

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Private Jet Services Group, LLC,
Plaintiff

v.

Case No. 20-cv-1015-SM
Opinion No. 2025 DNH 070

Tauck, Inc.,
Defendant

O R D E R

Private Jet Services Group ("PJS") is a New Hampshire-based private aircraft booking agent. It brings this breach-of-contract action against Tauck, Inc., a Connecticut-based provider of high-end domestic and international guided tours. The parties' relationship is governed by two contracts that work together: the Air Charter Services Blanket Purchase Agreement (the "BPA") (document no. 77-3) and the Statement of Work (the "SOW") (document no. 77-4). In general, those contracts contemplate that PJS would arrange for, and Tauck would use, a dedicated aircraft to conduct a minimum of fifty (50) tours of New Zealand per season, from 2019 through 2022.

PJS alleges that Tauck breached those contracts in each of two seasons. First, during the 2019 tour season, PJS says Tauck employed its services for only 48 tours - two fewer than the

parties' agreed-upon minimum (count one). Next, PJS says Tauck breached the parties' agreements during the 2020 tour season by using PJS's services for only 23 tours - 27 fewer than the 50 tour seasonal minimum (count two). PJS claims it is owed roughly \$265,000 in damages for the 2019 tour season and nearly \$1.7 million in damages for the 2020 season.

Tauck denies that it breached either of the parties' contracts and says it is excused from performing under those contracts, either because PJS breached first (count one) or because its performance was rendered impossible by unanticipated external events (count two). More specifically, with respect to the 2019 season, Tauck blames PJS for having failed to provide the agreed-upon aircraft for the first eight tours of the season, and says that failure amounts to a material breach. With respect to the 2020 season, Tauck says the global COVID-19 pandemic and New Zealand's related decision to close its borders to all foreign travelers precluded contract performance.

Each party has moved for summary judgment on both counts of PJS's complaint. For the reasons discussed, each motion is granted in part and denied in part.

Background

The factual background to this case, as well as the pertinent standard of review, are set forth in detail in the court's prior order and need not be repeated. See Order Denying Cross Motions for Summary Judgment (Sept. 30, 2022) (document no. 56). Those facts necessary to resolve the pending cross motions for summary judgment are discussed below.

Discussion

I. Count One - The 2019 Tour Season.

In the spring of 2018, Tauck provided PJS with its anticipated 2019 schedule of New Zealand tours. The schedule was ambitious. Tauck would operate 72 tours (22 more than the minimum required), beginning on January 13, 2019. A few months later, however, PJS informed Tauck that it was having difficulty securing an Air Operator Certificate for the dedicated Embraer aircraft. So, by letter agreement dated September 6, 2018, the parties amended the Blanket Purchase Agreement to replace the Embraer with an ATR-72 Turboprop.

On December 11, 2018, PJS notified Tauck that the required final audit (clearance) of the ATR-72 was scheduled for January 11, just a few days before the start of Tauck's 2019 tour season. Then, on January 3, 2019, PJS informed Tauck that the

aircraft had been damaged and was not expected to be in service until at least the third week in January. As it turned out, the aircraft audit was not completed until February 6, 2019, and inspectors did not approve the aircraft for flight until February 7, 2019, approximately three weeks after the date on which PJS was obligated to arrange the first scheduled flight for Tauck.

Because of the mechanical issues with the ATR-72, it was unavailable for eight of the tours Tauck operated in January. See Deposition of John O'Neil, PJS Vice President of Operations, Exhibit G to Defendant's Memorandum (document no. 78-8), at pg. 32, ln. 24-25. Accordingly, PJS offered to "sub-service" flights for those tours with aircraft secured through either Air Chathams or Air New Zealand. But, as was its right under the Blanket Purchase Agreement, Tauck declined that offer and elected to contract directly with a different air carrier (Alliance Air) to provide suitable air transportation for those eight tours. And, because Tauck elected to employ a different carrier for those tours, PJS agreed to refund the monies Tauck had already paid for them. PJS insists, however, that those eight missed tours that were flown using Alliance Air do not count toward Tauck's contractual obligation to "operate" a minimum of 50 tours during 2019.

According to PJS, the parties specifically contemplated that there would be occasions on which the ATR-72 aircraft might be unavailable. Consequently, says PJS, the contracts "required" it to have a "minimum of two contingency plans in place for every flight to quickly recover from a mechanical" delay. See BPA at Section 20 (stating that it is PJS's "policy" to always have at least two contingency plans). And, says PJS, it had those contingency plans in place and offered to "sub-service" the January flights, either through Air Chathams or Air New Zealand. Thus, it argues, it was never in breach of the parties' contracts. While Tauck exercised its contractual option to decline the alternate flight arrangements offered by PJS, PJS asserts that Tauck nevertheless remained obligated to meet the annual 50-tour minimum set forth in Section 10 of the Statement of Work. Because Tauck operated only 48 tours with PJS that season, PJS claims it is still entitled to payment for the two "un-booked" tours.

