

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Jon Swan

Docket No. 217-2023-CV-00285

**PLAINTIFF’S OBJECTION TO DEFENDANT’S MOTION FOR ENTRY OF  
FINAL ORDERS AND REQUEST FOR ALTERNATIVE FINAL ORDERS**

Plaintiff Casella Waste Systems, Inc. objects to Defendant Jon Swan’s Motion for Entry of Final Orders. Swan’s motion asks the Court to convert the jury’s breach findings against Casella into wholesale rescission of the parties’ Settlement Agreement, to erase the jury’s separate breach findings against Swan, to deny Casella the liquidated damages remedy provided by the Agreement, and to award Swan attorney’s fees. None of that follows from the verdict or from New Hampshire law.

Swan’s motion depends on an overbroad reading of *Gaucher v. Waterhouse*, 175 N.H. 291 (2022). *Gaucher* did not hold that every breach characterized as material automatically voids the entire contract, retroactively extinguishes independent obligations, or nullifies jury findings on later breaches. New Hampshire law instead asks whether the breach is “sufficiently material” and important to justify ending the whole transaction. A breach may support damages and may be material in the sense that it is not

merely technical, without requiring judicial rescission or relieving the breaching party of all future performance.

The question now before the Court is not whether Casella breached the Settlement Agreement. The jury answered that question. Nor is the question whether Swan breached the Settlement Agreement. The jury answered that question too. The present question is a remedial and legal one: whether the breaches found against Casella justify setting aside the entire Settlement Agreement and excusing Swan from compliance with the separate Future Public Communications provision. They do not.

**I. The legal consequences of the verdict are for the Court.**

Swan's own motion confirms that the jury asked whether, if one party breached the settlement, the settlement became null and void from that point forward. The Court correctly instructed the jury that the legal consequences of a breach finding would be determined by the Court. That ruling was correct. The jury's function was to resolve the factual breach questions submitted to it. The Court's function is now to apply the law to those findings and enter judgment.

The verdict form did not ask the jury whether the Settlement Agreement should be rescinded. It did not ask the jury whether Casella's breaches were sufficiently material to justify ending the whole transaction. It did not ask whether Swan made a timely election to renounce the Agreement. It did not ask whether Swan could simultaneously enjoy the benefits of the agreement, such as the entry of neither party docket markings, while being relieved of his obligations under it. And it did not ask whether the liquidated damages

clause should be applied to the breaches found against Swan. Those questions are for the Court at the remedy stage.

Swan asks the Court to treat the verdict as if the jury had declared the entire Agreement null and void. It did not. The jury found discrete breaches by both parties. The Court must enter an order that gives effect to all of those findings, not one that privileges Swan's favorable findings and nullifies Casella's.

## **II. *Gaucher* does not make every material breach a rescission event.**

Swan quotes *Gaucher* for the proposition that a material breach, *ipso facto*, discharges all remaining duties of the other party. But his motion omits the limiting principle embedded in New Hampshire law. The material-breach doctrine does not treat every material breach as a total breach that ends the entire contract. Rather, New Hampshire law clearly recognizes that not all material breaches are the same. A breach discharges future performance only when it is "sufficiently material" and important to justify ending the whole transaction. That the question governing the judicial relief afforded depends on whether the breach was "sufficiently material" to warrant contract termination is found repeatedly in New Hampshire case law. See *Fitz v. Coutinho*, 136 N.H. 721, 725 (1993); *Foundation for Seacoast Health v. Hospital Corp. of America*, 165 N.H. 168, 181-82 (2013).

That distinction is not semantic. It is the difference between damages for breach and rescission of the bargain. New Hampshire law recognizes that a breach that does not justify ending the entire transaction may still support damages. See *Fitz*, 136 N.H. at

724-25. The Court therefore must ask the remedy-specific question: whether Casella's breaches of the confidentiality provision were of such magnitude that Swan was entitled to abandon the Agreement and disregard the independent Future Public Communications provision.

