THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Casella Waste Systems, Inc.

v. Docket #217-2023-CV-00285

Jon Swan

PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO COMPEL[1]

NOW COMES Plaintiff Casella Waste Systems, Inc., by and through its undersigned counsel, hereby objects to Defendant's Motion to Compel and states as follows:

I. FACTS

This is a breach of contract action arising out of the Defendant's breach of the settlement agreement (the "Settlement Agreement") executed by the parties in settlement of an underlying defamation lawsuit. *See Casella Waste Systems, Inc. v. Jon Swan et. al.*, Merrimack County Docket No. 217-2020-cv-00212. The terms of the Settlement Agreement, entered into by the Parties on May 11, 2023, are neither complex nor ambiguous. Paragraph two of the Settlement Agreement states that "Swan agrees that in *any* public communication in which he imputes conduct or intent to Casella, he will (a) disclose the source of the facts on which he relies for such imputation; and (b) preface such communication with words such as "I understand," "I think," "In my opinion," or similar phrasing calculated to convey that the communication is an expression of opinion or belief rather than a statement of fact." *See* Exhibit A to Motion to File Under Seal dated May 25, 2023 (emphasis added). As alleged in the Second Amended Complaint, Defendant failed to comply with this carefully negotiated provision. In the event of

[1] Plaintiff is contemporaneously filing a motion to seal this objection based on the court's order dated October 10, 2024.

breach of the Settlement Agreement, Swan promised to pay Casella five thousand dollars as liquidated damages. *Id.* Swan repeatedly violated the terms of the Settlement Agreement and this lawsuit for breach of contract followed.

In discovery, Defendant has sought to obtain a broad array of internal documents and communications from Plaintiff, none of which have anything to do with whether Defendant complied with the restrictions Defendant agreed to in the Settlement Agreement concerning his (then) future public statements about Plaintiff. For example, Swan seeks to obtain from Plaintiff: email communications and other electronically stored information that reflect communications by Casella employees and others regarding him; documents and electronically stored information that contain any information reflecting testing for, or the detection of, contaminants or PFAS in air, soil, groundwater, the SEEP, and/or surface water at Casella's NCES landfill development. Furthermore, Defendant seeks documents that pre-date the May 11, 2023 Settlement Agreement, and cannot possibly be relevant to the question of whether Defendant breached the Settlement Agreement. Likewise, communications and reports that pre-date the Settlement Agreement cannot be relevant to Defendant's counterclaims.

In the spirit of comity and advancing the litigation, Plaintiff agreed to search for responsive documents and has produced limited information to Defendant that relates to Defendant's claim that Plaintiff breached the confidentiality provisions of the Settlement Agreement. That search produced more documents than Plaintiff provided to Defendant; however, the withheld documents have no relevance whatsoever to this dispute and are not likely to lead to the discovery of admissible evidence.

Defendant's Motion to Compel rests, in large part, on the theory that–notwithstanding the plain text of the Settlement Agreement to the contrary–the Settlement Agreement must be

interpreted in a manner that excuses Defendant from liability whenever he utters what he calls an "objectively verifiable truth."[2] He asserts it would be "unreasonable" to enforce the Settlement Agreement's liquidated damages provision for such statements. In effect, Defendant attempts to avoid the clear meaning of the words of settlement he agreed to by transforming the well-settled principle that courts interpret contracts according to the plain meaning of their terms into a broad license to rewrite the Settlement Agreement entirely. Rather than rely on a reasonable interpretation of the text of the Settlement Agreement, Defendant argues that the agreed-upon language now strikes him as "unreasonable" and seeks to avoid the plain terms of the Settlement Agreement. Because New Hampshire law does not permit courts to "make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably," this Court should reject Defendant's argument and deny the Motion to Compel.

II. ARGUMENT

A. Discovery Standard

Pursuant to Super. Ct. R. 21(b) and well-established New Hampshire law, the scope of discovery is not unlimited and can be restricted to prevent overreach, undue burden, and fishing expeditions. Rule 21(b) makes clear that discovery is only permitted for non-privileged matters that are directly relevant to the claims or defenses in the case, and that the requesting party must demonstrate that the information sought is reasonably calculated to lead to the discovery of admissible evidence. In *New Hampshire Ball Bearings, Inc. v. Jackson*, 158 N.H. 421 (2009), the

[2] Defendant's motion asks the Court to impose various forms of third-party supervision on the discovery process. As reflected in this pleading, Plaintiff continues to maintain that the discovery sought by Defendant is not relevant and does not need to be produced. To the extent that the Court makes any ruling requiring Plaintiff to produce material sought by Defendant, Plaintiff maintains that no third-party intervention in the discovery process is necessary or warranted. Counsel for the Plaintiff is presumably well-known to the Court and any Order of this Court will be complied with in its entirety and in a timely fashion.

