. *See, e.g.,* MTD at 13 and 15 (categorizing and listing allegations). This approach enabled SFL to attempt, unsuccessfully as it turned out, to camouflage actionable defamation among statements that Casella never claimed were defamatory. The court's order did not adopt defendants' categorical approach and instead isolated a set of nine statements that are actionable and held that "the bulk" of the remaining statements are not actionable. SFL complains in its motion for clarification that the court did not go on to undertake an allegation-by-allegation examination of the complaint to describe which of defendants' statements are not actionable, but that is not what the motion to dismiss sought. SFL

cites no authority that a party can seek on clarification a remedy not requested in the original motion. Nor does SFL cite authority that a party may shift to the court the responsibility to formulate the party's relief. Neither plaintiff nor the court was placed on notice by the motion to dismiss that defendants were seeking so sweeping and detailed a remedy. As a result, plaintiff did not brief the issue and the court did not address it. If SFL finds the order unclear because the court did not take a microscope to the complaint, it has only itself to blame.

Similarly, SFL cites no authority that every statement attributed to the defendant in a complaint for defamation must be actionable, much less that any such statement that is not actionable must be stricken from the complaint. Not only would such a result violate the principle that the allegations of a complaint are to be read as a whole and not in isolation, *Tice v. Thomson*, 120 N.H. 313, 318 (1980), it would also subject defamation complaints to the kind of procedural quibbling that New Hampshire law has long rejected. *Whitaker v. L.A. Drew, Inc.*, 149 N.H. 55, 59 (2003) (observing the supreme court's "emphasis on justice over procedural technicalities"). The paragraphs SFL asks the court to excise provide context for plaintiff's claim and support the proposition that SFL published the actionable statements with both actual and common law malice. For all of the foregoing reasons, the motion for clarification should be denied.

*b. Motion for Reconsideration*

A motion for reconsideration "allows a party to present points of law or fact that the Court has overlooked or misapprehended." *Smith v. Shepard*, 144 N.H. 262, 264 (1999); *see also* N.H. Super. Ct. R. 12(e). It is not an opportunity to relitigate or reiterate arguments already presented to and considered by the court, and it is not an appropriate mechanism for raising new issues for consideration before the court. Indeed, it is in the interests of judicial economy to

“require a party to raise all objections at the earliest possible time . . . .” *Mountain Valley Mall Assocs. v. Municipality of Conway*, 144 N.H. 642, 655 (2000) (emphasis in original).

The overarching argument SFL makes for reconsideration is that if dismissal is denied, the court will be “transmitting a message to well-financed corporations that intense public opposition to major projects can be subdued and eventually defeated with costly and time-consuming litigation.” Motion for Clarification and Reconsideration (“Motion”) at ¶20. This is nothing more than an attempt to induce the court to apply the principles of anti-SLAPP legislation as common law. Not only is this an unvarnished appeal to anti-corporate prejudice, it also proposes a procedure that the justices of the New Hampshire Supreme Court found to be unconstitutional over twenty-five years ago..

In 1994, the general court considered legislation that would subject “Strategic Lawsuits Against Public Participation” (“SLAPP”)<sup>3</sup> to a “special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” *Opinion of the Justices*, 138 N.H. 445, 447 (1994) (quoting proposed legislation). In considering this legislation, the justices concluded that subjecting complaints to a special motion to strike in such circumstances would require a court to resolve the factual merits of the claim at the outset of the litigation. *Id.* at 451. This, the justices determined, would violate a plaintiff’s constitutional right to a jury trial for factual disputes. *Id.* While acknowledging the importance of First Amendment rights, the justices concluded that a “solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group.” *Id.*

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<sup>3</sup> The court explained that the premise of anti-SLAPP legislation is that some lawsuits are brought only “to retaliate against political opposition, attempt to prevent future opposition and intimidate political opponents, and are employed as a strategy to win an underlying economic battle, political fight, or both” and deter public participation in the democratic process. *Opinion of the Justices*, 138 N.H. at 449.

Not only is SFL's overall rationale for reconsideration contrary to the New Hampshire constitution, SFL also fails to satisfy the law's requirements for reconsideration. Under N.H. Super. Ct. R. 12(e), SFL must identify any "points of law or fact that the Court has overlooked or misapprehended." As the table in Exhibit A<sup>4</sup> to this objection shows, SFL's motion seeks to relitigate arguments that were presented to the court during proceedings on the motion to dismiss or to present new arguments for the first time. Neither is an appropriate justification for reconsideration.

SFL seeks reconsideration on arguments that were presented to the court in the motion to dismiss. For example, the defendants identified allegations in the motion to dismiss which they claimed were not defamatory because they were supported by documentation found online or in the public record. In the motion for reconsideration, SFL raises the same argument once again, claiming that some of these allegations are supported by public documents and thus subject to dismissal. *Compare, e.g.*, Motion at ¶¶15-19 and MTD at 15-18 (arguing for dismissal of Complaint ¶¶19(b), 20(a) and 22); *see also* Exhibit A. SFL similarly repeats the argument that Complaint ¶39 is not defamatory because it is not a statement "of and concerning" Casella. *Compare* MTD at 5 *and* Motion at ¶11. The defendants also previously argued that statements in Complaint ¶¶39(a) and 39(b) are protected opinions. MTD at 13-14. SFL identifies no error or misapprehension of the law in asking the court to consider the same argument once again in the pending motion. Motion at ¶¶12 and 13; *see also* Exhibit A (additional examples of reargument).

Although the defendants' motion to dismiss attacked nearly every factual allegation in the complaint, SFL now raises new arguments in the motion for reconsideration concerning some of

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<sup>4</sup> Exhibit A summarizes the arguments raised in the motion to dismiss and the motion for clarification and reconsideration concerning the allegations listed in ¶¶14 and 15 of the Motion. This table is provided for illustrative purposes to identify instances where SFL is raising new or redundant arguments in its motion for reconsideration.



CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically through the court's ECF system upon counsel of record and all other parties who have entered electronic service contacts in this case.

Date: 9/4/20

/s/ Cooley A. Arroyo  
Cooley A. Arroyo, Esq.

# **EXHIBIT A**

<b>Complaint ¶</b>	<b>Citation to argument in Motion to Dismiss (“MTD”) and basis for seeking to dismiss allegation</b>	<b>Citation to argument in Motion for Reconsideration/Clarification (“Motion”) and basis for seeking to strike/dismiss allegation</b>
19(a)	<p>MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.</p>	<p>Motion at ¶16; statement is “supported by documentation that is either (a) public record, (b) incorporated by reference to Save Forest Lake’s extensive advocacy materials on social media, online and in the press, or (c) contextually supported by the statements themselves.”</p> <p>Motion at ¶18; statement is “part of a sustained, aggressive, voluminous public advocacy campaign by Save Forest Lake in opposition to Casella’s landfill” and thus “part of political discourse.”</p> <p>(“Motion at ¶¶16 and 18”)</p>
19(b)	<p>MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.</p> <p>MTD at 16-17; statement is “supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion.”</p>	<p>Motion at ¶¶16 and 18</p>
20(a)	<p>MTD at 15-16; statement is “based upon facts readily available in the public domain or referenced specifically in connection with the comments themselves.”</p>	<p>Motion at ¶¶16 and 18</p>
20(b)	<p>MTD at 16-17; statement is “supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion.”</p>	<p>Motion at ¶¶16 and 18</p>
21(a)	<p>MTD at 6; Casella does not “‘stat[e] with particularity’ the actual words that are alleged to be defamatory.”</p>	<p>Motion at ¶¶16 and 18</p>

	MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.	
21(b)	MTD at 6; Casella does not “stat[e] with particularity’ the actual words that are alleged to be defamatory.”  MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.	Motion at ¶¶16 and 18
22	MTD at 16-18; statement is “supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion.”	Motion at ¶¶16 and 18
23	MTD at 16-18; statement is “supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion.”	Motion at ¶6; statement is not defamatory as to Casella, is not “of and concerning Casella,” and a “non-defamatory assertion of fact.”
29(a)	MTD at 11; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.	Motion at ¶3; Save Forest Lake asks the court “expressly to dismiss or strike” a portion of the statement because the court “dismissed Plaintiff’s claims based upon statements or assertions that ‘were strongly worded opinion or hyperbole.’”  Motion at ¶7; portion stating Casella tried to “influence the vote on zoning in the Town of Dalton” is “opinion concerning a non-defamatory implied assertion of fact” and the defendants’ judgment.
32	<i>Not addressed in MTD</i>	Motion at ¶8; statement is “based upon the facts presented at a public hearing” and speculation that is not actionable.
34(a)	MTD at 10; statement is not defamatory and “contour lines, in and of themselves, do not ‘tend to lower the plaintiff in the esteem of any substantial and respectable group.’”	Motion at ¶9; statement is not defamatory because it does not hold Casella “up to contempt, hatred, scorn or ridicule, or tend to impair the Plaintiff’s standing in the community.”

	MTD at 16-18; statement is “supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion.”	
34(b)	MTD at 15; statements that are “conjecture, hypothesis, and speculation” are not actionable.	Motion at ¶9; statement is not defamatory because it does not hold Casella “up to contempt, hatred, scorn or ridicule, or tend to impair the Plaintiff’s standing in the community.”
34(c)	MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.	Motion at ¶¶16 and 18
35	MTD at 6; Casella does not “stat[e] with particularity’ the actual words that are alleged to be defamatory.”	Motion at ¶¶16 and 18
36	MTD at 15-16; statement is “based upon facts readily available in the public domain or referenced specifically in connection with the comments themselves.”	Motion at ¶10; statement contains opinion and is “not defamatory”. <sup>1</sup>
37	MTD at 16-17; statement is “supported by facts in the public domain, or by news reports or public records actually referenced by Save Forest Lake in or near the assertion.”	Motion at ¶¶16 and 18
38	MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.	Motion at ¶¶16 and 18
38(a)	MTD at 13; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.	Motion at ¶¶16 and 18
38(b)	MTD at 13-14; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s	Motion at ¶¶16 and 18

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<sup>1</sup> This paragraph of the Motion appears to contain a typographical error; it sets out to establish two propositions about the statement, but the sentence does not identify the second argument.

	motives and intentions” are protected as opinion.	
38(c)	<i>Not addressed in MTD</i>	Motion at ¶¶16 and 18
39	<p>MTD at 5; statements not “of and concerning the plaintiff” are not actionable.</p> <p>MTD at 13-14; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.</p>	Motion at ¶11; statements not “of and concerning the plaintiff” are not actionable.
39(a)	<p>MTD at 5; statements not “of and concerning the plaintiff” are not actionable.</p> <p>MTD at 13-14; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion.</p>	Motion at ¶12; statement is a “non-defamatory fact” followed by opinion on those facts.
39(b)	<p>MTD at 5; statements not “of and concerning the plaintiff” are not actionable. (Incorrectly cited as “¶39(c)”) </p> <p>MTD at 13-14; “subjective view[s],” “rhetorical hyperbole,” and “conjecture such as speculation about Casella’s motives and intentions” are protected as opinion. (Incorrectly cited as “¶39(c)”) </p>	Motion at ¶13; statement is “unalloyed opinion” and “personal judgments concerning Casella’s landfill project”