As the court has previously noted, PJS interprets the 50-tour minimum guarantee in the Statement of Work as an annual minimum payment guarantee. In 2019, says PJS, that minimum payment was \$3,055,000, or 50 times the base charter rate of \$61,100.00 per flight. In support of that interpretation of the contract, PJS points to the language of Section 10 of the

Statement of Work, which provides that, "in the event of a shortfall in the number of tours operated in any Season, Tauck will pay to Supplier the 50 tour minimum price for the applicable Season as set forth on Table 1 of this Agreement." SOW, at Section 10 (emphasis supplied). In short, PJS says Tauck failed to meet its contractual obligation to operate at least 50 tours (with PJS) in 2019 and, as a result, PJS is entitled to damages representing the difference between what Tauck actually paid for the 2019 tour season and the "50 tour minimum price" of \$3,055,000.

Tauck has a different perspective, noting that, "Despite PJS's inability to perform, Tauck still conducted a total of 55-57 tours during the 2019 tour season (48 tours with PJS, and 7-9 with Alliance Air)." Defendant's Memorandum in Support of Summary Judgment (document no. 78-1) at 6. Thus, says Tauck, it would have operated 50 tours with PJS but for PJS's own failure to perform under the contracts - that is, by neglecting to provide the dedicated ATR-72 aircraft for use during those eight initial tours in January. In Tauck's view, PJS's conduct amounts to a breach of the parties' contracts:

PJS breached the contract by failing to provide the air carrier that was specified in the contract and then by failing to have the replacement aircraft ready by the beginning of the contract's terms. PJS further breached Section 2 of the SOW, the "Dispatch

Reliability" clause by failing to deliver each contracted-for flight on the Tauck dedicated aircraft.

Defendant's Memorandum (document no. 78-1) at 13. Moreover, says Tauck, because PJS breached the contracts, it is barred from now seeking to enforce them. The court disagrees.

With regard to Tauck's first argument - that PJS breached by neglecting to provide the "air carrier that was specified in the contract," it is unclear precisely what Tauck means. It has failed to point to any provision in the contracts that required a specific air carrier (and the court has found none). If Tauck is referring to aircraft specified in the Statement of Work (a dedicated "Embraer 145 LR Regional Jet"), the parties amended that provision of the contract on September 6, 2018, and agreed that the dedicated aircraft would be an ATR-72. See Letter Agreement (document no. 77-11).

With regard to Tauck's claim that PJS failed to have the ATR-72 available at the start of the 2019 tour season, it is unclear whether that could have been considered a breach of contract. But, the important point is this: the parties certainly did not treat it as a breach. Indeed, they plainly anticipated that there would be occasions on which the aircraft would not be available, whether for mechanical or other reasons.

See, e.g., BPA, Section 4, "Schedule" ("Air carrier will use its commercially reasonable efforts, and the efforts standard in the industry, to comply with the timetable set forth in any SOW and as Customer's schedule requires; provided, however, that departure times and flight routes are subject to, and may be altered by, conditions beyond the reasonable control of Air Carrier, including without limitation, . . . mechanicals."). See also Id. at Section 20, "Contingency Management" (explaining the parties rights and obligations should the aircraft be "unable to complete any portion of the itinerary due to adverse weather, operational, or mechanical reasons"). As was its contractual right under Section 20, Tauck elected to secure air transportation from another carrier when the ATR-72 was not available due to mechanical issues. It did not, however, declare a breach or cancel the contracts. Instead, it simply opted to secure air transportation through a third party for those few flights and then resumed business with PJS once the ATR-72 was ready.

Next, Tauck asserts that PJS breached Section 2 of the SOW, "Dispatch Reliability." That section of the contract provides, in material part, that:

PJS agrees to maintain a 95% Dispatch Reliability rate. Dispatch Reliability means each flight:

i. will be delivered on the Tauck dedicated aircraft; and

ii. will depart within 45 minutes of its scheduled departure time during each Tour Season.

SOW, at Section 2. Should PJS fail to meet those requirements, the contract provides that Tauck has the right to terminate the parties' contracts. Id. ("If the Dispatch Reliability rate for any Tour Season, as measured after the completion of the last tour of the Tour Season, falls below 95%, Tauck will have the right to terminate the agreement with 180 days' notice.").

According to Tauck:

In prior court filings, PJS does not dispute [that it breached the "Dispatch Reliability" provisions] but argues instead that Tauck waived a breach of contract claim by failing to timely invoke the applicable remedy provisions. This argument misses a fundamental point: Tauck is not seeking damages for a breach of contract. However, the fact that PJS was in a material breach of the very terms of the contract it now seeks to enforce forecloses their efforts to hold Tauck accountable for a breach of a contract term it did not commit and for which PJS had already breached.

