THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Casella Waste Systems, Inc.

v.

Jon Swan

Docket No. 217-2023-CV-00285

ORDER ON POST-TRIAL MOTIONS

The Plaintiff, Casella Waste Systems, Inc. ("Casella"), sued the Defendant, Jon Swan, for breach of a settlement agreement. Doc. 25 (2nd. Am. Compl.) Mr. Swan filed a counterclaim. Doc. 6. A jury trial took place in May 2026. Casella now moves for judgment notwithstanding the verdict ("JNOV"), see Doc. 172, to which Mr. Swan objects. See Doc. 173. For his part, Mr. Swan moves for entry of a final order, see Doc. 165, to which Casella objects. See Doc. 171. The Court held a hearing on the motions on August 27, 2026. For the following reasons, Casella's motion is **DENIED**, and Mr. Swan's motion is **GRANTED** in part and **DENIED** in part.

BACKGROUND

The Court has discussed the background facts of this case extensively in prior Orders, incorporated by reference here. See Doc. 141 (Mar. 16, 2026, Order); Doc. 118 (Sept. 25, 2025, Order). In summary, in 2020, the parties were involved in previous litigation arising out of Mr. Swan's opposition to a landfill project that Casella operated. That litigation ultimately ended in a settlement agreement. The settlement agreement contained various provisions, including a confidentiality provision and a provision relating to Mr. Swan's future communications about Casella. Following the parties'

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execution of the settlement agreement, Mr. Swan made several statements online that Casella argued violated the settlement agreement.

This action followed. The parties' claims ultimately went to trial in May 2026. At the conclusion of the trial, the jury found for Mr. Swan with respect to Casella's claim that Mr. Swan breached the Covenant of Good Faith and Fair Dealing by posting Exhibit 1 on social media, and with respect to Mr. Swan's claim that Casella breached the settlement agreement by filing the Complaint and by disclosing the existence or terms of the settlement agreement to David Leonard. Doc. 169 (Jury Verdict). The jury found for Casella, however, with respect to its claim that Mr. Swan breached the settlement agreement by posting Exhibits 4–10, 12, and 15. Id.

ANALYSIS

I. Casella's JNOV Motion

Casella moves for JNOV on "the jury's determination that Casella breached the agreement by filing the lawsuit [and by] disclosing the existence of the settlement agreement to a third party, and [the jury's determination] that Swan did not breach by the initial post[,]" of resharing a newspaper article. Doc. 172 at 1.

VERDICT FORM

A.
Exhibit 1:
Social Media Post

Do you find that by posting Exhibit 1, Swan breached the covenant of good faith and fair dealing?

___ Yes X No

Go to B

B.
Filing of Complaint by Casella

Do you find that by filing the Complaint, Casella breached the Settlement Agreement?

X Yes ___ No

Go to C.

Doc. 169. In coming to its verdict, the jury was provided with the settlement agreement's "Future Public Communications" restrictions on Mr. Swan:

> Except in an instance in which Swan repeats or relays a public communication by an independent source, other than Swan, Swan agrees that in any public communication in which he imputes conduct or intent to Casella he will (a) disclose the source of the facts on which he relies for such imputation; and (b) preface such communication with words such as "I understand", "I think" , "In my opinion", or similar phrasing calculated to convey that the communication is an expression of opinion or belief rather than a statement of fact. To the extent Swan intends a public communication to be satirical, Swan shall include a statement within the public communication identifying it as such.

Doc. 2 (Sealed Settlement Agreement). Aware of such restrictions on Mr. Swan's communication, the jury was provided with the following social media post, Exhibit 1, to decide whether Mr. Swan breached the covenant of good faith and fair dealing:



Ex. 1.

As explained above, the jury determined that Mr. Swan did not breach the covenant in this initial social media post. Doc. 169. While Casella moves for JNOV, JNOV is required only when "the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand." Boynton v. Figueroa, 154 N.H. 592, 602 (2006); Blouin v. Sanborn, 155 N.H. 704, 707 (2007).

