

# The State of New Hampshire

**MERRIMACK COUNTY**

**SUPERIOR COURT**

CASELLA WASTE SYSTEMS, INC.

v.

JON SWAN f/k/a JON ALVAREZ, SAVE FOREST LAKE, et al.

Docket No.: 217-2020-CV-00212

## **ORDER**

The plaintiff, Casella Waste Systems, Inc. (“Casella”), brings this action for damages and equitable relief against the defendants, Jon Swan f/k/a Jon Alvarez and Save Forest Lake, alleging the defendants engaged in a campaign to disparage Casella’s reputation by publishing and disseminating false statements of fact and tortiously interfering with Casella’s prospective economic interests. Casella moves to compel Mr. Swan to fully and completely respond to Casella’s second set of requests for production of documents. Mr. Swan objects. Casella also moves to amend its complaint to include a statement made by the defendants on August 31, 2022. The defendants object. The Court held a hearing on these matters on October 11, 2022. For the reasons set forth below, Casella’s motions are GRANTED.

### **I. Background**

This Court has previously provided a detailed discussion regarding the factual history of this matter, which is incorporated herein by reference. See Casella Waste Systems, Inc. v. Jon Swan, et al., No. 217-2020-CV-00212, Court Doc. 33, at 2-7

(August 7, 2020) (Kissinger, J.). For context, a brief description of the relevant facts and procedural history follows.

Casella is a solid waste resource management company that maintains operations in New Hampshire and other northeast states. One of Casella's subsidiaries, North Country Environmental Services, Inc. ("NCES"), owns and operates a landfill in Bethlehem. Following litigation between NCES and the Town of Bethlehem in 2012, NCES entered into a settlement agreement that limited the size of NCES's landfill. Although NCES owns land adjacent to the landfill, it cannot expand the landfill into those parcels without the town's consent and an amendment to the town's zoning ordinance. NCES is in the process of seeking approval for a final expansion that would allow the landfill to operate until 2026. However, it was projected to run out of capacity by the end of 2021.

In 2018, to procure more space, NCES entered into an option contract with two property owners to acquire over 1,000 acres of contiguous parcels in Dalton to develop a second landfill. The property is located beyond a ridge from Forest Lake State Park. Jon Swan, who owns a home by the lake, became alarmed when he learned of the land purchase and founded "Save Forest Lake." Save Forest Lake is an organization aimed at stopping the development of the NCES landfill in Dalton.

Jon Swan, individually, and through Save Forest Lake, began making negative comments about Casella and the plan to operate a landfill in Dalton. In this Court's order on the defendants' motion to dismiss ("August 7 Order"), it outlined which statements were actionable for defamation including that Casella: scammed elderly residents of Dalton, did not recycle most of the materials placed in "zero sort" bins, filled

local landfills with out-of-state trash, illegally spilled 8,000 gallons of leachate into the Black River in Vermont, polluted the Ammonoosuc River, operated outside of permitted hours, sought to improperly influence the vote of the Bethlehem Planning Board, conspired with Horizons Engineering to avoid compliance with regulatory requirements, and improperly treated millions of gallons of leachate which were emptied into the Merrimack River. The defendants published such statements online including on several social media platforms.

## **II. Analysis**

### **a. Motion to Compel**

On February 3, 2021, Casella first propounded discovery requests for analytical audience data from Mr. Swan's social media accounts. The data would allow Casella to determine how many people saw the statements and how widely they were reposted, inter alia. After some discussion between counsel, Mr. Swan produced six spreadsheets of analytical data. Four of the spreadsheets contained Facebook data but did not identify the accounts or pages to which the data was associated. The spreadsheets contained data from a limited time frame. On November 1, 2021, Casella again requested analytical data from Mr. Swan's social media accounts and his website again relating to "defamatory statements." Casella defined "defamatory statements" in its requests as "those actionable statements at issue in this litigation" and included a list of statements almost identical to those the Court outlined in its August 7 Order. Casella specified which data points its requests contemplated, based on the social media platform. Casella allowed Mr. Swan additional time to respond and offered technical assistance for accessing the requested data. On November 30, 2021, beyond the

additional time Casella provided, Mr. Swan stated general objections claiming that Casella's requests were unduly burdensome because in order to access the requested data, Mr. Swan alleged he would have to purchase specialized software. Casella informed Mr. Swan that he would not have to purchase additional software and on December 3, 2021, provided Mr. Swan with step-by-step instructions to access analytical data on Facebook's platform. On February 18, 2022, after back and forth between counsel, Mr. Swan produced a portion of analytical data with no documentation or explanation as to how it was responsive to Casella's discovery requests.

