State of New Hampshire
Supreme Court

NO. 2009-0071

2009 TERM

JUNE SESSION

Syncom Industries, Inc.

v.

William Hogan

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT WILLIAM HOGAN

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   DEFENDANT WILLIAM HOGAN'S MEMORANDUM REGARDING WHAT ISSUES ARE TO BE DECIDED ON REMAND (Apr. 30, 2008); DEFENDANT WILLIAM HOGAN'S MOTION FOR RECONSIDERATION (Nov. 17, 2008). (Documents not included in appendix because not otherwise relevant, but will be provided if preservation challenged.).

2. Did the court err in making the award of attorneys fees jointly and severally payable when they should have been apportioned.

   DEFENDANT WILLIAM HOGAN'S MOTION FOR RECONSIDERATION (Nov. 17, 2008). (Documents not included in appendix because not otherwise relevant, but will be provided if preservation challenged.).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

As this Court may recall, Syncom is in the business of cleaning movie theaters. William Hogan, who had been involved in the commercial cleaning industry for many years, worked for Syncom for less than five months in 2001 and 2002. Both Mr. Hogan and a co-employee, Eldon Wood, had signed broad non-competition contracts. After Mr. Wood left and formed a competing company, Syncom sued under the contract and for breach of fiduciary duty. A nine-day bench trial in the Rockingham County Superior Court (*McHugh*, J.) resulted in injunctions and million-dollar verdicts against Messrs. Hogan and Wood. This Court affirmed portions of the case, but found the contracts unenforceable. It remanded for a determination of whether the contract should be reformed, and for a recalculation, if any, of damages. *Syncom Industries, Inc. v. Wood*, N.H. 73 (2007).[1]

A recap of the facts and issues decided in the first appeal largely suffices as background for the issues in this second appeal of the same case.

I. Supreme Court Opinion

The contract provided that Mr. Hogan could not, for a period of three years, "solicit business from any of [Syncom's] customers located in any territory serviced by [Syncom] while [Mr. Hogan] was in the employment of [Syncom]." The contract also provided that "[i]n any successful action by [Syncom] to enforce this contract, [Syncom] shall be entitled to recover its attorney's fees and expenses incurred in such action." *Syncom I*, 155 N.H. at 75.

Eldon Wood was clearly the instigator. While employed by Syncom, Mr. Wood "began

[1]The first opinion of this Court is included in the appendix to this brief for convenience. It will be referred to herein as *Syncom I*.

to formulate a plan to form a competing company and carefully orchestrate his time of departure." FINAL ORDER (Dec. 13, 2004), *appx.* at 29, 32. He arranged financing for a new venture and lined up several of Syncom's customers. Within two days of leaving Syncom, Mr. Wood formed a new entity ("Big-E" for **E**ldon), and within two weeks he was cleaning Syncom's theater customers. Within a few months was cleaning theaters which, as Syncom's salesman, he had been attempting to secure for Syncom. *Syncom I*, 155 N.H. at 76-77.

William Hogan – as the lower court termed it – was a "follower not a leader." FINAL ORDER (Dec. 13, 2004), *appx.* at 29, 32. His job at Syncom, which did not involve face-to-face contact with customers, was operations and not sales. His transgressions were in helping Mr. Wood's new company by "providing production rates and advising on budgetary matters," and giving Mr. Wood a stack of papers and confidential faxes. *Syncom I*, 155 N.H. at 77. Fifteen months later, after Mr. Hogan worked for an unrelated commercial cleaning company, Big-E hired Mr. Hogan.

The trial court ruled that Messrs. Wood and Hogan breached the contract restrictions and fiduciary duties. The court enjoined them from "rendering services to any current or former customer of Syncom for a period of eighteen months … and awarded Syncom $1,145,700 in compensatory damages, $250,000 in enhanced compensatory damages, and $100,000 in attorney's fees." *Id.* at 78.

On appeal this Court found that "[a]s a matter of law, the … restrictive covenants … are unenforceable because they are unreasonably broad in their scope." *Id.* at 81. This Court remanded for "possible reformation" of "both the geographic and temporal scope of the restrictive covenants." *Id.* at 81. This Court was careful to point out that even with a covenant

narrowed in its geographical and temporal scope, Mr. Hogan could only be liable for Syncom's losses stemming from theaters with which he had "special influence … obtained during the course of employment" and toward whom he "develop[ed] goodwill and a positive image." *Id.* at 79.

This Court directed that "the trial court must, of necessity, address" Mr. Hogan's claim he was under duress by being presented with the non-competition contract on his first day of work, as that "is the kind of bad faith that would allow the trial court to decline to reform the restrictive covenants." *Id.* at 84-85. This Court did not disturb the finding of fact that Mr. Hogan was a fiduciary, but made no determination as to the scope of that duty or whether any damages were caused by its breach.

This Court affirmed the methodology on which lower court calculated damages. *Id.* at 88. But because the non-compete covenant was remanded to determine its temporal and geographic scope, this Court declined to determine whether the damages were causally related to Mr. Hogan's acts, and remanded for re-calculation in light of the necessarily narrowed covenant. *Id.* at 87-88.

Finally, this Court recognized that the contract "plainly entitles Syncom to an award of attorney's fees and expenses if it prevails in an action under the contract." *Id.* at 88. But because the remand made it unknown to this Court whether Syncom could prevail under the contract, this Court vacated the award and declined to decide both that issue and whether "the defendants' litigation tactics warranted an award of attorney's fees under the common law." *Id.* at 89.

II. Remand Proceedings

The remand litigation was straight-forward. Aside from a variety of continuances for the usual reasons, the parties collectively filed a dozen pleadings. Several of these, which are not relevant here, involved whether a former Syncom employee would be deposed, and whether the court would use the deposition as evidence. Others involved how to treat Mr. Wood, given that had filed for bankruptcy.

The remaining few pleadings, which resulted in two court orders, addressed the parties' views on the contours of the issues the court would hear on remand, and the merits of those issues. The court held a status conference both in chambers and on the record, but aside from the former-employee deposition, no new evidence was taken in the remand proceedings.

III. Post-Remand Court Orders

In its order on the merits, the Rockingham County Superior Court (*McHugh*, J.) first made clear that its order is limited to just Mr. Hogan. The court then recognized that "Mr. Hogan is now out of the theater cleaning business and has very little by way of personal assets." It understood that "as a practical matter a restrictive covenant is no longer necessary for [Syncom] to have enforced and any large monetary judgment will be uncollectible." ORDER (Nov. 3, 2008), *appx*. at 61.

The trial court found Mr. Hogan failed to prove he was under duress when he executed the employment contract, but made no finding Syncom acted in good faith in its execution.

The court then turned its attention to "[t]he real problem," which it termed "the amount of money damages due the plaintiff as a result of Hogan's actions." Because the Supreme Court found the restrictive covenant overboard as a matter of law, "[t]he question therefore becomes, if

these covenants have to be reformed then what effect would a reformation have on the overall monetary damages." ORDER (Nov. 3, 2008), *appx*. at 61.

In answering that question, the court acknowledged both that Mr. Hogan worked for Syncom for "less than five months," and also that "Hogan's misdeeds without the leadership of Wood in all probability would not have cost the plaintiff any loss of business." The court thus declined to reform the contract, and ruled "justice requires that no monetary award for damages be levied against William Hogan." *Id.*

Forming the basis for Mr. Hogan's appeal is the award of attorneys fees in the last paragraph of the court's order:

> The question of attorney fees … falls into a different category. William Hogan's obvious misconduct by in effect stealing his employer's confidential and proprietary documents and supplying them to a direct competitor warrants sanction. That fact coupled with his continued denial with respect to events that were independently proven beyond a reasonable doubt and his lying under oath in Court on at least some issues compel the award for attorney fees to stand. Although presumably the plaintiff has incurred more attorney fees since the original Court Order in this case four years ago, the Court will affirm its award of attorney fees of $100,000.00. This sum is the joint and several responsibility of William Hogan and Eldon Wood. However the plaintiff may seek to enforce that Order against William Hogan solely if it is desirous of doing so given the fact that Wood is currently in bankruptcy.

ORDER (Nov. 3, 2008), *appx*. at 61, 64.

Both parties filed motions for reconsideration. In its denial, the court expounded on the basis for its decision. ORDER ON PENDING MOTIONS (Dec. 18, 2008), *appx*. at 65. It recognized that an "award of zero money damages" is "a severe blow" to Syncom, but also understood that "given the finances of Mr. Hogan," it is "unlikely that the plaintiff would have been able to collect any substantial damage award." The court said that "ordering William Hogan to

reimburse the plaintiff for attorney fees of $100,000.00 is detrimental to Mr. Hogan, but in the court's mind makes up for the benefit he has received in not having to pay damages to the plaintiff." *Id.*

Reduced to their essentials, the court's two orders court offered three distinct explanations for the award of attorneys fees. The first is as a "sanction" for Mr. Hogan's "misconduct by in effect stealing his employer's confidential and proprietary documents and supplying them to a direct competitor." This is essentially the underlying conduct for which Syncom sued Mr. Hogan. The second is Mr. Hogan's "continued denial with respect to events that were independently proven … and his lying under oath in court on at least some issues." The third is to "make[] up for the benefit [Mr. Hogan] received in not having to pay damages."

Mr. Hogan's appealed regarding the lawfulness of the award of attorneys fees, and Syncom cross-appealed.

SUMMARY OF ARGUMENT

William Hogan first notes that only a "prevailing party" is eligible for an award of attorneys fees. He argues that under any definition, Syncom was not a prevailing party because it received no judicial benefit, and enjoyed no award of damages.

Mr. Hogan then distinguishes damages from attorneys fees, and cites the law holding that fees can be based only on the small set of established exceptions to the American rule that each party pays its own fees. He points out that none of the explanations given by the court are in accord with any of the exceptions.

Finally, Mr. Hogan argues that if there is to be an award of fees, it must be apportioned according to the amount of time Syncom spent prosecuting its case against Mr. Hogan, and that Mr. Hogan should not bear the cost of fees associated with his co-defendant.

ARGUMENT

I. Syncom is Not a "Prevailing Party" and is Not Eligible for Award of Attorneys Fees

The first condition necessary for an award of attorneys fees is one be a "prevailing party." *Grenier v. Barclay Square Commercial Condominium Owners' Ass'n*, 150 N.H. 111, 117 (2003) ("A prevailing party may be awarded attorney's fees" upon certain conditions), quoting *Town of Nottingham v. Newman*, 147 N.H. 131, 137 (2001); *Royer v. Adams*, 121 N.H. 1024 (1981) (one must be "prevailing party" for attorneys fees award under federal civil rights act). This Court specifically required that Syncom may get fees and expenses "if it prevails in an action under the contract." *Syncom I*, 155 N.H. at 88.

The need to be a "prevailing party" is necessary even to the extent that "[w]here a party prevails upon some claims and not others … any fee award should be reduced to exclude time spent on unsuccessful claims." *LaMontagne Builders*, 154 N.H. at 261; *Funtown USA, Inc. v. Town of Conway*, 129 N.H. 352 (1987) (involving attorneys fees and severability of winning and losing claims), citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *In re Bergeron Estate*, 117 N.H. 963, 967 (1977) (attorneys fee award reduced by extent to which party prevailed).

To "prevail" means a party "must have secured a legal right or financial benefit greater than he or she had." *Appeal of Brown*, 143 N.H. 112, 119 (1998) (citing dictionary definition to construe workers' compensation statute requiring worker to "prevail" to get payment of attorneys fees).[2] *See also*, *Farrar v. Hobby*, 506 U.S. 103 (1992) ("[T]o qualify as a prevailing party, a … plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an

[2]The workers' compensation statute has since been amended to include a definition of "prevail" specific to the compensation context. See RSA 281-A:44, I; *In re Silk*, 156 N.H. 539 (2007).

enforceable judgment against the defendant from whom fees are sought.… Whatever relief the plaintiff secures must directly benefit him at the time of the judgment.… In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties.") (decided under federal civil rights law statute) (quotations and citations omitted).

Thus when a plaintiff gets no damage award, it is not a "prevailing party."

In *Soares v. Town of Atkinson*, 129 N.H. 313 (1987), a builder successfully challenged the constitutionality of restrictive zoning, thus making the builder a winning litigant. The town then amended its ordinance, thereby mooting the builder's request for injunction and damages. The builder then sought attorneys fees. This Court wrote:

> [T]he builder is not entitled to attorney's fees or costs because it did not receive a judicial remedy.… [T]he builder's relief here came in the form of an amended ordinance and not from a judicial decision. Its remedy, then, was legislative, rather than judicial.