Defendant's Memorandum (document no. 78-1) at 14 (emphasis supplied). Again, the court disagrees.

Even if one were to assume that PJS did breach the contracts when it failed to provide the ATR-72 at the start of the 2019 tour season (despite having offered two alternative aircraft and carriers), Tauck did not declare a breach or even

behave as if it believed PJS had breached - indeed, Tauck went on to accept 48 flights that PJS provided in 2019. Nor did Tauck declare a breach and terminate the agreements at the end of the 2019 season, once the "Dispatch Reliability" figures could be calculated. Rather, Tauck continued its contractual relationship with PJS into the 2020 tour season.

Having accepted the benefits of PJS's performance under the contracts, Tauck cannot now seek to avoid its payment obligations under those contracts. As one leading commenter has explained:

When there has been a material failure of performance by one party to a contract [PJS], so that a condition precedent to the duty of the other party's performance has not occurred, the latter party [Tauck] has the choice to continue to perform under the contract or to cease to perform and conduct indicating an intention to continue the contract in effect will constitute a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform.

In other words, the general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply when the latter party, with knowledge of the facts, either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance.

* * *

If the obligor [Tauck], nevertheless, knowingly and voluntarily accepts the defective performance, fairness dictates that it should thereafter render any

agreed return performance. Although the obligor may still be entitled to damages for the defective performance, it cannot escape the duty to perform for, by outward manifestations indicating that the defective performance has been accepted, the obligor has sent the unmistakable signal - by conduct, rather than by an express promise - that it still considers the contract to be binding.

14 S. Williston & R. Lord, Williston on Contracts § 43:15, The Effect of an Election to Proceed (4th ed. 2014) (emphasis supplied). See also Avila v. CitiMortgage, Inc., 801 F.3d 777, 787 (7th Cir. 2015) (quoting that text); AnywhereCommerce, Inc. v. Ingenico Inc., 2023 WL 5804257 (D. Mass. July 14, 2023) (citing that text). See generally Restatement (Second) of Contracts § 246 (1981) ("an obligor's acceptance or his retention for an unreasonable time of the obligee's performance, with knowledge of or reason to know of the non-occurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that non-occurrence.").

Plainly then, Tauck's conduct represented an indication that it considered the contracts to be binding and PJS can pursue a breach of contract claim against Tauck arising out of the 2019 tour season. What is unclear, however, is the precise nature of that claim and the corresponding damages. As far as the court can discern, there are two possibilities. The first is this: PJS is correct and Tauck was obligated to operate at

least 50 tours with PJS using the dedicated ATR-72 or, when it was unavailable, a comparable aircraft supplied by PJS. If Tauck failed to do so, it was obligated to pay PJS the "50-tour minimum price." For 2019, the contract minimum price was \$3,055,000. That number, less any payments actually made by Tauck, would represent PJS's damages.

A second possible interpretation of the contracts is this: Tauck was obligated to operate a minimum of 50 tours annually in New Zealand. It was also obligated to use PJS-supplied transportation provided the dedicated ATR-72 was available for 50 tours. If that aircraft was not available, Tauck was free to seek suitable air transportation for its guests through an alternate carrier and those tours would count toward the 50-tour minimum. Under those circumstances, Tauck would be obligated to pay PJS only for the tours actually operated through PJS, so long as it operated a total of at least 50 New Zealand tours (regardless of air carrier used). In 2019, that means Tauck would be liable to PJS for the cost of the 48 tours that PJS did provide, since Tauck met the 50 tour minimum.

To resolve that lingering dispute, the court must construe the terms of the parties' contracts. Under New Hampshire common law, "as a general rule, the proper interpretation of a contract

is ultimately a question of law for [the] court, and [it] will determine the meaning of the contract based on the meaning that would be attached to it by reasonable persons. In interpreting the terms of the contract, [the court] will consider the objective intent of the parties at the time the contract was made." Gamble v. Univ. Sys. of New Hampshire, 136 N.H. 9, 13 (1992) (citations and internal punctuation omitted). See also Matter of Liquidation of Home Ins. Co., 166 N.H. 84, 88 (2014) ("When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole.") (citation omitted).

The relevant terms of the contracts at issue provide as follows:

Contract Minimum (Guarantee): Tauck must guarantee a minimum of 50 tours per year. In the event of a shortfall in the number of tours operated in any Season, Tauck will pay to Supplier the 50-tour minimum price for the applicable Season as set forth on Table 1 of this Agreement.

By way of example, if Tauck operates 48 tours in the 2020 Season, Tauck will owe Supplier an additional payment of \$125,866 (50 tour minimum less 48 tours operated = 2 tour penalty x USD \$62,933 per tour = USD \$125,866).

