

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Case No. 217-2023-CV-00285

Casella Waste Systems, Inc.

v.

Jon Swan

**SWAN’S REPLY TO CASELLA’S OBJECTION TO SWAN’S MOTION
FOR ENTRY OF FINAL ORDERS**

Jon Swan replies to Casella’s Objection to his Motion for Entry of Final Orders as follows:

1. At the outset, Mr. Swan reiterates his previously stated exception to the Court’s jury instructions. Mr. Swan believes that the jury instructions should have informed that jury that a material breach by one party relieves the other party of its obligations under the contract after the breach of the first party. Mr. Swan’s proposed jury instructions and special verdict form specifically incorporated this sound, uncontroversial New Hampshire law by telling the jury that, if it concluded Casella materially breached the Settlement Agreement, it should “STOP.” Even if the instruction had remained as given, the Court’s response to the jury’s question during deliberations should have been the same, *i.e.*, that a material breach by one party relieves the other party of its future obligations.¹

2. That is the law of New Hampshire, and no amount of ballet by the Plaintiff can obscure it. *Gaucher v. Waterhouse*, 175 N.H. 291, 296 (2022) (“A material breach of contract by one party to a contract discharges the duty of performance of the other... a material breach

¹ The Court’s jury instructions incorporated within them an explicit materiality finding. Thus, in this case, a finding of breach necessarily meant a material breach.

excuses future performance[.]”). Indeed, it is the law of this case, as the Court itself set this standard earlier in the proceedings. Order of October 10, 2024 at 5.

3. The Plaintiff attempts to obscure this black-letter law by conflating rescission (a judicial remedy) with excuse of performance (a factual conclusion). Although the Defendant did request rescission in its pleadings (and would be entitled to it), the jury’s finding is sufficient under the law to relieve him of his own obligations under the contract at issue once Casella breached it—meaning that his “breaches” were not breaches (as the jury intimated) once Casella had disclosed the existence and terms of the Settlement Agreement.

4. In Section I of its Objection, Casella again bobs and weaves, suggesting that Mr. Swan is somehow asking to enjoy the benefits of “the entry of neither party docket markings, while being relieved of his obligations under [the Settlement Agreement.]” He is not. As the Supreme Court (and this Court) clearly, unambiguously, lucidly stated in *Gaucher*, “a material breach excuses *future performance*.” 175 N.H. at 296 (emphasis added; *see* Order of October 10, 2024 at 5). The fact is that both Mr. Swan and Casella “enjoyed the benefits of ... the entry of neither party docket markings” resolving the previous case. Both Mr. Swan and Casella enjoyed the benefits of their mutual releases for causes of action up to that time. Casella also enjoyed the benefit of Mr. Swan’s \$1,500 payment under the terms of the Settlement Agreement. And, had Casella abided by the terms of the Settlement Agreement regarding its ongoing confidentiality obligations, it would have continued to enjoy the benefit it derived from Mr. Swan’s ongoing speech modification obligations.

5. But when Casella breached its ongoing duties and obligations under the Settlement Agreement, Mr. Swan was relieved of his. *Gaucher*, 175 N.H. at 296.

6. Casella tries to find refuge in *Fitz v. Coutinho*, 136 N.H. 721 (1993), arguing that New Hampshire law will only relieve a party of its obligations under an agreement if it is not merely “material” but “sufficiently material” to do so. But *Fitz v. Coutino* is just a restatement of the law enunciated in *Gaucher*. In *Fitz*, the Supreme Court wrote, “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. Whether a delay in payments is a material breach is a question for the trial of fact to determine from the facts and circumstances of the case.” *Id.* at 725. In so writing, the Court was not elucidating a distinction between “material breaches” and “sufficiently material breaches” it was stating that a material breach sufficient to excuse performance was a factual question for the jury (something that Mr. Swan argued for in crafting jury instructions).