Soares v. Town of Atkinson, 129 N.H. at 317. Because the builder neither "secured a legal right or [a] financial benefit greater than he or she had," *Brown*, 143 N.H. at 119, it was not a "prevailing party" for the purposes of attorneys fees.

Syncom is in the builder's position. Its injunction was declared invalid by this Court, and it got no damages below. Thus it got no judicial remedy, is not a "prevailing party," and cannot get an award of attorneys fees.

This principle is shown doubly in *Van Der Stok v. Van Voorhees*, 151 N.H. 679 (2005). There, a seller of land lied about its condition to the buyer. When buyer refused to pay, seller sued, and buyer counterclaimed. The jury found for the buyer on everything, but awarded no

damages. Buyer sought attorneys fees for both successfully prosecuting his counterclaims, and successfully defending against the seller's suit.

This Court ruled that even though he won on the counterclaims, "because the jury awarded the [buyer] no damages, he did not prevail on his counterclaims for purposes of an award of attorney's fees." For successfully defending against the seller's suit, this Court ruled that "[t]he [buyer] did, however, successfully defend against, and therefore prevail on, the plaintiff's claim against him." *Van Der Stok v. Van Voorhees*, 151 N.H. at 685.

Van Der Stok is a double-example of the rule in *Brown*. First, because the buyer on his counterclaims did not enjoy any "financial benefit greater than he or she had," he was not a "prevailing party." Second, because the buyer "secured a legal right …greater than he or she had" – presumably the avoiding of potential liability – a successful defense makes one a "prevailing party." *See also*, *In re Rose*, 146 N.H. 219 (2001) (merely successfully obtaining a further hearing on same matter does not constitute prevailing); Annotation, *Who Is the "Successful Party" or "Prevailing Party" for Purposes of Awarding Costs Where Both Parties Prevail on Affirmative Claims*, 66 A.L.R.3d 1115.

Van Der Stok directly controls Syncom and Mr. Hogan. Syncom neither "secured a legal right" nor enjoyed a "financial benefit greater than [it] had." The legal right that could have been secured under the contract – an injunction against Mr. Hogan competing – was disallowed because the non-competition clause was declared overbroad and unenforceable by this Court. The financial benefit that Syncom might have gained was zeroed when the lower court, as in *Van Der Stok*, gave Syncom no damages.

In fact, his successful defense might otherwise make *Mr. Hogan* the "prevailing party."

And this is how it should be. Syncom required its employees to sign an overly broad non-competition contract, and then created an unstable work environment because, as the lower court found, Matthew Sinopoli (Syncom's principle) "does not appear to be a very good people person." FINAL ORDER (Dec. 13, 2004), *appx.* a 29, 32. Syncom then sued, and (in addition to putting Big E out of business and forcing Mr. Wood into bankruptcy) has involved Mr. Hogan and his family in eight years of litigation by the time this appeal is resolved, consumed untold hours of stress and worry, and cost Mr. Hogan (who worked for Syncom less than five months) in the neighborhood of a hundred thousand dollars in legal fees and costs.

In any event, Syncom is not a "prevailing party," and thus is not eligible for an award of attorneys fees.

II. Court Unlawfully Awarded Attorneys Fees as Damages

As noted, the court gave three explanations for its award of damages – as a sanction for Mr. Hogan's underlying misconduct, his denial and lying, and to make up for not having to pay damages. To make sense of these, it is necessary to briefly review the law of damages, and contrast it with the law of attorneys fees.

A. Damages Compensate for Underlying Conduct

Proof of damages is an element of any contract or tort claim, "and the absence of such proof defeats the plaintiff's claim." *Ferrero v. Coutts*, 134 N.H. 292, 295 (1991) (tort claim); *Parem Contracting Corp. v. Welch Const. Co., Inc.*, 128 N.H. 254, 259 (1986) (contract plaintiff has "the burden in the first instance of proving the extent and amount of its damages"). Thus without proof of damages, the plaintiff has failed to state a *prima facie* cause of action against the defendant.

1. Compensatory Damages

"The purpose of awarding compensatory damages in breach of contract actions … is to place the plaintiff in the position the plaintiff would have occupied absent a breach." *Concord Hosp. v. New Hampshire Medical Malpractice Joint Underwriting Ass'n*, 142 N.H. 59, 61 (1997). Compensatory damages for torts are "to make the plaintiff whole again, restoring the person wronged as nearly as possible to the position he would have been in if the wrong had not been committed." *Alonzi v. Northeast Generation Services Co.*, 156 N.H. 656, 666 (2008) (quotations and citations omitted).

2. Enhanced Compensatory Damages

Enhanced damages do not sound in contract, even if the breach is intentional. *DCPB, Inc. v. City of Lebanon*, 957 F.2d 913 (1st Cir. 1992) (see New Hampshire cases collected). For torts, enhanced damages recognize that the when "the element of malice enters into the wrong, the rule of damages is different and more liberal." *Bixby v. Dunlop*, 56 N.H. 456 (1876). Thus, "[w]hen an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced compensatory damages. These enhanced compensatory damages … are awarded only in exceptional cases. The mere fact that an intentional tort is involved is not sufficient; there must be ill will, hatred, hostility, or evil motive on the part of the defendant." *Stewart v. Bader*, 154 N.H. 87 (2006) (quotations and citations omitted).

3. Punitive Damages

Lastly, punitive damages, which this Court describes as "fine, penalty, punishment, revenge, discipline, or chastisement," *Fay v. Parker*, 53 N.H. 342 (1872), have been barred in New Hampshire since the nineteenth century, *id.*, and more recently by statute. RSA 507:16.

It is clear then, that damages, of whatever sort and in whatever measure, are designed to compensate the plaintiff for the *underlying conduct*.

B. Attorneys Fees Compensate for Conduct of the Litigation

Attorneys fees are entirely different from damages. They do not compensate for the underlying conduct, but are addressed to the conduct of the litigation.

"New Hampshire adheres to the American Rule on the question of attorney's fees: parties pay for their own attorneys' costs, subject to certain statutorily and judicially created exceptions." *Board of Water Com'rs, Laconia Water Works v. Mooney*, 139 N.H. 621, 628 (1995).

> Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser is the principle that no person should be penalized for merely defending or prosecuting a lawsuit. An additional important consideration is that the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits.

Harkeem v. Adams, 117 N.H. 687 (1977).

It is clear that attorneys fees are not for the purpose of "punishment," *Ives v. Manchester Subaru, Inc.*, 126 N.H. 796, 804 (1985), and therefore are not some sort of replacement for punitive damages.

Thus, New Hampshire law draws an easy distinction between damages, and the expenses of prosecuting a cause of action. In *Guay v. Brotherhood Bldg. Ass'n*, 87 N.H. 216, 220-21 (1935), this Court refused "to allow as damages the counsel fees incurred."

> It is perfectly well settled that the fees of attorneys and counsel, and other expenses of the litigation, beyond legal costs, cannot be recovered by the plaintiff in any actions of contract, or in those actions of tort in which punitive damages are not allowed; for, first, these expenses are not the legitimate consequence of the tort or breach of contract complained of; second, to allow these expenses to the plaintiff, which are never allowed to a successful defendant, would give the former an unfair advantage in the contest; and, third, where, as in this state, it is provided by statute that "the prevailing party may be allowed certain sums, termed costs, by way of indemnity for his expenses in the action," it is not in the power of courts or juries to increase the allowance fixed by statute, however inadequate that allowance may be.

Stickney v. Goward, 201 N.W. 630 (Minn. 1925). Thus, in *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271 (1994), the plaintiff alleged the defendant took confidential business information and breached his fiduciary duty. The defendant asserted a counterclaims based on interference with banking relationships. The court awarded no damages on the underlying conduct, but the defendant claimed he was damaged by the cost of defending the lawsuit. Drawing a bright line, this Court held that the cost of the suit were not "'damages'" because they "did not flow from

any interference with his banking relationships." *Clipper Affiliates*, 138 N.H. at 276 (quotation in original).

Courts everywhere have condemned efforts to confuse damages with attorneys fees. *See*, *e.g.*, *Tullock v. Mulvane*, 184 U.S. 497, 511 (1902) ("[I]t remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the [injunction]. That they were not is settled."); *Schlaifer Nance & Co., Inc. v. Estate of Andy Warhol*, 7 F.Supp.2d 364 (S.D.N.Y. 1998) (denouncing confusion of damages and attorneys fees in context of fraudulent licencing agreement); *Horn v. Wooser*, 165 P.3d 69, 75 (Wyo. 2007) (denouncing confusion of damages and attorneys fees in medical malpractice); *Chris Myers Pontiac-GMC, Inc. v. Lewter*, 697 So.2d 478 (Ala.Civ.App. 1997) ("court is unaware of any case or statutory law permitting attorney fees to be awarded as punitive damages").

C. Attorneys Fees Must Be Based on Established Exceptions

With this distinction in mind, attorneys fees are allowed in some circumstances.

"An award of attorney's fees must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an *established* exception to the rule that each party is responsible for paying his or her own counsel fees." *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 259 (2006) (emphasis added).

The phrase "established exception," is used in dozens of New Hampshire cases, going back a half-century. *See e.g.*, *Miami Subs Corp. v. Murray Family Trust*, 142 N.H. 501, 517 (1997); *Morse v. Ford*, 118 N.H. 280, 281 (1978); *Utica Mut. Ins. Co. v. Plante*, 106 N.H. 525, 526 (1965). Although "[t]hese exceptions are flexible, not absolute, and have been extended on occasion," *Harkeem v. Adams*, 117 N.H. 687, 690 (1977), it appears the list of established

exceptions has been stable for decades. Doleac, *Court Awarded Attorneys Fees Under New Hampshire Common Law*, 17 N.H.B.J. 134, 138-44 (1976).

There are four established exceptions.[3] A party's peculiar conduct in litigation can give rise to an award of attorneys fees:

- "where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established;
- "where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct;
- "as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and
- "for those who are forced to litigate against an opponent whose position is patently unreasonable."

Business Publications, Inc. v. Stephen, 140 N.H. 145, 147 (1995).

D. Court Awarded Attorneys Fees on Unlawful Grounds

As noted, the three explanations given by the court here for awarding Syncom's attorneys fees were:

- as a "sanction" for Mr. Hogan's "misconduct by in effect stealing his employer's confidential and proprietary documents and supplying them to a direct competitor";
- Mr. Hogan's "continued denial with respect to events that were independently proven … and his lying under oath in court on at least some issues"; and
- to "make[] up for the benefit [Mr. Hogan] received in not having to pay damages."

ORDER (Nov. 3, 2008), *appx*. at 61; ORDER ON PENDING MOTIONS (Dec. 18, 2008), *appx*. at 65.

[3]There have been several additional common law exceptions in the areas of domestic relations and trust law, *see* Doleac, *Court Awarded Attorneys Fees Under New Hampshire Common Law*, 17 N.H.B.J. at 134, 144, that probably have little current application and are not relevant to this case.

1. Unlawful to Award Attorneys Fees as Sanction for Misconduct

The first explanation, that Mr. Hogan's misconduct warrants a sanction via an award of attorneys fees, is a penalty for the underlying conduct on which Syncom suit is based. This runs afoul of the law for several reasons.

First, it is but damages by another name. *Guay v. Brotherhood Bldg.*, 87 N.H. at 216.

Second, as a "sanction," it is punitive. As noted, punitive damages have been barred in New Hampshire for well over a century, *Fay v. Parker*, 53 N.H. 342 (1872), and also by statute. RSA 507:16.

Third, calculating backdoor damages based on the billings of Syncom's lawyer violates the rule that the method of calculating damages must be reasonably approximate the plaintiff's actual harm. *Blouin v. Sanborn*, 155 N.H. 704, 707 (2007); *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271, 274 (1994) ("damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty"). Specifically here, it violates this Court's mandate that damages must be calculated based on "Syncom's projected lost profits," *Syncom I*, 155 N.H. at 88, which the remand court found could not "be levied against William Hogan."

2. Unlawful to Award Attorneys Fees for Denial and Lying Under Oath

The second explanation, that Syncom should get fees because Mr. Hogan lied at trial also has no basis. Nearly every trial requires the fact-finder to make assessments of credibility. Were there to be fees for merely being less credible than another witness, it would eviscerate the American rule that each party pays its own fees. In *MaGuire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51 (1990), for example, the defendant got no award of attorneys fees even though the jury specifically found the plaintiff had been "willful and intentional" in burning their own house, had

"willfully concealed or misrepresented a[] material fact" in bringing suit, and had sworn falsely in an effort to get insurance for the burned house.

