THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Case No. 217-2023-CV-00285

Casella Waste Systems, Inc.

v.

Jon Swan

JON SWAN'S REPLY TO CASELLA WASTE SYSTEMS, INC,'S OBJECTION TO MOTION TO COMPEL

The Plaintiff Casella objects to the Defendant's Motion to Compel by piously reciting New Hampshire law of contract, which calls for the courts to "give the language used by the parties its reasonable meaning … [and] determine the parties' intent from the plain meaning of the language used." Objection to Motion to Compel at 5 (*quoting Town of Pembroke v. Town of Allenstown*, 171 N.H. 65, 70 (2018) and *Stone v. City of Claremont*, 2024 N.H. 11). Casella gravely reminds the Court that "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." *Id*. (quoting *Pelissier v. GEICO Gen. Ins. Co.*, 2024 N.H. 60).

After wagging its finger at the Defendant for asserting his rights in discovery in this vexatious action by Casella to silence his advocacy against its unwanted and unneeded North Country landfill projects, existing and planned, the Plaintiff insists that "courts must allow the parties to reap the benefit of their bargain." *Id*. Conspicuously, however, this was not the argument made by the Plaintiff when it filed the breach of contract action against Mr. Swan for allegedly violating the non-disclosure terms of its settlement agreement with him because he posted a newspaper story announcing the end of Casella's first litigation against him.

The Court will recall that Mr. Swan moved for summary judgment in this matter shortly after the Plaintiff filed its action in May 2023. The Plaintiff's original Complaint, filed just two weeks after the parties' settlement agreement in a prior action, alleged that Mr. Swan breached the parties' settlement agreement by electronically posting a photograph of Mr. Swan and his undersigned counsel at the offices of Orr & Reno, and linking to a newspaper article from the Caledonian Record that reported on the termination of the parties' lawsuit entitled "Casella Drops Defamation Lawsuit Against Landfill Opponent." *See* Complaint at Exhibit 3. Casella alleged in its Complaint that this post breached the following term of the parties' 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.

See (original) Complaint at ¶4.

The Court will also recall that Mr. Swan moved for summary judgment, arguing that neither the Facebook post, nor the linked article, "disclose[d] the terms set forth in this Agreement" nor even the "existence of this Agreement." *See* Motion for Summary Judgment, July 7, 2023. Even a cursory read of the article and the social media post reveal no identification of the parties' Agreement or its terms. *See* (original) Complaint at Exhibit 2, 3. Thus, on its face, based on the "plain meaning of the language used," *see* Objection to Motion to Compel at 5, Casella's claim should have been dismissed. Nevertheless, Casella argued that its claim should survive because of *inferences* a reader might draw from either Mr. Swan's post or the article itself. *See* (original) Complaint at ¶8 ("This post, *taken in its totality*, was *tantamount to* a statement by Swan that Casella had simply dropped the litigation and that he had prevailed.")(emphasis added).

Somewhat incredibly, the Court agreed with Casella that the record could be construed to permit the claim because "the Court cannot determine the extent to which Swan may have revealed information to [the article author] Blechl in violation of the Agreement, how the headline from the article was draft on his social media post, or *what a reasonable person would have understood Swan to convey in the post*." See Order of December 14, 2023 at 4 (the "Summary Judgment Order at ___"). Similarly, the Court asked, "[W]as Swan's social media post linking to an article which contained alleged misrepresentations of the Agreement and included a picture where he is smiling with his attorney and holding a 'Save Forest Lake' sign a reasonable exercise of discretion in his performance under the Agreement? The record is devoid of any statements from Swan about his intent in posting the link or the extent to which he typed out the headline or merely linked to the article on his post." Summary Judgment Order at 5. As a consequence, "genuine disputes of material fact preclude summary judgment." *Id*. This, despite the facts that (a) the materials submitted by Casella in support of its claims *never once mentioned* the "terms or existence" of the parties' Settlement Agreement—which was, by any objective measure, the plain language of the parties concerning the scope of what the parties could *not* talk about; and (b) the reporter who drafted the article testified via affidavit that Mr. Swan declined to comment when asked to comment for the article. In short, he did exactly what the Agreement required of him on its face. Yet the Court left the question of whether Mr. Swan's statements violated the terms of the Agreement to the ultimate finder of fact in this case: the jury.

If that is the case regarding Casella's claim of breach arising from Mr. Swan's reposting of a newspaper article that did not mention the "terms and existence" of the parties' Settlement Agreement, and for which he offered no input when asked, then it must also be the case here. If a jury could potentially draw reasonable inferences from Mr. Swan's express statements that are

detrimental to his case, then they must also be permitted to draw reasonable inferences from his express statements that are beneficial to his defense. If the operative question as to Casella's affirmative claims is not the plain language of the parties' Agreement, but "what a reasonable person would have understood Swan to convey in the post," *see* Summary Judgment Order at 4, then the same standard must apply to Mr. Swan's defense against Casella's amended claims in this case, which assert violations of the portion of the Settlement Agreement that relate to his characterization of publicly available facts about Casella's existing and proposed North Country landfills.

