State of New Hampshire
Supreme Court

NO. 2009-0071

2009 TERM

SEPTEMBER SESSION

Syncom Industries, Inc.

v.

William Hogan

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

ANSWERING BRIEF OF DEFENDANT WILLIAM HOGAN

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SUMMARY OF ARGUMENT

In this Answering Brief William Hogan first reviews this Court's earlier decision, and notes the damages award was reversed and vacated. He addresses Syncom's argument that law-of-the-case doctrine somehow restores it. He then points to the remand court's award of "zero money damages as against William Hogan," and the remand court's reasons for the finding. He argues that damages for both the non-compete covenant and for breach of fiduciary duty are limited by policies which proscribe restraints on trade and competition, and which were reiterated in this Court's earlier decision. He also argues that Syncom's fiduciary duty claim is preempted by New Hampshire's trade secret statute. Finally, he briefly comments on joint and several liability, and points out that because Syncom already enjoyed an overbroad injunction, it is not entitled to any further remedies.

ARGUMENT

In its brief Syncom argues that despite this Court's opinion in *Syncom I*[1] eviscerating the trial court's award of damages, it should still recover both under the non-compete covenant and for breach of fiduciary duty, and moreover, the amount it should recover is that ordered by the trial court[2] before the appeal.

The argument ignores that this Court undermined and set aside both the trial court's award of damages and the way they were calculated.

I. *Symcom I* "Reversed" and "Vacated" Trial Court's Damage Award

In *Syncom I* this Court reversed and vacated the trial court's award of damages.

In its decision this Court found that the covenants in Mr. Hogan's employment contract were "broader than necessary for the purpose of advancing Syncom's legitimate interest in protecting its goodwill," *Syncom I*, 155 N.H. at 80, and also "broader than necessary to protect Syncom's legitimate interest in information [which] Hogan may have acquired about Syncom customers during the course of [his] employment." *Syncom I*, 155 N.H. at 80. Thus, regarding the trial court's enforcement of the covenants, this Court said, "we *reverse* that ruling." *Syncom I*, 155 N.H. at 81 (emphasis added).

This Court left open for the remand court the possibility of reformation, but because it "will require factual determinations," this Court "express[ed] no opinion on whether the covenants should be reformed." *Syncom I*, 155 N.H. at 81; *Massicotte v. Matuzas*, 143 N.H. 711

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[1]The first opinion of this Court, *Syncom Industries, Inc. v. Wood*, 155 N.H. 73 (2007), is included in the appendix to Mr. Hogan's opening brief, and will be referred to herein as *Syncom I*.

[2]This brief repeatedly distinguishes between the "trial court," meaning the proceedings prior to the appeal in *Syncom I*, and the "remand court," meaning the proceedings following *Syncom I* and leading to the current appeal.

(1999) (reformation of instruments within the discretion of the trial court).

Specifically regarding damages, this Court defined four categories of theater customers comprising Syncom's claim of damages – "the Regals, the diverted Regals, the non-Regals, and Empire 25." *Syncom I*, 155 N.H. at 87 (categories more fully defined, 155 N.H. at 77). This Court declined to address the issues of damages resulting from Syncom's alleged loss of the various customers because they "depend upon the scope of the restrictive covenants, a matter we are remanding." *Syncom I*, 155 N.H. at 87.

Thus this Court ruled that "because a proper calculation of damages will depend upon the scope of the restrictive covenants, we *vacate* the award of compensatory damages," *Syncom I*, 155 N.H. at 88 (emphasis added), "and remand for such further proceedings as the trial court deems necessary."

Going into the remand proceeding it was therefore clear that there was no existing holding regarding damages – the underlying ruling had been reversed and the damages had been vacated.

II. Law-of-the-Case Does Not Avoid "Reversed" and "Vacated" Damages

Syncom nonetheless argues that the pre-appeal trial court's findings regarding damages somehow survives "reversed" and "vacated" by the law-of-the-case doctrine.

In its brief Syncom correctly cites *Merrimack Valley Wood Products, Inc. v. Near*, 152 N.H. 192, 201 (2005), which held that "where an appellate court states a rule of law, it is conclusively established and determinative of the rights of the same parties in any subsequent appeal or retrial of the same case." Quite the opposite of Syncom's argument however, in *Syncom I* this Court "conclusively established" that the trial court's rulings on damages were "reversed" and "vacated." They therefore no longer exist, and cannot now be relied on.