Mr. Hogan was a witness all three parties wanted to hear from, and all three parties questioned during trial. Any falsehood did not prolong the litigation by even a minute, nor put Mr. Hogan in any of the other established exceptions. If Syncom wishes to recover damages against Mr. Hogan for what he said, its proper course would have been to add claims for slander, injurious falsehood, or something similar. His words as a witness, however, were not the cause of this litigation, and did not cause any harm. *See e.g.*, *Ciulla v. Rigny*, 89 F.Supp.2d 97 (D.Mass. 2000) (woman who fabricated claim she had been strip-searched during automobile stop not awarded attorneys fees).

3. Unlawful to Award Attorneys Fees to Make Up for Damages

The third explanation, that Syncom should get fees to "make up" for the benefit of it not having enjoyed a damages award, again conflates the separate legal issue of attorneys fees and damages. There is simply no basis in the law for an award of attorneys fees as a replacement for damages.

E. Mr. Hogan Should Not Pay Syncom's Attorneys Fees

Damages compensate for harm caused by a defendant's underlying actions. Attorneys fees compensate for conduct in the litigation process. Fees can be awarded based on only on a small set of established exceptions to the general rule that each party pays its own way. None of the explanations given by the court are recognized in the law as a basis for an award of attorneys fees, and therefore the award must be reversed. Moreover, even if Mr. Wood is guilty of unsavory litigation tactics, Mr. Hogan was separately represented, and he cannot be held liable for them.

III. Fees Should be Apportioned, not Joint and Several

As noted, the court below ordered that the attorneys fees award "is the joint and several responsibility of William Hogan and Eldon Wood. However [Syncom] may seek to enforce that Order against William Hogan solely if it is desirous of doing so given the fact that Wood is currently in bankruptcy." ORDER (Nov. 3, 2008), *appx*. at 61, 64.

If fees can be awarded at all, the order is nonetheless unlawful.

A. Fees Based on the Contract

It is understood that both Messrs. Wood's and Hogan's employment contracts contain a fees and costs clause. Mr. Hogan's contract provides: "In any successful action by [Syncom] to enforce this contract, [Syncom] shall be entitled to recover its attorney's fees and expenses incurred in such action." CONTRACT ¶ 6, *appx.* at 26, 27.

For several reasons, this provision does not help Syncom.

First, there is no indication the court awarded attorneys fees pursuant to the contract – and it could not have without reforming the contract, which it did not do.

Second, the fees clause is limited to "any successful action." But Syncom's action was not "successful" – this Court held that as a matter of law the contract was unenforceable, the lower court on remand declined to reform it, and no damages were awarded based on it.

Third, even if Mr. Wood violated his contract, Mr. Hogan is not a party to it, and is not bound by it. Thus, whatever Mr. Wood did in violation of his contract, Mr. Hogan cannot be liable for attorneys fees associated with the claims Syncom made against Mr. Wood.

B. Fees Based on Tort

If the attorneys fees award was based on Mr. Hogan's tort, the fees should be apportioned in accord with New Hampshire's comparative fault statute, with common law theories of vicarious tort liability, or perhaps with the time Syncom spent during trial proving its case against each defendant. The court here, however, simply provided Syncom an award of attorneys fees and ordered the defendants to pay – acknowledging the likelihood that Mr. Hogan will bear the entire fee.

1. Apportionment Under the Comparative Fault Statute

New Hampshire's comparative fault statute applies to damages and says nothing about attorneys fees. It may, however, provide a convenient analogy.

The statute requires that "the amount of damages awarded … against each defendant [be] in accordance with the[ir] proportionate fault." RSA 507:7-e, I(a). "[I]f any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him." RSA 507:7-e, I(b). If a defendant, however, is "found to have knowingly pursued or taken active part in a common plan or design resulting in the harm," the court shall enter "judgment against all such parties on the basis of the rules of joint and several liability." RSA 507:7-e, I(c).

As noted, the remand court explicitly found that "Hogan's misdeeds without the leadership of Wood in all probability would not have cost the plaintiff any loss of business." Although no percentage is attached to the finding, it appears "less than 50 percent."

There is no finding that Mr. Hogan "knowingly pursued" or took an "active part in a common plan or design resulting in the harm." All the findings made by the court both before

the first appeal and on remand suggest that Mr. Wood was the prime instigator of all actions that could have conceivably harmed Syncom.

2. Apportionment Under Common Law Theories

Applying the "rules of joint and several liability," it is apparent that Mr. Hogan should not be liable for the attorneys fees.

First, even if Mr. Wood engaged in unsavory litigation tactics, Mr. Hogan cannot be liable for attorneys fees associated with them.

Second, there are three known rules of vicarious tort liability that would suggest joint rather than several payment – joint enterprise, joint wrongdoer, and ratification. *See, Vidal v. Town of Errol*, 86 N.H. 1 (1932). None apply here. Mr. Hogan was not in a joint enterprise with Mr. Wood because Mr. Hogan had no interest in Big E, no interest in the accounts secured by Mr. Wood on Big E's behalf, and had no ability to direct the purpose or movements of Big E or its accounts. Mr. Hogan was not a joint wrongdoer with Mr. Wood because Mr. Hogan had nothing to do with the solicitation of the accounts Mr. Wood took from Syncom, and any information he gave to Mr. Wood was *after* the creation of Big E and *after* Mr. Wood took the accounts from Syncom. Mr. Hogan also could not ratify any of Mr. Wood's actions because Mr. Hogan was not a principle in Mr. Wood's startup company, and Mr. Wood at no time was Mr. Hogan's agent.

3. Apportionment by Time Spent at Trial Against Each Defendant

Because it is attorneys fees at issue here, the only "reasonable" methodology to apportion fees would be according to the time Syncom spent at trial proving its case against each defendant. *Blouin v. Sanborn*, 155 N.H. 704, 707 (2007) ("New Hampshire law does not require

that damages be calculated with mathematical certainty, and the method used to compute them need not be more than an approximation."); *T&M Associates, Inc. v. Goodrich*, 150 N.H. 161, 164 (2003) ("New Hampshire law does not require mathematical certainty in computing damages. The law does, however, require an indication that the award of damages was reasonable.").

As such facts would likely have to determined by the trial court, an exhaustive recitation here of the evidence pertaining to each defendant during the nine-day trial would be superfluous. Nonetheless, even a quick perusal of the transcripts reveals that Syncom believed – as did the lower court – that it was Mr. Wood's "plan to form a competing company and carefully orchestrate his time of departure," that Mr. Hogan was merely the "a follower not leader," and that "Hogan's misdeeds without the leadership of Wood in all probability would not have cost the plaintiff any loss of business." Accordingly, the bulk of the trial concerned what Mr. Wood did, the reasons he did it, his dissatisfaction with his ambiguous compensation scheme, and the theater accounts he secured for his start-up company.

In any event, making Mr. Hogan effectively indemnify Mr. Wood for the amount Syncom spent prosecuting Mr. Wood falls short of the law requiring that such charges be reasonably related to the harm. If this Court determines that an award of attorneys fees can be justified at all, it should order they be appropriately apportioned.

CONCLUSION

Based on the foregoing, William Hogan requests this Court reverse the award of attorneys fees, or in the alternative, apportion fees according to the time spent against each defendant.

Respectfully submitted,

William Hogan
By his Attorney,

Law Office of Joshua L. Gordon

Dated: June 25, 2009

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for William Hogan requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on June 25, 2009, copies of the foregoing will be forwarded to William S. Cannon, Esq.; V. Richards Ward Jr., Esq.; and to Joseph F. Hook, Esq.

Dated: June 25, 2009

Joshua L. Gordon, Esq.

APPENDIX

KEY EMPLOYMENT CONTRACT

THIS AGREEMENT is made and entered into this **13th day of September, 2001** between **Syncoln Services, Inc.** a Delaware Corporation with a mailing address of 15 Ermer Road, North Salem, New Hampshire 03079 (hereinafter called " the Company") and **William C. Hogan** (hereinafter called "the Manager").

WHEREBY IT IS AGREED AND DECLARED AS FOLLOWS:

1. **TERM:** This agreement shall remain in full force and effect for three (3) years and thereafter shall be renewed from year to year. Causes for termination include but are not limited to a commission of a felony by either party or a breach of contract by either party. In the alternative, this Agreement may be terminated at any time by mutual agreement of the parties in written form as follows: a.) The date upon which the death, legal incapacity or permanent disability of the Manager; b.) The date upon which the parties hereto, in writing, mutually agree to terminate this Agreement; or c.) The Company has received from the Manager the date, which is 30 days after written notice of intent to terminate this agreement has been received by the Company.

2. **COMPENSATION:**

   In consideration of Manager's services, the Company shall pay to the Manager during the continuance of this Agreement a fixed compensation at the rate of **$ 50,000.00** per annum which shall be reviewed in good faith by the Company on an annual basis during the term of this Agreement.

3. **EXTENT OF SERVICES:**

   The Manager shall faithfully and loyally serve the company and shall, unless prevented by ill health, injury or other cause beyond his control, or with the written consent of the Company, devote his whole time, attention, energy and ability, during working hours to the carrying out of his duties under this Agreement and shall use reasonable endeavors to promote the interests of this Company in all respects.

   The Manager agrees that during his employment with the Company, the Manager shall not become interested or associated, directly or indirectly as principal, agent employee or consultant with any other company in a similar business and agrees not to provide any services to any account or customers unless for the direct benefit of the company and with the company's full knowledge and under the companies direction.

The Manager further agrees that for a period of three (3) years (36 months) after termination of his employment, whether with or without cause, the Manager will not directly or indirectly, solicit business from any of the Company's customers located in any territory serviced by the Company while he was in the employment of the Company. The Manager also agrees that during such period the Manager will not become interested in or associated, directly or indirectly, as principal, agent or employee, with any person, firm or corporation which may solicit business from such customers. Manager shall not disclose the private affairs of the Company or any secrets or confidential information of the Company which he may learn while in the Company's employ.

4. **REMEDIES FOR BREACH OF CONTRACT:**

In the event of the breach of threatened of any provision of the contract by the Manager, the Company shall be entitled to injunctions, both preliminary and final, enjoining and restraining such breach or threatened breach at law or in equity including the Company's right to recover from the Manager any and all damages that may be sustained as a result of the Manager's breach of contract.

5. **SEVERABILITY:**

If any clause or provision herein shall be invalid or unenforceable by a court of competent jurisdiction or by operation of any applicable law, it shall not effect the validity of any other clause or provision, which shall remain in full force and effect. Each of the provisions of this contract shall be enforceable independently of any other provision this contract and independent of any other claim or cause of action.

6. **GOVERNING LAW:**

The contract shall be governed by the laws of the State of New Hampshire. In any successful action by the Company to enforce this contract, the Company shall be entitled to recover its attorney's fees and expenses incurred in such action. In the event of any dispute arising under this contract, it is agreed between the parties that the law of the State of New Hampshire will govern the interpretation, validity and effect of this contract without regard to the place of execution or place of performance thereof.

[Lole]

7. **COMPLETE AGREEMENT:**

This contract supersedes all prior contracts and understandings between the parties and may not be modified or terminated orally. No modification, termination or attempted waiver shall be valid unless in writing signed by the party against whom the same is sought to be enforced.

8. **WAIVER:**

The waiver by the Company of a breach of any provision of this contract by the Manager shall not operate or be construed as a waiver of any subsequent breach of the Manager.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date and year first above written:

William C. Hogan

Syncom Services Inc.
Duly Authorized President

Witness & Date

[67]

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

SYNCOM INDUSTRIES, INC. d/b/a SYNCOM SERVICES

v.

ELDON WOOD, FABIO FLORES and WILLIAM HOGAN

Docket No.: 02-E-188

FINAL ORDER

On May 10, 2002, the plaintiff brought a Petition for Declaratory Judgment, Permanent Injunction and Request for Monetary Damages against the three defendants named herein. The plaintiff is in the business of providing cleaning, maintenance and related services to owners of movie theaters nationwide. The plaintiff alleged in its Petition that it was the former employer of all three defendants. It further alleged that each of the defendants, as a condition of their employment, signed a document entitled "Key Employment Agreement," which contained the following paragraph:

> "The Manager [employee] further agrees that for a period of three (3) years (36 months) after termination of his employment, whether with or without cause, the Manager will not directly or indirectly solicit business from any of the Company's customers located in any territory services by the Company while he was in the employment of the Company. The Manager also agrees that during such period the Manager will not become interested in or associated, directly or indirectly, as principal, agent or employee, with any person, firm or corporation which may solicit business from such customers. Manager shall not disclose the private affairs of the Company or any secrets or confidential information of the Company which he may learn while in the Company's employ."

