

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Case Number: 217-2023-CV-00285

Casella Waste Systems, Inc.

v.

Jon Swan

**ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS
AND REQUEST FOR JURY TRIAL**

Defendant Jon Swan, by and through his attorneys, Orr & Reno, P.A., hereby answers the Plaintiff's Second Amended Complaint, approved by the Court on March 27, 2024. He states in answer:

1. Admitted.
2. Admitted.
3. Admitted in part, denied in part. Mr. Swan admits the first sentence, but denies the remainder as speculation. By way of further answer, Mr. Swan asserts that the Litigation, so-called, arose because Mr. Swan was an effective advocate against the Plaintiff's dangerous landfill projects (active and proposed) and it was the intention of the Plaintiff to litigate him into silence.
4. Admitted. By way of further answer, Casella, not Mr. Swan, was the first party to disclose the existence and specific terms of the settlement agreement quoted, in the context of this legal action; it continues to do so, including in open court with non-parties in the gallery. As to the quote, the settlement agreement speaks for itself.
5. Admitted in part, denied in part. Mr. Swan admits that counsel spoke about how Swan could acknowledge that the case had concluded without disclosing the terms of the

agreement. Mr. Swan denies that he ever disclosed the terms of the agreement, or the existence thereof, in any context until the Plaintiff brought this lawsuit and broadcast the settlement agreement to the public. As to the remainder of the allegation in this paragraph the communications speak for themselves and any editorial interpretation is denied.

6. Admitted in part, denied in part. Mr. Swan admits that an article appeared in the Caledonian record as alleged. Mr. Swan denies that the reporter who wrote the article reported “only sporadically” on the Litigation while it was pending, as well as the inference that the Plaintiff unreasonably draws from that false assumption. Mr. Swan admits that he has been interviewed by the same reporter multiple times, and, like the Plaintiff, can only speculate as to the reporter’s state of mind (allegations concerning which must therefore be denied).

7. Denied. The newspaper story speaks for itself and Plaintiff’s interpretation is an unreasonable one. Mr. Swan did not “know” that the newspaper story misrepresented the nature of the resolution of the Litigation at mediation; the newspaper story says what it says and Mr. Swan did not write it, edit it, or contribute to it except to say, as agreed, “No comment.”

8. Denied to the extent that the allegation implies Mr. Swan had a duty to affirmatively correct a newspaper story he did not comment on, and could not even discuss further without breaching his agreement with the Plaintiff. Further denied to the extent Mr. Swan had a duty not to post a newspaper story and a photograph of him and his attorney holding a Save Forest Lake sign and smiling. By way of further answer, Mr. Swan could, without breaching the agreement, post a photograph of him and his attorney smiling with a Save Forest Lake sign; and, posting a link to a newspaper article he did not write, edit or contribute to except to say, “no

comment” does not mention either the terms of the settlement agreement or its existence. Taken in its totality, this allegation is denied.

9. Admitted in part, denied in part. Mr. Swan admits that the parties’ settlement agreement imposed obligations on him. He denies the remainder of the allegations. He did not precipitate the newspaper article, write it, edit it or comment to the reporter. He made no representations, implied or otherwise, about the resolution of the Litigation, and therefore did not violate it. Nor did he violate any “agreement” between counsel “regarding what he could say about the docket markings if he posted them.”

10. Denied to the extent the agreements speaks for itself. Denied as to the relationship between NCES and Casella for lack of definitive knowledge and belief.

11. Denied insofar as this allegation purports to interpret a contract and is therefore a legal assertion.

12. Admitted in part denied in part. This allegation is admitted except insofar as the letter from DES to NCES is alleged not to identify any source from which came the PFAS that DES detected in the NCES landfill monitoring wells. These wells were installed to monitor groundwater for the purpose of detecting contaminants released from the NCES landfill, and contaminants were found in them.

13. Admitted that the quote is from a comment by Mr. Swan.

14. Denied. By way of further answer, the Plaintiff’s allegation implies that the PFAS and/or other contaminants detected in the monitoring wells that had been specifically installed to monitor the byproduct of NCES’ landfill must have come from some other source than the NCES landfill, which is denied. Mr. Swan alleges, by way of further answer, that the data and

evidence in this matter will show that the PFAS and possibly other contaminants that are regulated by the Environmental Protection Agency and DES so that they not be exposed to humans due to their detrimental effects on the human health, are being released by NCES' landfill. Further, the groundwater monitoring well network is located entirely on property owned by NCES, which is where the contaminants were found. Thus, Swan's comments are consistent with the good faith implementation of the parties' settlement agreement.