Casella contends that the JNOV standard is met here. It argues that, given the facts available to the jury at trial, no reasonable jury could conclude that Casella breached the settlement agreement. Doc. 172. Casella argues further that even though it filed this lawsuit and, as a result, disclosed the existence of the settlement agreement and the confidentiality provision, it did not disclose important conditions from the settlement agreement. Casella points to Mr. Leonard's testimony at the trial, where he explained that Casella did not disclose the existence of the settlement agreement, but rather he had assumed there was a settlement based on the newspaper article. Finally, Casella points to similar testimony by Lucy Golden, confirming "[t]he simple fact, . . . [ ] that when parties jointly [file] docket markings, it is common knowledge that the case has settled." Doc. 172 at 2. In response, Mr. Swan contends that Casella's assessment of the evidence reflects one of several plausible ways in which the jury could have interpreted the evidence presented at trial. Doc. 173 at 2. He argues that Casella cannot meet its extremely high burden in challenging an adverse jury verdict. Doc. 173 at 1.

Upon review, the Court agrees with Mr. Swan. Looking at the record and the parties' arguments, there was ample evidence to support the jury's decision here. See Ex. 144 (Def.'s Witness List) (describing many witnesses, including Mr. Swan and others, concerning the May 2023 newspaper article and Mr. Swan's, and others', social media posts); Doc. 145 (Def.'s Ex. List) (submitting the newspaper article, emails and communications, and social media posts). While Casella's assessment of the evidence is in fact a reasonable determination the jury could have made, the jury did not make that determination. Rather, the jury chose another reasonable alternative, given the various testimony and exhibits provided at trial, to find that Casella "breached the agreement by filing the lawsuit, disclosing the existence of the settlement agreement to a third party, and that Swan did not breach by the initial post[,]" of resharing a newspaper article. Doc. 172 at 1.

Further, the jury had all of Casella's arguments available to it when it made its findings: the jury heard sound cross-examination from Casella's counsel and closing argument about why it should agree with Casella in light of testimony provided by Mr. Leonard, Ms. Golden, and others. As a result of the testimony and arguments presented to it, the jury made its determination within its fact-finding discretion. The Court is not convinced that Casella's view, that it did not breach the settlement agreement by filing the Complaint, is the only reasonable inference available here. In light of the heavy burden for a party in establishing a JNOV, Casella's motion for JNOV is **DENIED**. Doc. 172; Boynton, 154 N.H. at 602 (requiring JNOV when the sole reasonable inference that may be drawn from the evidence, which must be viewed in

the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand").

II. Mr. Swan's Motion for Entry of Final Order

Mr. Swan moves for the Court to excuse him from any remaining obligations under the settlement agreement, to nullify the jury's findings of his breaches of the settlement agreement, to deny Casella liquidated damages, and to award Mr. Swan attorney's fees. Doc. 165 at 4. The Court first addresses his request for excuse of performance, as the answer affects his remaining requests.

A. Excuse of Future Performance

Mr. Swan contends that excuse of performance is an appropriate remedy here because this determination should have been one for the jury. Id. at 1. In support, he points to the jury's inquiry during its deliberations, when it asked the Court "[i]n the instance that one party breaches the settlement, is the settlement considered null and void from that point forward[?]" Id. at 1. In response, the Court instructed the jury that the legal consequences of the jury's finding a material breach would be determined by the Court, not the jury, referring it to the provided jury instructions when answering the question. Doc 168 (Jury Questions) ("Please read the instruction on page 15 – second full paragraph.")[1]; Doc. 165 ("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.")

[1] For context, the Court provides the referenced paragraph here: "One of the things you will recognize is that you are not being asked to find what harm may have been caused by any breach by either party of their obligations. The Court will determine the consequences of the answers you give in the special verdict form. Accordingly, you must not speculate about the legal effects of your answers."

Mr. Swan argues that, as a result of the Court's improper determination, the only remedy available now is to excuse him from all future performance of the settlement agreement, to nullify the jury's findings of his breaches of the settlement agreement, to deny Casella liquidated damages, and to award Mr. Swan attorney's fees. Id. at 4; see Doc. 48 (Def.'s Proposed Jury Verdict Form) (preserving his objection, asking Jury to "STOP" after answering "Yes" to the question whether Casella materially breached the Settlement Agreement). He contends that this outcome is mandated, because material breaches of a contract excuse future performance, and Mr. Swan's breaches, as found by the jury, began nearly three months after Casella twice breached the settlement agreement. Id. (citing Gaucher v. Waterhouse, 175 N.H. 291 (2022)).

