THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Jon Swan

Docket No. 217-2023-CV-00285

PLAINTIFF'S SURREPLY TO DEFENDANT'S REPLY TO PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR ENTRY OF FINAL ORDERS

Plaintiff Casella Waste Systems, Inc. ("Casella") submits this surreply to address arguments developed or materially expanded in Defendant Jon Swan's reply. Swan's post-trial pleadings seek to turn a limited set of jury findings into a sweeping remedial theory: that Casella's breach of the confidentiality provision automatically discharged every future obligation Swan had under the Settlement Agreement, nullified the jury's separate breach findings against him, defeated Casella's liquidated-damages remedy, and made Swan the party entitled to fees. That is not New Hampshire law and not what the jury decided.

Trial in this matter was properly structured to allow the jury to find disputed facts and for the court to apply the law to those facts, including the fashioning of a remedy. If the Court accepted Swan's theory that any breach found to be material can be mechanically applied in all cases, then there would have been no reason to ask the jury to consider subsequent breaches by Swan. Swan urged exactly that, and the Court properly rejected it.

The verdict found breaches by both sides. The legal consequences of those findings are for the Court. The Court should enter an order that gives effect to the whole verdict, rather than one that preserves only the findings favorable to Swan and erases the findings favorable to Casella.

I. Swan's Argument That Casella Denied Him His Only Continuing Benefit is Factually and Legally Incorrect.

Swan's papers lean heavily on his claim that by breaching the agreement, "Casella denied Mr. Swan the *only* continuing benefit he had under the agreement." *Reply* at ¶10 (emphasis added); *see also*, *Motion For Entry of Final Orders* at ¶4 ("The essence of the bargain between Mr. Swan and Casella concerning their mutual *ongoing* obligations was *eviscerated* by Casella's breaches." (Emphasis added)). This is simply an incorrect statement of fact and law.

New Hampshire law treats docket markings such as the one entered in the predicate litigation as a covenant not to sue that creates a continuing and ongoing obligation. They do not merely create a release that is concluded upon execution and filing with the court. In *Pro Done, Inc. v. Basham*, 172 N.H. 138, 143 (2019), the Supreme Court explained that a release is an "absolute extinguishment" of an obligation, but a covenant not to sue is different. It is "an agreement or promise of future forbearance from suing the other party on certain claims." *Id*. A covenant not to sue "recognizes the continued existence of the underlying obligation while creating a contractual promise not to enforce it by suit." *Id*.; *see also Stateline Steel Erectors v. Shields*, 150 N.H. 332, 338 (2003); 9 R. McNamara, *New Hampshire Practice, Personal Injury, Tort and Insurance Practice* §23.03 at 23-3 (3d ed.2003). That promise not to sue is mutual, ongoing, and perpetual. And contrary to Swan's claim that confidentiality was the sole continuing benefit he enjoyed under the Settlement Agreement, he also continues to enjoy the forward-looking, no-further-action provision of the docket markings.

Swan's all-duties-discharged theory thus fails at the threshold because the settlement did not consist of a single indivisible promise as he repeatedly argues. The ongoing nature of the covenant not to sue means that neither party has completed performing all of its obligations under the Settlement Agreement. It included multiple terms serving different functions: finality of the

prior litigation, releases, confidentiality, future public communications, and liquidated damages. New Hampshire law requires contracts to be read as a whole and in a way that gives reasonable effect to the parties' chosen terms. *Birch Broad., Inc. v. Capitol Broad. Corp.*, 161 N.H. 192, 196 (2010); *Poland v. Twomey*, 156 N.H. 412, 414-15 (2007). As set forth above, some of those mutual covenants continue in force.

The continued vitality of the covenant not to sue shows that, contrary to his assertions, Swan is not deprived of all benefit going forward. As a result, his proposed remedy is, effectively, selective rescission. The law does not permit Swan to keep the Agreement's completed benefits, rely on its continuing finality protection, invoke its exceptions as defenses, and then declare the Agreement dead only as to Casella's remedy and his own future-public-communications obligations.

II. Swan's reply overstates Gaucher and reads the "sufficiently material" requirement out of New Hampshire law.

Swan says that once Casella breached, "Mr. Swan was relieved of his" obligations. Reply ¶5. He treats *Gaucher v. Waterhouse*, 175 N.H. 291 (2022), as a mechanical rule under which any material breach of any important term ends every remaining covenant in a multi-term settlement. *Gaucher* does not go that far. *Gaucher* restates the familiar rule that a material breach may discharge the other party's duty of performance. *Id*. at 296. It does not hold that every breach labeled "material" automatically voids every independent obligation, every remedial term, and every finality provision in the same agreement.

