UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC., Plaintiff,	)))	
v.	)	Civil Action No. 2:16-cv-16
TOWN OF SHELBURNE and JOE COLANGELO in his capacity as Town Manager and Zoning Enforcement Officer, Defendants.	))))))	

VERMONT RAILWAY, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION TO ENJOIN ENFORCEMENT OF NEW "HAZARDOUS SUBSTANCES" ORDINANCE REGULATING OPERATION OF RAILROAD FACILITIES

Plaintiff Vermont Railway, Inc. (the "Railroad"), by its attorneys Downs Rachlin Martin PLLC, hereby submits a brief reply memorandum in support of its September 1, 2017, motion for an order enjoining the Town of Shelburne (the "Town") from enforcing a recently enacted Ordinance Regulating Storage, Handling, and Distribution of Hazardous Substances (the "Storage Ordinance") against the Railroad. A hearing on the motion has been scheduled for Monday, September 25, 2017.

On September 18, 2017, the Town filed an opposition brief advancing theories this Court has already rejected. The Town attached to its brief the affidavit of a member of the Town Selectboard, Colleen Parker, M.D. (Doc. 216-2) (the "Parker Affidavit"), which contains undisclosed, inadmissible, and unqualified expert opinions. The Railroad respectfully submits that the Parker Affidavit should be disregarded by the Court and, for the reasons stated in its opening motion, that the Storage Ordinance should be preliminarily enjoined.

I. THE TOWN SEEKS TO RE-LITIGATE ISSUES DECIDED IN THIS COURT'S JUNE 29, 2016 AND JUNE 28, 2017 ORDERS.

The Town's opposition brief reveals that its strategy is simply to re-argue that the activities undertaken by the Railroad on its transload facility constitute "long-term" warehousing that is purportedly not covered by the Interstate Commerce Commission Termination Act (the "ICCTA"). The Town has already been afforded ample opportunity to argue the merits of that contention, including at the Court's hearing this past spring. After receiving extensive evidence and testimony over multiple days, the Court rejected the Town's position and concluded that:

> [T]he Town does not set forth clear authority for the notion that seasonal storage would not be considered "short term." In fact, the Second Circuit has found that storage of salt for winter use constitutes transportation within the meaning of the ICCTA. See Green Mountain R.R. Corp. v. Vt., 404 F.3d 638, 640 (2d Cir. 2005). Therefore, the Court sees no reason to upset its prior determination on this question. Since newly presented evidence would not have changed the outcome of the Court's prior order on this matter, the Court denies the Town's motion for relief from judgment on this ground.

June 28, 2017 Opinion and Order at 31 (footnote omitted).[1] On August 21, 2017, the Court entered Final Judgment on the ICCTA's application to the Shelburne Transload Facility. The Town did not appeal Final Judgment and the deadline to do so has now passed.

Despite its decision not to appeal the Court's Final Judgment on this issue, the Town refuses to accept this portion of the Court's Order, maintaining that the Storage Ordinance only regulates the "long-term storage" of salt and other commodities.[2] See, e.g., Doc. 216 at 17 ("Indeed the theme of long-term storage is consistent throughout the Ordinance. . . . [I]t

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[1] On August 21, 2017, the Court entered Final Judgment that the ICCTA preempts the Town's "pre-construction permit requirement and related zoning regulations as to the Shelburne transload facility." Doc. 204. The deadline to file a notice of appeal expired on September 20, 2017. Especially in light of its decision to forego an appeal, the Town has no basis to re-litigate the issues decided in the Court's June 28, 2017 Order.

[2] This assertion strains credulity. On its face, the Storage Ordinance prohibits storage of any "hazardous substance" for more than twenty-four hours. See Doc. 209 at 5 n.9 (citing Ordinance § 5.0 which provides that "[a] material or substance is deemed to be stored when it is located on a site or in a facility for more than twenty-four (24) hours.").

specifically targets the long-term storage of hazardous substances[.]"). In cavalier terms, the Town implicitly criticizes the Court's clear holding to the contrary. See id. at 17 n.5 ("To reason that the salt storage by Plaintiff is not long-term storage is akin to reasoning that the grocery store's storage of foods is also a short-term use, because the bananas and beans (like the salt in this case) are periodically stocked and sold.").

