State of New Hampshire
Supreme Court

NO. 2005-0126

2006 TERM

MARCH SESSION

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

v.

WILLIAM HOGAN & ELDON WOOD

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT, WILLIAM HOGAN

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

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QUESTIONS PRESENTED

1. Were the restrictive covenants contained in the Syncom's employment agreement unenforceable because Mr. Hogan signed the contract under duress, Syncom breached first, because they are unreasonable, and because Syncom does not have the requisite clean hands for enforcement in equity?

   Preserved in Defendant William Hogan's Answer and Counterclaim/Crossclaim, and throughout trial

2. Did Mr. Hogan actually breach the covenants contained in Symcom's employment agreement?

   Preserved in Defendant William Hogan's Answer and Counterclaim/Crossclaim, and throughout trial

3. Was Mr. Hogan a fiduciary of Syncom when there was no particular trust reposed in him?

   Preserved in Respondent Eldon Wood's and Respondent William Hogan's Motion to Reconsider and Clarify Final Order and to Stay Injunctive Relief and for Immediate Hearing Thereon, and throughout trial

4. Were enhanced damages erroneously awarded when Mr. Hogan did nothing malicious, wanton, or oppressive, when the court provided no basis for the enhanced award, and when the amount is merely punitive?

   Preserved in Respondent Eldon Wood's and Respondent William Hogan's Motion to Reconsider and Clarify Final Order and to Stay Injunctive Relief and for Immediate Hearing Thereon, and throughout trial

5. Was Mr. Hogan liable for the damages, or should they have been apportioned, when it was his co-defendant, Eldon Wood, who was the animator behind the scheme to establish a competing company, and that Mr. Hogan was, as the court noted, merely a follower?

   Preserved throughout trial

6. Was the damage award excessive when the customers that were allegedly taken were not Syncom's customers, Mr. Hogan did not provide any services to them, the award was speculative, and it was erroneously calculated?

   Preserved in Respondent Eldon Wood's and Respondent William Hogan's Motion to Reconsider and Clarify Final Order and to Stay Injunctive Relief and for Immediate Hearing Thereon, and throughout trial

7. Was the court mistaken in awarding attorneys fees when nothing in the parties' agreement or the law creates authority for the award, and Mr. Hogan did nothing but contest Syncom's allegations?

   Preserved in Respondent Eldon Wood's and Respondent William Hogan's Motion to Reconsider and Clarify Final Order and to Stay Injunctive Relief and for Immediate Hearing Thereon, and throughout trial

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Syncom,[1] founded by Matthew Sinopoli, is in the business of cleaning movie theaters. It doesn't actually clean any theaters. Rather Mr. Sinopoli cleverly put together a team of experts, some from the movie theater business, some from the commercial cleaning sector. Their jobs were to find and manage local subcontractors to do the actual cleaning. 6 *Trn.* at 7. There is more money in this niche then one might imagine – it is a multi-billion-dollar industry. 4 *Trn.* at 60. Syncom operates regionally, mostly in the eastern half of the country and a spattering of other locations and states. 4 *Trn.* at 93-94; 7 *Trn.* at 312. Although Mr. Sinopoli claims he invented the theater-cleaning industry, 6 *Trn.* at 146, there are lots of others in the business, 6 *Trn.* at 185-190, and there is nothing revolutionary about Syncom's business plan. FINAL ORDER, *Br.Appx*; 9 *Trn.* at 600. By all accounts Mr. Sinopoli is a hard-working man, but difficult to work for. FINAL ORDER, *Br.Appx.*

Eldon Wood's prior experience was in opening brand-new movie theaters and in managing several movie theater chains. 8 *Trn.* at 519-520. Based on his experience and contacts in the theater industry, Syncom hired Mr. Wood as a salesman; his job was to get movie theaters to use Syncom as their cleaning contractor. 5 *Trn.* at 79 (testimony of Sinopoli). Upon hiring, Mr. Wood entered an employment contract with Syncom. Mr. Wood submitted his resignation from Syncom in January 2002. Two days later he formed a new company, Big E Theater Cleaning, LLC, which at the time was in direct competition with Syncom.

William Hogan also worked for Syncom. Before being hired, he had 16 years experience

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[1]There was considerable dispute below concerning the name of the plaintiff, in what state it is incorporated, whether it is registered as a business organization in New Hampshire, and similar issues. For the purposes of this brief, the plaintiff can be referred to simply as "Syncom."

in the commercial cleaning industry – managing the operations of janitorial firms and the cleaning needs of malls, office buildings, retail places, as well as movie theaters. 7 *Trn.* at 295, 307. On his first day at work, Mr. Hogan also entered an employment contract with Syncom. CONTRACT, Exh. 5, *Appx.* at 65.

Mr. Hogan's job at Syncom was in operations. 4 *Trn.* at 79-80 (testimony of Hogan); 5 *Trn.* at 123 (testimony of Sinopoli). He was responsible for collecting information about the theaters on which Syncom was bidding (*i.e.*, measuring and counting theaters, seats, bathrooms, movie screens, etc.), which he passed on to his superiors who did the actual pricing and bidding. 7 *Trn.* at 334. He was also responsible for lining up subcontractors to do the cleaning. 6 *Trn.* at 40-41. Mr. Hogan was not in sales or marketing, and had little contact with theater managers or personnel. 7 *Trn.* at 200 (testimony of Sinopoli); 9 *Trn.* at 601 (testimony of a theater manager).

Mr. Hogan's first day at Syncom was in September 2001. He was fired on February 11, 2002, ostensibly because he had contact with Mr. Wood although he had never been asked not to. 7 *Trn.* at 263-64, 331. Mr. Hogan worked at Syncom for just 4½ months. 4 *Trn.* at 50, HOGAN'S REQ. FOR FINDINGS, *Appx.* at 56; 4 *Trn*. at 50. He was then unemployed for about a month, 4 *Trn*. at 48, 62, and for about a year held another job in the commercial cleaning industry. 7 *Trn*. at 344-45, 348. In March 2003 Mr. Hogan was hired by Mr. Wood at Big E, 4 *Trn*. at 62; 8 *Trn.* at 364, which by that point no longer cleaned theaters and thus was no longer in competition with Syncom. HOGAN'S REQ. FOR FINDINGS, *Appx.* at 56.