7. *Fitz* also dealt with a case in which the alleged “material breach” was a failure to “tender payments on a weekly schedule.” *Id.* at 725. All payments were properly made, just not on the schedule called for by the agreement. The finder of fact did not find this to be a material breach that went to the essence of the agreement. *Id.* The Supreme Court upheld that finding. *Id.* (“We hold, therefore, that the trial court did not err in refusing to find that *Fitz* materially breached the contract. Because *Fitz* did not materially breach the contract, *Coutinho*’s nonperformance was not excused.”). In this case, by contrast, the jury did find that Casella “materially breach[ed] the contract.” Thus, the law that Casella relies on is based on a factually distinct result that it cannot explain its way out of: *Fitz* does not draw nuanced distinctions between “material” and “sufficiently material” breaches to excuse future performance by the other party. It simply applies the law of material breach to factual circumstances where the finder

of fact *found no material breach*. That is not this case. The jury found that Casella materially breached the Settlement Agreement. Mr. Swan’s future performance obligations were excused once Casella did that. *Gaucher*, 175 N.H. at 296.

8. Casella next argues that Mr. Swan could not elect to have his performance excused without first putting Casella on notice, by words or conduct, that he was treating the Settlement Agreement as discharged. First, this response to Mr. Swan’s affirmative defense and counterclaim for breach of contract (specifically asserting that Casella’s breach excused his performance) is entirely novel in this case. Casella never raised this legal excuse or response in its pleadings, nor in any previous motion or request to the Court. Most importantly, Casella never requested an instruction on this point to the jury. Since the question of whether Mr. Swan provided “notice, by words or conduct” of his belief that he was discharged from the contract is a factual question, Casella’s failure to raise this issue prior to commitment of Mr. Swan’s breach of contract/excuse of performance claim to the jury, is fatal—the jury made no findings on this point because Casella never asked it to. Having never raised this requirement of notice previously, it is waived.

9. Lest the Court consider Casella’s omission to put either the Court or Mr. Swan on notice of this novel legal “defense” to his argument of excuse of performance to be harmless, it is not. The Court will recall that during Mr. Swan’s testimony, the undersigned asked Mr. Swan to testify about his compliance with the Settlement Agreement prior to Casella’s breach, and to discuss his Exhibit J, which contained three exemplar emails of Mr. Swan’s pre-Casella breach compliance. In addition, the undersigned attempted to ask Mr. Swan about his contextual compliance with the Settlement Agreement after Casella’s breach—including his efforts to comply notwithstanding Casella’s breach (including questions on this point and, without

limitation, Exhibits I, K, L, M). Casella objected to *all* of these lines of inquiry and exhibits, and the Court sustained those objections.² Casella cannot now rely on a failure-of-notice-of-intent-not-to-be-bound argument after having successfully excluded all evidence of Mr. Swan’s efforts to comply pre- and post-Casella breach of the Settlement Agreement. That evidence most certainly would have been probative of whether Mr. Swan had put Casella “on notice, *by words or conduct,*” that he believed his duties had been discharged. As in so many other areas, Casella cannot have its cake and eat it too. It cannot exclude evidence that would have been probative of its factual assertions and then rely on the lack of evidence of Mr. Swan’s notice of his intent not to be bound in its defense after the trial.

10. In any event, Casella’s reliance on *Private Jet Services Group LLC v. Tauck, Inc.*, 2021 DNH 070, Case No. 20-cv-1015-SM, Slip Op. at *4 (DNH June 3, 2025) is misplaced for the following reasons. First, the facts are not analogous. This case did not involve a goods-or-services-for-fee agreement as in *Private Jet Services Group*. In this case, Casella and Mr. Swan owed each other ongoing, material contractual obligations regarding behavior. Of these, the only obligation Casella owed Mr. Swan was confidentiality. By breaching this obligation, Casella denied Mr. Swan the only continuing benefit he had under the agreement. In contrast, in *Private Jet Services Group*, the purportedly breaching party, Private Jet Services Group, continued to offer the Defendant Tauck its services under their agreement, and Tauck continued to accept those services and pay for them. Specifically, Tauck had contracted with Private Jet to use a

² Incredibly, Casella actually relies on these very Exhibits in its Objection at pages 8-9. It references Exhibit J (“on May 23, 2023 he described a tri-town contracting development...”, “On May 27, 2023, after the Complaint was filed, Swan wrote...”); Exhibit I (“Roughly two months later, on July 24, 2023, he posted ...”); and Exhibit K (“And on September 17, 2023, he again used ...”) attempting to argue that Mr. Swan continued to observe the obligations of the Settlement Agreement after Casella’s breach. What is good for the goose is good for the gander. These exhibits are not in evidence, something that Casella should well know. Casella is wasting Mr. Swan’s and the Court’s time with this argument and Mr. Swan should be entitled to fees.