The plaintiff alleged that all three defendants breached this provision of their respective employment agreements in several ways. They worked in a similar industry within the prohibited period, indeed in some cases within a few days of their separation from it; they used trade secrets and bidding documents to assist them in their competition

with the plaintiff; and they took the plaintiff's customer lists in order to obtain existing accounts from the plaintiff.

Defendant Flores signed his employment agreement on August 21, 2000; defendant Wood signed his on June 13, 2001; and defendant Hogan signed his on September 13, 2001. Defendants Wood and Flores submitted letters of resignation to the plaintiff in January of 2002. Defendant Hogan was terminated by the plaintiff on February 11, 2002. Thus, Flores was an employee of the plaintiff for seventeen months, Wood was an employee for seven months and Hogan was an employee for five months.

While defendants Wood and Hogan retained counsel and have vigorously defended this litigation, defendant Flores defaulted. By Order dated September 5, 2003, this Court awarded the plaintiff a judgment against defendant Flores in the sum of 3.65 million dollars. The monetary award was based upon the plaintiff's unchallenged opinion of the damages it suffered. The Court's Order also included injunctive relief.

In defense of this lawsuit, defendant Wood alleged that it was the plaintiff that breached his employment contract by failing to pay him commissions in addition to his weekly salary. Although he claimed commissions were in fact due him upon his termination, he never filed a counterclaim for those moneys. He testified, however, that the amount owed him was $5,370.

Defendant Hogan did file a counterclaim claiming that the plaintiff "terminated me without cause" and because of the plaintiff's breach of his employment contract he lost moneys that he was entitled to receive under said contract and also lost other employment opportunities. He alleged that he was due the sum of $129,166. Although he did not include it in his written counterclaim, he testified at trial that the plaintiff also failed to provide him with health insurance as promised.

At the time of trial, the plaintiff amended its Petition for Declaratory Judgment by adding a claim of breach of fiduciary duty. It alleged that independent of the breach of their employment contracts, the defendants owed the plaintiff an obligation of protecting the clients of the plaintiff because of their employment relationship. The plaintiff claims that the defendants breached their fiduciary duty to it by soliciting clients of the plaintiff for their competitive business and also by diverting the plaintiff, corporate opportunities for obtaining new clients. Syncom Industries, Inc. also claimed that the defendants misappropriated its proprietary and confidential information, trade secrets, and good will. For this conduct, the plaintiff alleged it was entitled to an award of enhanced compensatory damages.

The trial of this case encompassed nine days. Due to scheduling difficulties, it was heard in portions of May, June, July and October 2004. Both the plaintiff and defendants Wood and Hogan filed detailed Requests for Findings of Fact and Rulings of Law which the Court has addressed. Because those requests reference most of the evidentiary issues which the Court heard over the course of the trial, it will not seek to re-discuss those issues herein. Rather, the purpose of the within Order is to supplement those requests with additional findings which the Court deems to be relevant.

Before discussing the merits of the case, the Court offers its view on the three principle participants. It believes it is capable of doing so having in mind that the trial of this case consumed nine days. Syncom Industries, Inc. is run by Matthew Sinopoli. Although he has worked hard to build his company over the past ten years, he has not revolutionized the theater cleaning industry as he would have the Court believe. He may have changed some practices and procedures but the business itself is not brain surgery. He is a very precise individual perhaps because of his educational training as a chemist.

However, he does not appear to be a very good people person. His priorities and organizational skills need to be reevaluated and upgraded. Nevertheless, he is an honest person and he clearly was the most credible of the parties.

Eldon Wood can best be described as a "hothead." He is quick to anger and slow to reason. He believed early on that the inability of the parties to agree on the appropriate commission structure for him meant that the plaintiff never intended to pay him any more than his weekly salary. Thus, he began to formulate a plan to form a competing company and carefully orchestrate his time of departure from the plaintiff. He would have the Court believe that he simply got up one morning and decided there and then to type up his resignation letter. He testified that up to that point in time he had not made any concrete plans to start a competing company. Apparently it was pure coincidence and his past experience in the theater cleaning business that enabled him to incorporate and take three of the plaintiff's clients within one week of his resignation. The apparent disregard for the Court's intelligence is obvious.

William Hogan is a follower not a leader. He had hoped that his employment with the plaintiff would have been a rewarding and fruitful experience. However, that was not the case. He convinced himself after only a couple of months that he was both overworked and underpaid. Thus, he was a prime candidate for recruitment by Eldon Wood. Although he did not immediately begin to work for Mr. Wood upon his termination from the plaintiff in February of 2002, the parties did get together in 2003 and they currently are employed by Mr. Wood's competing company. Both his wife and Mr. Wood helped convince him that he was being treated unfairly by the plaintiff. Once both Mr. Wood and Mr. Hogan made the decisions they made in early 2002 to the detriment of the

plaintiff company, they believed they should do or say anything that supported those decisions.

Based upon the evidence submitted, the Court has little difficulty in finding that the defendants Wood and Hogan breached their employment contracts with the plaintiff.

With respect to defendant Wood, the evidence suggests that he began giving serious thought to starting his own competitive company in or before December of 2001. He convinced his father to lend him sufficient funds to enable him to undertake that task at that time. Although he had made the decision to begin a competing company and taken some affirmative steps to do so by the end of 2001, he denied that fact in a face-to-face meeting that he had with the plaintiff's principal on January 2, 2002.

Eldon Wood's letter of resignation is dated January 14, 2002. Two days later, on January 16, 2002, Articles of Organization were filed with the Secretary of State in Connecticut incorporating an entity known as Big E Theater Cleaning, LLC. Mr. Wood is the signatory on that document. It was apparently prepared with the assistance of Connecticut legal counsel. The timing of the resignation and formation of his new business entity evidence the fact that his intentions were not spur of the moment.

Not only was the new company in direct competition for theater cleaning services with the plaintiff, Mr. Wood was immediately able to convince several of the plaintiff's Regal theater clients to abandon the business relationship they had with the plaintiff and begin doing business with him. This changeover of business clients took place within two weeks after Mr. Wood resigned from the plaintiff company.

In addition to taking existing clients of the plaintiff, the evidence at the trial reflected the fact that Mr. Wood was able to gain as a client the AMC theater complex located in New York City. He conceded that for the six months or so that he worked for the plaintiff

he had been actively attempting to secure this AMC theater as a client of the plaintiff. However, although he had had several positive meetings with that theater's manager, he did not procure the contract for the plaintiff by the time of his resignation.

After forming his new company, Mr. Wood did sign up this New York City theater as a client beginning March 1, 2002. That was only six weeks after his resignation from the plaintiff. There was evidence to suggest that as early as February 1, 2002, Mr. Wood submitted a bid to AMC for the cleaning business. While the contract with Big E was not signed until after Mr. Wood's resignation from the plaintiff took effect, he does not deny that his relationship with this AMC theater began and was nurtured throughout the period of time that he was an employee of the plaintiff.

Immediately upon his resignation from the plaintiff, Eldon Wood set up his own company and actively competed with the plaintiff for its existing clients or any new clients in the theater cleaning business. Mr. Wood acknowledges receiving a letter from the plaintiff two days after he resigned reminding him of the terms of his employment agreement and warning him not to violate those terms. Within thirty days of his resignation he also received a similar letter from plaintiff's counsel. He ignored both letters. He argues that while he intentionally did not abide by the terms of his employment contract, he was justified in doing so because of the plaintiff's failure to pay him commissions in addition to his weekly salary.

It is true, as Mr. Wood alleges, that his employment contract did contain some language entitling him to commissions. Specifically, paragraph two of his contract contains the following language:

> "In consideration of Manager's [Wood's] Services, the Company shall pay to the Manager during the continuance of this Agreement a fixed compensation at the rate of $1,000.00* per week which shall be reviewed in good faith by the Company on an annual basis during the term of this

Agreement. *Plus commission once sales level exceeded per discussion with MWS" [Syncom's principal, Matthew Sinopoli].

However, although the contract indicates that Mr. Wood would be entitled to commissions, the specifics of how much and when they would be due were not set forth in said contract.

There is a dispute between the plaintiff and Mr. Wood as to whether or not any commissions are due him as a result of his brief employment with the plaintiff company. It appears that there was never a meeting of the minds as to the criteria that Mr. Wood had to meet in order to earn commissions. Various figures and proposals were exchanged between the parties, but there was no written agreement setting up the commission formula. It appeared to be a work in progress when he left the company. However, there is no doubt the plaintiff intended to pay commissions to Eldon Wood. That fact is borne out by the letter sent to Mr. Wood by Mr. Sinopoli the day after he received Mr. Wood's resignation letter.

The Court understands Mr. Wood's frustration with respect to this issue. However, even assuming that some commissions were due Eldon Wood, by his own admission those commissions were only $5,370. The evidence showed that as a result of Mr. Wood's formation of his new company and his taking of some of the plaintiff's former business clients as well as his competition with the plaintiff for new clients, Mr. Wood has caused the plaintiff company to lose a sum far in excess of said amount. Thus, the entitlement to $5,370 in commissions even if proven would not be justification for violating his employment contract or for causing the plaintiff to lose a substantial amount of money. Moreover, most, if not all, of the alleged commissions due him came from the three Regal theaters that he took from the plaintiff immediately after he resigned from Syncom.

Eldon Wood had alternate remedies he could have pursued to recover any commissions he believed were due him. Mr. Wood wants the Court to believe that if the plaintiff had just paid him the commissions he claims were due, he would have remained a loyal and happy employee. The evidence suggests otherwise. While the plaintiff's failure to address the commission issue definitely may have been the straw that broke the camel's back, there were many other issues surrounding his employment that caused him to want to leave and start his own company. Although the plaintiff suggests otherwise, Syncom Industries, Inc. was not a well-oiled machine. There was a fair amount of turmoil in terms of personnel and procedure that existed during the period of the defendants' employment. Nonetheless, because there was never a specific agreement reached as to how commissions were to be calculated, the Court is compelled to conclude that Eldon Wood has not sustained his burden of proof that he is entitled to recover the sum of $5,370.

The Court is highly critical of some of the testimony of Eldon Wood. It appears that he took his oath to tell the truth at the trial rather lightly. There were several instances where the plaintiff had documentary evidence to suggest that Mr. Wood's statement about an incident was false. Yet even confronted with that evidence, Mr. Wood either professed to have no knowledge of the subject matter or admitted to half truths. One example will suffice.

Both Mr. Hogan and Mr. Flores testified that they had a meeting with Mr. Wood in December of 2001 at a Connecticut restaurant. Mr. Wood initially could not recall that meeting. Mr. Flores testified that at that meeting the formation of Mr. Wood's new company was discussed in detail. When Mr. Wood was shown a receipt from the Pasta Fare Restaurant from Orange, Connecticut dated December 21, 2001, which was

included on his expense report, he conceded that he was there. However, while he said he had in fact met with both Hogan and Flores at that restaurant that day, he testified he did not meet with them together and no discussions took place with respect to the formation of his new company. In light of the evidence presented, the Court is compelled to conclude that Mr. Wood's version of what occurred that day is not credible.

Turning now to the claims of defendant William Hogan, the Court notes that his employment with the plaintiff was only five months and further notes that his employment contract did not entitle him to receive any commissions. Upon his termination from the plaintiff company, he did not immediately begin working with Mr. Wood in his new business venture. Nonetheless, the evidence clearly showed that while still employed with the plaintiff in late January and early February of 2002, he provided defendant Wood with several documents belonging to the plaintiff containing important bidding and client information.

It was in part as a result of receiving these documents from Mr. Hogan that Mr. Wood was largely able to successfully compete with the plaintiff company. Moreover, the evidence clearly showed that the same forms that the plaintiff company used with its clients and cleaning agents were used by Mr. Wood in his new company. He merely substituted his new company's name for that of the plaintiff on each of the documents.

In May of 2003, William Hogan began working with Mr. Wood in Big E and that employment relationship continues today. The supplying of the plaintiff's documents to Mr. Wood and his work in a competing company is in violation of William Hogan's employment contract.

The Court finds that there is no validity to William Hogan's claim that he was entitled to receive health insurance (or for that matter even profit sharing which he also

offered some testimony about) from the plaintiff. Neither of these subject matters were addressed in his written employment contract, nor in any other document that he produced. More importantly, his contract contained a merger clause which reads as follows:

> "This contract supercedes all prior contracts and understandings between the parties and may not be modified or terminated orally. No modification, termination or attempted waiver shall be valid unless in writing signed by the party against whom the same is sought to be enforced."