Even if the reversed and vacated rulings still had currency, a trial court may revisit its own rulings. *Id.* at 203 ("There can be no question of the inherent power of the Court to review its own proceedings to correct error or prevent injustice.") (quoting *Croteau v. Harvey & Landers*, 99 N.H. 264, 267 (1954)).

III. "Zero Money Damages as Against William Hogan"

The remand court made an award of "zero money damages as against William Hogan," ORDER ON PENDING MOTIONS (Dec. 18, 2008), *appx. to opening brf*. at 65, and made clear its reasons.

The court found that "[g]iven the events that have transpired since this litigation was brought, … 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." ORDER (Nov. 3, 2008), *appx. to opening brf*. at 64. The finding applied to both compensatory and enhanced damages.

In reaching its conclusions, the court took note of several facts:

- "Mr. Hogan is now out of the theater cleaning business."
- Mr. Hogan "has very little by way of personal assets."
- "Mr. Hogan's employment with [Syncom] consumed a period of less than five months."
- "Hogan's misdeeds without the leadership of Wood in all probability would not have cost [Syncom] any loss of business."

ORDER (Nov. 3, 2008), *appx. to opening brf*. at 62 & 64. The court also pointed out that the former co-defendant, Eldon Wood, is bankrupt, and thus any "claims against him will have to be resolved in the Bankruptcy Court." *Id.* at 61.

Overall, the remand court found: "While clearly some damages are due the plaintiff, it is virtually impossible … at this time to definitively determine a precise amount." *Id.* at 64.

After motions for reconsideration, the court reiterated its holding of "zero money damages as against William Hogan." It wrote: "[J]ustice require[s] that no monetary award for

damages be assessed against William Hogan." ORDER ON PENDING MOTIONS (Dec. 18, 2008), *appx. to opening brf*. at 65.

It is apparent from these findings that the remand court believed Wood was the real culprit and damages should have been paid from him to Syncom, but that because he is in bankruptcy it is out of the court's purview. This is in accord with the facts. Mr. Hogan's job was in operations – measuring theaters to aid Syncom in estimating bids. He was not in sales (although Wood was), and Mr. Hogan had little or no contact with Syncom's theater customers.

Mr. Hogan's contact with the Regals was as the recipient of complaints regarding the quality of Syncom's cleaning service, and it must be recalled that Syncom hired Wood because of his long previous career in the Regal organization. Mr. Hogan had no contact at all with the diverted Regals, or the non-Regals. Although Mr. Hogan once visited Empire 25 to measure it for the purpose of Syncom making an estimate of its cleaning cost, Wood repeatedly wined and dined the management of Empire 25 during his employment in an effort to secure the account for Syncom and secured it for Big-E before receiving any protected information from Mr. Hogan.

Thus, whatever he did, there is nothing in the record suggesting that Mr. Hogan himself caused Syncom any loss of theaters.

The remand court also expressed the impossibility of a reasonable computation of damages – "like picking through the bones of a Thanksgiving turkey years after it has been consumed." ORDER (Nov. 3, 2008), *appx. to opening brf*. at 61. "[B]asic tort law prohibits recovery 'where it cannot be shown with reasonable certainty that any damage resulted from the act complained of.'" *Witte v. Desmarais*, 136 N.H. 178 (1992) (quoting 25 C.J.S. *Damages* § 27, at 683 (1966)); *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271, 275 (1994) (no award of

damages where "more than reasonable certainty of damages was lacking").

Moreover, causation and damages are elements of any claim. Yet during the remand proceeding, Syncom did not suggest which theaters it believed Mr. Hogan was liable for, made no attempt to show causation regarding them, and failed to specify any damages. Rather it relied on its law-of-the-case argument.

As noted by in *Syncom I*, and also argued by Syncom in the first appeal, this Court views the facts surrounding an award of damages in the light most favorable to the award, and places the amount of damages within the discretion of the lower court. *Syncom I*, 155 N.H. at 88; *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270, 295 (1992) ("In reviewing damages awards, we will consider the evidence in the light most favorable to the prevailing party, and we will not disturb the decision of the factfinder unless it is clearly erroneous.").