The contracts Messers. Wood and Hogan signed with Syncom contained four covenants. During the term of employment to (1) faithfully and loyally serve Syncom and (2) eschew becoming interested or associated with a competitor. For three years after employment to (3)

not compete with Syncom and (4) not divulge Syncom secrets.[2]

Syncom sued Messers. Wood and Hogan[3] for violating the terms of their employment contracts and for breach of fiduciary duty. The Rockingham County Superior Court (*Kenneth R. McHugh*, J.) conducted a nine-day non-jury trial, finding that the men took cleaning business from Syncom at four Regal theaters in New Jersey, the Empire 25 theater in New York City, and some other theaters. Damages were assessed at nearly $1.5 million, and this appeal followed.

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[2]The employment contract, entered into by Messers. Wood and Hogan, contains four separate covenants:

> The manager shall faithfully and loyally serve the company and shall . . . 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.
>
> [D]uring 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 [will] not 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 [sic] direction.
>
> [F]or a period of three [] years [] 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. [D]uring 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.

CONTRACT, Exh. 5, *Appx.* at 65, ¶3 (minor omissions indicated).

[3]There was a third defendant, Fabio Flores, who defaulted.

SUMMARY OF ARGUMENT

Mr. Hogan first argues that because he was presented with an employment contract containing restrictive covenants on his first day on the job, he was forced to sign it under duress, and therefore the covenants are not enforceable.

He then shows that his employer, Syncom, breached their employment arrangement first by not providing health insurance as had been promised. For this reason as well, Mr. Hogan argues that the covenants are not enforceable.

Mr. Hogan goes on to argue that the covenants themselves are unreasonable as applied to his situation because he worked at Syncom for only 4½ months, and held a job in operations that involved little customer contact. Mr. Hogan thus didn't acquire any of his employer's goodwill, which is the basis for enforcement of non-compete covenants.

He also notes that enforcement of non-compete covenants are a matter of equity, and that Syncom did not come to the transaction with clean hands because the contract was signed under duress, Syncom breached first by not providing health insurance, Mr. Hogan was fired under false pretenses, and Syncom forced Mr. Hogan to sue to recover his wages and expense reimbursements.

Syncom claimed that Mr. Hogan divulged secrets, in violation of the covenants. Mr. Hogan shows that he didn't divulge anything, and that if he did, the substance of the information was not secret and was not learned during the employment.

In addition to the covenants, Syncom sued for breach of fiduciary duty; Mr. Hogan argues he was not a fiduciary because no particular trust was reposed in him.

The court awarded enhanced damages. Mr. Hogan notes that New Hampshire law does

not allow punitive damages, that the court provided no basis for the enhanced award, and the amount is merely punitive in a different guise.

Mr. Hogan argues that his co-defendant, Eldon Wood, was the animator behind the scheme to establish a competing company, and the Mr. Hogan was as the court noted, merely a follower. He thus suggests if there is liability, it is Mr. Wood's, or that damages should have been apportioned.

Finally, Mr. Hogan incorporates by reference the arguments made in Mr. Wood's brief regarding the amount of damages, the award of attorneys fees, and other matters.

ARGUMENT

I. Because the Employment Contract was Presented to Mr. Hogan When he Showed up For His First Day on the Job, the Contract is Unenforceable

Mr. Hogan was notified he had gotten the job at Syncom in August 2001. 9 *Trn.* at 704. His first day on the job was September 13, 2001, when he showed up at company headquarters in Salem, New Hampshire for his orientation. 7 *Trn.* at 311. On that day he was presented with the employment contract, which was the first time he had heard of it. 7 *Trn.* at 309-10. Mr. Hogan testified that he was not allowed to take the contract home, given time to get legal advice, or to consider the implications of signing. 7 *Trn.* at 310-11. Although Mr. Sinopoli regarded signing the contract as a condition of employment, *See* 1 *Trn.* at 45; PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶ 8, he nonetheless claims that Mr. Hogan had an opportunity to take it home. 7 *Trn.* at 210. In any case, Mr. Sinopoli acknowledged that lots of time passed between the date Mr. Hogan was hired and the date he started work. 7 *Trn.* at 210-212. It is undisputed the contract was signed on September 13, Mr. Hogan's first day on the job, CONTRACT, Exh. 5, *Appx.* at 65, after Mr. Hogan had already left his previous employment. Mr. Hogan thus felt that he signed the contract under duress. 7 *Trn.* at 311 (Hogan was told: "you're going to need to sign that before you leave here"); 8 *Trn*. at 394 ("I didn't sign this contract willingly."); 8 *Trn*. at 421.

The law in this area is settled. Non-compete covenants which are entered without an opportunity for the employee to consider their implications are void. In *Technical Aid Corp. v. Allen*, 134 N.H. 1 (1991), this Court reported that:

> Allen was hired by Technical Aid on or about April 20, 1981. When he first reported for work on April 27, 1981, Allen was told that he was expected to sign an employment contract . . . containing a number of restrictive covenants. Allen had not previously been told that he would have to sign such a contract. He wanted to take the contract home and have a lawyer look at it, but he was told that

> he could not work for Technical Aid without signing the contract immediately. Having already given notice to his previous employer, Allen felt he had no choice but to sign the contract.

Technical Aid, 134 N.H. at 6. Mr. Hogan is in precisely the same position. Because the contract was presented to him on the first day of work, Syncom acted in bad faith, making its non-compete covenant unenforceable. Accordingly, the lower court erred in assigning any liability to Mr. Hogan.

II. Covenants are Unenforceable Because Syncom Breached the Contract First by Reneging on its Promise to Provide Health Insurance

Mr. Hogan has a wife and six children, and medical benefits are important to them. 4 *Trn.* at 56; 9 *Trn.* at 733. It is undisputed that the advertisement which Mr. Hogan answered mentioned health insurance. 4 *Trn.* at 66; 7 *Trn.* at 207, 235, 309. Mr. Hogan was promised health insurance either during his job interview or later during his orientation on his first day of work. 7 *Trn.* at 209, 236; 9 *Trn.* at 702. Health insurance is also promised in Syncom's employee handbook. Other than restricting it to eligible employees, there are no other equivocations in the handbook's promise of health insurance. Because employers in their experience have group plans, Mr. Hogan and his wife thus understood the various promises to mean that they and their family would be covered under standard health insurance. 9 *Trn.* at 724-29; 7 *Trn.* at 318. On his first day at work, Mr. Hogan learned there would be a 90-day waiting period before benefits would start, 7 *Trn.* at 309, and he and his wife reluctantly accepted that. 7 *Trn.* at 236, 238-30; 9 *Trn.* at 703, 709.