In objecting, Casella contends that Mr. Swan's request for excuse of performance depends on an overbroad reading of Gaucher, and that not every material breach automatically voids the entire contract, retroactively extinguishes independent obligations, or nullifies jury findings on later breaches. Doc. 171 at 1. Rather, New Hampshire law asks whether the breach is "sufficiently material" and important to justify ending the whole transaction. Id.

The Court must determine whether the breaches here excuse Mr. Swan of all future performance of the settlement agreement. In doing so, it looks to and applies relevant New Hampshire case law. As it is particularly relevant here, the Court looks to and briefly explains Gaucher, 175 N.H. at 293, in which the court found that the plaintiff, and not the defendants, materially breached a lease termination agreement ("LTA"). Id. One of the defendants was a trust that leased a portion of a store to the plaintiff. Id. The trust began negotiating the sale of its property to a limited liability company ("LLC")

that did not want to assume the landlord/tenant relationship with the plaintiff after the transfer of the property. Id. The plaintiff agreed to accommodate the trust and to relinquish his rights under the lease in exchange for a $20,000 lease termination fee. Id. Thereafter, the plaintiff and the trust executed the LTA, in which the plaintiff agreed to vacate by June 15, 2015, and the trust agreed to pay him $20,000 on July 1, 2015. Id.

The plaintiff ceased operating and vacated the premises prior to June 15. Id. On July 1, the trust failed to pay the plaintiff the $20,000 termination fee. Id. The trust informed the plaintiff that because the sale had not yet closed with the LLC, it lacked the funds to pay him. Id. at 294. In response, sometime in July, the plaintiff reoccupied the premises. Id. On July 27, the trust closed the sale of the property to the LLC. Id. That same day, the trust offered the plaintiff the $20,000 lease termination fee if he agreed to vacate the premises. Id. The plaintiff refused to leave, claiming that the trust's failure to pay the $20,000 on July 1 “rescinded” the LTA and resurrected his tenancy. Id. When the plaintiff refused to vacate the property, the LLC attempted to evict the plaintiff. Id. The trial court found that, although the trust’s failure to pay the plaintiff a termination fee on July 1 may support a claim for damages, it did not resurrect the tenancy and, thus, granted the eviction. Id.

The plaintiff then initiated an action against the LLC and the trust seeking, among other things, the return of his $1,500 security deposit and the payment of the $20,000 lease termination fee. Id. The trust filed counterclaims for indemnification. Id. The trial court entered judgment in favor of the defendants and found that the plaintiff terminated his tenancy when he vacated the premises prior to June 15 and that the trust did not

commit a material breach of the contract by failing to pay the lease termination fee on July 1. Id. The court reasoned that "the contract did not provide that time was of the essence and that the precise date of payment was not essential to the contract." Id. It further found that "[e]ven if" the trust did commit a material breach by failing to pay, the plaintiff "had no right to re-enter the premises and re-take possession." Id.

Thus, the court found that the plaintiff materially breached the LTA by reoccupying the premises in July, reasoning that because the lease termination fee was intended to effect the plaintiff's permanent separation from the premises, the plaintiff's subsequent "trespassory retaking of possession, and refusal to leave . . . [was] the very definition of a material breach." Id. Because the plaintiff "materially breached the [LTA], the Trust [was] discharged from its obligation to" pay the lease termination fee to the plaintiff. Id.

In affirming, the New Hampshire Supreme Court explained that a "material breach of contract by one party to a contract discharges the duty of performance of the other." Id. (citing Fitz v. Coutinho, 136 N.H. 721, 724-25 (1993)). It clarified that a "material breach excuses future performance, not past performance." Gaucher, at 296. It agreed with the trial court that because the plaintiff vacated the premises and terminated his tenancy prior to June 15, even if the trust materially breached the LTA, any such breach did not permit the plaintiff to rescind his prior performance, unilaterally reoccupy the premises, and enforce the trust's obligation to pay the $20,000 termination fee. Id.

Relying on this holding, Mr. Swan argues that his breaches, as found by the jury, began three months after Casella twice breached the settlement agreement and sued

him. Doc. 165 at 2. He also points to the fact that because the settlement agreement only provided liquidated damages to Casella for Mr. Swan's breach, the only remedy available to Mr. Swan under the circumstances is excuse of performance. Id. In response, Casella argues that although a "breach may support damages and may be material in the sense that it is not merely technical," it does not always require rescission or relieving the breaching party of all future performance. Doc. 171 at 1–2.