Court reaffirmed the longstanding rule that trial courts have broad discretion to limit discovery to only those materials strictly necessary to support a claim or defense, explicitly warning against "open-ended fishing expeditions" and unnecessary access to electronic data or records beyond what is specifically relevant to the disputed issues. *Id.* at 430. These principles require that discovery be narrowly tailored to avoid unnecessary production of documents, limit electronic data requests to only those that have a demonstrated connection to the claims, and exclude any materials that are cumulative, duplicative, or speculative in their potential relevance. The law thus makes clear that determination of the proper scope of discovery turns on the nature of the case. And "[i]t is clear…that the information sought must be relevant *to the pending action.* A party may not use discovery in one case to ascertain the merits of another." 4 Gordon J. MacDonald, New Hampshire Practice: Wiebusch on New Hampshire Civil Practice and Prcedures §4:22 (4th ed.2014) (emphasis added). The same limitation necessarily holds true where a party seeks a fishing expedition to produce information to use for an extra-judicial purpose, such as Defendant's "long and public opposition" to Plaintiff's activities. *Mo to Compel* at 9.

B. Freedom to Contract and Contract Interpretation

First, New Hampshire law is crystal clear that parties are free to settle disputes "on any terms they desire and that are allowed by law." *Moore v. Grau*, 171 N.H. 190, 194 (2018); *Poland v. Twomey*, 156 N.H. 412, 414–15 (2007). When parties choose to resolve litigation via a private settlement contract, courts apply ordinary contract principles to determine the enforceability of those terms. *Id.*; *Strike Four, LLC v. Nissan N. Am., Inc.*, 164 N.H. 729, 744 (2013). Absent some showing that a contractual term offends public policy, is unconscionable, or is ambiguous, "parties are bound by the terms of an agreement freely and openly entered

into." *Mentis Scis., Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 591–92 (2020); *Olbres v. Hampton Co-op. Bank*, 142 N.H. 227, 233 (1997).

Second, under well-established precedent, courts focus on the words used by the parties in the instrument and give "the language used by the parties its reasonable meaning…." *Stone v. City of Claremont*, 2024 N.H. 11, ¶ 12 (citing *Town of Pembroke v. Town of Allenstown*, 171 N.H. 65, 69 (2018)); *Monadnock Regional School District v. Monadnock District Education Association, NEA-NH,* 173 N.H. 411, 419 (2020); *Pro Done, Inc. v. Basham,* 172 N.H. 138, 142 (2019); *Crowly v. Town of Loudon,* 162 N.H. 768, 771 (2011). As long as the contract language is "unambiguous," the court must "determine the parties' intent from the plain meaning of the language used." *Town of Pembroke*, 171 N.H. at 70 (2018).

Third, and crucially, "courts cannot improve the terms or conditions of an agreement that the parties themselves have executed or rewrite contracts merely because they might operate harshly or inequitably." *Pelissier v. GEICO General Insurance Company,* 2024 N.H. 60, ¶ 9; *Zannini v. Phenix Mutual Fire Insurance Co.*, 172 N.H. 730, 734 (2019); *Mentis Sciences, Inc. v. Pittsburgh Networks, LLC,* 173 N.H. 584, 591 (2020); *Rizzo v. Allstate Ins. Co.*, 170 N.H. 708, 713, 185 A.3d 836 (2018); *Mills v. Nashua Fed. Sav's and Loan Assoc.,* 121 N.H. 722, 726 (1981). In other words, courts must allow the parties to reap the benefit of their bargain.

C. The Construction of the Settlement Agreement Advanced By Defendant Is Based On An Incorrect Interpretation of New Hampshire Law.

Defendant urges the Court to abandon the well-established premise that *the words of the agreement* must be construed reasonably into a requirement that the *outcome produced by those words* be reasonable. Nothing in New Hampshire law entitles the Defendant to obtain a judicial re-write of the words he agreed to in the Settlement Agreement. Indeed, as cited *infra,* New Hampshire law expressly provides that Courts cannot rewrite contracts that the parties

themselves have executed merely because they may operate harshly. Yet that is precisely what Defendant seeks here: A judicial re-write of the Settlement Agreement to require the agreed upon terms to apply in a way that he deems now "reasonable."

Defendant states that "the theory behind [his] defensive position is that an agreement must be interpreted reasonably" and that it would be unreasonable "to impose any amount of liquidated damages for an objectively verifiable truth." *Mo. to Compel* at 3. This argument misconstrues relevant New Hampshire law. In fashioning his argument, Defendant ignores the Supreme Court's repeated statement that courts must give "*the language used by the parties* to the agreement its reasonable meaning…." See, *infra.* Instead, Defendant asks this Court to apply a standard of reasonableness to the results the terms of the Settlement Agreement produce. But this is just a covert way of avoiding the plain meaning of the words used by the parties and an attempt to have this Court rewrite the Settlement Agreement.

The meaning of the words used in the Settlement Agreement could hardly be clearer. The relevant provision provides:

> Except in an instance in which Swan repeats or relays a public communication by an independent source, other than Swan, Swan agrees that in any public communication in which [Swan] imputes conduct or intent to Casella he will (a) disclose the source of the facts on which he relies for such imputation' and (b) preface such communication with words such as "I understand", "I think", "In my opinion", or similar phrasing calculated to convey that the communication is an expression of opinion or belief rather than a statement of fact."