The Town offers no justification for attempting to re-litigate issues that have been briefed and argued by the parties multiple times, decided by the Court, and for which it has already sought (and been denied) reconsideration. Because its shopworn arguments raise no new evidence or law that would change the outcome of the Court's prior Orders, which constitute the law of the case, the Railroad respectfully requests that the Court put this matter to rest once again and hold that the Storage Ordinance improperly regulates "transportation" within the meaning of the ICCTA.

II. THE STORAGE ORDINANCE DISCRIMINATES AGAINST THE RAILROAD.

The Town states in its opposition that "[t]he [Storage] Ordinance applies broadly and evenly to all Town residents." Doc. 216 at 16. This assertion, however, is inconsistent with the limitations and exemptions that the Town Selectboard carved into the Storage Ordinance, whose purpose and effect were to ensure that the Railroad's operations would be uniquely affected. Two provisions manifestly demonstrate this fact.

First, it is undisputed that the Storage Ordinance permits storage of up to 550 tons of salt. This limitation conveniently allows the Town's salt shed to operate (even though it is located adjacent to a school and to the LaPlatte river), but not the Railroad's, whose storage capacity enables the distribution of upwards of 80,000 tons of salt throughout the winter and which is in fact the only facility in the Town to which this aspect of the ordinance would apply. See Doc.

209 at 5-6, 11 & n.13, 15. These are the only two salt storage facilities in the Town of Shelburne and thus with respect to common road salt, the Ordinance is applicable exclusively to the Railroad's facility.

Second, while the Storage Ordinance prohibits the temporary storage of other commodities, such as home heating fuel transported by the Railroad, existing gas stations and "heating oil, propane or natural gas held in a storage tank on a residential or commercial property strictly for the home owner's or business owner's residential or commercial heating needs[]" are exempt. See id. at 6 (quoting Storage Ordinance § 6.0(C)). In light of these provisions, the Town cannot genuinely assert that the Storage Ordinance, which exempts The Town and an expansive group of individuals and entities from among its most onerous provisions, applies "broadly and evenly" to all Town residents.

Because the Storage Ordinance clearly discriminates against the Railroad's operations at both the Shelburne transload facility and other rail properties in the Town, and for the reasons stated in the Railroad's motion, the Railroad respectfully requests that the Storage Ordinance be preliminarily enjoined.

III. THE PARKER AFFIDAVIT CONTAINS UNDISCLOSED AND INADMISSIBLE EXPERT OPINIONS AND SHOULD BE DISREGARDED.

Finally, in adjudicating the Railroad's motion for a preliminary injunction, the Court should disregard the Parker Affidavit, which contains undisclosed and inadmissible expert opinions. In the affidavit, Dr. Parker[3] sets forth two core opinions: (1) "local hospitals," including the University of Vermont Medical Center ("UVMMC"), lack the "response

[3] According to her affidavit, Dr. Parker is a medical doctor employed by the Department of Anesthesiology for the University of Vermont Health network and practices at the Champlain Valley Physicians Hospital in Plattsburgh, New York. Parker Affidavit ¶ 2. She performed her residency at the University of Vermont Medical Center and her spouse is a Professor of Medicine at the University of Vermont in the Department of Orthopedic Surgery. Id. ¶ 3.

capabilities to deal with a mass casualty event[,]" even representing that the Pediatric Intensive Care unit at UVMMC contains "only one room and this would be insufficient to deal with a mass casualty event"; and (2) the contamination of Shelburne Bay would present "significant health risks" because it is a drinking water source for the Town. Parker Affidavit ¶¶ 5-6, 8.[4] Dr. Parker's opinions, and the manner in which they have been submitted to the Court, transgress both Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 702.

Pursuant to Federal Rule of Evidence 701, if a witness is not testifying as an expert, his or her opinion testimony must be "rationally based on the witness's perception" and "helpful to clearly understanding the witness's testimony or to determining a fact in issue" but may "not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(a)-(c). These requirements are designed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Bank of China, New York Branch v. NBM LLC, 359 F.3d 171, 181 (2d Cir. 2004) (quoting Fed. R. Evid. 701 advisory committee's notes to 2000 amendments). The Rule "also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 . . . by simply calling an expert witness in the guise of a layperson." United States v. Garcia, 291 F.3d 127, 139 n.8 (2d Cir. 2002) (quoting Fed. R. Evid. 701 advisory committee's notes to 2000 amendments).