All of Mr. Swan's social media posts that Casella challenges in this case relate to his relay of public information already published by the State of New Hampshire's Department of Environmental Services or by *Casella itself* through its publications about the contamination released from its North Country landfills. By way of example, in Casella's Amended Complaint, Mr. Swan is alleged to have posted excerpts from a New Hampshire Department of Environmental Services letter sent to Casella in 2017 that addressed positive testing for PFAS and other contaminants[1] in the monitoring wells at Casella's Bethlehem landfill facility. *See* Amended Complaint at ¶¶12-13, Exhibit 4. Mr. Swan observed "From a letter to Casella from NHDES, November 1, 2017. That is a long time for NHDES to keep this under wraps… not one peep about this at any of the numerous hearings where we've been told that there are no issues and NCES is a state-of-the-art landfill. This data says otherwise. The bad stuff is not being contained and its flowing with the groundwater within the watershed of the Ammonoosuc River."

[1] These are the chemicals that contaminated the groundwater of Merrimack, N.H. at the St. Gobain facility in that community. PFOA and PFOS are contaminants that have been identified as toxic by the N.H. DES. The New Hampshire legislature has deemed these chemicals so toxic and problematic that it extended New Hampshire's normal three year statute of limitations to six years for claims relating to PFAS and related chemicals. RSA 485-H:12.

The source of this statement is a November 1, 2017 letter from DES to Casella, a public communication by a third party, which identified the release of PFAS in groundwater samples at the NCES facility, following review of groundwater monitoring data provided by Casella itself to N.H. DES—those reports are included in the material that Mr. Swan seeks in discovery. This lawsuit, like the one before it, is just an effort to silence Mr. Swan, a highly successful public activist opposed to the contamination of New Hampshire's lakes and rivers, including the release of dangerous chemicals into the environment.

A jury might reasonably determine that Mr. Swan's reposting of factual data produced by Casella itself, or the findings of N.H. DES, are "an instance in which Swan repeats or relays a public communication by an independent source" excepting the statement from the limitations of the Settlement Agreement. *See* Objection at 6 (quoting relevant provision of Settlement Agreement).[2] A jury might reasonably conclude that by repeating or posting the publicly available data produced *by Casella* under DES' supervision, he is not imputing "conduct or intent to Casella" but merely stating irrefutable facts that are in the public domain—and were put there by Casella itself.[3] Thus might the jury find that Mr. Swan did not violate the Settlement Agreement. Lastly, if Casella takes the position that a jury may infer meaning from Mr. Swan's statements that is not expressly stated in order to find that he violated the confidentiality

[2] "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 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."

[3] Whether a given statement imputes "conduct or intent" to Casella is a question for the jury. Casella states at page 7 of its Objection that "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." Casella does not explain why such a motion would be "inevitable." As the Court has already reminded the parties, when considering a dispositive motion the Court construes the well-pled facts, drawing all reasonable inferences in favor of the Plaintiff. *See* Summary Judgment Order. On that standard, a Defendant might reasonably conclude that a Complaint would survive a dispositive motion even it he believed, as Mr. Swan does, that ultimately the Plaintiff will not be able to meet its burden of proof before a jury.

provisions of the Settlement Agreement, then Casella must also accept and acknowledge that the jury could equally infer that Mr. Swan's communication is an expression of opinion or belief about irrefutable public facts, regardless of what express words he used.

In its Objection, Casella is, in essence, asking for the Court to rule that a jury could never find that Mr. Swan's recitation of Casella's *own public admissions* did not breach the parties' Settlement Agreement. Casella wants the jury to be able to draw reasonable inferences in its favor, but not to its detriment. Casella cannot have it both ways. What's good for the goose is good for the gander. If it is up to the jury whether Mr. Swan breached the Settlement Agreement based on "what a reasonable person would have understood Swan to convey" regardless of what actual words he used, then it must be up to the jury whether Mr. Swan's reposting or relaying of public communications and factual admissions by Casella breached the agreement, regardless of what actual words he used or did not use. If inferences and unspoken meaning are fair game for Casella to rely on, then they are fair game for Mr. Swan to rely on as well. The Court would be perpetrating an injustice if it permitted Casella to prove its contract case on inferences and inuendo, but denied Mr. Swan the right to defend himself on similar grounds.