With respect to the health insurance issue, even though it was not promised to him in his employment contract, the evidence suggests that the company was willing to reimburse him for the cost of this insurance if he elected to obtain the insurance himself. In fact, that is how the health insurance issue was handled with Mr. Wood. The appropriate paperwork was given to William Hogan by the plaintiff. However, Mr. Hogan never followed through with it. Perhaps the heated discussions that took place between Mrs. Hogan and employees of the plaintiff's explain the inaction. He claimed he could not afford the premium cost. Yet he never brought that concern to the plaintiff. If he had, Matthew Sinopoli testified he would have lent him the money. Moreover, it does not appear that the lack of insurance coverage resulted in any significant monetary loss to him or his family. Thus, he has no basis upon which to claim that the plaintiff violated any terms of his employment contract. His counterclaim is, therefore, DENIED.

Considering William Hogan's actions in December of 2001 and January and February of 2002, wherein he assisted Eldon Wood in procuring confidential Syncom information and documents, the plaintiff had ample grounds to terminate him in February of 2002.

Having found that the plaintiff has sustained its burden of proving that both Mr.

Wood and Mr. Hogan violated the terms of their respective employment contracts, and having also found that their claims of entitlement to commissions, profit sharing and health insurance benefits have no legal merit, the Court is left with the issue of what relief to provide the plaintiff. The Court determines that the plaintiff is entitled to both injunctive relief as well as money damages. In a case like this, it is very difficult to quantify money damages, but the plaintiff has made a good faith effort in order to do so by providing the Court with evidence of its monetary losses as well as the financial gains of Mr. Wood's competing company.

The Court finds and rules that both Eldon Wood and William Hogan are "interested in or associated directly or indirectly" with Big E Theater Cleaning, LLC ("Big E") in violation of the restrictive covenants of their employment agreements with the plaintiff and that Big E and the defendants have been soliciting customers of the plaintiff and have entered into contracts for cleaning such customers' theaters ("cleaning contracts") in violation of the restrictive covenants.

The Court determines that the defendants are bound by the covenants not to compete with the plaintiff contained in their Key Employment Agreements. However, given the limited period of their employment and considering the events that have transpired since they left the plaintiff's employment, the Court concludes that the imposition of a three year non-compete provision is not reasonable at this point in time. Thus, the Court enters an injunction enjoining the defendants from rendering any services to any customer or former customer of the plaintiff themselves or through Big E or any other person acting in concert with them or either of them for a period of eighteen months commencing January 1, 2005. Note that the plaintiff is not seeking to prevent the defendants from engaging in a commercial cleaning business in general, just the

cleaning of movie theaters, which is just a small part of the commercial cleaning industry. The within Order should not result in undue hardship to the defendants. They have admitted that they can and have diversified their Big E business to include non-theater clients.

With respect to the plaintiff's claim for monetary damages, the Court finds that it has made a good faith effort to determine what they are in dollars and cents. (See Plaintiff's Exhibits Nos.: 55 through 65 and No. 82.) Given what is involved in this case, that was no easy task. However, the evidence suggests that portions of the damage claims are speculative and unsupportable. Accordingly, the Court is compelled to reduce them.

The Court determines that the plaintiff's claims for breach of contract, breach of fiduciary duty, and loss of business reputation and good will should all be considered together. It finds that the damages sought for the losses suffered in the period of time from the termination of the defendant's employment through the present are reasonable for the four Regals ($275,568.00); AMC Empire 25 ($209,600.00); the six diverted Regals ($247,782.00); and the four non-Regals ($412,750.00). It rejects the future damages claimed for these four categories of loss. It also rejects the alleged net profit loss attributable to carpet cleaning with AMC Empire 25.

To this extent that the defendant argues that the plaintiff's estimates of loss for the four categories of damages awarded are excessive, any perceived excess is more than offset by the damages sought by the plaintiff for the other categories of loss which the Court has not awarded damages. By neglecting to award damages for those other categories the Court does not mean to suggest that those claims are frivolous. Rather it simply means that the Court was compelled to find that the plaintiff failed to prove the

amount of those damages in any reasonable measurable way.

Given the knowing and premeditated actions of the defendants at or about the time of their separation from the plaintiff, their continuing open defiance of the terms of their employment contacts, as well as the character and context of their testimony at trial, the Court finds and rules that the plaintiff is entitled to an award of enhanced compensatory damages. The Court determines those damages to be $250,000.

The plaintiff also seeks an award for reimbursement of reasonable attorney fees. Such an award is justified both by the terms of the defendant's Key Employment Agreement (Paragraph 4) and by their conduct throughout this litigation. The Court determines reasonable attorney fees in this case to be $100,000.

In summary, the plaintiff is awarded a verdict in the total sum of $1,495,710.

At the conclusion of the trial, the plaintiff moved to have Exhibits 72 thru 75 be admitted as full exhibits. That motion is GRANTED, although the exhibits in question did not assist the Court in reaching its decision. The plaintiff also filed a Motion to Preclude Evidence Not Produced By Defendants In Discovery. Although that motion has merit, the Court DENIES it because granting it would not assist the Court in reaching its decision.

All parties filed Requests for Findings of Fact and Rulings of Law. With respect to the plaintiff's requests, the Court GRANTS all but requests 4, 39, 45, 46, 50, 73, 74, 78, 100, 104 thru 116, 134, 139, 140, 141, 142, 144, 145, 147, 148, 150 thru 157, 159, and 160. Requests 4, 46, and 50 are neither GRANTED nor DENIED, therein being insufficient evidence to support them. The rest are DENIED.

With respect to defendant Eldon Wood's Requests for Findings of Fact, the Court GRANTS all but requests 1 thru 10, 18, 19, 23, 24, 26, 27, 28, 30 thru 34, 43, 44, 45, 48

thru 52, 54, 59 thru 63, 69, and 71. Requests 1 thru 10 are DENIED, but even if granted they have no legal significance. Requests 23, 50, 52, 54, and 59 are neither GRANTED nor DENIED, their being insufficient evidence put before the Court to enable it to rule on them. The remaining requests are DENIED. As to Eldon Wood's Requests for Rulings of Law, the Court GRANTS requests D, F, G, H, J, K, L, M, N, O, AND P-1. It DENIES requests A, B, C, E, I, P, K-1, L-1, M-1, N-1, O-1, Q, R, S, and T.

With respect to defendant William Hogan's Requests for Findings of Facts and Rulings of Law, the Court GRANTS requests 1, 2, 4, 5, 6, 10, 12, 16, 17, 21, and 22. It DENIES requests 3, 7, 8, 9, 11, 13, 14, 15, 18, 19, 20, 23, 24, and 25.

So Ordered.

DATED: December 13, 2004

Kenneth R. McHugh
Presiding Justice

HE STATE OF NEW HAMPSHIRE
Rockingham Superior Court
PO Box 1258
Kingston, NH 03848 1258
603 642-5256

NOTICE OF DECISION

MARK SULLIVA
27 FRONT STR ET
EXETER NH 03 33

02-E-0188 Syncom Industries Inc dba et al v. Eldon Wood et al

Please be advised that on 1/13/2005 Judge McHugh made the following order relative to:

Motion to Reconsider ; Order Made & Clarify "For all of the reasons set forth in the Plf's objection, the Dfts' Motion for Reconsideration is denied. Concerning the Dft; clarification request, be advised

that "customer" means any theatre chain in the district. The injunction prevents the dfts from doing business with the chain customers but only in territories or regions serviced by the Plf during the Dfts employment."

01/21/2005

Raymond Taylor
Clerk of Court

cc: William S Gannon
James R Davis
James J Flynn

AOC Form SUCP052 (Rev 09/27/2001)

COPY

Appendix Page 22

Rockingham
No. 2005-126

SYNCOM INDUSTRIES, INC. d/b/a SYNCOM SERVICES

v.

ELDON WOOD & *a.*

Argued: November 8, 2006
Opinion Issued: March 16, 2007

1. Labor—Employment Contracts—Noncompetition Covenants

The law does not look with favor upon contracts in restraint of trade or competition. Such contracts are narrowly construed. However, restrictive covenants are valid and enforceable if the restraint is reasonable, given the particular circumstances of the case. A covenant's reasonableness is a matter of law for the court to decide.

2. Labor—Employment Contracts—Noncompetition Covenants

To determine the reasonableness of a restrictive covenant ancillary to an employment contract, a three-pronged test is employed: first, whether the restriction is greater than necessary to protect the legitimate interests of the employer; second, whether the restriction imposes an undue hardship upon the employee; and third, whether the restriction is injurious to the public interest. If any of these questions is answered in the affirmative, the restriction is unreasonable and unenforceable. In determining whether a restrictive covenant is reasonable, the court will look only to the time when the contract was entered into.

3. Labor—Employment Contracts—Noncompetition Covenants

Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of employment; confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image.

4. Labor—Employment Contracts—Noncompetition Covenants

When the legitimate interest an employer seeks to protect with a restrictive covenant is its goodwill with customers, a covenant that restricts a former employee from soliciting business from the employer's entire customer base sweeps too broadly.

5. Labor—Employment Contracts—Particular Cases

Because restrictive covenants extended to the employer's customers with which the defendant employees had no direct contact, they were broader than necessary for the purpose of advancing the employer's legitimate interest in protecting its goodwill.

6. Labor—Employment Contracts—Noncompetition Covenants

Employers have a legitimate interest in protecting information about their customers gained by employees during the course of their employment. To protect that interest, an employer may restrict a former employee from soliciting business from customers with which that employee had no direct contact, so long as the employee gained significant knowledge or understanding of those customers during the course of his or her employment.

7. Labor—Employment Contracts—Particular Cases

Because the restrictive covenants barred the defendant employees from soliciting all of the employer's customers, rather than just those customers about which they had gained information while working for the employer, and because that deficiency in the framing of the covenants was not cured by the employer's invocation of its top-down marketing strategy, the restrictive covenants were broader than necessary to protect the employer's legitimate interest in its proprietary information.

8. Labor—Employment Contracts—Noncompetition Covenants

Courts have the power to reform overly broad restrictive covenants if the employer shows that it acted in good faith in the execution of the employment contract.

9. Labor—Employment Contracts—Noncompetition Covenants

A restrictive clause in an employment contract preventing future competition by the employee may not be enforced where there has been a breach by the employer of his own obligations under the contract.

10. Labor—Employment Contracts—Particular Cases

Because the employer and defendant employee reached no agreement regarding how commissions were to be calculated on sales made partly by defendant and partly by other employees, there was no enforceable commission agreement. Accordingly, the trial court correctly rejected defendant's argument that the employer's failure to pay commissions was a breach of the employment contract, and, therefore, the trial court correctly ruled that the employer's failure to pay commissions was not a breach that excused defendant from complying with restrictive covenants.

11. Labor—Employment Contracts—Breach

An anticipatory breach of contract occurs when a promising party repudiates his obligations either through words or by voluntarily disabling himself from performing them before the time for performance.

12. Labor—Employment Contracts—Particular Cases

A disciplinary action stated in a letter from the employer to defendant employee—suspension without pay for one week—was not a material anticipatory breach of the employment contract that excused defendant from complying with the restrictive covenants. Defendant's argument that any violation of wage and hour laws is a *per se* anticipatory breach that relieves an employee of any obligations he or she may have under a contract of employment was rejected. RSA 275:43-b.

13. Damages—Excessive Damages—Review

In reviewing damage awards, the evidence is viewed in the light most favorable to the prevailing party. A damage award will be overturned only if it is found to be clearly erroneous.

14. Damages—Excessive Damages—Factors Considered

New Hampshire law does not require mathematical certainty in computing damages. The law does, however, require an indication that the award of damages was reasonable.

Law Offices of Paul M. Monzione, P.C., of Wolfeboro (*V. Richards Ward, Jr.* on the brief and orally), and *William S. Gannon, PLLC*, of Manchester (*William S. Gannon* on the brief), for the plaintiff.

Sheldon, Davis, Wells & Hockensmith, P.C., of Keene (*James Romeyn Davis* on the brief and orally), for defendant Eldon Wood.

Law Office of Joshua L. Gordon, of Concord (*Joshua L. Gordon* on the brief and orally), for defendant William Hogan.

BRODERICK, C.J. Defendants Eldon Wood and William Hogan, former employees of plaintiff Syncom Industries, Inc. ("Syncom" or "the company"), appeal an order entered after a bench trial in the Superior Court (*McHugh*, J.) awarding Syncom injunctive relief, compensatory and enhanced damages and attorney's fees on its claims of breach of contract, breach of fiduciary duty, and loss of business reputation and goodwill. We affirm in part, reverse in part, vacate in part and remand.