They were not.

The Future Public Communications provision remained fully capable of performance after the confidentiality disclosures found by the jury. That provision required Swan, when making public communications imputing conduct or intent to Casella, to disclose the source of the facts on which he relied and to use phrasing such as "I understand," "I think," or "In my opinion," unless he was repeating or relaying a public communication by an independent source. The Court previously recognized the operative language of this provision in its discovery and summary judgment orders. The provision did not depend on the continued secrecy of the Agreement. It governed Swan's future public statements about Casella and its subsidiaries. That obligation remained meaningful and performable regardless of whether Casella's Complaint or a disclosure to David Leonard revealed the Agreement's existence or terms.

Swan's proposed order would collapse all contractual obligations into one. But the Settlement Agreement contained multiple, distinct promises. The confidentiality provision served one function. The Future Public Communications provision served another. The liquidated damages clause served a third. And crucially, the provision requiring termination of the underlying defamation action served Swan's interests most of all, because it removed the specter of a monetary judgment. A breach of one provision

does not automatically erase every other provision unless the breach defeats the object of the entire contract entirely. The jury's findings do not compel that conclusion, and the record does not support it.

### **III. The Court should not set aside the Settlement Agreement.**

Swan's requested relief is rescission in substance, even if he describes it as "excuse of performance." He asks the Court to declare that his remaining obligations under the Agreement, including Paragraphs 2, 5, and 7, are excused; that the jury's breach findings against him are nullities; and that Casella's damages claim is denied. That is not a narrow prospective excuse. It is an attempt to set aside the contract retroactively and erase Casella's successful verdict.

Swan's theory would produce an inequitable and legally unsound result. The problem is that Swan would continue to receive the benefit of termination of the litigation, but would be completely relieved of his ongoing duties. Under his view, Casella's breach would erase Swan's later breaches, but Swan's own repeated breaches would have no remedial consequence. That is not contract law; it is forfeiture. The Court should instead apply the ordinary rule: both parties' breach findings stand, and the available remedies are determined under the Agreement and governing law.

### **IV. Contract law required Swan to make a prompt election; having continued under the Agreement, he cannot now seek discharge from future performance.**

Even if Casella's confidentiality breaches could have supported prospective discharge, the remedy Swan seeks had a precondition: he had to make an election to treat

those breaches as a total breach and to place Casella on notice, by words or conduct, that he was treating the Settlement Agreement as discharged. A private, uncommunicated decision is not enough. The reason is practical and doctrinal. Discharge changes the parties' legal relationship and ends future duties. Contract law, therefore, looks to objective manifestations that apprise the defaulting party of the claimed discharge, or conduct inconsistent with continued performance. Without that manifestation, the contract remains the governing instrument, and the remedy, if any, is damages for the earlier breach—not judicial cancellation of later duties after the fact.

*Private Jet Services Group, LLC v. Tauck, Inc.* applies that rule in a closely analogous setting. There, Tauck argued that Private Jet Services had materially breached the parties' contracts by failing to supply the contracted aircraft at the start of the season, and that the alleged breach barred Private Jet Services from enforcing Tauck's payment obligations. The court assumed the breach for purposes of analysis but rejected Tauck's avoidance theory because Tauck did not declare a breach, did not behave as if Private Jet Services had breached, accepted forty-eight later flights, and continued the contractual relationship into the next season. *Priv. Jet Servs. Grp., LLC v. Tauck, Inc.*, No. 20-cv-1015-SM, Opinion No. 2025 DNH 070, at 9-11 (D.N.H. June 3, 2025). Relying on Williston and the Restatement, the court explained that in the event of breach the other party may choose either to cease performance or to continue; but continuing performance, accepting performance, or insisting on future performance is an election to proceed. *Id.* at 10-11 (quoting 14 Williston on Contracts § 43:15; citing Restatement (Second) of Contracts § 246). The dispositive point was objective conduct. Tauck's

outward conduct signaled that it still considered the contracts binding, so the court declined to impose the total-breach consequence Tauck later sought.