On March 14, 2022, Casella notified Mr. Swan of the deficiencies in his discovery responses and informed him that without resolution, Casella would move to compel the documents. On March 21, 2022, Mr. Swan declined to clarify or supplement his responses. Mr. Swan suggested that Casella narrow its requests to seek analytical data for specific posts.

Therein lies the crux of the parties' dispute: which party has the burden and ability to determine the exact posts that fall under Casella's definition of "defamatory statement" in order to determine for which posts Casella requests analytical data. Casella contends that Mr. Swan regularly posts the same statement on multiple accounts on different social media platforms. This presents difficulty for Casella to pinpoint all of the posts Mr. Swan has disseminated with statements qualifying under Casella's request. Accordingly, Casella has provided a category of statements, those it defines as "defamatory statements," which it requests Mr. Swan to apply to his social media accounts, determine which posts qualify, and provide the requested analytical data. Casella contends that the analytical data it requests is readily available to Mr.

Swan as the owner and custodian of the relevant social media accounts. Mr. Swan disagrees, claiming that Casella should provide precise posts it requests analytical data for.<sup>1</sup> Mr. Swan contends that without guidance from Casella as to which specific posts it requests analytical data for, he is left to do guesswork as to which posts may be responsive to Casella's requests.

"Although discovery rules are to be given a broad and liberal interpretation, the trial court has discretion to determine the limits of discovery." N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009). "A party's request for information must appear relevant and reasonably calculated to lead to the discovery of admissible evidence." Id. at 429-30. "The trial court, therefore, is permitted to keep discovery within reasonable limits and avoid open-ended fishing expeditions or harassment to ensure that discovery contributes to the orderly dispatch of judicial business." Id. at 430. As such, deciding whether to compel pretrial discovery is a matter left to the sound discretion of the trial court. See RAL Auto. Group, Inc. v. Edwards, 151 N.H. 497, 499 (2004). "[P]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to a claim or defense of the party seeking discovery or to the claim or defense of another party . . . ." N.H. Super. Ct. R. 21(b). Information is discoverable, even if it will be inadmissible at trial, "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id.

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<sup>1</sup> In Mr. Swan's objection, he argues that Casella's requests for general user data are not relevant and not reasonably calculated to lead to the discovery of admissible evidence. (See Pl.'s Mot. to Compel, Ex. E at 6-10). To the extent Casella's motion to compel relates to requests for general user data of Mr. Swan's social media accounts, the issue is insufficiently developed for the Court to decide at this time. The Court will address Casella's motion to compel only as it relates to social media user data regarding posts containing statements Casella defines as "defamatory" in its requests.

Mr. Swan's social media data regarding posts containing actionable statements are relevant to Casella's damages. The data demonstrate the scope of the audience each post reached and how the audience interacted with each post. If a fact finder determines that the statements made by defendants are defamatory, the extent of the audience they reached may be relevant to the potential damages awarded to Casella.

The Court acknowledges the difficulties posed by collecting all the posts that qualify as a "defamatory statement" under Casella's definition in order to extract the applicable analytical data. Both parties agree that Mr. Swan is prolific in his authorship of posts about Casella. The mass of total posts imposes difficulties on both Casella and Mr. Swan to scour his social media pages for qualifying posts. Casella permissibly included a category of statements in its request rather than a list of specific posts on specific pages. See Super. Ct. R. 25(e). However, Mr. Swan has credibly conveyed his inability to parse out exactly which phrases qualify throughout all his accounts on several social media pages.