Dr. Parker's predictions regarding the inability of "local hospitals" to respond to a hypothetical mass casualty event and the "significant health risks" presented by a hypothetical contamination of Shelburne Bay constitute classic expert opinion because they are not based

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[4] Nowhere, however, does Dr. Parker draw any explicit connection between these opinions and the Storage Ordinance. Dr. Parker avers that "[a]ccordingly, the Shelburne Selectboard has felt it important to protect the Town and its citizens from large volumes of potentially hazardous substances." Id. ¶ 7.

upon Dr. Parker's rational perception, but instead must have been based upon "scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. Throughout this long-running litigation, however, Dr. Parker has never been disclosed as an expert by the Town, and the disclosure of her opinions in a conclusory affidavit one week before this Court's hearing does not afford the Railroad an adequate opportunity to take appropriate discovery and respond to her opinions.[5] Moreover, the Railroad specifically asked the Town to identify any expert witness that it intended to call at the hearing; the Town agreed to do so, and disclosed only the opinions of an engineer, John Diego. Under such circumstances, the Town should not be permitted to circumvent the disclosure requirements of Rule 26 by proffering a member of its Selectboard as "an expert in lay witness clothing." Bank of China, 359 F.3d at 181; see also Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). For this reason alone, Dr. Parker's untimely expert opinions and affidavit should be disregarded.

In addition, Dr. Parker's opinions amount to little more than speculation, which is not admissible under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). She is an anesthesiologist and was a cosmetic physician at a medical

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[5] For example, as reported in the September 21, 2017 issue of the Shelburne News, Dawn LeBaron, UVMMC's vice president of operations and incident commander, disputes Dr. Parker's opinions, stating that "[t]he UVM Medical Center has comprehensive mass casualty response plans that have been approved by federal regulators. We also regularly participate in drills with the state of Vermont and numerous public safety agencies to ensure our readiness[.] . . . We are a certified Level 1 Trauma Center, a designation granted by the American College of Surgeons that depends in part on the capability to respond to mass casualty events[.]" The Vermont Health Department's director of emergency preparedness, response and injury prevention, Chris Bell, is quoted as saying that "[a]ll Vermont hospitals, including the Medical Center, participate in an annual cycle of training and exercises to prepare for a mass casualty and disaster situation[.]" See Mike Donoghue, *Town Official Questions Hospital Preparedness*, Shelburne News, Sept. 21, 2017, at 1. The issue is not yet available online. A copy of Mr. Donoghue's article is attached as **Exhibit A**. As further reflected in the article, James Fay, the general manager of the Champlain Water District is quoted as stating that his water district "ha[s] source protection plans" to address a potential contamination. Id.

spa. She does not identify any expertise in crisis management, disaster response, logistics, critical care or emergency medicine, or the health risks associated with the contamination of drinking water sources. She is therefore not qualified to render expert opinions on any of those subjects. See Estate of Jaquez v. City of New York, 104 F. Supp. 3d 414, 429 (S.D.N.Y. 2015) (precluding expert opinion of emergency room physician who lacked expertise in "the areas in which he seeks to opine" and commenting that "[t]he mere possession of a medical degree does not qualify one to be an expert in all medically related fields"); accord Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558, 642 (S.D.N.Y. 2007) ("Testimony on subject matters unrelated to the witness's area of expertise is prohibited by Rule 702."). Moreover, Dr. Parker does not set forth the rationale supporting her opinions, nor the facts or data, if any, she considered in forming them, with the possible exception that she performed her residency at UVMMC at some point in the past. See Estate of Jaquez, 104 F. Supp. 3d at 428 (precluding expert opinions which were "not based on any methodology, scientific research, or testing, but rather largely consist of *ipse dixit*"). Her conclusory opinions therefore fall well short of satisfying the reliability standard for admissibility under Rule 702. For these additional reasons, the Court should disregard the Parker Affidavit in adjudicating the Railroad's motion for a preliminary injunction.