Fitz v. Coutinho states the limiting principle Swan's reply tries to erase: "Not every breach of duty by one party to a contract discharges the duty of performance of the other. Only a breach that is *sufficiently material* and important to justify ending the whole transaction is a total breach that discharges the injured party's duties." 136 N.H. 721, 725 (1993); *see also McNeal v. Lebel*,

157 N.H. 458, 465 (2008). The word "sufficiently" is not surplusage. It distinguishes a breach that supports a partial remedy from a total breach that justifies ending the transaction. And while the "sufficiently" formulation is not used in *Gaucher,* it is quite commonly used in other Supreme Court precedent. *S&W Roofing, LLC v. Shepperson,* 2020 WL 2306477; *Kisha, Inc. v. Jalbert,* 2017 WL 2799476; *Coleman v. Desteph*, 2015 WL 11082639; *Bonin v. Scott, Kathy Walsh Real Estate, Inc. v. Sewell Farms Realty, LLC,* 2009 WL 10643729.

Swan fails to cite case law or otherwise explain how or why the word "sufficiently" should be stripped from these extensive precedents when that word modifies "material." Clearly, that modification suggests that there are degrees of materiality that warrant various forms of relief depending on severity and context. Swan's failure to request a jury instruction or jury verdict form response cannot now, after the trial, convert a legal question with an embedded question of degree into an automatic switch that excuses his performance after the fact.

Because the contract at issue is a settlement agreement, Swan's mechanical-discharge theory is even less persuasive. Settlement agreements are contracts, but the enforcement of a settlement agreement is an equitable remedy committed to the Court's discretion. *PC Connection, Inc. v. Sillich*, 2023 DNH 069, at 6-7 (D.N.H. May 31, 2023) ("enforcement of a settlement agreement is within the court's discretion, and the court must consider principles of equity when deciding whether to enforce a settlement agreement"); *Poland*, 156 N.H. at 415. Thus, the Court's task is not simply to ask whether Casella breached an important term and then treat every remaining provision as extinguished. The Court must decide whether, in equity and in light of the entire settlement structure, Casella's confidentiality breaches justify the extraordinary relief Swan seeks: discharge of independent future speech obligations, nullification of the jury's breach findings against him, denial of Casella's liquidated-damages remedy, and preservation of the

completed and continuing benefits Swan received from the same bargain. They do not. Equity does not require, and should not permit, selective cancellation of the Agreement in a manner that allows Swan to retain the settlement's finality protections while avoiding only those provisions that now operate against him.

Swan's reliance on the Court's October 10, 2024 order does not change that analysis. That order denied a motion to dismiss a counterclaim. It held that Swan had stated a claim arising from Casella's public filing and recognized that confidentiality was an essential term. It did not decide, after trial, that Casella's breaches were sufficiently material that they terminated every other covenant, discharged Swan's later duties, or nullified a jury verdict that had not yet been returned. It did not decide the remedial issue now before the Court.

III. Swan's "rescission versus excuse" distinction places form over substance; the relief he seeks is rescission in substance and retroactive cancellation in effect.

Swan accuses Casella of conflating rescission with the excuse of performance. Reply ¶3. The labels do not control. Swan asks the Court to declare that his later breaches "were not breaches," to make the jury's breach findings against him "a nullity," to deny Casella liquidated damages, and to discharge him from future obligations under Paragraphs 2, 5, and 7 of the Settlement Agreement. That is an attempt to unwind the settlement selectively and retroactively after an adverse verdict.

Rescission is an equitable remedy that attempts to undo the bargain. A party seeking it must restore, or be able to restore, the other party substantially to the pre-contract position. *Derouin v. Granite State Realty, Inc*., 123 N.H. 145, 147-48 (1983); *Mooney v. Nationwide Mut. Ins. Co.*, 149 N.H. 355, 357-58 (2003). Swan has not offered to restore the benefits he received. He has not offered to reopen the prior litigation. He has not offered to undo the docket markings. He has not

offered to return the parties to the status quo ante. He asks to keep the benefits while invalidating the burdens.

