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,
Save Forest Lake, et al.

PLAINTIFF'S REPLY TO OBJECTION TO MOTION TO COMPEL

The plaintiff, Casella Waste Systems, Inc. ("CWS"), respectfully submits the following reply to the defendant(s)', Jon Swan & Save Forest Lake, et al. ("Swan"), objection to CWS's motion to compel.

I. Introduction

The defendant's objection to the motion is based on the proposition that, if a discovery request is inconvenient to answer, a party may disregard it. First, Swan argues that the plaintiff must specifically identify each statement for which it seeks information, but in fact the court's discovery rules expressly contemplate requesting information regarding categories of information, as the plaintiff has done. He further alleges that it is simply too difficult for him to locate each iteration of his defamatory statements, an assertion that disregards his exclusive ownership, control, and personal knowledge of the relevant social media accounts. He claims he has operated in good faith, despite producing only information that is wholly unresponsive to the discovery requests at issue and failing to provide objections and responses as to each propounded request. Swan claims that since the requests used language he did not agree with, he had no obligation to give any response, a theory that is both incorrect and would swiftly bring the justice system to a halt if adopted.

The plaintiff asks the court to hold this motion in abeyance until it rules on his summary judgment motion, but the court's rules do not suspend discovery pending the outcome of a dispositive motion. Permitting the defendant to elude discovery in this manner by simply refusing to answer reasonable and relevant requests will prevent CWS from obtaining discovery it is otherwise entitled to and reward the defendant for dragging his feet on discovery obligations in the hope that a later motion renders his non-compliance moot. The court must grant the plaintiff's motion and address that request for relief before ruling on the motion for summary judgment.

II. Argument

As CWS discussed at length in its motion, the requested social media analytical data is relevant since it is one of the best means by which to assess the audience and impact of Swan's actionable statements. Mot. to Compel (4/5/22) at 9-13. In response, Swan argues that "general user data" such as that requested cannot inform the impact or reach of Swan's actionable statements, and to the extent CWS wishes to make such an argument at trial, it would be both irrelevant and prejudicial. Obj. (4/15/22) at ¶8. But it is not up to Swan to decide what information he thinks is useful for CWS to make its case[1], and his opinion on what information CWS wishes to use to present its claims is, ironically, irrelevant. *See* N.H. Super Ct. R. 21(b) ("[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible

[1] Swan's productions to date concerning analytical data have been unusable, and his statements regarding these productions are misleading. Obj. at ¶10. The lengthy file of Facebook data Swan provided with his objection is useless because, *inter alia*, it is for a date range that was not requested. *Id.* Exhibit B, Mot. to Compel at 4. A wholly non-responsive document does not become responsive by virtue of being lengthy or "fully searchable", nor is producing a handful of such non-responsive documents any indication of good faith – rather, given the ease of adjusting the date range to produce a relevant report, these non-responsive productions cut in the opposite direction. Obj. at ¶10.

evidence."). The information sought is relevant, as it directly addresses the publication element of plaintiff's defamation claim. Swan's claim that the information is irrelevant or prejudicial may be addressed in a subsequent motion in advance of trial; it is not a justifiable excuse for evading discovery.

It is well-established in New Hampshire jurisprudence that the discovery process should be conducted broadly. N.H. Super. Ct. R. 21(b); *N.H. Ball Bearings. Inc. v. Jackson*, 158 N.H. 421, 429 (2009), citing *Scarborough v. R.T.P. Enterprises, Inc.*, 120 N.H. 707, 711 (1980). Any non-privileged information relevant to *any* claim or defense of either party is discoverable. N.H. Super. Ct. R. 21(b). Swan has used, and continues to use, his numerous social media accounts to disseminate his online influence campaign against CWS. Certain of these accounts posted various messages which the court concluded are potentially actionable. Order (8/10/20) at 9. These messages have not been posted just one time on a single platform. Swan routinely shares posts across his social media pages and platforms and even tags high-profile users to extend the reach of his content.[2] It should come as no surprise to him, then, that data regarding his extensive and remarkably interconnected body of social media accounts is relevant and discoverable, as the plaintiff cannot know how far each potentially defamatory statement has traveled on the internet, and the requested data is expected to shed light on the volume of users who have engaged with his postings. CWS's requests for that portion of Swan's social media data for his accounts that published (or republished) these actionable statements, during the specific time period in which, to the best of its knowledge, Swan was making the statements, thus is clearly calculated to lead to the discovery of admissible evidence. Despite the fact that

[2] For instance, Swan's defamatory accusation on Twitter that CWS had "weaponize[d] the legal system" against him ends by tagging 9 distinct other Twitter accounts or "handles", including major news entities such as WMUR and the Boston Globe. Exhibit A.

producing the requested data is simple and requires little effort to obtain from Facebook, Swan continues to protest that the effort of locating his own actionable statements and producing the simple reports requested constitutes an undue burden.

Insofar as there is a "burden" attached to responding to CWS's requests for Swan's social media data, that burden is the result of Swan sharing and disseminating the defamatory statements across a series of social networks and pages. If he did indeed need to spend hours learning how to use new tools to access his data – which he does not – or expend great effort to produce the requested data sets – which he does not – or if searching for his own actionable statements in accounts he has created and continues to control required much speculation – which it does not – CWS's requests would still not constitute any undue burden. Swan is the author, promoter, and sole custodian of the influence campaign which made the actionable statements. CWS has propounded requests upon Swan in accordance with the rules of discovery, seeking information solely in his hands which is reasonably calculated to produce admissible evidence. CWS has accommodated extensions of time to respond and provided instructions to obtain the information requested, but ultimately, the burden to produce requested, relevant information is contemplated and inherent in our justice system. Swan alone possesses the information and he must produce it, regardless of the temporary inconvenience of this burden.