Thus, sometime before the three-month mark of Mr. Hogan's employment, his wife contacted Syncom for the proper forms. 4 *Trn.* at 58; 7 *Trn.* at 316. From the record it is clear that Mr. Hogan's wife is a forceful personality, and there resulted communication difficulties between her and Syncom which they largely blame on each other. 5 *Trn.* at 43; 7 *Trn.* at 233, 243-44, 309, 316, 318-20; 9 *Trn* at 706.

During their interchanges, the Hogans learned that because of Syncom's structure – a small office in New Hampshire with small cells of employees working in widely disparate places – the company did not have a conventional employer-sponsored health plan. 5 *Trn.* at 43. Thus some employees had non-standard arrangements that involved reimbursements according to what

was available in their particular state, *see* 4 *Trn.* at 66; AFF. OF WOOD, *Appx.* at 59.1, ¶ 35, some had no insurance at all, and some were perpetually annoyed by the issue. 7 *Trn.* at 315. The Hogans were repeatedly told that Syncom was addressing the matter, but they began to doubt that anything was actually being done. 7 *Trn.* at 316. Ultimately Mr. Hogan and his wife felt "deceived" by Syncom, and began to distrust the company. 7 *Trn.* at 323-24; 9 *Trn.* at 707-08, 714.

Mr. Hogan was eventually told – in January after the three-month period had expired – to get his own health insurance and Syncom would reimburse him. 4 *Trn.* at 64; 9 *Trn.* at 706-07, 712, 716, 722. Mr.Hogan's wife then sought insurance in their home state of Rhode Island, 9 *Trn.* at 713, but learned that because they was not part of a group it could not be easily acquired, that it was expensive, 9 *Trn.* at 717-18, there were significant up-front premiums, 4 *Trn.* at 64, there would be further waiting periods, 9 *Trn.* at 717. and that because of the gap in coverage no company operating in Rhode Island would insure her family. 9 *Trn.* at 710, 712-13, 716, 722. She was also told that Syncom would reimburse only 45 percent of the health insurance premium (far less than she had expected, 9 *Trn.* at 730) making the up-front costs beyond the Hogan's budget. 4 *Trn.* at 52-53, 7 *Trn.* at 319-20; 9 *Trn.* at 717-18, 723-25, 731-32.

These matters further angered Mr. Hogan because he felt that had he known about them he and his wife would have made other arrangements for their six children long before. 7 *Trn.* at 318; 9 *Trn.* at 703, 707. Mr. Hogan's wife testified that health insurance was so important to her that had she known she would not have allowed her husband to work for Syncom, 9 *Trn.* at 707, 723, and that upon learning of these matters she directed him to find another job. Because Mr. Hogan was fired before his health insurance problem was fully addressed, Syncom was apparently

unaware of the extent of these problems. 9 *Trn.* at 723.

Because Mr. Hogan felt mislead by his employer, he believed that Syncom breached their employment arrangement, 4 *Trn.* at 45-46. and that the breach was substantial. He raised the matter early in this litigation. HOGAN'S ANSWER, *Appx.* at 3; OBJ. TO SUM.JT., *Appx.* at 59.

Syncom argued below that because its employment contract with Mr. Hogan contains a merger clause ("This contract supersedes all prior contracts and understandings between the parties," CONTRACT, Exh. 5, *Appx.* at 65, ¶7), and health insurance was not mentioned in the contract, that it had no obligation to provide the benefit despite its various oral and written promises. The argument fails for two reasons. First, the promise to provide Mr. Hogan health insurance appears in the employee handbook, which he got sometime after he began employment. 9 *Trn.* at 728. Second, employment is a highly regulated matter. Regardless of whether an employment contract contains employer promises to pay timely wages or maintain a safe workplace, for instance, employers have legal duties to do so. *See Russell v. Hixon*, 117 N.H. 35 (1977) (merger doctrine does not encompass all matters). Mr. Hogan's employment contract does not purport to regulate the parties' entire relationship. Thus the merger clause applies to those matters appearing in the contract, but not to those separately promised.

The trial court held that in failing to provide health insurance, Syncom either did not breach, or that its breach was not material. PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶¶ 8, 13-19 128, 131; FINAL ORDER; HOGAN'S REQ. FOR FINDINGS, *Appx.* at 56.

The cause of the misunderstanding regarding health insurance, however, is largely a result of Syncom's diffused nature. Although Syncom apparently does not clean any theaters in New Hampshire, its small corporate office is in Salem, and its employees are widely dispersed

geographically. Thus it enjoys whatever advantages a New Hampshire base provides, but makes insufficient efforts to neutralize inconveniences the structure causes its employees. Moreover, one of the covenants Syncom cites – the duty to faithfully and loyally serve – works both ways. Mr. Sinopoli, the head manager of Syncom, has a duty to serve the company as well, by not reneging on his promises.

Accordingly, because Syncom was the first to breach, it cannot claim that Mr. Hogan's alleged breach of the contract caused it prejudice. *See Laconia Clinic, Inc. v. Cullen,*119 N.H. 804 (1979).

III. Syncom's Non-Compete Covenant is Unreasonable and Unenforceable

This court has encapsulated its jurisprudence regarding non-compete covenants, and has provided a roadmap for analysis of when they are enforceable:

> [T]he law does not look with favor upon contracts in restraint of trade or competition. Such contracts are to be narrowly construed. Nonetheless, restrictive covenants are valid and enforceable if the restraint is reasonable, given the particular circumstances of the case. In determining whether such restriction is reasonable, the court will look alone to the time when the contract was entered into. The determination of whether a covenant is reasonable is a matter of law for this court to decide.
>
> To determine the reasonableness of a restrictive covenant ancillary to an employment contract, this court employs a three-pronged test: first, is the restriction greater than is necessary to protect the legitimate interests of the employer; second, does the restriction impose an undue hardship on the employee; and third, is the restriction injurious to the public interest? If any of these questions is answered in the affirmative, the restriction in question is unreasonable and unenforceable.

Technical Aid Corp. v. Allen, 134 N.H. 1, 8 (1991) (numerous citations and quotations omitted).