Statement of Work (document no. 77-4), Section 10 (emphasis supplied).

Contingency Management & Interruption. PJS' policy is to always have a minimum of two contingency plans in place for every flight to quickly recover from a mechanical, weather, or other Force Majeure. . . . When unforeseen interruptions occur, PJS' dedicated client service team will work with Customer to analyze all contingency options available, and if necessary, to reposition the closest suitable aircraft. PJS may arrange for alternative transportation only with the express written authorization from Customer.

If the aircraft is unable to complete any portion of the Itinerary due to adverse weather, operational, or mechanical reasons, Customer shall be notified immediately and PJS shall credit [i.e., "reimburse"] to Customer all proposed charges with respect to the canceled charter flight legs. Flights operated on a delayed or subcontracted basis [i.e., through PJS] will not be credited.

Blanket Purchase Agreement (document no. 77-3), Section 20 (emphasis supplied).

Fundamentally, the parties disagree as to the meaning of the word "operate," as used in the Statement of Work, and how it affects Tauck's obligation to use the ATR-72 (or alternate aircraft) provided by PJS. According to PJS, the contracts obligate Tauck to "operate" a minimum of 50 tours each season using aircraft provided by PJS - that is, the ATR-72 when it is available, or comparable alternate aircraft offered by PJS when it is not. In PJS's view, it had no interest in how many tours

Tauck operated using third parties' aircraft; when the contracts were drafted, it sought to ensure that Tauck would use its services for a minimum of 50 tours each season so it could cover its substantial operating expenses. And, says PJS, because Tauck only "operated" 48 tours with PJS in 2019, it breached the contracts and is required to pay the "50-tour minimum price."

Tauck, on the other hand, interprets the contracts to mean that it was obligated to use the dedicated ATR-72 when it was available in a timely fashion. When that dedicated aircraft (for which it contracted) was not available in a timely fashion - whether for staffing, weather, or mechanical reasons - Tauck believes it was permitted to seek an alternate aircraft suitable for its clients. See BPA, Contingency Management & Interruption, Section 20. Moreover, says Tauck, any tours operated using a third party's aircraft and pursuant to Section 20 of the BPA must be counted toward the 50-tour annual minimum. Thus, says Tauck, it met its 2019 contractual obligation to "operate" a minimum of 50 tours by using the ATR-72 for the 48 tours that it was available and, when that aircraft was unavailable, by operating another 7 to 9 tours with Alliance Air (for a total of at least 55 tours that season). See e.g., Defendant's Memorandum (document no. 78-1), at 11 ("Stated clearly, PJS is not entitled to damages under the Contract

Minimum/Guarantee because Tauck operated more than 50 tours, thereby satisfying the requirement.").

Given the language employed in the parties' contracts, Tauck's interpretation is the rational and reasonable meaning that would be attached to the terms by reasonable people. Indeed, the language of the "Contingency Management & Interruption" section of the Blanket Purchase Agreement compels that conclusion. That provision states that if the dedicated ATR-72 is not available for use by Tauck, Tauck is free to secure air transportation from a third party and, critically, the contracts do not compel Tauck to use alternate aircraft offered by PJS. Here, PJS offered alternate aircraft, but Tauck elected to secure air transportation from a third party and PJS actually reimbursed (or at least credited) Tauck for the eight missed flights. By vesting control with Tauck over which carrier (and which aircraft) it used when the dedicated ATR-72 was unavailable, and by omitting any language expressly stating that flights operated using a third party provider under those circumstances would not count toward the 50-tour minimum, the contracts contemplate that Tauck would operate a minimum of 50 tours each season with PJS provided the dedicated ATR-72 was available. Had the parties intended that only tours using the ATR-72 or alternate aircraft provided by PJS would count toward

the 50-tour minimum, the contracts would have included such a provision. They do not.

Suppose, for example, that PJS had been unable to provide the ATR-72 for the first 20 Tauck tours of the season and Tauck operated a total of 50 tours that season - 30 with PJS and 20 with another carrier. Tauck would hardly be responsible for paying both the third party it necessarily hired to provide air transportation suitable to its clientele for those 20 flights and PJS for 20 flights it never furnished. Had that been the intent of the parties, Section 20 of the BPA would have included language that either: (a) required Tauck to use whatever alternate aircraft PJS provided (assuming, of course, it was deemed "comparable" to the ATR-72 - presumably by Tauck); or (b) expressly noted that, while Tauck was free to secure air transportation from a third party when the ATR-72 was unavailable rather than use alternates furnished by PJS, those flights would not count toward the 50-tour contract minimum. The contracts have no such language.

Tauck's interpretation of the contracts is that which a reasonable person would adopt, and it met the 50-tour minimum for the 2019 season. That conclusion does not, however, end the court's inquiry. Even if Tauck was not obligated to operate 50

tours with PJS if the designated ATR-72 was unavailable, it did conduct 48 tours with PJS during the 2019 season. It must, therefore, pay PJS for those 48 tours.