15. Denied. "Bad stuff" is inherently a statement of opinion, and the letter from DES to NCES factually supports Mr. Swan's online comment. Thus, his comments are consistent with the good faith implementation of the parties' settlement agreement.

16. Admitted in part, denied in part. Mr. Swan admits that he made a post concerning an October 21, 2019 letter from DES to NCES. Denied to the extent that the Plaintiff's allegation purports to interpret and restate a letter that speaks for itself. Furthermore, the so-called "former unlined landfill" is on NCES property and the new landfill was constructed on top of it; hence, Casella is responsible for contaminants released by it and any suggestion otherwise is false.

17. Admitted in part, denied in part. Mr. Swan admits the quote that was made by him but denies that his statements were false or a violation of the good faith implementation of the parties' settlement agreement. By way of further answer, Casella when it acquired the property in question assumed responsibility and liability for the "former unlined landfill located close to the new landfill site." Casella literally constructed its new Stage II atop the "former unlined landfill." *See* attached Exhibit A.

18. Admitted in part, denied in part. Mr. Swan admits the quote that was made by him but denies that his statements were false or a violation of the good faith implementation of the parties' settlement agreement.

19. Denied. This allegation, repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

20. Denied.

21. Denied.

22. Admitted in part, denied in part. Mr. Swan admits the quote that was made by him but denies that his statements were false or a violation of the good faith implementation of the parties' settlement agreement.

23. Denied. The allegation that "the NCES landfill is not releasing contaminants," repeated more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

24. Denied.

25. Denied. By way of further answer, it appears the allegation should read "Mr. Swan" not "Casella."

26. Admitted in part, denied in part. Mr. Swan admits the quote was made by him but denies that the allegations were false or a violation of the good faith implementation of the parties' settlement agreement. Nor does this allegation "impute conduct" to the Plaintiff.

27. Denied. The allegation that “the NCES landfill is not releasing contaminants,” repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella’s and NCES’ landfills, new and old, lined and unlined.

28. Denied.

29. Admitted in part, denied in part. Mr. Swan admits that he created a Facebook event page for a “Close the Dump Protest.” Mr. Swan denies the suppositions alleged by the Plaintiff in this paragraph, and denies that this communication was a violation of the good faith implementation of the parties’ settlement agreement.

30. Denied. The document described speaks for itself. By way of further answer “leaking” is a failure to contain.

31. Denied. The allegation that “the NCES landfill is not releasing contaminants,” repeated more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella’s and NCES’ landfills, new and old, lined and unlined.

32. Denied. The document described speaks for itself. The allegation that “the NCES landfill is not releasing contaminants,” repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella’s and NCES’ landfills, new and old, lined and unlined.

33. Admitted in part, denied in part. Mr. Swan admits that he published a link to a video clip by Cinde Warmington, but denies the description of the Warmington remarks because they speak for themselves.

34. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement. The allegation that "the NCES landfill is not releasing contaminants," repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

35. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement.

36. Denied. The allegation that "the NCES landfill is not releasing contaminants," repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

37. Denied. This allegation, repeated more than 14 times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

38. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement.

39. Denied. Mr. Swan denies that the alleged statements impute conduct to NCES or violate the good faith implementation of the parties' agreement.

40. Denied. The statements speak for themselves and relate facts that have been established by DES and the Plaintiff's own environmental testing. Recounting the Plaintiff's own admissions, and the conclusions of the state environmental agency, is not a violation of the good faith implementation requirements of the parties' agreement.

41. Denied.

42. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement.

43. Denied that the statement is false. The allegation that "the NCES landfill is not releasing contaminants," repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

48. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement.

49. Denied. The allegation that "the NCES landfill is not releasing contaminants," repeated substantively more than a dozen times in this amended complaint, contradicts the hard

facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

50. Denied.

51. Denied.

52. Denied.

53. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement.