Nor does the doctrine of excuse of performance erase accrued rights or jury findings. Even if a breach can excuse future performance after a proper election, it does not retroactively make later adjudicated breaches disappear where the party claiming excuse continued to treat the contract as operative and litigated under it. Swan's requested order would do exactly that. The Court should reject the remedy, not merely the label.

IV. Any right to terminate or claim discharge was lost by election, continued performance, and litigation conduct.

Swan says Casella waived any election or notice argument because it did not request a jury instruction. Reply ¶8. That reverses the burden. The material-breach doctrine is an affirmative defense when asserted to defeat a claim for breach of contract, and the party claiming excuse bears the burden to produce and persuade. *Kishan* at *2 (citing *Meaney v. Rubega*, 142 N.H. 530, 532 (1997) ("defining 'affirmative defense' to mean any matter raised by a defendant that admits the plaintiffs' allegations but provides an excuse or justification for the allegations or otherwise defeats the plaintiff's claims")). If there was a waiver, it was Swan's failure to plead it as an affirmative defense. If Swan wanted a jury finding that he promptly elected termination, renounced the Agreement, or gave legally sufficient notice that he would no longer perform, it was his burden to request that those questions be submitted to the jury. Casella did not waive Swan's affirmative defense by failing to ask the jury to make findings he did not seek.

The election issue is now before the Court in precisely the posture anticipated by the jury verdict form, specifically, and the manner in which the trial was conducted, more generally. The jury was not asked to decide rescission, election, waiver, restoration, prejudice, or prospective discharge. Those remedial limits are for the Court to apply in deciding the relief now requested.

The governing principle is straightforward. A party that knows of an alleged material breach may either treat the breach as ending further performance or continue under the contract and seek appropriate damages. But conduct indicating an intention to continue the contract constitutes an election and waives the right to claim discharge. *Private Jet Services Group, LLC v. Tauck, Inc*., No. 20-cv-1015-SM, 2025 DNH 070, at 9-10 (D.N.H. June 3, 2025); *AccuSoft Corp. v. Palo*, 237 F.3d 31, 55-56 (1st Cir. 2001); Restatement (Second) of Contracts § 246; 14 Williston on Contracts § 43:15 (4th ed.).

Swan did not promptly renounce the Agreement. He did not ask in his answer of July 2023 to vacate the docket markings, reopen the defamation action, restore the parties to their pre-settlement positions, or declare that the Future Public Communications provision no longer bound him. He filed a summary-judgment motion and sought fees while simultaneously asserting a counterclaim under the Agreement. He defended Casella's Future Public Communications claims by invoking the Agreement's text, including the "repeat or relay" safe harbor and the "imputes conduct or intent" requirement. He asked the jury to find that his posts complied with the Agreement. Those are not the acts of a party that elected to terminate. They are the acts of a party that treated the Agreement as operative when doing so was useful.

Swan's July 7, 2023 answer does not prove otherwise. At most, it put Casella on notice that Swan claimed Casella had breached. It was accompanied by a request for summary judgment and an award of attorney's fees. It carried no notice of claim of excuse, discharge of duty, or request for declaratory judgment. A notice of breach is not a notice of termination, nor is it a notice of excuse of performance. A party can allege breach and seek damages while affirming the contract. To elect termination or discharge, the party must take a position clearly inconsistent with continued performance. Swan did not do so. His July 7 filing did not declare that he would no

longer comply with the Future Public Communications provision. It did not request prompt declaratory relief discharging all duties. It did not seek restoration. It preserved the settlement's benefits while asserting litigation positions under it.

V. Swan's evidentiary argument does not defeat his failure of election.

Swan argues that Casella objected to evidence of his supposed post-breach compliance and therefore cannot rely on an absence of notice. Reply ¶9. That argument depends on the proposition that the Court's application of the law is bound by the same evidence the jury heard. There is no reason for that to be so. At trial, Swan proffered exhibits that were clearly more prejudicial than probative and not relevant to the issues the jury was asked to decide. For that reason, they were objected-to and excluded. But the Court's election analysis is not restricted to the evidence the jury considered, nor is it limited to evidence that was admissible. The Court may properly consider any factors it deems helpful to making its post-verdict legal determinations. Here, the election is established by exhibits Swan marked, but did not admit, and various court filings and other evidence developed during this litigation. Those are matters of record, not factual exhibits excluded from consideration by the Court.