A finding of zero damages may occur in cases arising in contract as well as in tort. *Miami Subs Corp. v. Murray Family Trust*, 142 N.H. 501 (1997) (contract); *Kravitz v. Beech Hill Hosp., L.L.C.*, 148 N.H. 383 (2002) (tort). Equity allows a zero damage award, especially where the employee will be disproportionately effected. *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 684 (1979). Syncom has not suggested that the remand court's findings are without support in the record, and thus the award must be upheld.

Finally, despite this Court holding in 2007 that the over-broad and over-long injunction was improper, by the time *Syncom I* was decided the period of the injunction had run. Thus Syncom already enjoyed the valuable benefit of an improper injunction. It has also cost Mr. Hogan thousands of dollars and years of stress, and sent Wood into bankruptcy. Given these additional factors, the remand court's holding of zero damages serves equity.

IV. If Damages are Warranted, they Must be Calculated with Regard to Limitations Set Forth by Law

Despite this Court having eviscerated the trial court's damage award, and despite the remand court then having made findings of fact that cannot support any damages to be paid by Mr. Hogan, Syncom maintains it is nonetheless entitled to the amount of damages originally found by the trial court for its causes of action stemming from both the covenant and the related tort.[3] This claim of entitlement ignores not only this Court's holding in *Syncom I* reversing damages, and also the remand court's findings of fact precluding damages, but it also ignores how damages are to be calculated if indeed any at all were warranted.

A. Methodology for Calculating Damages if the Remand Court had Reformed

As noted, this Court ruled that "a proper calculation of damages will depend upon the scope of the restrictive covenants," *Syncom I*, 155 N.H. at 88, which scope includes both "geographic and temporal" "aspects." *Id.* at 81.

If the remand court had reformed, the ordinary way to calculate damages would have been to create a list of individual theater customers, or classes of customers, that are within the permissible geographic and temporal scope of the reformed covenants, and then to determine how much damage Mr. Hogan may have caused Syncom with regard to each. Indeed, this is how Syncom advocated it should be done. *See* DAMAGE WORKSHEETS, *appx. to Syncom's brf. in first*

[3]In *Syncom I* this Court found that Mr. Hogan did not preserve for appeal whether "the trial court incorrectly deemed him a fiduciary of Syncom." *Syncom I*, 155 N.H. at 78. Despite this failure, Mr. Hogan has always broadly contested damages, both throughout trial and in pleadings. *See., e.g.*, WILLIAM HOGAN'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW (May 10, 2004), *appx. to answering brf.* at 22, 24, proposed finding # 24 ("William Hogan caused no damages to the Company."). Syncom nonetheless suggests that just because Mr. Hogan waived the issue of whether he was a fiduciary also means he waived "any issue related thereto," including the issue of whether Syncom was damaged by the breach of fiduciary duty. *Syncom's Brf.* at 8 and at v., question IV. The suggestion is unsupported by this Court's fairly large preservation jurisprudence, and at odds with the record.

appeal, Plaintiff's Exhibits 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 82.

Reforming would have involved re-drawing the permissible geographic and temporal scope in accord with this Court's mandate, and making a list of theaters which are narrowly connected to those business interests Syncom may legitimately protect and which do not impose an undue hardship on Mr. Hogan's ability to compete in the market. *Syncom I*, 155 N.H. at 79. Only the harm Mr. Hogan may have caused Syncom regarding that list of theaters would be eligible for inclusion in a damages calculation.

Syncom suggests that even if this were the case regarding its cause of action stemming from the covenant, damages stemming from the tort may nonetheless be calculated with a much broader list of theaters that is not narrowed by this Court's holding in *Syncom I*.

B. List of Theaters is the Same for Covenant and Tort

That suggestion must fail for several reasons: it would produce an absurd result, there is a close identity between violation of the covenant and the related tort, and courts routinely limit tort damages for the same reasons they limit recovery on non-compete covenants.

1. Not Limiting Recovery on a Tort Which is in Restraint of Trade and Competition Would Produce an Absurd Result

First, allowing the list of theaters for tort duties to be broader than the list for violation of the covenant would produce an absurd result. It is a tautology that only those employees who enter non-compete covenants are subject to them. Once entered, the specific terms of the covenant are supplied by the covenant itself. But the allowable scope of covenants is determined by the law, which "does not look with favor upon contracts in restraint of trade or competition." *Syncom I* at 78.[4]

[4]The principle has its root in the Thirteenth Amendment. *Pollock v. Williams*, 322 U.S. 4 (1944).