private jet furnished by Private Jet Services for business travel. *Id.* at *1-2. Tauck argued that Private Jet failed to furnish a jet 8 times when Tauck had demanded the service at the beginning of the agreement. Private Jet took the position that the lack of immediate availability was expressly contemplated by the parties' agreement. Regardless, after those 8 times, the record was undisputed that Tauck had demanded the use of the private jet and received that benefit 48 times. The Court then ruled that Tauck continued to act as if it were still bound the agreement. *Id.* at *3 (“Tauck did not declare a breach or even behave as if it believed PJS had breached... Tauck continued its contractual relationship with PJS into the 2020 tour season.”). In other words, the parties continued to trade their respective benefits under their agreement for years after the alleged breach. *Id.* at *4.

11. Second, in this case, unlike in *Private Jet Services*, the only evidence in the record shows that Mr. Swan immediately began to “behave as if [he] believed that [Casella] had breached.” *Id.* at *3. As noted, the only evidence in the record—by virtue of Casella’s own strict limitations on the record in this case—shows the following timeline:

- a. An internet post by Mr. Swan on May 19, 2023 that the jury found did not breach Mr. Swan’s covenant of good faith and fair dealing.
- b. A disclosure of the existence and terms of the Settlement Agreement by Casella’s Rebecca Metcalf to Dave Leonard on May 19, 2023, which the jury found to be a material breach.
- c. A disclosure of the existence and terms of the Settlement Agreement by Casella when it filed its legal action on May 25, 2023, which the jury found to be a material breach.

- d. A sequence of nine posts on the internet by Mr. Swan beginning with a first post on August 9, 2023, which the jury found to be material breaches of the settlement agreement.

12. The only evidence in the record in this case shows a timeline in which Mr. Swan only breached the Settlement Agreement *after* Casella did so. There is no evidence from the posts in the record that Mr. Swan acted as if he were bound by the Settlement Agreement after Casella's breach. Casella *might have* preserved this argument if it had permitted Mr. Swan's testimony and exhibits showing his compliance in other posts, but having successfully restricted the Court's consideration to only the internet posts in evidence, its efforts on this factual dispute are unavailing.³

13. Casella's reliance on *Accusoft Corp. v. Palo*, 237 F.3d 31, 54-55 (1st Cir. 2001) is similarly misplaced. First and most glaringly, in *Accusoft v. Palo* the finder of fact deemed the other Defendant's breach not to be material. *Id.* at *54. That is in direct contrast to this case, where the jury was expressly instructed on materiality and found that Casella's breach was

³ Even if the argument were preserved, however, it fails. Even if there were some evidence in the record of Mr. Swan's efforts to comply with the agreement after Casella's breach, Casella's duty of confidentiality, unlike the provision of private jet services in *Private Jet Services Group*, was absolute and, once breached, irrecoverable. Mr. Swan's duties were excused regardless if there were evidence that he continued to try to express his statements in terms of opinion from time to time after Casella's breach. The law cannot require Mr. Swan to expose himself to limitless liability (\$5,000 per breach for every statement he made about Casella—and Mr. Swan testified that he made statements about Casella thousands of times) merely in order to assert an affirmative defense. Moreover, nothing in the Settlement Agreement bound Mr. Swan not to express his views in terms of opinion. Thus, Casella could not attempt to argue that his subsequent speech that happened to comply with the Settlement Agreement constituted Mr. Swan's agreement that the Settlement Agreement still applied. Put differently, the distinction between this case and *Private Jet Services Group* turned on the Defendant in *Private Jet Services Group* having continued to accept *the benefits* of the agreement after the alleged breach by the Plaintiff; here, the best that Casella can argue is that Mr. Swan continued to accept *the obligations* of the Settlement Agreement. *Private Jet Services Group*, 2025 DNH 070 at *3-4. But absent the reciprocal benefits owed by Casella to Swan, which were destroyed irretrievably with Casella's disclosure of the existence and terms of the Settlement Agreement, he never got the benefits of the Settlement Agreement he entered into with Casella after May 19, 2023—just one week after Casella promised him that benefit in perpetuity. For that reason, Casella's material breach excused Mr. Swan's future performance.

material. That alone renders *Accusoft Corp.* inapposite here.⁴ Secondly, in *Accusoft*, unlike in this case, there was an express finding that Accusoft continued to operate under the contract after the Defendant's alleged breach. As such, *Accusoft* is more similar to *Private Jet Services Corp.* than it is to this case, for the reasons discussed in depth, *supra*.