The Statement of Work establishes the rates that Tauck agreed to reimburse PJS for each tour, depending upon the total number of tours in any given season; the more tours Tauck operated with PJS, the less PJS would charge it for each individual tour. For the 2019 season, the parties agreed to the following fee schedule, with a "base charter rate" or "top tier billing rate" of \$61,000 per tour:

| <u>Number of Departures</u> | <u>2019 Charter Rate</u> |
|-----------------------------|--------------------------|
| 65-70 | \$53,020 |
| 61-65 [sic] | \$55,100 |
| 55-60 | \$58,100 |
| 50-54 | \$61,100 |

SOW, at 4, Table 1.

All agree that Tauck operated 48 tours with PJS in 2019. So, pursuant to the terms of the SOW, it was obligated to pay PJS the base charter rate of \$61,100.00 for each of those 48 tours. It did not. Instead, because Tauck had originally planned to operate a total of 72 tours that season, it was billed at the discounted rate of \$58,100 per tour. In essence, Tauck was given a \$3,000 volume discount per tour, in

anticipation of it actually operating significantly more than 50 tours with PJS. Of course, those additional tours never materialized. And the difference between what Tauck was billed (and presumably paid) and what it actually owes under the contract amounts to a difference of \$3,000 per tour. Consequently, Tauck owes PJS a total of \$144,000 for the 2019 season: that is, 48 flights times the \$3,000 underpayment per flight. See SOW, at 4, Table 1. See also SOW at para. 7(a) ("The rate to be charged at time of departure each year will be based on the mutually agreed projected number of departures at the beginning of each season [and] any adjustments due to lower or higher departure tiers will be paid/refunded prior [to] the October 1 payment of each year.").

But, says Tauck, PJS has overstated its damages. In support of that claim, it points to Section 10 of the Statement of Work (quoted above), which provides an example in which (coincidentally) Tauck operates only 48 tours in the 2020 season and explains that PJS's damages would be limited to \$125,866. See Defendant's Memorandum (document no. 78-1) at 12. Applying the rationale of that example for the 2019 season, PJS's damages would be \$122,200 - that is, \$61,100 base charter rate per tour times two missed tours. But, of course, that example contemplates that Tauck had paid the full base charter rate for

each of the 48 tours actually operated through PJS (\$61,100 per tour). It did not. As explained above, Tauck was billed at a discounted rate (\$58,100 per tour) for those 48 tours in anticipation of it actually operating significantly more. Because those additional tours operated through PJS did not materialize, Tauck was not eligible for the discounted rate and it is liable for payment of the full base charter rate of \$61,100 per tour for each of the 48 tours operated in 2019. See SOW at para. 7(a).

Accordingly, PJS' motion for summary judgment as to Count One of its complaint is granted in part. Pursuant to the terms of the parties' contracts, Tauck owes PJS a total of \$144,000.00 for the 2019 tour season.

II. Count Two - The 2020 Tour Season.

In 2020, Tauck's ability to conduct its tours in New Zealand was thwarted by the global COVID-19 pandemic. From January 1 through March 19, 2020, Tauck operated, and PJS arranged air travel for, 23 tours in New Zealand. Tauck was billed \$1,447,459 for those services. On March 20, 2020, however, New Zealand closed its borders to foreign travelers through (and well beyond) the remainder of that year. At that point, Tauck was unable to operate any of its remaining 2020

tours in New Zealand and all were cancelled. As a result, says Tauck, it refunded nearly \$5 million to customers who had prepaid for trips to New Zealand.

Given those circumstances, PJS and Tauck attempted but were unable to resolve their relative obligations under the contracts, nor were they able to amend the contracts to each party's satisfaction. On May 28, 2020, Tauck invoked the "Adverse Economic Conditions" provision contained in the Statement of Work and cancelled the parties' contracts in their entirety. See Letter from Tauck to PJS dated May 28, 2020 (document no. 77-23). Under the terms of the Statement of Work and, in particular, the Adverse Economic Conditions provision, the contracts between the parties would terminate at "the end of the [2020] season" and, absent legal excuse, Tauck remained obligated to pay PJS "for all flights flown" as well as all other obligations for which "Tauck is otherwise committed to by this Agreement." SOW, Section 6, at 3. That, says PJS, means Tauck still must honor (and pay for) its guarantee of a minimum of 50 tours for the 2020 season, notwithstanding Tauck's inability to actually operate those tours. And, because Tauck

operated only 23 tours in 2020, PJS says it is entitled to payment for the remaining 27 tours it was promised.¹

Tauck concedes that it may not seek to escape its contractual liability by invoking the contracts' Force Majeure provisions. See, e.g., Defendant's Memorandum in Opposition (document no. 78-1) at 3. Nevertheless, Tauck contends that neither it nor PJS ever contemplated the scope and duration of the pandemic's economic impact. Nor, more specifically, did either party imagine that New Zealand would close its borders to all non-citizens - a first in the country's history. Consequently, says Tauck, it may properly invoke the common law contract doctrines of impossibility and frustration of purpose to discharge its obligations under the contracts, thereby excusing performance of its commitment to operate 50 tours in the 2020 season.