*AccuSoft* reaches the same result. In *AccuSoft*, the First Circuit denied a party's attempt to obtain rescission or relief from future performance where, after learning of breaches of a settlement agreement, it continued accepting the agreement's benefits, acted as though the agreement remained in effect, and only later sought cancellation. *AccuSoft Corp. v. Palo*, 237 F.3d 31, 55-56 (1st Cir. 2001). *AccuSoft* is particularly instructive because it involved the same remedial maneuver Swan attempts here: converting an earlier settlement-agreement breach into retroactive cancellation of later duties. The court refused that result because the claimed discharge remedy was inconsistent with the party's conduct after the alleged breach. *Id.*

That analysis directly answers Swan's first-breach argument. The mere fact of an earlier breach does not automatically require the total-breach remedy Swan now seeks. A first breach may create a possible remedial choice, but the Court imposes discharge only if the party seeking it actually made that choice in an objectively cognizable way. An uncommunicated election that does not apprise the defaulting party of an intention to declare total breach cannot later be converted, after an adverse verdict, into the basis for disabling a contract the parties continued to litigate and perform under.

Swan's conduct likewise fails the precondition for the remedy he asks the Court to impose. He knew from the outset that Casella's Complaint disclosed the existence and certain terms of the Settlement Agreement. He also treated the Dave Leonard disclosure as a breach: his own theory was that Leonard's May 2023 social-media comments

showed that someone had disclosed the Agreement or its non-disclosure terms to Leonard. Yet Swan did not then tell Casella that he was treating the Agreement as discharged. He did not seek prompt restoration of the defamation action. He did not seek the return of the \$1500 settlement check. He did not ask the Court at the outset to determine that Casella's alleged breach had ended his future-public-communications obligations.

Instead, he litigated under the Agreement, interpreted its provisions, invoked its safe-harbor language, and continued to rely on the completed termination of the defamation litigation. When he answered the original complaint and counterclaimed, Swan made no reference to the remedies he now seeks and gave no indication that he considered the Settlement Agreement terminated. He did not seek declaratory judgment to that effect, nor did he allege that his own obligations under it were discharged. The same holds true of his answer and counterclaim to the first amended complaint. It was not until he answered the second amended complaint nearly one year later that Swan, for the first time, asserted that his own obligations under the Settlement Agreement were discharged by Casella's breach.

The chronology of Swan's own "opinion" statements reinforces the same conclusion. If the relevant trigger is the Leonard disclosure, the record shows that after Leonard's May 2023 comments Swan still used the opinion formulation contemplated by the Future Public Communications provision: on May 23, 2023, he described a tri-town contracting development as positive and wrote that it would help "ensure that NCES gets shuttered, in my opinion...JS." If the relevant trigger is Casella's Complaint, the record is

even clearer. On May 27, 2023, after the Complaint was filed, Swan wrote that testing would include testing for 1,4-Dioxane, “which in my opinion, is leaking from the NCES landfill, along with PFAS, based on my research of the groundwater monitoring reports submitted to NHDES.” Roughly two months later, on July 24, 2023, he posted that the NCES groundwater issue was “going to become quite a big story, in my opinion.” And on September 17, 2023, he again used the Agreement’s opinion framework, writing “In my opinion, based on my research,” that NCES was failing to contain PFAS and other contaminants, and that it was his “belief” that the NCES landfill was leaking. These are not objective manifestations that the Agreement had ended. They are manifestations that Swan continued to speak within the Agreement’s framework while preserving, at most, a damages claim for Casella’s alleged confidentiality breaches.