54. Denied. The allegation that "the NCES landfill is not releasing contaminants," repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

55. Denied.

56. Denied.

57. Admitted in part, denied in part. Mr. Swan admits that he made the statement alleged. But Mr. Swan denies that it imputes conduct to NCES or violates the good faith implementation of the parties' agreement.

58. Denied.

59. Denied. The allegation that "the NCES landfill is not releasing contaminants," repeated substantively more than a dozen times in this amended complaint, contradicts the hard facts concerning pollution being released from Casella's and NCES' landfills, new and old, lined and unlined.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

Defendant objects to the request to determine that Swan has breached the agreement;

Defendant objects to the demand for a damages award;

Defendant objects to further relief.

Affirmative Defenses

I. Plaintiff fails to state a claim upon which relief can be granted.

II. The March 12, 2023 Agreement bars Jon Swan from disclosing the “terms and existence of this Agreement.” The conduct alleged by the Plaintiff does not violate this provision of the Agreement.

III. The Plaintiff, by this filing, has—in clear violation of the Agreement—advertised the existence of the Agreement, and its most material terms, *i.e.*, confidentiality and a liquidated damages clause, including the amount of the agreed upon liquidated damages. This constitutes a breach of the agreement by the Plaintiff in the first instance, excusing any failure to perform by Mr. Swan (if any).

IV. Unclean Hands.

V. Waiver, estoppel, and acquiescence.

VI. Failure to preserve confidentiality on the part of the Plaintiff.

VII. Statements by Mr. Swan were constitutionally protected opinion based on disclosed facts.

VIII. Statements by Mr. Swan were true and accurate and therefore not actionable under the terms of the Agreement.

IX. The Agreement, as interpreted by the Plaintiff, violates public policy because it makes true statements actionable when it was never the intention of the parties to require Mr. Swan to cabin undeniably true statements as though they were statements of opinion.

X. Plaintiff is only entitled to nominal damages.

XI. The liquidated damages provision in the Settlement Agreement caps damages available to the Plaintiff to \$5,000 in total.

Counterclaims

1. Counterclaim Plaintiff Jon Swan lives at 25 Cashman Road, Dalton NH 03598.

2. Counterclaim Defendant Casella and its affiliates and subsidiaries (“Casella”) are as described at Complaint at ¶1.

3. Jon Swan and Save Forest Lake reached a confidential settlement agreement (the “Agreement”) with Casella to conclude Case No. 217-2020-CV-212 on May 11, 2023. The Agreement required the parties not to disclose “the terms and existence of this Agreement”:

The Parties agree that the terms and existence of this Agreement shall be confidential. No Party shall disclose the terms set forth in this Agreement to any person, other than members of a Party’s immediate family, legal counsel, or tax advisors, or by order of the court, and none of these persons shall disclose the terms of this Agreement.

Casella Complaint at ¶4.

4. The parties in 271-2020-CV-212 filed neither party docket markings a few days later.

5. A newspaper reporter wrote a story about the filing of neither party docket markings and asked Mr. Swan for comment. *See* Exhibit 2 to Casella Complaint.

6. In response to the reporter's request, Mr. Swan said, "No comment" and did not disclose the existence or terms of the Agreement.

7. The resulting newspaper story did not mention the existence of the Agreement.
Exhibit 2.

8. The resulting newspaper story did not mention the terms of the Agreement.
Exhibit 2.

9. The resulting newspaper story did not quote Mr. Swan referencing the existence of the Agreement or its terms. Exhibit 2.

10. There is no allegation in Casella's Complaint that Mr. Swan's quotes in the newspaper story, drawn from ancillary written communications, breach the Agreement. Casella Complaint, generally.

11. Mr. Swan posted a link to the story together with a photograph of him and his attorney holding a Save Forest Lake sign. Exhibit 3 to Casella Complaint. The posted link did not disclose the existence of the Agreement nor the terms of the Agreement.

12. On May 25, 2023, Casella then initiated this action, publicizing expressly the existence, nature and material terms of the Agreement for the first time.

13. On information and belief, Casella, and/or its agents or employees, disclosed the existence, nature and/or terms of the agreement to third parties prior to the commencement of this action on May 25, 2023 and prior to the Caledonian Record article attached to Casella's complaint in this matter.

14. The Agreement did not bar Mr. Swan from posting a link to any newspaper stories. *See* Motion to File Under Seal, Exhibit A.