When the parties filed their original motions for summary judgment, PJS embraced the view that because the terms of the amended Force Majeure clause protect only PJS, they implicitly

¹ Unlike its claims in Count One, PJS does not assert that Tauck paid less than the full amount owed for each of the 23 tours actually operated in 2020. It seems that Tauck was billed \$1,447,459 for 23 tours, or \$62,933 per tour. That is the "top tier" pricing for 2020 under the Statement of Work. So, there is no doubt that Tauck was billed (and presumably paid) the full amount owed for the 23 tours actually operated in 2020.

(but not explicitly) assign the risk of adverse events materially affecting contract performance related to epidemics and the exercise of civil authority to Tauck. The parties actively negotiated the language of the Force Majeure clause (Tauck even suggested that PJS include protection from "epidemic" events). So, in PJS's view, Tauck could have contractually protected itself from Force Majeure events, but it did not. Consequently, said PJS, by agreeing to the Force Majeure clause that extended protection exclusively to PJS, Tauck implicitly accepted all risks associated with the events described in that provision - which include "Acts of God, events of nature, epidemics, and civil or military authority" - and waived the common law defenses of impossibility and frustration of purpose.

When PJS first raised that argument it was unclear whether, under New Hampshire law, by agreeing to the Force Majeure clause as written, Tauck implicitly waived otherwise available contract defenses. That is to say, whether a Force Majeure clause protecting just one of the parties necessarily allocates (by implication) the risks of such identified events to the other party to the extent of depriving that party of otherwise available contract defenses, like impossibility of performance or frustration of purpose. To resolve that critical issue of

state law, the court certified the question to the New Hampshire Supreme Court. See Certification Order, Sept. 30, 2022 (document no. 58).

In April of 2024, the New Hampshire Supreme Court issued its response, holding that:

[T]he common law contract defenses of impossibility, impracticability, and frustration of commercial purpose are so fundamentally related to contract formation and purpose that they remain viable unless expressly waived. Accordingly, a force majeure clause that protects only one party to a contract should not be deemed, in and of itself, a relinquishment of the other party's right to interpose those common law defenses.

Priv. Jet Servs. Grp., LLC v. Tauck, Inc., 176 N.H. 553, 555 (2024) (emphasis supplied). So, because Tauck did not expressly waive its common law contract defenses, they remain available to it.

In its motion for summary judgment on Count Two, Tauck focuses first (and primarily) on the common law doctrine of impracticability/impossibility. The Court of Appeals for the Second Circuit has explained that doctrine as follows:

In general impossibility may be equated with an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract. The doctrine comes into play where (1) the contract does not expressly

allocate the risk of the event's occurrence to either party, and (2) to discharge the contractual duties (and, hence, obligation to pay damages for breach) of the party rendered incapable of performing would comport with the customary risk allocation. Essentially, then, discharge by reason of impossibility - as well as the concomitant remedy (to the discharge) of rescission - enforces what can reasonably be inferred to be the intent of the parties at the time of contract.

United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508

F.2d 377, 381 (2d Cir. 1974) (emphasis supplied). Similarly, the Restatement (Second) of Contracts provides that:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts, § 261 (1981).² See also Perry v. Champlain Oil Co., 99 N.H. 451, 453 (1955) (discussing the doctrines of "commercial frustration" and "impossibility").

² "Although the rule stated in this Section is sometimes phrased in terms of 'impossibility,' it has long been recognized that it may operate to discharge a party's duty even though the event has not made performance absolutely impossible. This Section, therefore, uses 'impracticable,' the term employed by Uniform Commercial Code § 2-615(a), to describe the required extent of the impediment to performance." Restatement (Second) of Contracts, § 261 comment d.

The Restatement goes on to state that, "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts, § 264 (1981). In other words, "It is a basic assumption on which the contract was made that the law will not directly intervene to make performance impracticable when it is due. Therefore, if supervening governmental action prohibits a performance or imposes requirements that make it impracticable, the duty to render that performance is discharged, subject to the qualifications stated in § 261." Id., comment a (emphasis supplied).

PJS contends that the parties specifically contemplated that both "epidemics" and "travel advisories of the Department of State" might impede performance under the contracts and, through the Force Majeure provision, protected PJS - but not Tauck - should such conditions arise. See Plaintiff's Memorandum (document no. 77-1) (citing Statement of Work, para. 5). So, because the parties anticipated such events and allocated the risks associated with those events, PJS says Tauck cannot avail itself of the common law defense of impracticability/ impossibility.