VI. *AccuSoft* and *Private Jet* support Casella's election argument, not Swan's.

Swan tries to distinguish *AccuSoft* by emphasizing that the First Circuit did not decide whether the breach there was sufficiently material. Reply ¶13. That is the point. *AccuSoft*'s election holding did not depend on rejecting materiality; it was independent of it. The court expressly affirmed on the ground that the party seeking relief had elected to continue accepting benefits under the agreement and therefore "lost any right it may have had to be excused from performance." 237 F.3d at 55-56. That holding answers Swan's remedial problem even if Casella's breach is treated as material.

AccuSoft is particularly instructive because it also involved a settlement agreement and alleged breaches of confidentiality and publicity-related provisions. The party seeking to escape performance reframed its requested relief as something less than full rescission, but the First Circuit still rejected a retroactive attempt to cancel obligations after the party continued to accept contractual benefits. *Id*. at 54-56. Swan's requested relief is materially similar: he seeks to preserve the benefits of the settlement while avoiding the later consequences of the same instrument.

Private Jet is not limited to charter-aircraft contracts. Swan's distinction between a services-and-payment contract and "ongoing, material contractual obligations regarding behavior," Reply ¶10, is immaterial. *Private Jet* applied a general contract principle: a party with knowledge of an alleged material breach that continues performance or otherwise indicates that it considers the contract binding makes a conclusive election and cannot later claim the breach discharged its performance duties. 2025 DNH 070, at 9-10. That principle applies to settlement agreements, covenants not to sue, confidentiality clauses, speech-modification provisions, and other negative covenants. It is especially important in settlement cases, where parties often receive both completed benefits and ongoing protections, and where those benefits are not easily segregated into repeat, ongoing commercial transactions.

Swan also argues that, unlike *Private Jet,* he immediately behaved as though Casella had breached. Reply ¶¶11-12. The chronology does not establish election. A party may know of a breach and still elect to continue under the contract. Swan's later litigation conduct, continued reliance on the Agreement's protections, and failure to seek timely restoration demonstrate election to continue, not termination.

VII. Alternative pleading does not allow inconsistent final remedies after verdict.

Swan cites *Werne v. Executive Women's Golf Ass'n*, 158 N.H. 373, 377 (2009), for the general proposition that a party may plead inconsistent defenses. Reply ¶15. Casella does not dispute that rule. The issue now is not whether Swan could plead or argue in the alternative before verdict. The issue is whether, after the jury found that he breached the Settlement Agreement nine times, he may use alternative-pleading doctrine to nullify the verdict and obtain a final remedy inconsistent with the way he litigated the case.

He may not. Swan was free to argue, in the alternative, that his posts complied with the Agreement if the Agreement applied. But that trial strategy is evidence that he treated the Agreement as operative. *Werne* does not hold that a party may affirm a contract throughout litigation, accept its benefits, invoke its safe harbors, lose on liability, and then retroactively elect termination to avoid the remedy.

VIII. The absence of a symmetric liquidated-damages remedy does not entitle Swan to erase Casella's verdict.

Swan argues that because the liquidated-damages provision benefits Casella and not Swan, excuse of performance is his "only equitable remedy." Reply ¶16. That is wrong. If Swan proved a breach by Casella, he had ordinary contract remedies. He could have sought nominal damages. He could have sought provable consequential damages, subject to the requirements of causation and proof. And he could have sought equitable relief if he satisfied the requirements for that relief. See *Pro Done*, 172 N.H. at 145-46. The fact that the Agreement did not give him a liquidated-damages shortcut does not authorize the Court to rewrite the parties' bargain.

Settlement agreements are contracts, and courts enforce the bargain the parties made rather than the bargain one side later wishes it had made. *Poland*, 156 N.H. at 414-15; *Mentis Sciences, Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 591-92 (2020). The absence of a symmetric

liquidated-damages clause was part of the settlement. It does not make wholesale discharge the default remedy.

The jury found Swan breached the Settlement Agreement as to Exhibits 4, 5, 6, 7, 8, 9, 10, 12, and 15. The Agreement provides liquidated damages for Swan's breaches. The Court should enforce that provision and award $45,000, representing $5,000 for each of the nine breaches found by the jury.