If the scope of damages for a violation of fiduciary duty were not determined by these same consideration of trade and competition, two things would occur. First, damages for the tort could be as broad as the employer's imagination, while damages under the covenant would be carefully circumscribed by the law. Second, that unlimited fiduciary duty would apply to all employees who may be fiduciaries by the nature of their job, even though they have avoided entering a covenant.

Thus, leaving damages for fiduciary duty unregulated by restraint-of-competition public policy concerns would vastly broaden both the number of employees and their duties, regardless of whether they have entered a covenant. Non-compete covenants, and the law curtailing their scope, would then be largely superfluous. And also it would mean that either this Court's remand for calculation of damages in *Syncom I* was superfluous, or that the trial court's error identified in *Syncom I* of calculating damages on the covenant overly-broadly would merely have been harmless error.

It is thus unavoidable that damages for violation of fiduciary duty be limited by the same considerations which also limit damages for violation of restrictive covenants. The list of theaters entering a damage calculation for violation of Mr. Hogan's fiduciary duty can be no larger than the list for violation of the covenants.

2. Violation of Non-Compete Covenant is Essentially a Tort Cause of Action

The second reason for this identity of theater lists is that the cause of action for violation of a non-compete covenant, even though it arises from a contract, is essentially a tort. Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: the Dilution of Employee*

Bargaining Power via Standard Form Noncompetes, 2006 MICH. ST. L. REV. 963 n. 17 (2006) ("Covenants not to compete occupy a peculiar legal never-never land between contract and tort, in which party consent and externally imposed obligation are intimately but complexly intertwined.") (quoting Katherine V. W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* 131 (2004)) (also citing Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law* 2 (New York University Law School, Public Law Research Working Paper No. 06-20, 2006), available at http://ssrn.com/abstract=911284 (describing non-competes as embodying a hybrid form of employment regulation falls between contract and torts)).

The tort – violation of protective covenant – springs into being by the covenant, and only those who enter it are bound by its duties. But the tort's outside contours are controlled by public policy. In this view, breach of non-competition covenants and breach of fiduciary duty are both torts, and it is not surprising that damages for them are limited by the same public policy concerns – the legitimacy of the interests the employer seeks to protect, and the hardship imposed on the employee's ability to compete in the market.

3. Courts Routinely Limit Torts in Accord with Restraint of Trade Concerns

The third reason to treat the covenant and the tort similarly is that courts generally do exactly that. In cases where there is no non-compete covenant or it is unenforceable, and where the dispute between employer and employee involves allegations of tortuous betrayal of some special trust, courts routinely impose limitations on the scope of the tort. The limitations are placed either on the constituent elements of the tort or on the calculation of damages related to

them. The limitations are similar to those that limit non-competition covenants, and stem from the same concerns regarding the interests of employers, the ability of employees to sell their labor for a livelihood, and the public interest in a free competitive market.

In *AMP Inc. v. Fleischhacker*, 823 F.2d 1199 (7th Cir. 1987), for instance, the former employer sued the former high-level employee after he left and joined a competing company. An agreement purporting to keep trade secrets confidential was deemed unenforceable because it contained no durational or geographical limitations. The Seventh Circuit first compared the employer's interests with and without a covenant:

> While an enforceable restrictive covenant may protect material, such as confidential information revealed to an employee during the course of his employment, which does not constitute a trade secret, *an employer's protection absent a restrictive covenant is narrower* and extends only to trade secrets or near-permanent customer relationships.

Fleischhacker, 823 F.2d at 1201 (emphasis added). The court then set forth the interests of the employee and the public:

> [T]he right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right. Our society is extremely mobile and our free economy is based upon competition. One who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience. These skills are valuable to such employee in the market place for his services. Restraints cannot be lightly placed upon his right to compete in the area of his greatest worth.

Fleischhacker, 823 F.2d at 1202 (quoting *ILG Industries, Inc. v. Scott*, 273 N.E.2d 393, 396 (Ill. 1971). The Seventh Circuit thus held that the information the employee took did not constitute protectible secrets[5] because "[a]ny other result would severely impede employee mobility and

[5]As in New Hampshire, the definition of a trade secret in Illinois is now controlled by statute, making the specific definition – not relevant here – no longer current. *See PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

undermine the competitive basis of our free economy." *Fleischhacker*, 823 F.2d at 1205.