The terms of the Settlement Agreement are clear. First, the Settlement Agreement excepts from liability, public communications in which Swan is repeating something he obtained from an independent source. That exception is not at issue here. Second, by its plain terms, the scope of the Settlement Agreement extends to "*any*" public communication in which Swan imputes conduct or intent to Casella. The use of the word "any" indicates that the Parties intended the

agreement to have broad–indeed universal–reach. And each of the allegations contained in the Complaint meet this agreed-upon "conduct or intent" standard. If Defendant believed that his statements did not, in fact, impute conduct or intent to Casella he would inevitably have moved to dismiss those claims. He has not done so. Third, the Settlement Agreement requires Defendant to disclose the source of facts on which he relies and to preface such communication with words indicating his public communication is an expression of opinion or belief. As detailed in the Complaint, Defendant failed to do this and is thus liable for breaching this requirement.

Defendant argues that "it would be unreasonable for the parties, the court or the jury to interpret the parties' settlement agreement to impose any amount of liquidated damages for an objectively verifiable truth." But nothing in the Settlement Agreement provides an exception to liability for "objectively verifiable" truths. Defendant hangs his entire claim to discovery on this "theory behind his defensive position." And he does this despite the absence of any suggestion in the Settlement Agreement that there is such a truth defense, as there would be in a defamation lawsuit. His motion to compel provides no textual argument and no case law that support his claim that there it is somehow unreasonable not to infer the presence of such a provision.

Even if Defendant's claim that the Settlement Agreement itself must be reasonable to be enforced, rather than the interpretation of the words, his argument would still fail. In support of his claim that it is unreasonable to subject him to damages for stating an "objectively verifiable truth," Defendant posits the hypothetical statement, "Casella's trucks are out picking up trash this morning." But he offers no theory to explain why it would be unreasonable for liability to attach to the making of this statement if it violated the express terms of the Settlement Agreement (as indeed it would). After all, the Parties could have reached an agreement by which Defendant agreed to say *nothing* about Casella whatsoever. Indeed, that kind of agreement is

entered into every day by parties in varying contexts, including settlement of defamation lawsuits. If it would not have been unreasonable for Defendant to agree to say nothing at all about Casella, and for liability to attach if he did, how is it now unreasonable for the Defendant to be liable for breaching an agreement that provides him with a broader avenue to discuss the company, albeit with negotiated limitations attached? Nothing in Defendant's pleadings offers or suggests any reason why his claimed right to state "objective truths" is required in the face of Settlement Agreement language that contains no such provision.

In fact, Defendant is simply asking this Court to re-write the Settlement Agreement so that he has some basis to support his claim that the information sought in discovery is relevant. But the law is clear: This Court cannot re-write the Settlement Agreement, even if Defendant now believes that it operates against him in an inequitable fashion. The words of the Settlement Agreement plainly and unambiguously do not provide for an exception to the Settlement Agreement's limits due to a claim that a statement is based on "objectively verifiable truth".

Absent Defendant's "truth-based" theory of defense, the utter irrelevance of the information sought in discovery becomes immediately apparent. The simple fact is that the information he seeks has nothing whatsoever to do with the question of whether he breached the Settlement Agreement and nothing whatsoever to do with holding him liable for liquidated damages arising from his breach.

Defendant's discovery requests are little more than a wildly overbroad fishing expedition in which he seeks to obtain internal documents and communication to use in his ongoing against Casella Waste Systems, Inc. The Court should not permit the discovery process in this simple breach of contract case to be used for that improper purpose.

Finally, the discovery requested relating to Defendant's counterclaim should be denied. The only time frame relevant to the counterclaims is the period from the date of the Settlement Agreement, May 11, 2023, to the filing of Plaintiff's complaint. Plaintiff conducted a search of its emails using the terms and parties Defendant identified. Plaintiff and disclosed the documents that were potentially relevant. Any of the other documents that were responsive to the search terms were plainly not discoverable. Defendant, however, would have this court require that any documents that are responsive to search terms must be disclosed regardless of whether such documents are discoverable relevant to the action or likely to lead to the discovery of relevant evidence. Such a request is a preposterous attempt to seek confidential business information that has no bearing on whether Plaintiff breached the confidentiality portion of the Settlement Agreement.

III. Conclusion

The Court must reject Defendant's attempt to recast "reasonableness" as a license to nullify the plain text of the Settlement Agreement and to enlist this Court in his effort to re-write it. The Settlement Agreement is presumed valid and enforceable according to its terms, and there is no legal basis to treat the liquidated damages clause as void for allegedly reaching communication that violate its express terms, even ones that purport to communicate "objectively verifiable truths." Defendant's Motion to Compel should be **DENIED** in its entirety.

WHEREFORE**,** Plaintiff respectfully requests that this Court:

1. Deny Defendant's Motion to Compel in its entirety; and
2. Grant such further relief as is just and equitable.

Respectfully submitted,
CASELLA WASTE SYSTEMS, INC.
By Its Attorneys,

Date: March 10, 2025

By: */s/ Jacob M. Rhodes*

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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: March 10, 2025

/s/ Jacob M. Rhodes
Jacob M. Rhodes, Esq.

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