In Mr. Hogan's case, although the two covenants which apply during employment may be reasonable, the two purporting to apply for three years after termination are not.

The third covenant prohibits Mr. Hogan from soliciting business from "any of [Syncom's] customers located in any territory serviced by [Syncom] while he was in the employment" of Syncom. The court enforced this covenant in its final order, "enjoining the defendants from rendering any services to any customer or former customer of the plaintiff . . . for a period of 18 months." FINAL ORDER, *Br.Appx.*

> When an employee is put in a position involving client contact, it is natural that some of the goodwill emanating from the client is directed to the employee rather than the employer. The employer has a legitimate interest in preventing its employees from appropriating this goodwill to its detriment. For a restrictive covenant based on an employee's client contact to narrowly protect the legitimate interests of the employer, the geographic scope of the restriction generally must be

> limited to that area in which the employee had client contact, as that is usually the extent of the area in which the employer's good will is subject to appropriation by the employee. For salespersons, this area often corresponds to the territory to which they are assigned to make sales.

Technical Aid, 134 N.H. at 9-10.

Syncom operates in many states, including California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, New York, New Jersey, North Carolina, Pennsylvania, South Carolina, and Tennessee. 1 *Trn*. at 91; 4 *Trn*. at 88-89. Mr. Hogan's work occurred in a subset of this list. 4 *Trn*. at 95-96.

But Mr. Hogan's job was in operations. He was not a salesman, and was not involved in marketing. Mr. Sinopoli testified that Mr. Hogan "didn't have any position in sales." 7 ***Trn.*** at 200. A regional manager of the Regal theaters which the plaintiff claims accounts for the bulk of its damages testified that he never met Mr. Hogan, and that the only contact he had with Mr. Hogan was some phone calls complaining that Syncom was doing a poor job cleaning the theaters for which he was responsible. 9 ***Trn.*** at 601-02. Thus there is no possibility that any of Syncom's goodwill rubbed off on Mr. Hogan. Rather the opposite is true; apparently when the Regal regional manager complained to Mr. Hogan, little was done to fix the problem. 9 ***Trn.*** at 602.

Moreover, Mr.Hogan worked for Syncom for just four-and-a-half months, far too short for any goodwill that might have rubbed off to stick very well. ***See Merrimack Valley Wood Products, Inc. v. Near***, 152 N.H. 192 (2005) (term of employment 5 years); ***Technical Aid***, 134 N.H. at 1 (term of employment 5 years); ***Smith, Batchelder & Rugg v. Foster***, 119 N.H. 679 (1979) (term of employment 3 years after entered employment contract).

Because "[t]he legitimate interests of the employer generally extend only to those areas in which the employee had actual client contact," ***Concord Orthopaedics Professional Ass'n v.***

Forbes, 142 N.H. 440, 443 (1997), and Mr. Hogan had little, if any, client contact at all, Syncom has no legitimate interest in Mr. Hogan's subsequent contact with its customers. To the extent that it does, the restriction is not narrowly tailored to the interest and thus unreasonable.

Likewise the restriction places an undue burden on Mr. Hogan. Because he had no apparent pre-existing relationship with Syncom's customers, he was in no better position than a mere cold-caller. Thus his ability to earn a living cleaning theaters has been unduly restricted, and the covenant is thus unreasonable and unenforceable.

IV. The Covenants are Unenforceable Because Syncom had Unclean Hands

The enforcement of non-compete covenants is a matter of equity. *See e.g., Dunfey Realty Co. v. Enwright*, 101 N.H. 195 (1958) (former employer brought suit in equity against former employee to enforce covenant in restraint of competition). "[T]hose who come to equity must do so with clean hands, or equitable relief is properly denied." *Cornwell v. Cornwell*, 116 N.H. 205, 210-11, (1976).

Syncom seeks equitable relief, but without clean hands. Syncom required Mr. Hogan to sign an employment contract containing restrictive covenants on his first day of work, making him unable to consider the matters contained in the covenants, and giving him no opportunity to bargain fairly. And Syncom did not provide Mr. Hogan with a rational health care insurance plan, despite its promises.

Syncom hands are unclean in other ways as well. He was fired ostensibly for having lunch with Mr. Wood, 7 *Trn.* at 263-64, although but he was never directed not to. 7 *Trn.* at 331.

After Mr. Hogan was fired, he was owed wages for time he had worked, and owed reimbursement for various expenses he had incurred on Syncom's behalf during his employment. Neither were paid. Mr. Hogan was forced to resort to the Rhode Island Department of Labor for the wages, and to small claims court for the reimbursements. 4 *Trn.* at 45; 7 *Trn.* at 345-46; 9 *Trn.* at 714-18.

Although the trial court did not allow the defendants to pursue questioning on the matter, there is also evidence that Syncom defamed them and Big E. 8 *Trn.* at 541-544. As is developed further in Mr. Wood's brief, Syncom did not pay him his commissions. There is also evidence that the defendants did not receive profit-sharing to which all Syncom employees were entitled. 2

Trn. at 48; 4 *Trn.* at 47; 6 *Trn.* at 114-117; 7 *Trn.* at 248. These actions comport with the trial court's assessment that Mr. Sinopoli "does not appear to be a very good people person," and that "[h]is priorities and organizational skills need to be reevaluated and upgraded." FINAL ORDER, *Br.Appx.*

Because Syncom came to this suit with unclean hands, its covenants are unenforceable.

V. Mr. Hogan Did Not Divulge Any Secrets

The court found that Mr. Hogan participated in divulging confidential information during the several weeks between when Mr. Wood quit and when Mr. Hogan was fired. PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶¶ 52, 56, 88-102; FINAL ORDER, *Br.Appx.*

The fourth covenant prohibits Mr. Hogan from "disclos[ing] the private affairs of [Syncom] or any secrets or confidential information of [Syncom] which he may learn while in the [Syncom's] employ." The covenant applies for three years after termination of employment.[4]

The covenant prohibits divulging information "he may learn" during Mr. Hogan's employment with Syncom. This court has held that such language must be construed to mean information "of which he gained a significant understanding" during the employment, *Technical Aid*, 134 N.H. at 12, and not that which he knew before or from some other source. *Concord Orthopaedics*, 142 N.H. at 443 ("Covenants are valid only to the extent that they prevent employees from appropriating assets that are legitimately the employer's.").