Notwithstanding PJS's suggestions to the contrary, as both a factual and legal matter, see Restatement (Second) of Contracts, § 264, comment a, the parties did not contemplate, and could not have reasonably contemplated at the time of contract formation, that the New Zealand government would close its borders to all foreigners for more than two years because of a world-wide pandemic. Stated slightly differently, that New Zealand's borders would remain open to foreign tourists was a basic assumption upon which the parties' contracts were based. That unforeseen governmental action made it impossible for Tauck to conduct its planned tours of New Zealand. Most obviously, Tauck could not transport its clients into New Zealand. And, absent that ability, Tauck was prevented from operating any tours for the entirety of New Zealand's border closure and was unable to derive any benefit from its bargain with PJS.³

But, says PJS, the Adverse Economic Conditions clause pursuant to which Tauck cancelled the contracts specifically

³ Parenthetically, the court notes that it is entirely unclear whether even PJS could have performed its own obligations under the contracts in light of New Zealand's border closure and related COVID-19 restrictions. For example, PJS has not shown that it could have provided the necessary flight crews, maintenance crews, ground crews, catering services, etc. - all of which were essential to its performance under the contracts.

provides that, "Nothing contained in this Agreement shall be construed as to relieve Tauck from its obligation to pay Supplier for all flights flown or which Tauck is otherwise committed to by this Agreement." Statement of Work, para. 6 (emphasis supplied). Consequently, PJS asserts that despite Tauck's earlier cancellation of the contracts, it remains obligated to PJS for the unpaid balance of the annual guaranteed contract minimum of \$3,146,650. Indeed, says PJS, that performance under the contract - Tauck's obligation to make an annual minimum payment - has been completely unaffected by the New Zealand border closure and the doctrine of impossibility or impracticability does not operate to relieve Tauck of that payment obligation. PJS misconstrues the applicability, scope, and effect of the doctrine of impossibility or impracticability.

Had Tauck simply invoked the Adverse Economic Conditions clause as a result of a market correction and cancelled the contracts on that basis, PJS's point might be well taken. Under those circumstances (and absent the additional material facts related to New Zealand's border closure), Tauck's obligation to pay the annual 50-tour minimum price would, as the parties plainly agreed, survive Tauck's decision to cancel the contracts. Here, however, more than simply a market correction was at play. New Zealand closed its borders to foreigners and

prevented Tauck from operating its planned tours. That government action was unanticipated by the parties and Tauck has properly interposed the common law defense of impossibility or impracticability to discharge all of its 2020 obligations under the contracts – that is, in essence, avoidance or rescission of the contracts in their entirety. See Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d at 381 (noting that rescission is a “concomitant remedy” to discharge under the doctrine of impossibility or impracticability). See also Brodnik v. Cottage Rents LLC, 209 N.E.3d 1200, 1203-04 (Ind. Ct. App. 2023) (“Under Florida law, rescission or cancellation of a contract may be obtained on the ground of impossibility of performance. ‘Impossibility of performance’ refers to those factual situations where the purposes for which the contract was made have, on one side, become impossible to perform.”); RW Holdings, LLC v. Mayer, 131 A.D.3d 1228, 1230, 17 N.Y.S.3d 171, 173 (2015) (noting that a contract may be rescinded based upon impossibility of performance); YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 403 Ill. App. 3d 1, 2-3, 933 N.E.2d 860, 862 (2010) (same).⁴

⁴ Additionally, Tauck’s obligation to pay the 3,146,650 50-tour minimum amount for 2020 is discharged by the doctrine of frustration of commercial purpose. See 30 S. Williston & R. Lord, Williston on Contracts § 77:112, The Effect of Failure as Justified by Frustration of Commercial Purpose (4th ed. 2014) (“The frustration of purpose doctrine is applicable when after a

In short, then, Tauck is entitled to invoke the common law defense of impossibility or impracticability to discharge its 2020 obligations under the contracts - even those that purport to survive contract cancellation under the Adverse Economic Conditions clause. This point was made clear by the Indiana Court of Appeals in an analogous case. See Brodnik v. Cottage Rents LLC, 209 N.E.3d 1200 (Ind. Ct. App. 2023). In Brodnik, the plaintiff prepaid \$6,000 to rent a Florida vacation home through the defendant, a vacation rental company. A few weeks before plaintiff's rental was to begin, the COVID-19 pandemic emerged. Then, five days before plaintiff's planned arrival in Florida, the governor issued an executive order that prohibited all but essential travel throughout the state. When the rental agent refused to refund his prepayment, the plaintiff filed suit in Indiana.

contract is made, a party's principal purpose is substantially frustrated without that party's fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made. The main thrust behind the doctrine of frustration of purpose is to excuse a party from performing under a contract on the occurrence of an intervening or supervening condition that substantially frustrates the main purpose for which the parties entered into the contract in the first place. Under the doctrine of commercial frustration, a contract is to be considered subject to the implied condition that the parties will be excused in case, before breach, the state of things constituting the fundamental basis of the contract ceases to exist without default of either of the parties.").