In truth, these circumstances are a familiar to those who have dealt with comparable discovery situations involving email databases. A plaintiff in such litigation might know that the defendant authored an email on a certain topic relevant to the case, but he would not know if additional emails on this topic exist. If the plaintiff then requests all relevant emails regarding that topic, it cannot be a valid objection for the defendant to claim that the request must precisely identify each and every email on that topic. The defendant has sole custody and control of his

emails, and personal knowledge regarding what emails he authored and when, so the burden of locating responsive emails rightfully rests with him. Similarly, since CWS has defined the categories of Swan's communications subject to the discovery requests, the burden of locating and providing the data he alone possesses falls upon Swan, the sole custodian of this information.

Swan claims that a "good faith" response to these requests would be to produce nothing, since CWS's requests are predicated on information relevant to his defamatory statements, and his belief is that he has made no such statements. *Id.* at ¶¶4-5, 7.[3] These arguments overlook the instructions to the requests, which defined "Defamatory Statement" to mean those identified as potentially actionable by the court's order on the motion to dismiss. Mot. to Compel (4/5/22) at 2. Swan may not agree that the statements are defamatory, but that does not mean the instruction was unclear or vague, when in fact it seeks to discover information about a specific set of statements that the court already determined could be defamatory.

Swan also objects to the fact that CWS has provided a list of "categories" of Swan's actionable statements, rather than specifying each individual post which it alleges is defamatory. But this list was drawn from the court's order which found that certain statements could be actionable, supplemented with the new defamatory statement topics in CWS's amended complaints. Order (8/10/20) at 9, Mot. to Compel (4/5/22) at 12-13. Indeed, the discovery rules expressly contemplate requesting "categories" of information. N.H. Super. Ct. R. 24(b)(1) ("The request shall set forth, *either by individual item or by category*, the items to be inspected, and describe each with reasonable particularity.") (emphasis supplied). Swan may not agree that the

[3] Swan himself describes this argument as a "useless sophis[tic] morass." Obj. at ¶5.

statements are defamatory, but he does not need to adopt that characterization to answer the request, nor does that make the instruction vague or unclear, when in fact it seeks to discover information about a specific set of statements that the court already determined could be defamatory. CWS has thus fulfilled its obligation to identify the categories of information it seeks.

Swan urges the court to decide his motion for summary judgment before the motion to compel in service of judicial efficiency, based on the argument that his motion will reduce or eliminate this discovery disagreement. Obj. (4/15/22) at ¶15. As a threshold matter, dispositive motions do not suspend discovery once filed, nor should they, as such a practice would substantially impede the discovery process. Assuming that a dispositive motion will reduce or narrow issues in controversy also assumes that the motion will be at least partially granted, when instead, Swan bears the burden of prevailing on that motion, and all reasonable inferences should be granted in favor of CWS. Memorandum of Law in Support of Mot. for Summary Judgment (4/14/22) at 3 ("In reviewing a motion for summary judgment, the Court 'consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party . . .") (quoting *Dube v. N.H. Dep't of Health and Human Servs.*, 166 N.H. 358, 364 (2014)). In order to avoid delay and disruptive precedents, the court should decide the motion to compel before considering the motion for summary judgment.[4]

[4] This is also consonant with judicial efficiency. With the filing of this reply, the motion to compel is fully briefed and ready for the court's consideration at its earliest convenience. The defendant's objection to the motion for summary judgment is not due until May 16, 2022, and the plaintiff's reply will follow no more than ten days after that. Adopting the plaintiff's reasoning would require the court to set aside this fully-briefed motion pending the resolution of the summary judgment motion, when an order on this discovery motion would permit the parties to continue with discovery while the dispositive motion is pending.

III. Conclusion

For all the foregoing reasons, CWS respectfully requests that the court grant its motion to compel.

Respectfully submitted,

CASELLA WASTE SYSTEMS, INC.,
By Its Attorneys,

Date: 4/25/22

By: /s/ Morgan G. Tanafon

Bryan K. Gould, Esq. (NH Bar #8165)
gouldb@cwbpa.com
Cooley A. Arroyo, Esq. (NH Bar #265810)
arroyoc@cwbpa.com
Morgan G. Tanafon, Esq. (NH Bar #273632)
tanafonm@cwbpa.com
Cleveland, Waters and Bass, P.A.
2 Capital Plaza, P.O. Box 1137
Concord, NH 03302-1137
(603) 224-7761

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: 4/25/22

/s/ Morgan G. Tanafon
Morgan G. Tanafon, Esq.

EXHIBIT A

Tweet

SaveForestLake
@SaveForestLake1

When Casella weaponizes the legal system: img1.wsimg.com/blobby/go/3a99… A sad reality, meant to silence those who oppose them. NH deserves better than this company. @grayno2 @nancywestnews @aropeik @amyWMUR @KlandriganUL @BostonGlobe @KirstiePecci @pfasprojectnh @WendyENThomas

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Replying to @SaveForestLake1 @grayno2 and 8 others
That's too bad but not a surprise. These GQP folks play dirty as their signs imply.