CONCLUSION

For the foregoing reasons and for the reasons stated in its motion, Vermont Railway, Inc. respectfully requests that this Court enter a Preliminary Injunction enjoining the Town's enforcement of the Ordinance Regulating the Storage, Handling and Distribution of Hazardous Substances as applied to the Railroad.

Dated at Burlington, Vermont this 21st day of September, 2017.

/s/ Marc B. Heath
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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, September 21, 2017, I electronically filed Vermont Railway, Inc.'s Reply Memorandum in Support of Its Motion to Enjoin with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: /s/ Jennifer McDonald

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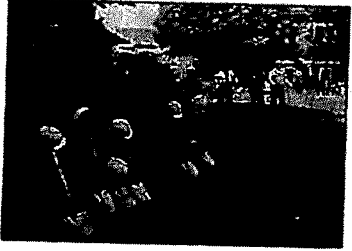
EXHIBIT A



Wake Robin groundbreaking
The senior community begins a two-year construction project.

Page 3

New year, new school district
A letter from the new school board explains the CVSD district.

Page 4

Redhawk recap
CVU had a successful week in golf, football, soccer, and volleyball.

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Shelburne News

Volume 47 Number 38 shelburnenews.com September 21, 2017

On the Ti: New citizens begin voyage as Americans

Hailing from 15 nations, they boarded the Ticonderoga Monday under blazing late-summer sunshine for a solemn but festive ceremony with about 100 friends, family and onlookers. They left an hour later as newly minted United States citizens.

U.S. District Judge William K. Sessions III presided over the 20th naturalization ceremony held aboard Shelburne Museum's iconic steamboat, administering the oath of allegiance to 18 new Americans.

Wooden deck chairs filled the aft Promenade Deck as the applicants for citizenship took their spots in the front rows before Sessions, who wore his black robe for the U.S. District Court proceeding, with the museum's

See **NEW AMERICANS** on page 6

Sun shines on Alzheimers walkers

PHOTO BY STEPHEN MEASE PHOTOGRAPHY

More than 1,000 Champlain Valley residents participated in Sunday's Walk to End Alzheimer's at Shelburne Museum, raising more than $235,000. Sponsored by the Vermont chapter of the Alzheimer's Association, the two-mile walk was one of five in Vermont this month. Participants received and "planted" pinwheel flowers in blue, yellow, orange, and purple to honor those affected by Alzheimer's disease in a Promise Garden ceremony. "It was a gorgeous day for the event, and we couldn't have asked for a better turnout from the community," said Jane Mitchell, development director of the Vermont Chapter of the Alzheimer's Association. Walks in Rutland and St. Johnsbury raised an additional $54,000. The final two walks this weekend are at Bennington's Willow Park Saturday and Lyman Park in White River Junction Sunday. To donate or register: alz.org/walk.

Town official questions hospital preparedness

BY MIKE DONOGHUE

A Shelburne Selectboard member who is employed by the University of Vermont Health Network says she believes local hospitals "do not have the response capabilities to deal with a mass casualty event."

Dr. Colleen Parker made the comment in a sworn affidavit filed this week by the Shelburne town government in its contentious lawsuit with the Vermont Railway. The issue involves the Selectboard's 3-2 decision in early August to enact a hazardous materials ordinance designed to limit the work of Vermont Railway and other businesses.

Town lawyers are using Parker's two-page affidavit in trying to block a preliminary injunction requested by the railroad in the 20-month-old civil lawsuit. A hearing is planned later this month in U.S. District Court in Burlington.

Parker wrote in her affidavit: "The capabilities in Burlington are not the same as a large urban hospital." She went on to criticize the size of the pediatric intensive care unit at the UVM Medical Center.

The unit "is only one room and this would be insufficient to deal with a mass casualty event," she said.

Parker, who works for UVM at Champlain Valley Physicians Hospital in Plattsburgh, N.Y., said she is "professionally very familiar with the capabilities of the local hospitals," especially at UVM. Parker said she did her medical residency there, and her husband, Dr. Craig Bartlett, is a professor of medicine and attending physician at UVM in the Department of Orthopedic Surgery.

The UVM Medical Center — and others involved in health and safety — took exception to Parker's comments.