Here, the jury determined that Casella breached the settlement agreement by (1) filing the Complaint and (2) disclosing the existence of the settlement agreement to Mr. Leonard. Doc. 169. At the same time, the jury determined that Mr. Swan breached the settlement agreement "by posting Exhibit 4," followed by eight more breaching posts. Id; Ex. 4 ("August 9. 2023 Facebook Post").

A breach discharges future performance only when it is "sufficiently material" and important to justify ending the whole transaction. Fitz, 136 N.H. at 725. "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." Gaucher, 175 N.H. at 296 (citing Found. for Seacoast Health v. Hosp. Corp. of America, 165 N.H. 168 (2013)).

In determining whether a breach is material, the Court reviews the settlement agreement and its purpose and essential terms. First, the settlement agreement plainly states that, "one of the purposes of this Agreement is to 'buy peace' and that this paragraph is a substantial inducement for each of the Parties entering into this

Agreement." Doc. 2. Similarly, in coming to the agreement, the parties agreed to a mutual release of claims. Id. At the same time, the parties also agreed that the "terms and existence of this Agreement shall be confidential." Id. at 5.

Mr. Swan consequently argues that confidentiality of the settlement agreement was an essential term of the contract and thus "[t]he essence of the bargain between Mr. Swan and Casella concerning their mutual ongoing obligations was eviscerated by Casella's breaches." Doc. 165 at 2. Casella contends that its breaches of the confidentiality provision were not of such magnitude to disregard the independent provisions of the settlement agreement, such as the covenant not to sue. Doc. 171 at 4, Doc. 177.

Upon review, the Court agrees with Mr. Swan. Casella's violations of the essential confidentiality provision are a material breach of the settlement agreement. First and foremost, this Court has already expressed its opinion that such provision is essential to the settlement agreement.

> The Agreement required its terms and existence remain confidential. The Agreement prohibited the parties from disclosing the terms of the Agreement to any person. 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.

Doc. 52 (Oct. 10, 2024, Order, St. Hilaire, J.) at 5. Casella did not seek reconsideration as to this issue.

Indeed, as laid out above, one of the purposes of this agreement was to "buy peace." Doc. 2. As explained by Mr. Swan, confidentiality of the agreement was a key incentive to his contractual commitment, and to the creation of the agreement itself. By failing to adhere to an essential bargaining term of the agreement by improperly

bringing about the complaint in a way that did not keep an essential term confidential, Casella defeated a substantial purpose of the agreement. It broke the agreed upon peace by improperly bringing the complaint forward, defeating the object of the entire contract and the requirements for "buy[ing] peace." See Doc. 2 at 4 ("Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and full effect to the extent not held invalid or unenforceable, unless such invalidity or unenforceability frustrates the purpose of the Agreement." (Emphasis added)).

Thus, the legal consequences of Casella's material breach results in Mr. Swan's performance of the remaining obligations under the settlement agreement being excused. Mr. Swan's breaches, found by the jury, began in August 2023, months after Casella twice breached the settlement agreement by violating the confidentiality provision. Casella's initial material breach discharged Mr. Swan's duties to further perform his obligations under the settlement agreement. See Lassonde v. Stanton, 157 N.H. 582 (2008) (an owner's failure to pay the contractor after discovery of project deficiencies for which the owner was responsible constituted a material breach that precluded the owner's recovery of damages from the contractor); see also United Concrete Products, Inc. v. NJR Construction, LLC, 207 Conn. App. 551 (2021) (upholding an award based on the trial court's analysis under § 241 of the Restatement (Second) of Contracts § 241 to determine the materiality of breaches and concluding that the contractor rather than subcontractor was the first to have committed a material breach).

Casella, however, contends that such a remedy is wholly disproportionate and improper in the circumstances here, arguing that the 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. Doc. 171 at 7. In other words, it contends that the Court may only discharge an entire agreement if the party seeking such a remedy actually made that choice in an objectively cognizable way: however, here, Mr. Swan did not seek prompt restoration of the defamation action, did not seek return of his $1,500 settlement check, and finally, did not ask the Court at the outset to determine that Casella's alleged breach had ended his obligations outright. Id. Casella argues that "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." Doc. 177 at 7 (citing Priv. Jet Servs. Grp., LLC v. Tauck, Inc., No. 20-CV-1015-SM, 2025 WL 1566907, at *9–10 (D.N.H. June 3, 2025); AccuSoft Corp. v. Palo, 237 F.3d 31, 55-56 (1st Cir. 2001)).