At trial, the parties agreed that the executive order prohibited the plaintiff from traveling to the Florida vacation home he had rented. Given that, the plaintiff argued he was entitled to a refund because the contract was unenforceable under the common law doctrine of impossibility. The defendant disagreed, asserting that plaintiff could have received a refund under the contract (less a \$250 service fee) if: (a) the plaintiff had given written notice of cancellation (which he failed to do); and (b) the defendant had been able to re-rent the property (which it claimed it likely could have done). In defendants view, then, the doctrine of impossibility was inapplicable and, having failed to give the required written notice of cancellation pursuant to the contract's terms, plaintiff was not entitled to a refund. The court disagreed, concluding that "the Executive Order made it impossible for Vacationer to derive any benefit from the bargain" and it was an "unforeseeable supervening event that radically altered the world in which the parties were expected to fulfill their promises." Brodnik v. Cottage Rents LLC, 209 N.E.3d 1200, 1204-05 (Ind. Ct. App. 2023). The court then held that, "because the doctrine of impossibility applies, [plaintiff] may avoid the contract, including all provisions concerning cancellation." Id. at 1205.

Finally, the court explained why the contract's provisions - including those governing cancellation - could not be enforced against the plaintiff.

In applying the doctrine of impossibility, the dissent looks to the cancellation provisions in the contract. Yet those provisions formed part of an overall bargain for the rental of a Florida vacation home - a deal struck in May 2019 with the basic understanding Vacationer could lawfully enjoy the "Salt Air Cottage" in March 2020.

Unforeseeably, the tide changed; the pandemic led to an Executive Order prohibiting interstate travel. In other words, "the real world in some way failed to correspond with the imaginary world hypothesized by the parties to the contract." That is why the doctrine of impossibility applies here, permitting Vacationer to rescind the contract regardless of any ancillary term contained in the bargain; the foundation unforeseeably shifted, resulting in "changes, unbargained for and radical, that make enforcement of the bargain unwise." Id.

Brodnik, 209 N.E.3d at 1204 n.2 (quoting Cook v. Deltona Corp., 753 F.2d 1552, 1558 (11th Cir. 1985)). (emphasis supplied).

Here, Tauck does not seek relief from its contractual obligations pursuant to the Adverse Economic Conditions clause (or any other clause) of the contracts. Instead, it seeks to discharge all obligations under those contracts for the 2020 tour season - including those that purportedly survive contract cancellation - based upon application of

the common law doctrine of impossibility or impracticability. Because it has shown that there are no genuinely disputed material facts and it has demonstrated that it is, as a matter of law, entitled to application of that common law defense, Tauck is entitled to discharge of its obligations under the contracts for the 2020 tour season. Consequently, it is not liable to PJS for the unpaid balance of the 2020 contract minimum of \$3,146,650 and its motion for summary judgment as to Count Two of PJS's complaint is necessarily granted.⁵

Conclusion


For the forgoing reasons, PJS's Motion for Summary Judgment (**document no. 77**) is granted in part and denied in part. Similarly, Tauck's Motion for Summary Judgment

⁵ Parenthetically, the court notes that PJS asserts that Tauck's ability to perform under the contracts was not, technically speaking, rendered "impossible" by the New Zealand border closure. The government re-opened its borders in July of 2022 and at that point, Tauck could have (and, indeed, appears to have) resumed its tours. See Plaintiff's Memorandum (document no. 77-1) at 18. But, this dispute involves only the 2019 and 2020 tour seasons. The contracts did not extend beyond that period because Tauck invoked the Adverse Economic Conditions clause and cancelled them as of the close of the 2020 season. So, for purposes of this dispute, whether Tauck could have resumed tours in the middle of 2022 (18 months after the contracts were cancelled) is irrelevant. Tauck's performance under the contracts for the majority of the 2020 tour season was rendered impracticable/impossible by the border closure, and its obligations with respect to the 2020 tour season are discharged.

(document no. 78) is also granted in part and denied in part. As to Count One of PJS's complaint (relating to the 2019 tour season), PJS is entitled to payment from Tauck in the amount of \$144,000, plus applicable interest and costs. As to Count Two of PJS's complaint (relating to the 2020 tour season), Tauck is entitled to judgment as a matter of law and PJS is not entitled to any contract recovery from Tauck.

The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.


Steven J. McAuliffe
United States District Judge

June 3, 2025

cc: Counsel of Record