During his testimony, Mr. Sinopoli was closely questioned regarding exactly what secrets Mr. Hogan took. He was unable to identify any, and evasive in his answers. Although he initially claimed the entire employee handbook was secret, when questioned page by page his contention looked ridiculous. 6 *Trn.* 141-190. Forgiving brevity, a portion of his testimony is worth reprinting here:

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[4]There is some ambiguity regarding whether this covenant operates only during the term of employment, or whether it springs into operation only upon termination and lasts for three years thereafter. The latter is presumed because 1) this covenant appears in the contract in the same paragraph as the covenant previously discussed which is preceded by a clause noting it applies "for a period of three [] years [] after termination of [] employment," and 2) because if it did not apply after employment it would be redundant with the first covenant which clearly operates only during employment.

Q: What private affairs of your company, so-called secrets or confidential information, did Bill Hogan disclose to anybody?

A: All of it.

Q: So this is just global, isn t it. It s everything –

A: It certainly is global.

Q: – everything from the beginning of Syncom to the present, right? When you mean all of it.

A: Mr. Flynn, I ve been on the receiving end of machination so Machiavellian that I've never seen 'em except in spy novels. These people coordinated, planned, stole part of my business and my reputation. They worked together.

Q: Well, Mr. Sinopoli, I'm trying to narrow this down as much as I can.

A: You can't narrow it down.

Q: I m trying to ask you –

A: It's the whole thing.

Q: – to tell his Honor here what particular secrets he took. Not what Wood took or Flores took.

A: You asked –

Q: What secrets did Hogan take?

A: You asked what he took and shared with others. All of them.

Q: That's your testimony. All of them.

A: Yes, sir.

Q: You can t be more specific than that.

A: You asked me which ones. All of them.

Q: Didn't the people that worked at the corporate office also have access to this information?

A: Some.

Q: Or all of it.

A: Are you talking about some of the people or some of the information or – where are we?

Q: Well, wouldn't the people at the corporate office have more access to information than people that worked out in the field?

A: No, sir.

Q: Weren't people in the corporate office receiving faxes from people out in the field?

A: Yes, sir.

. . .

Q: What secrets did Mr. Hogan learn in his brief employment with Syncom that he didn't know about cleaning based on his past experience?

A: I guess the short answer would be whatever commercial espionage he could learn in four months working at Syncom.

Q: What did he learn that was different about cleaning that he didn't already know?

A: Everything that makes Syncom different from every other cleaning company.

Q: But didn't Mr. DeSimone testify for Syncom some time ago that cleaning is cleaning?

A: I don t remember that, sir.

Q: You don't remember that.

A: No, sir.

Q: So how – how could you fairly separate whatever knowledge Mr. Hogan gained in four-and-a-half months of working for your from the knowledge that he had previous?

A: How can I separate it?

Q: Yes. Or how can you ask this Court to separate what mr. Hogan may have gained in experience in the brief period he worked for you from the – from the experience he had previously?

A: That would speak to everything that makes Syncom different, the way we differentiate outselves, the way we specialize. In M.r Hogon's own deposition he admitted that we're a special company. He admitted that it's a specialized industry.

Q: Well he said –

A: It's in –

Q: – you clean theaters, –

A: It's in his own deposition.

Q: – didn't he? He said –

A: It's in his own –

Q: You clean movies –

A: It's in his deposition.

Q: But he said you clean theaters. That's what was different.

A: No. Read his deposition.

Q: How is it you remember that part of his deposition, sir?

A: Because it was a great thing for him to say.

Q: Okay. And doesn't the restriction in Exhibit 5, isn't it intended to preclude disclosure of information to people outside of Syncom?

A: Where – where are you on Exhibit 5? I assume the confidentiality or –

. . .

Q: I ll read it to you. "Managers 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." You found that, Mr. Sinopoli?

. . .

A: Yes, sir.

Q: Okay. Well doesn't that prohibit disclosure of Syncom information to people outside of the company?

A: Yeah, I think it states – I – I think it tries to state fairly broadly from number 3 on – from number 3 on who we're talking about, who we're talking about there. It's listed all types of associations and –

Q: You're not answering the question, Mr. Sinopoli. The question was does that section restrict disclosure . . . of information to persons outside of Syncom?

A: I would say that s the main thrust of it.

Q: Okay. So, if Wood, Flores, . . . and Hogan had this information –

A: What information?

Q: That you don t want them to disclose.

A: Right.

Q: If they only disclosed it to each other, –

A: Mmhmm.

Q: – would they be restricted from that disclosure?

A : I don't know, based on that paragraph, I'd say the main thrust is outside of the family, outside of the company.

. . .

Q: So what particular part did Bill play in providing any confidential information to anyone who already didn't have it?

A: Is that a trick question?

7 *Trn.* 215-223.

Despite Mr. Sinopoli's protestations, there is nothing particularly unique or confidential in the way Syncom did business. 8 *Trn.* at 365. As the court noted in its order, Mr. Sinopoli

> 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.

FINAL ORDER, *Br.Appx.*

Syncom's business model – marketing to those at the top of theater organizations – was clear to any observer of the industry. Mr. Sinopoli took out advertisements and sought publicity

in motion picture trade publications telling anybody who cared. *See e.g.,* EMPLOYEE HANDBOOK, Exh. 1, *Appx.* at 60. He testified that he gave breakfast speeches and seminars at the big industry conventions, cavorted with as many high-level industry executives as possible, and got involved in movie industry charity organizations. 4 *Trn.* at 146-150. It is thus obvious that his marketing strategy was not directed at each locality. 4 *Trn.* at 151. Mr. Sinopoli credits his success to this high-level strategy. 4 *Trn.* at 145.

Mr. Hogan was not involved in sales or marketing, had no access to customer lists, and therefore could not have divulged them. If there is any information Mr. Hogan is alleged to have divulged, it might consist of "production rates," PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶¶ 40, 42, copies of the contracts which Syncom endeavored to enter with its various theater customers, and estimation forms. PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶¶ 51, 55.

Mr. Hogan was in the cleaning business – including theater cleaning – for virtually his entire career. "Production rates" in the janitorial industry refer to charts of the amount of time it takes a person to accomplish a particular cleaning task. 7 *Trn*. at 300-03. These rates generally do not change over time. 7 *Trn.* at 307. Thus Mr. Hogan was able to make estimates based on things like the fact that in office buildings, for instance, people don't leave gum on their chairs, but in movie theaters they do. 7 *Trn*. at 302.