Swan’s trial conduct reinforces this view. At trial he argued that all of his statements were consistent with his contract obligations. For each of the nine communications that the jury found breached the Settlement Agreement, Swan argued either that it fell within the agreement’s “safe-harbor” provision or did not meet the contractual standard of attributing conduct or intent to Casella. That is not the conduct of a litigant who claims that the Settlement Agreement no longer applied due to Casella’s breach. It is the conduct of a party arguing that his conduct was not prohibited by the still-active contract.

The Court need not hold that Swan was not entitled to any relief for Casella’s earlier breaches to reject the remedy he now seeks. The point is narrower: the specific remedy of judicial discharge requires an objective election to treat the contract as

discharged before the party asks a court to relieve him of future duties. *Private Jet Services, AccuSoft, Williston*, and the Restatement all tie the consequence to outward manifestations, acceptance of continued performance, or conduct inconsistent with continued obligation. Swan supplied no such manifestation. Because the precondition for judicial discharge never occurred, the Court should not use Casella's earlier breaches to erase the jury's later findings that Swan breached the Future Public Communications provision.

**V. The jury's findings against Swan should be enforced, and the Court should award \$5,000 per breach.**

The jury found that Swan breached the Settlement Agreement by posting Exhibits 4, 5, 6, 7, 8, 9, 10, 12, and 15. Those findings should be applied. The Settlement Agreement provides for liquidated damages of \$5,000 for breach by Swan. The Court should therefore award Casella \$45,000, representing \$5,000 for each of the nine breaches found by the jury.

That result is consistent with the Agreement and New Hampshire law governing liquidated damages. New Hampshire enforces liquidated damages provisions when the anticipated damages are uncertain in amount or difficult to prove, the parties intended to liquidate damages in advance, and the amount is reasonable and not greatly disproportionate to the presumable loss or injury. See *Holloway Automotive Group v. Giacalone*, 169 N.H. 623, 627 (2017); *Orr v. Goodwin*, 157 N.H. 511, 514-15 (2008); *General Linen Services, Inc. v. Franconia Investment Associates, L.P.*, 150 N.H. 595, 599-600 (2004).

The Court has already determined “that \$5,000 per statement is a reasonable liquidated damages award as that amount was a reasonable estimate for damages that would have been difficult to ascertain at the time the parties entered into the settlement agreement.” *Order on Defendant’s Motion to Partial Summary Judgment and Plaintiff’s Motions in Limine* at 5. The Court now must conduct “a retrospective appraisal of the liquidated damages provision,” and if the evidence establishes “the actual damages turn out to be easily ascertainable” the Court must determine whether the stipulated sum is unreasonable. *Holloway*, 169 N.H. at 627.

The Future Public Communications provision was designed to prevent reputational, business, and public-relations harms arising from non-compliant public statements about Casella and its subsidiaries. Those harms are inherently difficult to quantify. They occur in public discourse, spread through social media, affect public perception, and cannot be measured with a simple invoice, repair cost, or lost-sale calculation. The difficulty of proving actual damages is exactly why parties bargain for liquidated damages.

The retrospective analysis leads to the same conclusion. Looking back, the harm from Swan’s public communications remains difficult to establish with precision. Casella should not be required to prove the number of people who read each post, how each reader understood it, how it affected regulatory or community perceptions, or what specific business consequence flowed from each communication. The parties avoided that uncertainty by agreeing to a fixed liquidated amount. A \$5,000 award for each breach is not disproportionate to the anticipated or actual difficulty of proving harm from

repeated public communications about environmental contamination, landfill operations, and Casella's conduct.

**VI. Swan is not entitled to attorney's fees.**

Swan also asks for attorney's fees under *Harkeem v. Adams*, 117 N.H. 687 (1977), or RSA 507:15. The request should be denied.