The following facts were found by the trial court or are otherwise supported by the record. Syncom provides cleaning and maintenance services for movie theaters. The company was established in 1995 by its current president and CEO, Matthew Sinopoli.

Wood executed a "key employment contract" with Syncom in June 2001, and served as Syncom's vice-president of sales. Hogan executed a similar contract in September 2001, and served first as an area manager and later as a regional manager. Each contract was for a term of three years and included a section titled "extent of services" that contained the two restrictive covenants underlying Syncom's breach of contract claims:

> The [employee] . . . agrees that for a period of three (3) years (36 months) after termination of his employment, whether with or without cause, the [employee] will not directly or indirectly, solicit business from any of the Company's customers located in any territory serviced by the Company while he was in the employment of the Company. The [employee] also agrees that during such period the [employee] will not become interested in or associated, directly or indirectly, as principal, agent or employee, with any person, firm or corporation which may solicit business from such customers. [The employee] shall not disclose the private affairs of the Company or any secrets or confidential information of the Company which he may learn while in the Company's employ.

Both contracts also provided that "[i]n any successful action by the Company to enforce this contract, the Company shall be entitled to recover its attorney's fees and expenses incurred in such action." Neither contract provided for health insurance.

In addition to the restrictive covenants, which were common to both contracts, Wood's contract contained the following provision pertaining to

compensation: "[T]he Company shall pay to the [employee] during the continuance of this Agreement a fixed compensation at the rate of $1,000.00 per [week] . . . plus commission once sales level is exceeded per discussion with [Sinopoli]." Sinopoli and Wood discussed the manner in which Wood's commission was to be calculated, and various Syncom employees discussed the matter among themselves, but Sinopoli and Wood never reached a final agreement on all the essential terms of a commission agreement.

In late November or early December 2001, while they were still employed by Syncom, Wood and Hogan, along with at least one other Syncom employee, began plans to establish a new movie theater cleaning company, which they envisioned as a competitor to Syncom. On one occasion in December 2001, Wood, Hogan and another Syncom employee, Fabio Flores, met at a restaurant in Connecticut, during working hours, to discuss the establishment of Wood's new company. Also during that month, Wood negotiated with three of Syncom's customers, Regal Brandywine, Regal Burlington and Regal Cumberland, and lined them up as customers for himself upon his departure from Syncom and the establishment of his new company. In late December, Wood asked his father to loan him $30,000 to cover three weeks of payroll costs he expected to incur in the course of providing cleaning services to the three Regal theaters he had lined up as his future customers. On January 2, 2002, Wood's superiors at Syncom confronted him with their suspicions that he was planning to form a rival company. He denied it, but indicated that he would consider doing so, and threatened to breach the restrictive covenants in his employment contract.

After the January 2 meeting, Syncom's senior vice-president of operations, Carl DeSimone, sent Wood a memorandum noting that Wood "not only openly refused to deny, but . . . cemented [his] participation in this offense [attempting to start his own competing business and trying to destroy Syncom] by telling the President of the company, in front of the Sr. Vice President, that [he, Wood] had approached [his] father for funding for [his] start-up company." For that offense, DeSimone informed Wood that he would be suspended without pay from January 14 through January 20, 2002. By letter dated January 14, 2002, Wood resigned from Syncom, citing the lack of commission payments and his suspension. Two days later, with the assistance of legal counsel, Wood filed articles of organization for Big E Theater Cleaning, LLC (Big E) with the Connecticut Secretary of State.

Within two weeks of Wood's resignation from Syncom, Big E began performing cleaning and maintenance at the three Regal theaters Wood had solicited for Big E while he was still employed by Syncom. By the end

of February, Big E had also displaced Syncom at Regal Ronkonkoma (hereinafter, Regal Brandywine, Regal Burlington, Regal Cumberland and Regal Ronkonkoma are referred to collectively as "the Regals"). Within six weeks of his resignation, Wood secured as a Big E client an AMC theater complex in New York City (Empire 25) that he had previously spent six months soliciting for Syncom. Subsequently, Big E entered into cleaning contracts with six other Regal theaters (the diverted Regals) and displaced Syncom at four additional theaters, Imax, Movies 10, Neshaminy 24 and Tinseltown (the non-Regals).

On February 11, 2002, Syncom terminated Hogan's employment. After Wood resigned but before Hogan was terminated, Hogan performed various tasks for Big E such as providing production rates and advising on budgetary matters. One day in early February, before he was terminated, Hogan went to Wood's home during working hours, carrying a stack of papers. At some point in late March or thereafter, several faxes from Hogan containing confidential Syncom information were recovered from Wood's trash. Those faxes were sent on various dates in March 2002. In May 2003, approximately fifteen months after Syncom terminated Hogan, Big E hired him.

In May 2002, Syncom brought a verified petition for declaratory judgment, permanent injunction and other relief against Wood, Hogan and Flores. Specifically, Syncom asked the court to: (1) declare that the defendants were bound by the restrictive covenants in their employment contracts; (2) determine that the defendants, through Big E, solicited business and contracted with theaters in violation of the restrictive covenants; (3) permanently enjoin the defendants from rendering any services to any current or former Syncom customers; (4) require the defendants to provide a complete accounting of their dealings with any current or former Syncom customers; and (5) award Syncom an amount equal to the profits the defendants earned as a result of violating the restrictive covenants. During trial, the court granted Syncom's motion to add a claim for breach of fiduciary duty, for which it sought compensatory and enhanced damages. Hogan filed a counterclaim for breach of contract. Flores defaulted, and the trial court awarded Syncom a judgment of $3,650,000 against him.

Syncom's claims against Wood and Hogan were tried to the court. At trial, Wood argued, among other things, that the restrictive covenants were unenforceable as a matter of law because they were overly broad and otherwise unreasonable, and also were unenforceable because Syncom materially breached the employment contract. Hogan defended on similar grounds.

The trial court denied Hogan's counterclaim for breach of contract and ruled that Wood and Hogan breached both the restrictive covenants and their fiduciary duties to Syncom. Based upon those rulings, the trial court enjoined the defendants from rendering services to any current or former customer of Syncom for a period of eighteen months, starting on January 1, 2005, and awarded Syncom $1,145,700 in compensatory damages, $250,000 in enhanced compensatory damages and $100,000 in attorney's fees. The defendants filed a motion for reconsideration and clarification which the trial court granted to the extent of defining one of the terms in its injunction but otherwise denied. This appeal followed.

Between their two briefs, the defendants raise more than a dozen issues which we will consider in turn. First, however, we identify three issues that have not been preserved for our review because they were not raised in the trial court: (1) Wood's argument that the trial court incorrectly deemed him a fiduciary of Syncom; (2) Hogan's argument that the trial court incorrectly deemed him a fiduciary of Syncom; and (3) Hogan's argument that the trial court erred by failing to apportion damages. *See Tiberghein v. B.R. Jones Roofing Co.*, 151 N.H. 391, 393 (2004) ("It is well established that we will not review issues raised on appeal that were not first presented in the trial forum."); *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004) (explaining that the supreme court may consider the issue of preservation "regardless of whether the opposing party objects on [that] ground[]").

I

Both defendants argue that the restrictive covenants are unenforceable as a matter of law. The covenants obligated the defendants, for a period of three years after leaving Syncom, not to "directly or indirectly, solicit business from any of the Company's customers located in any territory serviced by the Company while [they were] in the employment of the Company" or to become affiliated with a person or organization that solicited such business. The trial court rejected the defendants' arguments that the covenants were unreasonably broad and, consequently, unenforceable. We disagree.

[1, 2] The law does not look with favor upon contracts in restraint of trade or competition. *Merrimack Valley Wood Prods. v. Near*, 152 N.H. 192, 197 (2005). Such contracts are narrowly construed. *Id.* However, restrictive covenants are valid and enforceable if the restraint is reasonable, given the particular circumstances of the case. *Id.* A covenant's reasonableness is a matter of law for this court to decide. *Id.* To determine the reasonableness of a restrictive covenant ancillary to an employment

contract, we employ a three-pronged test: first, whether the restriction is greater than necessary to protect the legitimate interests of the employer; second, whether the restriction imposes an undue hardship upon the employee; and third, whether the restriction is injurious to the public interest. *Id.* If any of these questions is answered in the affirmative, the restriction is unreasonable and unenforceable. *Id.* In determining whether a restrictive covenant is reasonable, the court will look only to the time when the contract was entered into. *Technical Aid Corp. v. Allen*, 134 N.H. 1, 8 (1991).

[3] The first step in determining the reasonableness of a given restraint is to identify the legitimate interests of the employer, and to determine whether the restraint is narrowly tailored to protect those interests. *Merrimack Valley*, 152 N.H. at 197. Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of employment; confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image. *Nat'l Employment Serv. Corp. v. Olsten Staffing Serv.*, 145 N.H. 158, 160 (2000).

Wood argues that the restrictive covenants are unreasonable and thus unenforceable because they: (1) covered theaters that were not Syncom customers when he worked for the company; (2) included areas in which he never operated and theaters with which he never had contact; (3) prevented him from soliciting any theater in a chain with a theater served by Syncom; (4) covered both current and former Syncom customers; and (5) extended for too long. Wood also argues, citing *Technical Aid*, 134 N.H. at 17, 18, that because of Syncom's conduct, the covenants cannot be judicially reformed. Hogan argues that the covenants are unenforceable as to him because: (1) he did not have the type of job with Syncom that allowed him to appropriate the company's goodwill; (2) he worked for Syncom for too short a time to appropriate any of the company's goodwill; and (3) the covenants imposed an undue hardship upon him. Syncom argues, to the contrary, that the covenants reasonably restricted the defendants from doing business with Syncom customers with whom they had no direct contact because Syncom's unique business model provided the defendants with important inside information about all Syncom customers.

[4, 5] It is well established in our case law that when the legitimate interest an employer seeks to protect with a restrictive covenant is its goodwill with customers, a covenant that restricts a former employee from soliciting business from the employer's entire customer base sweeps too broadly. *See Merrimack Valley*, 152 N.H. at 198; *Concord Orthopaedics Prof. Assoc. v. Forbes*, 142 N.H. 440, 443 (1997) (holding that restrictive covenant prohibiting physician from competing with former practice for new patients was overbroad); *Technical Aid*, 134 N.H. at 10. Because the restrictive covenants in this case extended to Syncom customers with which Wood and Hogan had no direct contact, they were broader than necessary for the purpose of advancing Syncom's legitimate interest in protecting its goodwill.

[6] However, employers also have a legitimate interest in protecting information about their customers gained by employees during the course of their employment. *Id.* at 13. To protect that interest, an employer may restrict a former employee from soliciting business from customers with which that employee had no direct contact, so long as the employee gained significant knowledge or understanding of those customers during the course of his or her employment. *Id.*

The restrictive covenants in this case are broader than necessary to protect Syncom's legitimate interest in information Wood and Hogan may have acquired about Syncom customers during the course of their employment. If that were the intent of the covenants, they could have been written to prohibit the defendants from soliciting business from Syncom customers about which they had gained information while employed by Syncom. But, as drafted, the covenants barred the defendants from soliciting "business from *any* of the Company's customers located in *any territory* serviced by the Company while [they were] in the employment of the Company." (Emphasis added.) It is difficult to imagine how the defendants, had they terminated their employment within several weeks of being hired, could have gained the kind of inside information contemplated by *Technical Aid* with regard to *all* of Syncom's customers in *all* of its territories. And, as the record demonstrates, Syncom hired Wood in part to gain the benefit of Wood's previous experience in the theater industry, which provided him with knowledge of Syncom customers independent of the knowledge he may have gained as a Syncom employee.

[7] Moreover, while Syncom appears to argue, at least implicitly, that its "top-down" marketing strategy somehow created a situation in which all of the company's knowledge of its customers could be imputed to every employee, we do not accept that reasoning. In *Concord Orthopaedics*, we held that a medical practice could not prohibit a former employee from

competing with his former employer for new patients. *Concord Orthopaedics*, 142 N.H. at 443. At the same time, however, we rejected the employer's argument that "because [the employee doctor] had actual contact with referring physicians, and those physicians generate new patients, [the employer had] a legitimate interest in all new patients." *Id.* In other words, we declined to "consider new patients a subset of referring physicians." *Id.* While not directly on point, *Concord Orthopaedics* stands for the general proposition that the legitimate interests an employer may protect with a restrictive covenant must be direct and concrete rather than attenuated and speculative. Here, because the restrictive covenants barred the defendants from soliciting all of Syncom's customers, rather than just those customers about which they had gained information while working for Syncom, and because that deficiency in the framing of the covenants is not cured by Syncom's invocation of its top-down marketing strategy, we conclude that the restrictive covenants are broader than necessary to protect Syncom's legitimate interest in its proprietary information.