Mr. Hogan learned most of what he knows about production rates from his experience prior to working for Syncom, throughout his career. 7 *Trn*. at 299, 302-04, 352. None of this information was developed by Syncom, and none of it is peculiar to Syncom or to theaters. 7 *Trn*. at 352; 8 *Trn* at 395. Production rates are "pretty standard" in the cleaning industry. 8 *Trn.* at 395. Mr. Sinopoli hired Mr. Hogan for this sort of expertise, about which Mr. Hogan told Mr.

Sinopoli during his job interview. 7 *Trn.* at 298. During his term at Syncom, Mr. Hogan sometimes referred back to the production rate information he carried with him from previous employers. 7 *Trn.* at 304-05. Even if Mr. Hogan perfected his understanding of production rates during his employment with Syncom, he had a "significant understanding" of it beforehand and thus it does not constitute a secret to which the covenant applies.

Even if the production rates were Syncom secrets, dates on faxes Mr. Hogan sent to Mr. Wood show that the production rates were disclosed to Mr. Wood *after* Mr. Wood had taken customers from Syncom, thus making it impossible that Mr. Hogan was liable. 4 *Trn*. at 122-24, 129-32; 7 *Trn*. at 353; 8 *Trn*. at 446, 461-63.

There was nothing secret about the contracts Syncom had with its theater customers. They were freely shared with Syncom's customers and potential customers and did not contain any non-disclosure clauses. 8 *Trn*. at 385-87.

Syncom also uses forms for collecting the facts necessary for estimating jobs. They are widely used in the cleaning industry, similar to other companies' in the commercial cleaning industry, 3 *Trn.* at 42; 8 *Trn.* at 366-67, and were themselves taken from firms who preceded Syncom in the business. AFF. OF WOOD, *Appx.* at 59.1, ¶ I-K. The same is true of weekly inspection reports. 7 *Trn.* at 298. None of these estimation tools were secret. 8 *Trn.* at 525.

If any secrets were divulged, Mr. hogan was not responsible. Mr. Wood testified that it was he who revamped the various forms and estimation sheets, and improved them while at Syncom. 8 *Trn.* at 524; 9 *Trn.* at 661. Mr. Flores, the third defendant who defaulted, testified that he was the one who crossed out Syncom's name and wrote in "Big E," and that Mr. Wood told him to do so. 3 *Trn.* at 24-25. In Mr. Sinopoli's lengthy testimony about every item he

claimed was secret, he repeatedly names Mr. Wood, not Mr. Hogan. 6 *Trn*. 141-190.

Finally, there was evidence that a private investigator saw Mr. Hogan arrive at Mr. Wood's home after Mr. Wood quit but before Mr. Hogan was fired. Without binoculars, the investigator testified that even though he was far away he saw Mr. Hogan go into Mr. Wood's house with some papers in his hand, and come out without them. 5 *Trn*. at 8. The investigator went through Mr. Wood's garbage and found documents purporting to be either Syncom's secrets, 5 *Trn*. at 11, or documents similar to Syncom's. 8 *Trn*. 548-50.

The investigator's observations, however, are classic circumstantial evidence. As such any inferences drawn from the evidence must exclude all other rational explanations. *See e.g., State v. Duguay*, 142 N.H. 221 (1997). As it would be rational to conclude that Mr. Wood could have acquired the documents and put them in his trash all by himself, the court was in error in finding that Mr. Hogan was involved.

Accordingly, there is no evidence Mr. Hogan divulged any secrets, and thus no evidence he violated the covenant.

VI. Mr. Hogan Was Not a Fiduciary

In addition to suing Mr. Hogan for breach of the covenants, Syncom claimed a breach of fiduciary duty, AMENDED PETITION, *Appx.* at 17, for which he was found liable. PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶¶ 136-138; FINAL ORDER, *Br.Appx.* The finding is important because it formed the basis for enhanced damages. FINAL ORDER, *Br.Appx.*

"A fiduciary relationship has been defined as a comprehensive term and exists wherever influence has been acquired and abused or confidence has been reposed and betrayed." *Lash v. Cheshire County Savings Bank*, 124 N.H. 435, 438 (1984) (quotation and brackets omitted); *Schneider v. Plymouth State College*, 144 N.H. 458 (1999).

> A fiduciary relation does not depend upon some technical relation created by, or defined in, law. It may exist under a variety of circumstances, and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.

Schneider v. Plymouth State College, 144 N.H. at 462. Thus a college professor is a fiduciary of his students, *Schneider v. Plymouth State College*, 144 N.H. at 458, and a bank loan officer is a fiduciary of a small business when lending it money. *Lash v. Cheshire County Sav. Bank, Inc.*, 124 N.H. 435 (1984). But there must be a certain level of trust before a person can be considered a fiduciary. Thus in *Ahrendt v. Granite Bank*, 144 N.H. 308, 311 (1999), this Court held that "[a]s a general rule, the relationship between a bank and a customer is not a fiduciary one."

In the employment context, an employee is a fiduciary if the employee has control of propriety information. In *Vigitron, Inc. v. Ferguson*, 120 N.H. 626 (1980), the company manufactured and sold "a series of sophisticated electronic flame safety controls" which the company sought to patent. The employees were its chief engineer hired to develop new products,

and its vice president. This Court held that the level of confidentiality reposed in the employees was sufficient to be fiduciary and their non-company use of the information was a breach of their fiduciary duty.

No known New Hampshire case has held that merely being an employee implies a fiduciary relationship. If the bar is set too low, nearly every employment and contract dispute would be morphed into a tort, thus undermining the policies regarding damages available by statute and for the benefit of the bargain in contract. *See, e.g., Salem Eng'g and Constr. Corp. v. Londonderry School Dist.*, 122 N.H. 379 (1982) (contract damages limited to amount due under contract, interest, and consequential damages foreseeable at time of contract formation).

While Mr. Wood's position in sales may have given him a fiduciary status, Mr. Hogan was not a fiduciary of Syncom. His job was in operations – measuring theaters and lining up subcontracts to clean them. It did not involve any particular confidences nor any particularly guarded information. Mr. Hogan was employed for just 4½ months, and there was no testimony that he and Mr. Sinopoli shared a particularly trustful relationship.