The Court grants Casella's motion to compel the production of Mr. Swan's social media metadata for posts containing actionable statements outlined in the Court's August 7 Order. Casella is permitted to utilize an information technology professional to review Mr. Swan's social media accounts in Mr. Swan's presence for up to 8 hours. Mr. Swan may be accompanied by counsel. Mr. Swan shall act cooperatively and in good faith with Casella's information technology professional. If the parties conclude more time is required, they may request leave from the Court for additional time if they are unable to reach agreement as to the need for and extent of additional time.

b. Motion to Amend

On August 31, 2022, the defendants authored a new social media post using the Twitter account @SaveForsestLake1. The post states: “Under this proposed rule, EPA will both help protect communities from PFAS pollution . . . Let’s hope this means preventing the purposeful introduction of PFOS/PFOA contaminants into the Forest Lake area by Casella”. The post tagged several accounts including the New Hampshire Department of Environmental Services, Michael Regan, EPA New England, and National Public Radio. Casella moves to amend its complaint to include this new post as an alleged defamatory statement.

“Whether to allow a party to amend his or her pleadings rests in the sound discretion of the trial court . . . .” Sanguedolce v. Wolfe, 164 N.H. 644, 648 (2013). “Generally a court should allow amendments to pleadings to correct technical defects but need only allow substantive amendment to prevent injustice.” McDermott v. Paciulli, No. 2011-0299, 2012 WL 2830344, at \*1 (N.H. Feb. 1, 2012) (non-precedential); see RSA 514:9. “[L]iberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence.” Coan v. N.H. Dept. of Env’t Serv., 161 N.H. 1, 10-11 (2010).

Casella’s original complaint included allegations of defamatory statements similar to the August 31 statement. As a similar statement, it should not surprise the defendants that Casella would seek to introduce it through an amended complaint. Further, as Mr. Swan himself is the author of the statement, he and the other defendants should not be surprised by the statement itself or Casella’s interest in

including it in this matter. The new statement relates directly to the claims Casella brought in its first complaint and does not introduce an entirely new cause of action nor call for substantially different evidence. Casella additionally contends that the addition of this statement would not affect the procedural schedule of the case. The discovery period ends May 31, 2023, leaving both parties ample opportunity to engage in discovery over the new statement.

The August 31 statement is sufficiently actionable as defamatory. To determine whether a statement communicates defamatory material, the Court examines “whether the statement was reasonably capable of conveying the particular meaning . . . ascribed to it by the plaintiff” and “whether that meaning is defamatory in character.” Boyle v. Dwyer, 172 N.H. 548, 554 (2019). A statement is defamatory in character when it would tend to “impair [the plaintiff’s] standing in the community,” if not directly hold it “up to contempt, hatred, scorn, or ridicule.” Id. It is reasonable to assume that the accusation that Casella would purposely introduce pollution into Forest Lake would significantly impair its standing in the community surrounding the Lake and potentially subject it to contempt, hatred, scorn, or ridicule. While statements of “rhetorical hyperbole” which cannot be construed as factual assertions are non-defamatory statements of opinion, the August 31 statement is not rhetorical hyperbole. See Automated Transactions, LLC v. Am. Bankers Ass’n, 172 N.H. 528, 532 (2019). Whether or not Casella intends to purposely introduce PFOS/PFOA into the Forest Lake area is a factual assertion that can be proven or disproven. Therefore, the statement is sufficiently actionable as a defamatory statement.

Accordingly, the Court grants Casella’s motion to amend.

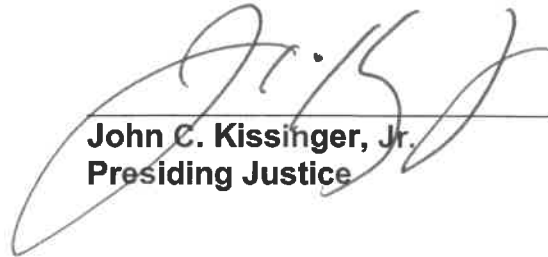


**III. Conclusion**

For the foregoing reasons, Casella's motion to compel and motion to amend are GRANTED.

**SO ORDERED.**

10/31/22  
Date

  
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John C. Kissinger, Jr.  
Presiding Justice