As a matter of law, the two restrictive covenants at issue are unenforceable because they are unreasonably broad in their scope. Thus we hold that the trial court erred by ruling to the contrary. Accordingly, we reverse that ruling.

[8] That is not, however, the end of the matter. Courts have the power to reform overly broad restrictive covenants if the employer shows that it acted in good faith in the execution of the employment contract. *Merrimack Valley*, 152 N.H. at 200. And indeed, Wood argues in his brief that we should not reform the restrictive covenants in light of Syncom's conduct during and after his employment, thus placing the question of reformation before us. We express no opinion on whether the covenants should be reformed as to either or both of the defendants. Rather, as resolution of that issue will require factual determinations, it is for the trial court to consider on remand. Finally, as the defendants have challenged both the geographic and temporal scope of the restrictive covenants, and have properly preserved those challenges, both aspects of the covenants are open to possible reformation.

II

Wood and Hogan both argue, on multiple grounds, that if the restrictive covenants are not unenforceable as a matter of law, they are unenforceable under the circumstances of this case. While we have ruled that the covenants, as drafted, are unenforceable, the possibility remains that the trial court could reform them as to either or both of the defendants.

Accordingly, in the interest of judicial efficiency, we will consider the defendants' arguments regarding unenforceability.

[9] A restrictive clause in an employment contract preventing future competition by the employee may not be enforced where there has been a breach by the employer of his own obligations under the contract. *Laconia Clinic, Inc. v. Cullen*, 119 N.H. 804, 807 (1979). One who is himself guilty of a wrong for breach of contract should not seek to hold his counter-promisor liable. *Id.*

A. Wood's Arguments for Unenforceability

Wood argues that the restrictive covenants are unenforceable against him because Syncom: (1) breached its employment contract with him by failing to pay him commissions he claims to have earned; and (2) committed a material anticipatory breach of the employment contract by threatening him with a suspension without pay in violation of RSA 275:43-b, I (1999).

1. Commissions

The trial court held that "because there was never a specific agreement reached as to how commissions were to be calculated, [it was] compelled to conclude that . . . Wood ha[d] not sustained his burden of proof that he [was] entitled to recover the sum of $5,370" for unpaid commissions. It also noted that even if Wood had proved that Syncom owed him $5,370 in commissions at the time he resigned, that would not have justified his actions, which cost Syncom far more than the amount Wood claimed to have been owed.

Offer, acceptance, and consideration are essential to contract formation. *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 501 (2006). There must be a meeting of the minds on all essential terms in order to form a valid contract. *Id.* A meeting of the minds is present when the parties assent to the same terms. *Id.* This is analyzed under an objective standard. *Chisholm v. Ultima Nashua Indus. Corp.*, 150 N.H. 141, 145 (2003). Moreover, the terms of a contract must be definite in order to be enforceable. *Behrens*, 153 N.H. at 501. When there is a disputed question of fact as to the existence and terms of a contract, it is to be determined by the trier of fact. *Chisholm*, 150 N.H. at 145. In such circumstances, we will sustain a trial court's findings and conclusions unless they are lacking in evidentiary support or tainted by an error of law. *Behrens*, 153 N.H. at 500-01.

The trial court's finding that the parties failed to reach a complete meeting of the minds concerning the calculation of commissions is

supported by the record. Moreover, this is not a case such as *Ives v. Manchester Subaru, Inc.*, 126 N.H. 796 (1985), in which the trial court accepted one party's version of a commission agreement over the version propounded by the other party, *see id.* at 799. Rather, this is a case in which the trial court essentially rejected both parties' versions, terming the commission formula "a work in progress when [Wood] left the company."

[10] While the record establishes that Syncom agreed to pay Wood commissions once his sales reached $200,000, it also supports a factual finding that the parties reached no agreement regarding how commissions were to be calculated on sales made partly by Wood and partly by other Syncom employees. Obviously, that was a matter of some importance. Given that Syncom had operated for more than five years prior to hiring Wood as the company's first salesman, and, necessarily, had made sales prior to Wood's hiring, it is reasonable to conclude that at the time Wood was hired, there were partially developed sales "in the pipeline" to which Syncom employees other than Wood had contributed. Moreover, the record demonstrates that Wood himself involved other Syncom employees in the sales process. However, notwithstanding the participation of other Syncom employees in sales, the record demonstrates that the parties in this case, unlike those in *Galloway v. Chicago-Soft*, 142 N.H. 752, 755 (1998), reached no agreement concerning the manner in which credit for sales was to be given to the various Syncom employees involved in making a particular sale. Because Syncom and Wood reached no agreement on this essential term, there was no enforceable commission agreement. Accordingly, the trial court correctly rejected Wood's argument that Syncom's failure to pay commissions was a breach of the employment contract, and, therefore, we affirm the trial court's ruling that Syncom's failure to pay commissions was not a breach that excused Wood from complying with the restrictive covenants.

2. Disciplinary Action

Wood next contends that the trial court erred by failing to find that the January 10, 2002 disciplinary action was an anticipatory breach that relieved him from his obligation to abide by the restrictive covenants. Specifically, he contends that because the disciplinary action stated in the January 10 letter—suspension without pay for one week—violated RSA 275:43-b, Syncom's threat to impose that action constituted a material anticipatory breach of the key employment contract.

[11, 12] An anticipatory breach of contract occurs when a promising party repudiates his obligations either through words or by voluntarily

disabling himself from performing them before the time for performance. *LeTarte v. West Side Dev. Group*, 151 N.H. 291, 294 (2004). The action that qualified as an anticipatory breach in *LeTarte* was a developer's failure, over the course of approximately three years, to make any of the nineteen separate $1,000 payments it owed a landscaping contractor. *Id.* at 295. Similarly, in *Hoyt v. Horst*, 105 N.H. 380 (1964), our other leading anticipatory breach case, the action that constituted an anticipatory breach was a cessation of installment payments on a loan with little or no prospect of resumption. *Id.* at 389. Here, by contrast, Syncom did not threaten a complete abandonment of its obligations under the key employment contract. Rather, it merely signaled its intent to impose a one-week suspension. Because a one-week suspension, in the context of a three-year employment agreement, was hardly tantamount to a complete abandonment of Syncom's contractual obligations, it was not incongruous for the court to determine that the suspension, if actually imposed, would have violated RSA 275:43-b but would not have been an anticipatory breach of the key employment contract. We reject what seems to be the premise of Wood's argument; namely, that any violation of wage and hour laws is a *per se* anticipatory breach that relieves an employee of any obligations he or she may have under a contract of employment. Accordingly, we affirm the trial court's determination that the disciplinary action stated in the January 10 letter was not a material anticipatory breach of the employment contract that excused Wood from complying with the restrictive covenants.

B. Hogan's Arguments for Unenforceability

Hogan argues that the restrictive covenants are unenforceable against him because Syncom: (1) required him to sign the key employment contract when it was first presented to him, on his first day of employment; (2) breached its employment contract with him by failing to provide him with health benefits; and (3) sought equitable relief with unclean hands.

1. Duress

According to Hogan, the restrictive covenants in the key employment contract are unenforceable because he was first shown the contract, and required to sign it, on his first day of work, after he had left his previous employment. Syncom contends that the factual record supports the trial court's rejection of Hogan's argument on this point. Hogan raised the issue of duress in his closing argument, but the trial court appears not to have ruled upon it. On remand, when considering the question of reformation, the trial court must, of necessity, address this issue because duress of the

sort claimed by Hogan is the kind of bad faith that would allow the trial court to decline to reform the restrictive covenants. *See Technical Aid*, 134 N.H. at 17 ("A court may partially enforce an overly broad restrictive covenant if it finds that the employer acted in good faith in the execution of the contract."). If the trial court were to determine that the restrictive covenants could not be reformed due to Syncom's bad faith, then there would be no need to further address their enforceability. However, if the trial court were to determine that Syncom acted in good faith, then it would, necessarily, reject Hogan's argument that the reformed covenants were unenforceable due to Syncom's bad faith. Either way, we leave this issue to the trial court.

2. Health Benefits

The trial court found, as a factual matter, that Hogan's employment contract did not obligate Syncom to provide him with health benefits. The court also found that, notwithstanding the terms of the agreement, Syncom offered Hogan partial reimbursement for health coverage, subject to Hogan's obtaining coverage and submitting the paperwork to Syncom, steps that Hogan never took. We cannot say that the trial court's findings are not supported by the record. Accordingly, we reject Hogan's argument that Syncom committed a breach of the employment contract that relieved him of his obligations under the restrictive covenants.

3. Unclean Hands

Hogan also argues that when Syncom sought to enforce the restrictive covenants, it had unclean hands because it terminated him without cause and forced him to resort to litigation to collect unpaid wages and expenses. Therefore, according to Hogan, under the principles of equity, Syncom's unclean hands bar it from enforcing the restrictive covenants. In his request for findings of fact and rulings of law, Hogan asked the trial court to find that Syncom failed to pay him certain wages and expenses and forced him to resort to litigation to obtain relief. The trial court granted those requests, but denied a request that it find Hogan had been terminated without cause. Hogan also asked the court to rule that Syncom breached the employment contract by failing to: (1) provide health insurance and profit sharing during his employment; and (2) pay lawful wages and expenses after his termination. The trial court denied that request. While Hogan asked the trial court to rule that failure to pay wages and expenses was a breach of contract excusing his compliance with the restrictive covenants, there is nothing in the record to indicate that Hogan presented the trial court with the argument he makes here, that Syncom's conduct was sufficient to trigger application of the doctrine of

unclean hands. Thus, that issue is not preserved for our review. *See Tiberghein*, 151 N.H. at 393.

III

Hogan argues that the trial court erred in finding that he "participated in divulging confidential information during the several weeks between when . . . Wood quit and when [he] was fired." Specifically, he challenges two of the trial court's factual findings:

> 52. Between January 14, 2002 when Wood resigned and February 10 or 11 when Hogan resigned, the Defendants took confidential and proprietary information and trade secrets belonging to the Plaintiff, including its customer lists, database, files, documents, policies, procedures, quality control program, inspection program, subcontractor labor base, managers, operations people, pricing, past and pending proposals and past and pending sales efforts and sales techniques and contacts, that are critical components of the [Syncom] Model.
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> . . . .
>
> 56. While still employed with Syncom, Hogan delivered confidential documents, proprietary information and trade secrets of Syncom to Wood's home.

According to Hogan, because the trial court incorrectly determined that he had participated in divulging Syncom's confidential information, it necessarily erred in determining that he violated the non-disclosure provision of the restrictive covenants. In response, Syncom contends that: (1) the trial court properly rejected Hogan's "incredible testimony" that he did not disclose confidential information; and (2) we should defer to the findings of the trial court regarding Hogan's alleged breach of fiduciary duty.

We will uphold the findings and rulings of the trial court unless they lack evidentiary support or are legally erroneous. *Green v. Sumner Props.*, 152 N.H. 183, 184 (2005). We defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses and determining the weight to be given evidence. *Id.*

Finding number fifty-two does not lack evidentiary support. At trial, there was evidence that Hogan faxed Syncom information to Wood. While that information was faxed in March, after Hogan was terminated, he necessarily took that information from Syncom at a time when he had legitimate access to it, *i.e.*, prior to his termination, and it would have been reasonable for the trial court to find, in light of the facts of the case, that Hogan took that information for the purpose of providing it to Wood.

Hogan argues that the material he transmitted to Wood was not confidential or proprietary. While that material was before the trial court, in the form of exhibits, it is not in the record transmitted to us, so we are hardly in a position to question the trial court's characterization of that material as confidential or proprietary. *See Bean*, 151 N.H. at 250 (explaining that when trial evidence is not included in the appellate record, the supreme court "must assume that the evidence was sufficient to support the result reached by the trial court"). Thus, we affirm the trial court's determination regarding finding number fifty-two. Because there is evidentiary support for the trial court's finding that Hogan took confidential Syncom information for the purpose of providing it to Wood, we cannot agree with Hogan that the trial court erred by determining that Hogan violated the non-disclosure provision in the restrictive covenants. Finally, because finding number fifty-two has evidentiary support, and is a sufficient basis for the trial court's determination that Hogan violated the non-disclosure portion of the restrictive covenants, we need not decide whether finding number fifty-six also has evidentiary support.