Under *Harkeem*, attorneys' fees are not available merely because a party prevails, or even because the opposing party's position is rejected. New Hampshire follows the American Rule, and fees may be shifted only when authorized by statute, contract, or a recognized equitable exception. *Maguire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51, 54-55 (1990); *Pugliese v. Town of Northwood*, 119 N.H. 743, 752 (1979). The *Harkeem* exception is narrow. It applies when "overriding considerations" require fee-shifting to do justice, including when a party is forced to seek judicial assistance to vindicate a clearly defined and established right that should have been enjoyed without litigation. *Harkeem*, 117 N.H. at 690-91. Later cases state the same rule in practical terms: fees may be awarded where litigation is instituted or unnecessarily prolonged through "oppressive, vexatious, arbitrary, capricious or bad faith conduct," or where a party is forced to litigate against a position that is "patently unreasonable." *Maguire*, 133 N.H. at 54; *Keenan v. Fearon*, 130 N.H. 494, 502 (1988); *St. Germain v. Adams*, 117 N.H. 659, 662 (1977). But the doctrine does not punish every losing argument. A fee award is improper where the issue was fairly debatable, factually disputed, or advanced in good faith. See *Maguire*, 133 N.H. at 55-56; *Adams v. Bradshaw*, 135 N.H. 7, 16-17 (1991). Thus, Swan cannot obtain fees simply by pointing to the jury's adverse findings against

Casella or to the fact that Casella did not prevail on every claim. He must show that Casella’s prosecution of the case, or some discrete portion of it, was so baseless, unreasonable, or bad-faith that he was forced to defend litigation that should never have been brought or maintained. That showing is especially unavailable where the Court itself has already characterized at least one disputed issue as “genuine and in good faith” and declined fees under *Harkeem*.

The *Harkeem* factors are absent here. This is not a case in which Swan was forced to defend a groundless action or litigate to vindicate a right that Casella had no legitimate basis to contest. The jury found that Swan breached the Settlement Agreement nine separate times—Exhibits 4, 5, 6, 7, 8, 9, 10, 12, and 15—defeating any claim that Casella’s enforcement action was frivolous, vexatious, or brought in bad faith. Nor does the jury’s separate finding that Casella breached the Agreement transform Casella’s claims into sanctionable litigation. At most, that finding reflects that both sides presented contested breach theories arising from a disputed settlement agreement. And contested breach issues do not satisfy *Harkeem*. Fee-shifting under *Harkeem* is reserved for cases involving oppressive, bad-faith, or patently unreasonable litigation conduct, not for ordinary contract litigation in which each side wins some issues and loses others. See *Maguire*, 133 N.H. 54–56; *Adams*, 135 N.H. at 16–17 (1991); *St. Germain*, 117 N.H. at 662. The point is reinforced by this Court’s prior ruling refusing to award Swan fees under *Harkeem* where it found the parties’ jury-trial dispute “genuine and in good faith.” The same logic applies with greater force after trial: a case that produced nine jury

findings of breach by Swan cannot be recast as the kind of baseless, unnecessary, or bad-faith proceeding that *Harkeem* permits a court to punish through attorney's fees.

## **VII. Conclusion.**

Swan's motion asks the Court to go far beyond the verdict. The jury found breaches by both parties. New Hampshire law does not require the Court to treat Casella's breaches as automatically voiding the entire Settlement Agreement. The proper question is whether those breaches were sufficiently material and important to justify ending the whole transaction and excusing Swan's independent future-public-communications obligations. They were not. In any event, Swan waived any such remedy by continuing to act under the Agreement and failing to renounce it in a timely manner.

For these 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) denies Swan's request to declare his obligations excused and the jury's findings against him nullities and holds that the Settlement Agreement remains in place and in effect between the parties; (3) preserves the jury's findings that Swan breached the Settlement Agreement as to Exhibits 4, 5, 6, 7, 8, 9, 10, 12, and 15; (4) awards Casella \$45,000 in liquidated damages, representing \$5,000 for each Swan breach found by the jury; (5) denies Swan's request for attorney's fees and costs; and (6) grants such further relief as is just and equitable.

Respectfully submitted,

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By Its Attorneys,

May 21, 2026

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#### 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.

May 21, 2026

/s/Richard J. Lehmann  
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