The Court has already rejected Swan's pretrial effort to invalidate the $5,000-per-statement provision as facially punitive, concluding that $5,000 per statement was a reasonable liquidated-damages award for harms difficult to ascertain when the parties settled. See Order on Defendant's Motion for Partial Summary Judgment and Plaintiff's Motions in Limine at 5. The remaining retrospective appraisal does not change that result. Looking back, the actual harm from Swan's non-compliant public communications remains difficult to measure with precision and is not grossly disproportionate to the liquidated sum.

IX. Swan is not entitled to attorney's fees.

Swan's fee request should be denied. The jury found that Swan breached the Settlement Agreement nine times. That alone defeats the claim that Casella's enforcement action was frivolous, oppressive, or brought in bad faith.

Harkeem fees are reserved for exceptional cases involving oppressive, vexatious, arbitrary, capricious, or bad-faith litigation conduct. *Harkeem*, 117 N.H. at 690-91; *St. Germain v. Adams*, 117 N.H. 659, 662 (1977). RSA 507:15 likewise requires that it "clearly appear" that an action or defense was frivolous or intended to harass or intimidate the prevailing party. Those standards are not met where Casella obtained a jury verdict finding nine breaches by Swan.

Nor can Swan satisfy RSA 507:15 by recasting a mixed verdict as a complete victory. The statute requires that it clearly appear that the action or defense was frivolous or intended to harass or intimidate the prevailing party. Swan is not the prevailing party on Casella's enforcement claim: the jury found nine breaches by him. At most, the verdict is mixed. A mixed verdict after genuine contract litigation is not a fee-shifting event.

Swan's "dirty hands" rhetoric does not change the verdict. This was contested contract litigation. Both sides prevailed on some issues and lost on others. Casella's decision to enforce the Agreement cannot be deemed frivolous after the jury accepted a substantial part of its claim. No fee award to Swan is warranted.

Likewise, nothing in the post-verdict pleadings entitles Swan to attorney's fees either. Swan complains that Casella did not assert that he had breached the speech modification provisions of the Settlement agreement until it amended its complaint. *Reply* at ¶14. Swan claims that in his July 7, 2023 answer, he "put Casella on notice that he believed Casella to have breached the agreement on July 7, 2023 and demanded relief accordingly." *Id.* But what relief did he seek? He sought only dismissal and attorney's fees under *Harkeem* and RSA 507:15. He did not seek recission, and he did not seek a declaration under the affirmative defense that his future performance was excused.

X. The final order should enforce the whole verdict.

The proper final order should preserve all verdict findings. The jury found that Casella breached the Settlement Agreement. The jury also found that Swan breached the Settlement Agreement as to Exhibits 4, 5, 6, 7, 8, 9, 10, 12, and 15. Those findings can coexist. Nothing in

Gaucher, *Fitz*, *Kishan*, *Pro Done*, *AccuSoft*, *Private Jet*, or New Hampshire settlement practice requires the Court to erase one side of the verdict.

For the foregoing reasons, Casella respectfully requests that the Court deny Swan's Motion for Entry of Final Orders and enter final judgment that: (1) preserves the jury's findings that Casella breached the Settlement Agreement; (2) preserves the jury's findings that Swan breached the Settlement Agreement as to Exhibits 4, 5, 6, 7, 8, 9, 10, 12, and 15; (3) holds that Swan's obligations were not discharged and that the Settlement Agreement, including the Future Public Communications provision and the no-further-action finality reflected in the docket markings, remains enforceable; (4) awards Casella $45,000 in liquidated damages; (5) denies Swan's request for attorney's fees and costs; and (6) grants such further relief as is just.

Respectfully submitted,

CASELLA WASTE SYSTEMS, INC.,

By its Attorneys,

LEHMANN MAJOR LIST, PLLC

June 8, 2026

/s/ Richard J. Lehmann
Richard J. Lehmann, Esq. (NH Bar #9339)
rick@nhlawyer.com
Lehmann Major List PLLC
6 Garvins Falls Road
Concord, NH 03301
(603) 715-2516

-and-

June 8, 2026

CLEVELAND, WATERS & BASS, PA

/s/ Jacob M. Rhodes
Jacob M. Rhodes, Esq. (NH Bar #274590)
rhodesj@cwbpa.com

2 Capital Plaza, Fifth Floor
Concord, N.H. 03301
(603) 224-7761

CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically through the court's electronic filing system upon counsel of record and all other parties who have entered electronic service contacts in this case.

June 8, 2026 */s/Richard J. Lehmann*

Richard J. Lehmann

4927-1411-1667, v. 1