14. Regarding the argument that Mr. Swan did not assert his affirmative defense of excuse of performance until he answered Casella's amended complaint, *see* Motion at 8, Casella did not assert that he had breached the speech modification provisions of the Settlement Agreement until its amended complaint. But Casella's assertion is also completely false, and knowingly so in a way that should justify an award of attorney's fees. Mr. Swan's July 7, 2023 Answer—which preceded his August 9, 2023 post by more than a month, states, “The Plaintiff, by this filing, has—in clear violation of the Agreement—advertised the existence of the Agreement, and some of its most material terms, *i.e.*, confidentiality and a liquidated damages clause, including the amount of the agreed upon liquidated damages.” *See* July 7, 2023 Answer, Affirmative Defenses and Counterclaims at III. Mr. Swan put Casella on notice that he believed Casella to have breached the agreement on July 7, 2023 and demanded relief accordingly. Thus, not only has Casella materially misstated the record in this case, it has hidden from the Court the clear and unambiguous notice it claims Mr. Swan failed to give.

15. Regarding the argument that Mr. Swan's trial conduct (arguing that the statements were consistent with his contractual obligations), he made a number of arguments in the alternative. He argued not only that he was excused from performance, but also that, even if

⁴ Furthermore, the distinction from *Accusoft* underscores the validity of *Gaucher* and its applicability in this case. *Gaucher v. Waterhouse*, 175 N.H. at 296. New Hampshire law unambiguously holds that a material breach by one party excuses another party from its future performance under the agreement. *Id.* The First Circuit expressly stated that the *Accusoft* breach was not material; therefore, there was no excuse of performance. The finding in *Private Jet Services Group* was implied—the 8 alleged breaches were not material, because the parties continued to exchange benefits under the agreement 48 more times. 2025 DNH 070 at *3=4.

he were not excused, the posts did not breach the agreement. Arguing inconsistent defenses is permissible and not prejudicial under New Hampshire law. *Werne v. Executive Women's Golf Ass'n*, 158 N.H. 373, 377 (2009).

16. Regarding Section V of the Plaintiff's Objection, the Defendant incorporates and references his previously filed Motion for Final Orders in response. In addition, the Defendant incorporates his pre-trial filings regarding why, if liquidated damages are provided in this case, he should only have to pay \$5,000. Finally, he notes that the only remedy available to him under the Settlement Agreement is excuse of performance. The liquidated damages provision of the Settlement Agreement only allows liquidated damages for Casella, not Swan. There is no remedy for Casella's wholesale breach of the most important ongoing term for Mr. Swan. For this reason, excuse of performance is his only equitable remedy.

17. Regarding Section VI of the Plaintiff's objection, Mr. Swan incorporates his previously filed Motion which included his request for attorney's fees. In addition, he notes that in its very Objection, Casella continues to mischaracterize the record in this matter by asserting arguments that are flatly contradicted by the pleadings, and referencing exhibits and testimony that it objected to—successfully—at trial. Casella's entire approach to this litigation was tainted by its dirty hands, from the moment it wantonly disclosed the existence and terms of the Settlement Agreement one week after it executed the agreement when Rebecca Metcalf said, "I can't talk about it. There's a non-disclosure agreement." This very language was deemed by Casella itself to be a violation—yet now it seeks to escape the consequences of its own standards.

18. This is a theme in this matter. Casella wants a world in which the standards only apply to Mr. Swan. Evidence is not relevant if it helps Mr. Swan, but it is relevant if it helps Casella. The Settlement Agreement is sacred if it helps Casella, but not if it helps Mr. Swan.

The confidentiality of the Settlement Agreement is critical and subject to strict standards of disclosure when it comes to Mr. Swan, but those same standards are only loosely to be applied to Casella. This is bad faith. The Court should award Mr. Swan attorney's fees and costs, enter judgment in his favor, and discharge him from any future obligation under the terms of the Settlement Agreement.

Respectfully submitted,

JON SWAN

By his Attorneys:

ORR & RENO, P.A.

Dated: May 26, 2026

By: /s/ Jeremy D. Eggleton
Jeremy D. Eggleton, Esq.
NH Bar No. 18170
45 South Main St.
PO Box 3550
Concord NH 03302-3550
(603) 224-2381
jeggleton@orr-reno.com

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