"The UVM Medical Center has comprehensive mass casualty response plans that have been approved by federal regulators. We also regularly participate in drills with the state of Vermont and numerous public safety agen-

See **ORDINANCE** on page 16

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ORDINANCE

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cies to ensure our readiness," said Dawn LeBaron, vice president of operations and incident commander.

She said the pediatric intensive care unit has four beds and the hospital can increase the number if necessary.

"We are a certified Level 1 Trauma Center, a designation granted by the American College of Surgeons that depends in part on the capability to respond to mass casualty events," LeBaron said. The American College of Surgeons mandates that the hospital meet disaster standards, including commitment, readiness, resources, policies, patient care and performance improvement.

"All Vermont hospitals, including the Medical Center, participate in an annual cycle of training and exercises to prepare for a mass casualty and disaster situation," said Chris Bell, director of the division of emergency preparedness, response and injury prevention for the Vermont Health Department.

He said a large railroad explosion was one of the last statewide emergency training exercises.

Vermont Emergency Management takes those cooperative training exercises seriously, so people are truly prepared for the real event, according to spokesman Mark Bosma.

Parker also said that Shelburne Bay serves as the drinking water source for Shelburne and other towns. She said the potential of contamination of the drinking water "presents significant health risks."

Marc Heath, one of the Burlington lawyers for the railroad, said his client plans to file a written rebuttal. He said part of it will question Parker's qualifications to weigh in on the capabilities of the hospital and the delivery of drinking water.

He noted the fight is over salt storage facilities the railroad has installed.

"We are talking about road salt. It is not a hazardous material by any standard," Heath said.

Shelburne gets its municipal drinking water from the regional Champlain Water District, which has two intakes in Shelburne Bay.

"We have source protection plans," said James Fay, the district's general manager. The district, which provides water to 12 municipal systems in nine communities outside Burlington, should be able to address any possible contamination problem, he said.

The solutions range from additional treatment of water to switching on a special connection with the city of Burlington, which has its own intake and treatment system, Fay said. He said the district also has water storage across Chittenden County.

He said the Champlain Water District intakes are about a half mile out from shore and 75 feet deep. He said the district undergoes various training scenarios and had a tabletop exercise two weeks ago with Green Mountain Power.

Fees piling up

Between July 1, 2015, and June 30, 2017, the Selectboard has spent $378,403 for the town attorney for just the Vermont Railway lawsuit, and a total of $582,308 for the town attorney during the two years. Legal fees since July 1 were not immediately available.

The Parker affidavit is one of two exhibits attached to a 21-page response by Town Attorney Claudine Safar to the request to block the ordinance.

The other affidavit is from Town Manager Joe Colangelo, who also is the zoning administrator. He was named as a defendant when the lawsuit was filed in January 2016.

Colangelo, who was hired in April 2014, said in his affidavit, "I have been aware that the storage of hazardous substances in Shelburne has been a concern with members of the Town of Shelburne Selectboard for many years. ... Due to more imminent concerns," it was only recently that the selectboard passed an ordinance covering storing, handling and distributing hazardous substances.

Colangelo and selectboard Chairman Gary von Stange have said the discussion has been going on for at least three years, but the Shelburne News was unable to find minutes of meetings or other public records where it was discussed.

Colangelo did not specify in his affidavit what other pressing town issues prevented the selectboard from taking action in recent years on the hazardous materials ordinance.

When reached by phone Wednesday, Colangelo referred to the regular crush of town business as competing with work on the ordinance. "There is an immense amount of stuff – day to day, week-to-week, year-to-year, that needs to get done in a municipality that is a $12 million business. It includes town government, water, sewer, public safety, recreation, a full suite of services."

He said Shelburne, a community of 7,200 residents, "has a lot of citizen involvement." He said the voter turnout percentage is among the highest in the state.

Parker, von Stange and Vice Chairman John Kerr have come under fire from some residents and businesses who believe the trio rushed to pass the ordinance to beat a court deadline. Some companies are concerned that the regulation may force them out of business.

Selectboard members Jerry Storey and Josh Dein voted against the ordinance, saying it was hurried without full consideration. They have proposed that it either be rescinded or tabled until it can be rewritten or amended. However, other board members have not supported that move. The ordinance is due to take effect in early October.

w. Dr. Katie Manges

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