IV

Both defendants argue that the trial court's computation of compensatory damages was incorrect. The trial court awarded a total of $1,145,700 in compensatory damages. That total was composed of profits Syncom would have made from the Regals, the diverted Regals, the non-Regals, and Empire 25 from the time of the defendants' departure from Syncom until December 13, 2004, the date of the trial court's post-trial order. According to the defendants: (1) damages for the diverted Regals were improper because those theaters were not Syncom customers when the defendants worked for Syncom, and the defendants never solicited business from those theaters; (2) damages were improper for the non-Regals because, while those theaters were Syncom customers during the defendants' tenure with the company, neither of the defendants ever had any contact with them; (3) all of Syncom's evidence on damages was speculative and inherently unreliable; and (4) the trial court was barred from awarding Syncom its own lost profits because the damages it requested in its petition were limited to the profits Big E earned from the accounts it allegedly stole from Syncom. Because the defendants' first two arguments depend upon the scope of the restrictive covenants, a matter we are remanding, we decline to address them. In addition, because the defendants did not raise their fourth issue before the trial court, it has not been preserved for our review. *See Tiberghein*, 151 N.H. at 393. Thus, we consider only the defendants' third argument, that the trial court awarded damages based upon inherently unreliable evidence and subsequently

misunderstood that evidence. Moreover, because the actual amount of the damage award depends upon the scope of the restrictive covenants, a question we are remanding, we will decide at this point only whether the quality of the evidence before the trial court was sufficient to support *any* award of compensatory damages. We do so because the record is sufficient for such a determination and because resolution of this question may be helpful to the parties on remand.

[13, 14] In reviewing damage awards, we view the evidence in the light most favorable to the prevailing party. *T&M Assocs. v. Goodrich*, 150 N.H. 161, 164 (2003). We will overturn a damage award only if we find it to be clearly erroneous. *Id.* New Hampshire law does not require mathematical certainty in computing damages. *Id.* The law does, however, require an indication that the award of damages was reasonable. *Id.*

We begin by noting that this case is not analogous to *Whitehouse v. Rytman*, 122 N.H. 777 (1982), upon which the defendants rely. In that case, we held that the trial court properly ruled that the plaintiffs failed to sustain their burden of proof on damages when their calculation of prospective lost earnings was, among other things, based upon an assumption—refuted by their own testimony—that the market price for chickens would remain unchanged over time. *Whitehouse*, 122 N.H. at 780. Here, by contrast, Syncom's projected lost profits were supported by the testimony of Matthew Sinopoli which was, in turn, based upon his direct knowledge of how much Syncom charges its customers, how much it pays its contractors, and what its overhead costs are. In sum, we cannot say that the trial court acted unreasonably in relying upon the evidence before it in making an award of damages. However, because a proper calculation of damages will depend upon the scope of the restrictive covenants, we vacate the award of compensatory damages and remand for such further proceedings as the trial court deems necessary.

V

Both defendants argue that the trial court erred by awarding attorney's fees to Syncom. The key employment contract, however, plainly entitles Syncom to an award of attorney's fees and expenses if it prevails in an action under the contract. Because it may be determined on remand that attorney's fees should be awarded under the employment contract, we decline to decide at this time whether the defendants' litigation tactics warranted an award of attorney's fees under the common law. *See Kukene v. Genualdo*, 145 N.H. 1, 3 (2000). We vacate the award of attorney's fees

for further consideration after the trial court has ruled upon the other remanded issues.

Affirmed in part; reversed in part; vacated in part; and remanded.

DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

Merrimack
No. 2005-859

THE STATE OF NEW HAMPSHIRE

v.

DARIN A. PARKER

Argued: November 8, 2006
Opinion Issued: March 16, 2007

1. **Criminal Law—New Hampshire Constitution—Right to Counsel**
A defendant's right to assistance of counsel attaches by virtue of the commencement of formal criminal proceedings, and once the right has attached, a defendant is entitled to the assistance of counsel at critical stages of criminal proceedings. N.H. CONST. pt. I, art. 15.

2. **Criminal Law—New Hampshire Constitution—Right to Counsel**
Sentencing, as well as a hearing on a deferred sentence, constitute critical stages of a criminal proceeding. N.H. CONST. pt. I, art. 15.

3. **Criminal Law—Right to Counsel—Particular Cases**
Where an order left open the sentencing decision of whether to impose a seven-year term until after defendant served the initial fifteen years of his sentence, to the extent the language of the order was ambiguous concerning the conclusion of the sentencing phase, the court held it ought to err on the side of protecting defendant's constitutional right to counsel. Accordingly, the order denying the defendant's motion for appointment of counsel was reversed, the decision denying suspension of the seven-year deferred term vacated and the case remanded for a further hearing on whether the seven-year deferred sentence should be imposed. N.H. CONST. pt. I, art. 15.

Kelly A. Ayotte, attorney general (*Nicholas Cort*, assistant attorney general, on the brief and orally), for the State.

Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the defendant.

BRODERICK, C.J. The sole issue on appeal is whether the Superior Court (*Fitzgerald*, J.) erred when it refused to appoint counsel for the defendant, Darin A. Parker, to assist him in seeking to avoid imposition of

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY **SUPERIOR COURT**

Syncom Industries, Inc.

v.

William Hogan

Docket No: 02-E-0188

ORDER

Hopefully this is the final chapter in the long saga involving these two parties. This litigation began over six years ago and culminated in this Court's fourteen page Order dated December 13, 2004. A Supreme Court Appeal was taken and that court rendered a formal opinion on March 16, 2007. The decision was a mixed bag. Most of this Court's factual findings were affirmed however the Supreme Court determined that the scope of the restrictive covenants that were at the heart of this litigation were in fact broader than they had to be in order to protect the plaintiff's legitimate business interests. Accordingly the case was remanded back to this Court for a review of the restrictive covenant issue as well as the other collateral issues that the restrictive covenant issue affected, including potentially the issue of damages and the award of attorney fees.

Both defendants Eldon Wood and William Hogan appealed this Court's decision to our Supreme Court. Defendant Wood has since filed bankruptcy and therefore the claims against him will have to be resolved in the Bankruptcy Court. The within Order pertains only to William Hogan.

This Court does not relish the task of attempting to sort out at this late date some of the factual and legal issues that have been remanded. The task is much like picking through the bones of a Thanksgiving turkey years after it has been consumed. Not unexpectedly, it is William Hogan's position that virtually all of the Court's earlier factual findings as to his alleged misconduct are now open for review. Conversely, it is the

plaintiff's position that the remand was very narrow and does not require the Court rewrite the script after the show has been produced, in this case over the course of nine trial days. What makes the Court's task even less palpable is the fact that Mr. Hogan is now out of the theater cleaning business and has very little by way of personal assets. Thus as a practical matter a restrictive covenant is no longer necessary for the plaintiff to have enforced and any large monetary judgment will be uncollectable. Yet the Court has been charged with the responsibility of reviewing the remanded issues and thus it will do so.

The Court issued a Procedural Order on June 23, 2008. In said Order permission was given for the taking of the deposition of one Charles Hyatt. He was present for at least portions of the time when William Hogan's employment contract was discussed. The parties were ordered once that deposition was completed to forward a copy of the transcript to the Court. Neither party elected to do so. However the Court assumes that Mr. Hyatt's deposition was taken given the fact that the parties in their respective pleadings have so referenced. At this point in time the Court finds that it does not need to review Mr. Hyatt's testimony verbatim in order to resolve the remaining issues in this litigation. The Court also has in mind as argued by the plaintiff that Mr. Hyatt is a disgruntled former employee of Syncom Industries who was terminated on January 4, 2002. That fact colors to some extent his recollection of events nearly seven years ago.

Upon review of the original trial evidence as well as all of the pleadings filed by the parties subsequent thereto, the Court finds that William Hogan has not sustained his burden of proving that he was subject to "duress" when he executed his employment contract on September 13, 2001. The Court makes this determination for essentially two reasons. First, given the length of this trial and the volume of evidence submitted, William Hogan's "duress" argument must be considered to be nothing more than an after thought. His competent trial counsel spent an inordinate amount of time discussing the minutia

involving the actions of Mr. Hogan and the plaintiff and yet this claim of "duress" was mentioned only one time in passing. If there was anything to the claim the Court concludes that it would have constituted much more of the underlying theme of Mr. Hogan's defense than it did.

Secondly, as the plaintiff suggests in its Memorandum of Law, on this issue the only evidence is the testimony of three individuals, to wit, Matthew Sinopoli, William Hogan, and Charles Hyatt. The Court has made the overall finding that as between Sinopoli and Hogan it is Sinopoli's testimony that is more credible. Given the fact that Hyatt admittedly was not present for all of the employment discussions between Sinopoli and Hogan, and given the circumstances under which Hyatt was separated from the company, and finally given the fact that he was not called as a trial witness and only offered his testimony recently, it simply cannot be the basis for any finding in favor of Hogan.

Moreover the Court cannot give any great weight to Hogan's overall testimony given the boldface lie that he told regarding the dissemination of documents of the plaintiff by him to Wood. The plaintiff hired a private detective to follow Hogan and he related a meeting between Hogan and Wood wherein Hogan carried to Wood's home a series of papers. Some of those had been recovered and they were in Hogan's own handwriting. Hogan vehemently denied ever forwarding documents belonging to the plaintiff to Wood. That episode alone has forced the Court to review all of Hogan's testimony under oath with a jaundiced eye. In summary, the Court finds that Hogan has not met his burden of proof with respect to the "duress" issue.

The real problem for the Court on remand is the determination of the amount of money damages due the plaintiff as a result of Hogan's actions. Our Supreme Court has already found that the restrictive covenants which formed the basis of this case were overbroad. The question therefore becomes, if these covenants have to be reformed then

what effect would a reformation have on the overall monetary damages awarded the plaintiff in this case. While clearly some damages are due the plaintiff, it is virtually impossible for the Court at this time to definitively determine a precise amount. Given the events that have transpired since this litigation was brought, although admittedly that perhaps is not the best test to use, the Court determines that justice requires that no monetary award for damages be levied against William Hogan. This is in fact an equity case and thus the Court is charged with doing equity. The Court notes that Mr. Hogan's employment with the plaintiff consumed a period of less than five months. It also notes the fact that Hogan's misdeeds without the leadership of Wood in all probability would not have cost the plaintiff any loss of business.

The question of attorney fees however falls into a different category. William Hogan's obvious misconduct by in effect stealing his employer's confidential and proprietary documents and supplying them to a direct competitor warrants sanction. That fact coupled with his continued denial with respect to events that were independently proven beyond a reasonable doubt and his lying under oath in Court on at least some issues compel the award for attorney fees to stand. Although presumably the plaintiff has incurred more attorney fees since the original Court Order in this case four years ago, the Court will affirm its award of attorney fees of $100,000.00. This sum is the joint and several responsibility of William Hogan and Eldon Wood. However the plaintiff may seek to enforce that Order against William Hogan solely if it is desirous of doing so given the fact that Wood is currently in bankruptcy.

So Ordered.

DATED: November 3, 2008

Kenneth R. McHugh
Presiding Justice

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

Syncom Industries, Inc.

v.

William Hogan

Docket No: 02-E-0188

ORDER ON PENDING MOTIONS

The Court issued its Order in this remanded case on November 3, 2008. In said Order the Court determined that justice required that no monetary award for damages be assessed against William Hogan. It did however find that an award of attorney fees against him because of his participation in this lengthy litigation and his failure to tell the truth when called upon warranted the payment of the plaintiff's attorney fees incurred up to and including the trial. Both parties objected to the Court's Order. The plaintiff filed a Motion for Partial Reconsideration and the defendant filed a Motion to Reconsider and a Motion to Supplement the Record.

Both parties' Motions for Reconsideration are denied. When crafting its original Order on November 3, 2008 the Court assumed that the response of both parties would be as their respective Motions to Reconsider have set forth. An award of zero money damages as against William Hogan is at least on paper a severe blow to the legal position of the plaintiff, although given the finances of Mr. Hogan, it is certainly unlikely that the plaintiff would have been able to collect any substantial damage award made in this case. By the same token, ordering William Hogan to reimburse the plaintiff for attorney fees of $100,000.00 is detrimental to Mr. Hogan, but in the Court's mind makes up for the benefit he has received in not having to pay damages to the plaintiff. Therefore on balance the Court finds and rules that its decision with respect to these two issues is reasonable and in

fact called for by the evidence in this case. Accordingly both Motions to Reconsider are denied.

The Court will grant the defendant's Motion to Supplement the Record by including the full deposition testimony of Charles Hyatt as part of the overall exhibits. While the Court does not view that testimony as particularly relevant, it is some evidence and thus will be part of the file should the parties wish to appeal the Court's current Order to our Supreme Court for further review.

So Ordered.

DATED: December 18, 2008

Kenneth R. McHugh
Presiding Justice