The Court is not persuaded by Casella's argument. New Hampshire law unambiguously holds that a material breach by one party excuses another party from its future performance under the agreement. At the same time, "[b]ecause the material breach doctrine excuses a party's performance under a contract, it constitutes an affirmative defense when asserted in response to a claim for breach of contract." Kishan, Inc. v. Jalbert, No. 2016–0463, 2017 WL 2799476, at *2 (N.H. 2017) (non-precedential). "As such, any party claiming that its contractual performance is excused due to the other party's material breach bears the burdens of production and persuasion as to the defense, and is obligated to timely raise it." Id. Mr. Swan here affirmatively pled that Casella's May 2023 disclosure of the existence and terms of the settlement

agreement excused any subsequent failure to perform on his. Doc. 6 at 3 ("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.").

Consistent with the foregoing, Mr. Swan's request for an Order confirming that he is excused from future performance of the agreement is **GRANTED**. As a result, Casella is not entitled to an award of damages in connection with Mr. Swan's breaches, which occurred after Casella's material breach of the agreement.

B. Mr. Swan's Request for Attorney's Fees

Next, Mr. Swan contends that in light of Casella's breaches months prior to Mr. Swan's subsequent breaches, and the jury's rejection of Casella's Covenant of Good Faith and Fair Dealing claim, Mr. Swan should be entitled to an award of his fees and costs in this matter under Harkeem v. Adams, 117 N.H. 687, 691 (1977), or RSA 507:15.

The general rule in New Hampshire is that parties pay their own attorney's fees. See Fat Bullies Farm, LLC v. Devenport, 170 N.H. 17, 30 (2017). Underlying this rule "is the principle that no person should be penalized for merely defending or prosecuting a lawsuit." Id. (citing Harkeem, 117 N.H. at 690). However, courts have recognized exceptions to this rule. Fat Bullies, 170 N.H. at 30. A court may award attorney's fees when specifically authorized by statute. Id.; see, e.g., RSA 358-A:10, I (2009). Otherwise, an award of attorney's fees must be based on an agreement between the parties or a judicially-created exception to the general rule. Id.

"As to judicially-created exceptions, attorney's fees have been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." Fat Bullies, 170 N.H. at 30 (citing Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365, 377-78 (2012) (quotation omitted)). "Under the bad faith litigation theory, an award of attorney's fees is appropriate [when] one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, [when] the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and [when] it should have been unnecessary for the successful party to have brought the action." Id. A party's unreasonableness is one type of bad faith. "A claim is patently unreasonable when it is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." Fat Bullies, 170 N.H. at 31 (citing Glick v. Naess, 143 N.H. 172, 175 (1998) (describing unreasonableness as "a variety of bad faith" (quotation omitted))).

The Court determines there is no basis for an award of attorney's fees under Harkeem or RSA 507:15: there is nothing on the record to support an argument that Casella brought frivolous claims. See RSA 507:15 (explaining that the prevailing party in a lawsuit may receive fees where claims were raised frivolously and initiated in bad faith). Casella litigated disputed questions of fact and contract interpretation. While the jury did not ultimately agree with Casella's Covenant of Good Faith and Fair Dealing claim, such efforts should not expose litigants to liability for the prevailing party's attorney's fees. Fat Bullies, 170 N.H. at 30 (providing that an award of fees would run counter to the principle that "no person should be penalized for merely defending or prosecuting a lawsuit," considering the fact that the court could not conclude whether the

claims were "without any reasonable basis in the facts provable by evidence"). As such, Mr. Swan's request for an award of attorney's fees is **DENIED**. Doc. 165.

CONCLUSION

For the reasons stated above, Casella's motion for a JNOV is **DENIED**. Doc. 172. Mr. Swan's motion for entry of a final order is **GRANTED** in part and **DENIED** in part, consistent with this Order. Doc. 165.

SO ORDERED.

Date November 5, 2026

Hon. Martin P. Honigberg
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/05/2026