Accordingly the court erred in finding that Mr. Hogan was a fiduciary and that a fiduciary duty was breached.

VII. Mr. Hogan's Actions Were Not Wanton, Malicious, or Oppressive, and Did Not Justify Enhanced damages

Syncom initially sued Messers. Wood and Hogan for breach of the employment contract. VERIFIED PETITION, *Appx.* at 1. Later Syncom amended its petition to include breach of fiduciary duty. AMENDED PETITION, *Appx.* at 17. Nonetheless, this case is essentially a contract action.

"New Hampshire law does not permit the recovery of enhanced compensatory damages in contract cases, even where the breach is intentional." *Jimenez v. Verdecchia*, 2000 WL 1752803 (D.N.H. 2000) (citing *DCPB, Inc. v. City of Lebanon*, 957 F.2d 913 (1st Cir.1992)). To compensate, some statutes not relevant here, such as New Hampshire's Uniform Trade Secrets Act, RSA 350-B, and the Consumer Protection Act, RSA 358-A, provide for double or treble damages. Thus enhanced damages should not have been awarded.

Moreover, New Hampshire does not allow for damages as a mode of punishment. "Exemplary, or punitive, damages are generally defined or described as damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious, or oppressive character of the acts." 22 AM. JUR. 2D *Damages* § 236 (1965). The terms are used interchangeably in most jurisdictions. Typical of torts for which such damages are awarded are assault and battery, libel and slander, deceit, malicious prosecution, and intentional interferences with property such as trespass. PROSSER, LAW OF TORTS § 2, at 10 (4th ed. 1971).

In jurisdictions where exemplary damages are allowed, they are awarded not for compensation, but as punishment to the defendant and as warnings and examples to deter the defendant and others from committing like offenses in the future. *See e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 161 (1967) (punitive damages "not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse").

In New Hampshire, however, the punitive function of exemplary damages has been rejected in forceful and colorful language:

> What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.

Fay v. Parker, 53 N.H. 342, 382 (1872). This anathema is found in less vitriolic language in *Bruton v. Corporation*, 87 N.H. 304 (1935) ("Elements of damage do not include impositions, in the nature of penalties, to induce the defendant and others to conduct themselves properly"). Nevertheless, this Court in *Fay v. Parker* and more particularly in *Bixby v. Dunlap*, 56 N.H. 456 (1876), has recognized that in cases where the acts complained of were wanton, malicious, or oppressive, the compensatory damages for the resulting actual material loss can be increased to compensate for the vexation and distress caused the plaintiff by the character of defendant's conduct.

Now called "enhanced damages," they are available when the defendant's actions were wanton, malicious, or oppressive. *See Panas v. Harakis*, 129 N.H. 591, 608 (1987). But even if Mr. Hogan was a fiduciary, and he breached the duty, however, his actions were neither wanton, malicious, nor oppressive.

"Malice" means "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others." *Baer v. Rosenblatt*, 106 N.H. 26, 30 (1964).

"Wanton," for the purposes of awarding enhanced damages, has not been defined in New Hampshire, but it has in other jurisdictions. In *Fabrey v. McDonald Village Police Dept.*, 639 N.E.2d 31 (Ohio 1994), the court held that:

> The standard for showing wanton misconduct is . . . high. . . . [W]anton misconduct [is] the failure to exercise any care whatsoever. [M]ere negligence is not converted

> into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor. Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury."

Fabrey, 639 N.E.2d at 35 (quotations and citations omitted). In *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir.2001), the court held that "wanton" means the defendant has

> intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences.

Webner, 267 F.3d at 837-38 (citing case quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed.1984).

"Oppressive conduct" for the purpose of awarding enhanced damages "denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003).

Schneider v. Plymouth State College, 144 N.H. 458 (1999), is the only known New Hampshire case in which enhanced damages were awarded for breach of fiduciary duty. There this court held that the jury's determination that the defendants' conduct was wanton or oppressive was supported by the defendants' refusal to investigate allegations that a professor sexually harassed his student.

Mr. Hogan's case is not nearly so shocking. He was alleged to have given Mr. Wood information that furthered Mr. Wood's ability to establish and run a company in competition with Syncom. There was no evidence that Mr. Hogan took any part in establishing the competitor, or that without the information Mr. Wood would have been unable to establish the competitor. The court found that enhanced damages were justified "given the knowing and premeditated actions of the defendants . . . , their continuing open defiance of the terms of their employment contracts, as

well as the character and context of their testimony at trial." FINAL ORDER, *Br.Appx.* These findings apply to Mr. Wood, and not Mr. Hogan. They do not jibe with the court's order that found "William Hogan is a follower not a leader," FINAL ORDER, *Br.Appx*, and do not add up to anything that is wanton, malicious, or oppressive. The court provided no explanation regarding what Mr. Hogan did at trial that would justify enhanced damages, and did not explain how it arrived at an enhanced award of $250,000, what relation that amount bore to any facts of the case, how the amount is not simply a windfall to the plaintiff, or what particular vexation or distress justified it.

The enhanced award appears to be nothing more than punitive damages under the guise of an acceptable vocabulary. If approved by this Court, nearly every intentional tort case will justify enhanced damages, thus creating the "monstrous heresy" barred by *Fay v. Parker*.

VIII. Mr. Wood, Not Mr. Hogan, is Responsible For Any Damages

The court found that Mr. Wood "formulate[d] a plan to form a competing company and carefully orchestrate[d] his time of departure from the plaintiff." The facts bear out this assessment.

Mr. Wood repeatedly threatened to create a competitor. During a meeting, Mr. Wood told Mr. Sinopoli he was raising money to start a new company, 2 *Trn.* at 8, and admitted that he threatened Mr. Sinopoli he would do so if he didn't get the commissions he believed were owed. 1 *Trn.* at 56.

Mr. Wood created Big E. He raised money from his father during Christmas vacation 2001. 2 *Trn.* at 14-15. "Big E" was Eldon Wood's boyhood nickname. 8 *Trn.* at 529. He registered the company with the State of Connecticut with the assistance of a lawyer within several days of leaving Syncom, FINAL ORDER, *Br.Appx*, and the registration papers specify it was to specialize in theater-cleaning. 1 *Trn.* at 88. Mr. Wood's co-worker felt Mr. Wood was a "contentious" man who "had a penchant for developing his own policy." 2 *Trn.* at 6.