15. The Agreement did not bar Mr. Swan from posting a picture of himself and his attorney. *See* Motion to File Under Seal, Exhibit A.

16. The Agreement did not bar Mr. Swan from referencing, posting or alluding to public court filings. *See* Motion to File Under Seal, Exhibit A.

17. The Agreement did not bar Mr. Swan from continuing to communicate publicly in opposition to Casella’s plans to develop a landfill in Dalton, N.H. *See* Motion to File Under Seal, Exhibit A at §2.

18. When asked by the reporter for comment, Mr. Swan replied, “No comment.” Mr. Swan did not comment for the newspaper story.

19. Mr. Swan did not comment about the newspaper story in his post after it was published.

20. Casella makes no direct allegation that Mr. Swan disclosed the existence or terms of the Agreement to any party.

21. Casella instead speculates in a conclusory manner that it is “reasonable to infer that Swan steered the reporter to the review the court docket.” Complaint at ¶6.

22. Casella also alleges in a conclusory manner that Mr. Swan’s internet post “taken in its totality, was tantamount to a statement by Swan that Casella had simply dropped the Litigation and that he had prevailed.” Casella Complaint at ¶8.

23. Casella alleges approximately 16 additional statements that “breached” the parties’ agreement since it first violated the agreement on or before May 26, 2023. *See* Second Amended Complaint. Those allegations are denied, but they constitute a bad faith use of the agreement to quell Mr. Swan’s speech.

24. Counterclaim Defendant Casella is trying (again) to use the courts as a cudgel against Mr. Swan, to punish him from speaking, and chill him from future speech.

25. Casella's latest claim does not state a claim for relief. It is arbitrary, capricious, vexatious and oppressive and calculated to burden Mr. ~~Casella~~. (should read Swan)

26. Casella's latest action is an abuse of the power of the Courts and a waste of judicial resources.

Count I: Breach of Contract

27. The foregoing allegations are incorporated herein by reference.

28. Casella breached the parties' settlement agreement on or before May 25, 2023 by publicizing to third parties the existence, terms and nature of the parties' settlement agreement.

29. Mr. Swan is entitled to a jury verdict finding Casella in breach and corresponding relief, up to and including damages, rescission and relief from further obligation under the agreement following Casella's breach.

Count II: Breach of the Covenant of Good Faith and Fair Dealing

30. The foregoing allegations are incorporated herein by reference.

31. Implicit in any contract is the covenant of good faith and fair dealing.

32. By first breaching the settlement agreement itself when it publicized the existence, nature and terms of the settlement agreement to third parties on or before May 25, 2023, Casella gave up its rights under the agreement to enforce the speech restrictions it has alleged in its Second Amended Complaint.

33. Casella's use of the provisions of the settlement agreement that are favorable to Casella while violating the provisions of the settlement agreement that it chooses to ignore is a breach of the covenant of good faith and fair dealing.

34. Mr. Swan is entitled to any and all relief available to him for a breach of the covenant of good faith and fair dealing, up to and including damages (of any kind whatsoever) and rescission.

Count III: Attorney's Fees and Costs

35. Mr. Swan is entitled to relief in the form of attorney's fees under *Harkeem v. Adams*, 117 N.H. 687 (1977).

36. Mr. Swan is also entitled to relief under RSA 507:15 ("If, upon the hearing of any contract or tort action, it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus \$1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the supreme court committee on professional conduct.").

WHEREFORE, the Defendant/Counterclaim Plaintiff Jon Swan requests that the Court:

- A. Dismiss Casella's Second Amended Complaint;
- B. Hold a jury trial on all claims;
- C. Enter judgment in Mr. Swan's favor in an amount within the jurisdiction of the Court;
- D. Declare the settlement agreement to be rescinded due to Casella's conduct;
- E. Award attorney's fees and all other appropriate relief under RSA 507:15; and
- F. Award attorney's fees under *Harkeem v. Adams*;
- G. Grant such other and further relief as the Court deems to be just and equitable.

Respectfully Submitted,

JON SWAN

By his Attorneys,

ORR & RENO, P.A.

Date: April 25, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded, this day, to all parties of record, via the Court's electronic file & serve system.

/s/ Jeremy D. Eggleton

4824405

EXHIBIT A