For these reasons, whether Mr. Swan's statements repeat or relay publicly available communications or irrefutable public facts from an independent source is relevant to whether Mr. Swan breached the Settlement Agreement with his social media posts. From the public regulatory record concerning Casella's landfill permitting requests, it is clear that Casella has obtained, and publicly produced, reports and test results from its consultants and engineers that confirm the very facts that Mr. Swan has repeated or relayed in his social media communications. Mr. Swan has requested all such documents, including communications between Casella and its consultants and engineers, in order to procure evidence that tends to

show that his statements were the repetition or relay of public communications from an independent source, often Casella itself. Similarly, documents that substantially affirm Mr. Swan's statements tend to prove that he is not "imputing conduct or intent" to Casella, but merely stating irrefutable facts from independent sources, including Casella itself. Mr. Swan is entitled both to have the documents sought in discovery, because they are reasonably calculated to lead to admissible evidence, and to depose John Gay, former employee of Casella, concerning Casella's and others' independent public communications concerning the issues raised by Mr. Swan in his social media campaign.

Regarding Mr. Swan's counterclaim and the discovery of emails, letters or other communications in Casella's files with a list of specific individuals, using those names and certain other search terms, Mr. Swan is entitled to all responsive communications. It is not for the Plaintiff to judge what is relevant and not relevant if the communication is identified as being responsive to the discovery request. The single communication that was produced to counsel clearly referenced an ongoing existing conversation about Casella's lawsuit against Mr. Swan and his advocacy group, Save Forest Lake. As stated in Mr. Swan's Motion, there are public social media communications by at least one third party with known ties to Casella, in which that person recounted information about the parties' Settlement Agreement that it would have been impossible for him to know unless he had spoken to a Casella insider about it. He even boastfully referenced the "PR" person, presumably at Casella, whom he presumably learned the information from. In this light, to allow the fox to guard the henhouse would be inequitable and unjust.

Moreover, Casella's determination about the "relevance" of the communications usurps the role of the Court at trial. While the purpose of discovery is to produce relevant information,

it is not for the Plaintiff to unilaterally, and self-servingly, determine that one document or another, or a hundred, are not relevant. If the category of discovery—emails with individuals in the community who appear to have knowledge of Casella's disputes with Mr. Swan—is relevant, and it is, then whether a given individual email is relevant should be a decision left to the Defendant in the first instance. The Defendant will attempt to put information he believes is relevant before the jury at trial, and the Plaintiff can object if it wants to at that point. Admissibility is then up to the Court.

At the discovery stage, if the communications, letters and documents sought "appear[] reasonably calculated to lead to the discovery of admissible evidence," then they must be produced. N.H. Super. Ct. R. 21. The single document that *was* produced, which contained suggestions about an ongoing conversation concerning Casella's first lawsuit against Mr. Swan that addressed the settlement. The public social media communications by Casella allies in the community straightforwardly imply that Casella was disclosing the terms of the Settlement Agreement. Under these circumstances, Mr. Swan's requests are *manifestly* "reasonably calculated to lead to the discovery of admissible evidence." N.H. Super. Ct. R. 21.

Casella's efforts to hide the ball should only raise further questions with the Court about what it is hiding. The only fair result is for Casella to produce all responsive documents, meaning, all documents which constitute communications between any person at Casella and any of the individuals identified, and all documents which mention the key words provided by Mr. Swan in an effort at compromise. Upon review of the document bundle that is responsive to those metrics, Mr. Swan will then determine which of the communications is relevant. Obviously, the Plaintiff will have an opportunity to object to the admissibility of the documents

at trial, and argue a lack of relevance. But to be judge and jury on that issue at this point it in time suggests that Casella is hiding documents that are damaging to its case.

Furthermore, the documents produced, including especially email communications, are very likely to show which parties within or outside Casella might have information about the claims and defenses in this matter. This will give Mr. Swan an opportunity to depose them for further information.

For the reasons, Mr. Swan requests that Casella be required to produce the documents requested, conduct the electronic records search as described (including "lawsuit" and "suit" as well as all the other key words suggested), under the supervision of a third party technician, and that all production be made without redaction or any other change to the face of the documents in question. In addition, Mr. Swan requests that the Court grant his deposition of Mr. Gay, recorded by video because Mr. Gay is a former employee of Casella and not under its control day-to-day. Finally, Mr. Swan requests that the Court grant all other relief requested, including fees.

Respectfully submitted,

JON SWAN

By his Attorneys:

ORR & RENO, P.A.

Dated: March 25, 2025

By: */s/ Jeremy D. Eggleton*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was forwarded, this day, to all counsel via the Court's electronic file and serve system.

/s/ Jeremy D. Eggleton
Jeremy D. Eggleton