Mr. Wood took several of Syncom's accounts within several days of starting Big E, 3 *Trn.* at 117; 6 *Trn.* at 6, and they may have been lined up before he quit. 3 *Trn.* at 18. Mr. Wood worked for some of the theater chains before his employment with Syncom, and his contacts proved fruitful. 8 *Trn.* at 472, 521-22. Although he denies it, Mr. Wood may also have used Syncom's database of contacts. 6 *Trn.* at 134, 139; 8 *Trn.* at 565. Mr. Wood probably quoted the theaters the same prices as he had at Syncom, 6 *Trn.* at 135, and Mr. Sinopoli believes that it was Mr. Wood who landed the sales for Big E that caused Syncom's damages. 5 *Trn.* at 80.

Mr. Hogan may have done some unwise things. He met with Mr. Wood for lunch on

company time, 7 *Trn.* at 333 (although he had never been told to not have contact, 7 *Trn.* at 331), and this was the ostensible reason for being fired. 7 *Trn.* at 263-64. After Mr. Wood quit – and after Mr. Wood's new firm had already taken Syncom's customers – Mr. Hogan gave him production rate charts, 7 *Trn.* at 353, and perhaps other advice. 3 *Trn.* at 29-30, 34.

There was evidence that Mr. Hogan and Mr. Wood met in Connecticut with another man – Fabio Flores – and discussed setting up a new company. Mr. Flores testimony, however, is suspect. He was originally a defendant here, but took a default verdict in the amount of approximately $3.65 million. Mr. Flores nonetheless testified on Syncom's behalf, providing the only evidence of Mr. Hogan's alleged premeditation. This, after Mr. Flores was flown to New Hampshire for the trial and treated to dinner by Mr. Sinopoli. His testimony makes it obvious he was hoping for some sort of release from liability, 3 *Trn*. at 84, he was aware Syncom had not attempted to collect the judgment, 7 *Trn*. at 255, and he testified that if "I would have had the money I wouldn't be here." 3 *Trn.* at 38.

As the court termed it, Mr. Hogan is a "follower not a leader." FINAL ORDER, *Br.Appx.* Mr. Hogan heard Mr. Wood by day deriding his boss; and his wife by night bemoaning no health insurance for their six children.

Mr. Hogan had no ownership interest in Big E, 7 *Trn.* at 350, and didn't begin working for Big E for over a year after he was fired from Syncom. It is not reasonable to believe that Mr. Hogan was "volunteering" for Big E while he was working for Syncom and Mr. Sinopoli suggests. 7 *Trn*. at 225. After Mr. Wood left, Mr. Hogan was doing two jobs – his own and Mr. Wood's. 4 *Trn.* at 115. Even the court refused to find that Mr. Hogan "was involved in the operation of Big E while still employed with Syncom." PLF'S REQ. FOR FINDINGS, *Appx.* at 21, ¶ 39.

Mr. Hogan is not responsible for any damage caused to Syncom by Mr. Wood's plan. Mr. Wood admits that Big E was cleaning the Regal theaters just a few days after Mr. Wood left Syncom, long before Mr. Hogan was involved. 1 *Trn.* at 71; 2 *Trn.* at 95. Mr. Sinopoli could not identify any particular account that Mr. Hogan might have taken away from Syncom. 7 *Trn.* at 214. Mr. Wood got the very-important Empire 25 account long before Mr. Hogan was hired, and even before he was alleged to have been helping Mr. Wood. 1 *Trn.* at 99, 101.

Mr. Sinopoli testified that it was Mr. Wood who damaged his company, 6 *Trn.* at 130-31, and who "wiped out a good portion of our management." 7 *Trn.* at 200. Mr. Hogan could not have aided these efforts because any information he gave to Mr. Wood was *after* Mr. Wood had already landed the Regals and the Empire 25 for Big E. 8 *Trn.* at 462-63.

Mr. Hogan believed that Mr. Wood's threats to start a new company was all water-cooler talk. He thought it was a joke, 4 *Trn.* at 106-07, 7 *Trn.* at 336, and didn't take it seriously. 4 *Trn.* at 99-101, 103-04. Mr. Wood kept Mr. Hogan in the dark regarding his intentions. 7 *Trn.* at 338-39; 8 *Trn.* at 402, 442; 8 *Trn.* at 467.

As noted, Mr. Sinopoli could not identify any particular secrets that Mr. Hogan took, 7 *Trn.* at 216-17, and any information Mr. Hogan gave to Mr. Wood was before Mr. Hogan knew that Mr. Wood was running a theater cleaning company. 7 *Trn.* at 353.

When Mr. Sinopoli docked Mr. Wood's pay for the threat to start a competitor, he did not also dock Mr. Hogan's, believing Mr. Hogan was not involved. 2 *Trn.* at 75.

Thus, although Mr. Hogan may have done unwise things, he was not instrumental or necessary to Mr. Wood's actions. Mr. Wood took Syncom's customers *before* Mr. Hogan is alleged to have helped him. Mr. Hogan didn't take the Regals, the Empire, or the other accounts

from Syncom – it was all Mr. Wood's doing.

Accordingly, to the extent that damages are justified at all, the trial court mis-apportioned them. Mr. Hogan should not be jointly and severally liable when the evidence shows that Mr. Wood was the one who instigated and consummated the scheme to complete. Mr. Hogan played, at most, a minor role. Even if Mr. Wood was malicious, wanton, or oppressive in his actions, Mr. Hogan was not, and should not be tagged with Mr. Wood's deeds.

IX. Incorporation by Reference

Mr. Hogan hereby incorporates by reference Mr. Wood's brief on the issue of damages, attorneys fees, the injunction, and any other matters of benefit to him.

CONCLUSION

For the foregoing reasons, Mr. Hogan requests that the judgment against him be reversed, or in the alternative that this case be remanded for re-apportionment of damages.

Respectfully submitted,

William Hogan
By his Attorney,

Law Office of Joshua L. Gordon

Dated: March 10, 2006

Joshua L. Gordon, Esq.
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.

I hereby certify that on March 10, 2006, copies of the foregoing will be forwarded to William S. Gannon, Esq.;V. Richards Ward, Jr., Esq. and James R. Davis, Esq.

Dated: March 10, 2006

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225