

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Case No. 217-2023-CV-00285

Casella Waste Systems, Inc.

v.

Jon Swan

MOTION FOR ENTRY OF FINAL ORDERS

Mr. Swan moves for entry of a final order in this matter, as follows:

1. The Jury has entered a verdict in this case. The verdict was for Jon Swan on Casella's Breach of the Covenant of Good Faith and Fair Dealing claim; for Mr. Swan on each of his breach of contract claims against Casella due to their two disclosures of the confidentiality provisions of the Settlement Agreement; and for Casella on Mr. Swan's breaches of the Future Public Communications provision of the Settlement Agreement.

2. The Jury inquired: "In the instance that one party breaches the settlement, is the settlement considered null and void from that point forward." The Court instructed the Jury, over Mr. Swan's objection, that the legal consequences of a material breach finding would be determined by the Court, referring the Jury to the given-instructions on this point.

3. As Mr. Swan has argued throughout the Jury Instruction development process, the question of whether Mr. Swan should be excused from future performance of the rest of his obligations should have been for the jury. *See* Defendant's Proposed Jury Verdict Form (asking Jury to "STOP" after answering "Yes" to the question whether Casella materially breached the Settlement Agreement). Regardless, there is only one legal option under New Hampshire law for a material breach by Casella, which the Jury found here. "A material breach of contract by one

party to a contract discharges the duty of performance of the other.” *Gaucher v. Waterhouse*, 175 N.H. 291, 296 (2022). Furthermore, “a material breach excuses future performance[.]” *Id.* There is no argument to be made that the law says otherwise.

4. In this case, Mr. Swan’s breaches, as found by the jury, began August 9, 2023, nearly *three months after* Casella twice breached the Settlement Agreement and sued him. Furthermore, the Settlement Agreement only provided liquidated damages to Casella for Mr. Swan’s breach, not the other way around. The only remedy available to Mr. Swan under the circumstances is excuse of performance. In addition, the character of the breaches differs in that the liquidated damages provision, in theory, acts as a disincentive¹ to breaching the Future Public Communications provision of the Settlement Agreement. The Court has determined that a new non-compliant statement by Mr. Swan in public is a new breach of the Settlement Agreement, for which damages may be awarded in accordance with the terms of the Agreement. By contrast, the confidentiality of the Settlement Agreement, once disclosed, can never be restored. The essence of the bargain between Mr. Swan and Casella concerning their mutual ongoing obligations was eviscerated by Casella’s breaches.

5. Included in the Jury Instruction in this case was an integrated materiality determination. Jury Instructions. In *Fitz v. Coutinho*, 136 N.H. 721, 725 (1993), the Supreme Court observed: “The question whether a breach discharges the injured party’s remaining duties is a different form of the question whether a breach goes ‘to the essence’ or not.” The Jury determined in this case that Casella’s breaches went “to the essence.” *Id.* (*citing* 4 Corbin on Contracts, §946 at 810 n. 5); Verdict Form. That is why the only remedy here, and the remedy

¹ For the reasons noted in the Defendant’s Motion for Partial Summary Judgment and related arguments in this case, the liquidated damages provision in this case functions as a penalty, not a damages figure.

called for unambiguously by New Hampshire law, is excuse of performance for Mr. Swan's remaining obligations under the Settlement Agreement. *Gaucher*, 175 N.H. at 296.

6. Moreover, the Court has already determined in this case that the consequences of Casella's material breach would be excuse of Mr. Swan's performance:

A breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract. A breach of contract by one party to a contract discharges the duty of performance of the other. A breach is material if (1) a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions; (2) the breach substantially defeats the contract's purpose; or (3) the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract. Whether conduct is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case.

Plaintiff concedes that a violation of a contract's confidentiality clause may constitute a material breach of the agreement... Defendant has stated a claim that Plaintiff violated the confidentiality provision of the Agreement by publicly filing a complaint, disclosing the existence and certain terms of the Agreement. This alleged breach was material because the confidentiality of the Agreement was an essential term.

Order of October 10, 2024 at 5 (citing and quoting *Gaucher*, 175 N.H. at 296 (but citations and quotations omitted for clarity)).

7. "The issue whether a party's breach excuses future performance of the contract by the nonbreaching party, as this is another way of declaring the breach material, presents a question of fact." 23 *Williston on Contracts* § 63:15 (4th ed.). The Jury has made that finding of fact against Casella in this case. Under the plain language of *Gaucher* and this Court's prior orders, Mr. Swan is excused from performance of his remaining obligations by Casella's breach. Any other result would not be consistent with *Gaucher* or the law of New Hampshire. 175 N.H. at 296.

8. In light of Casella's breaches months prior to Mr. Swan breaching the Settlement Agreement, and the jury's rejection of Casella's Covenant of Good Faith and Fair Dealing claim, Mr. Swan should be entitled to his fees and costs in this matter under *Harkeem v. Adams*, 117 N.H. 687, 691 (1977) or RSA 507:15 (as the prevailing party in a lawsuit that was frivolous and initiated in bad faith). Casella launched this legal action two weeks after the parties reached a settlement agreement, with a baseless claim of breach of contract that eventually morphed into a baseless claim for Breach of the Covenant of Good Faith and Fair Dealing. Mr. Swan should be entitled to attorney's fees and costs.

9. As a practical matter at this point, there is nothing left of the Settlement Agreement if Mr. Swan has no further obligations and the confidentiality provisions were mooted by Casella's breaching disclosures.

WHEREFORE, Mr. Swan requests that the Court:

A. Issue a final order in this case stating that:

- a. Mr. Swan's performance of the remaining obligations under the Settlement Agreement, including, specifically and without limitation, Paragraphs 2, 5 and 7 thereof, is excused;
 - b. The jury's findings regarding Mr. Swan's breaches of contract concerning Exhibits 4, 5, 6, 7, 8, 9, 10, 12 and 15 are a nullity;
 - c. Casella's claim for damages is denied;
 - d. Mr. Swan is awarded his reasonable attorney's fees and costs in this matter;
- and

B. Grant such other and further relief as the Court deems to be just and equitable under the circumstances.

Respectfully submitted,

JON SWAN

By his Attorneys:

ORR & RENO, P.A.

Dated: May 8, 2026

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