In *Wexler v. Greenberg*, 160 A.2d 430 (Pa. 1960), the former employer sought to enjoin a former employee after he left and joined a competing company. There was no non-compete covenant. The Pennsylvania Supreme Court cautioned against restraints against "employee mobility" based on both "an individual in the pursuit of his livelihood and the harm to the public":

> We are thus faced with the problem of determining the extent to which a former employer, without the aid of any express covenant, can restrict his ex-employee, a highly skilled chemist, in the uses to which this employee can put his knowledge of formulas and methods he himself developed during the course of his former employment because this employer claims these same formulas, as against the rest of the world, as his trade secrets. This problem becomes particularly significant when one recognizes that [employee's] situation is not uncommon. In this era of electronic, chemical, missile and atomic development, many skilled technicians and expert employees are currently in the process of developing potential trade secrets. Competition for personnel of this caliber is exceptionally keen, and the interchange of employment is commonplace. One has but to reach for his daily newspaper to appreciate the current market for such skilled employees. We must therefore be particularly mindful of any effect our decision in this case might have in disrupting this pattern of employee mobility, both in view of possible restraints upon an individual in the pursuit of his livelihood and the harm to the public in general in forestalling, to any extent widespread technological advances.

Wexler v. Greenberg, 160 A.2d at 433.

Closer to home, in *Vigitron, Inc. v. Ferguson*, 120 N.H. 626 (1980), where there was no non-compete covenant, the employer sued former employees for breach of confidential relationship after they appropriated trade secrets and established a competing company. This Court wrote:

> The law does not favor a stifling of competition. Nor does the law favor the disclosure of trade secrets, however, or the use of confidential information by an employee to the detriment of his employer. [The lower court was correct] in enjoining the defendants from designing or manufacturing [competing products]

> for a period of two years. The injunction is for a limited time period.…Moreover, the injunction is narrowly drawn, and does not deprive the defendants of a livelihood.

Vigitron, Inc. v. Ferguson, 120 N.H. at 632 (quotations and citations omitted). *See also In re Uniflex, Inc.*, 319 B.R. 101, 108 (Bkrtcy. D.Del. 2005) (Action for violation of fiduciary duty against chief executive officer who did not have non-compete covenant and who established competing company. "The Thirteenth Amendment to the Constitution assures that all employees who are not otherwise bound by contract are free to leave their job at any time. This means they may be solicited by former employees or leave on their own and create a competing business."); *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 492 N.E.2d 814, 818 (Ohio 1986) (Action for misappropriation of trade secret against employee who did not have non-compete covenant and who established competing company. In narrowing duration of injunction, court wrote: "Underlying almost every case in which a former employee is accused of the unauthorized disclosure or use of trade secrets is the matter of balancing or reconciling the conflicting rights of an employer to enjoy the use of secret processes and devices which were developed through his own initiative and investment and the right of employees to earn a livelihood by utilizing their personal skill, knowledge and experience."); *MPI, Inc. v. Dupre*, 596 S.W.2d 251, 254 (Tex. App. 1980) (Action for violation of duty of confidentiality and loyalty against employees who did not have non-compete covenant and who established competing company. "The policy of the law is one in approval for such to be done. It generally is a part of what is called the free enterprise system.").

What these cases show is that when courts construe torts that are in derogation of an employee's right to compete in the market, that right is taken seriously. The tort is construed

with the same, or even narrower, policy limitations as are imposed on non-compete covenants. Because the tort restrains the same conduct and has the same effect on the "competitive basis of our free economy," *AMP Inc. v. Fleischhacker*, 823 F.2d 1199, 1205 (7th Cir. 1987), but potentially applies to a larger group of employees and without regard to a contract, it stands to reason that the types of restrictions placed on covenants are carried over to the related tort.

4. The Limitations on Covenant Damages in *Syncom I* Apply to Fiduciary Duty

The fourth reason to treat the covenant and the tort similarly is that this Court's decision in *Syncom I* implicitly recognized that the list of theaters comprising Syncom's damage claim would be the same for both causes of action. In the section of this Court's opinion that addressed damages for both causes of action, this Court wrote:

> [B]ecause 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.

Syncom I, 155 N.H. at 88. The Court did not address itself to damages only on the covenant, but generally to "a proper calculation of damages" which includes damages for the fiduciary count.

5. Fiduciary Count Added at End of Trial

Finally, the reason to treat the covenant and the tort similarly is that this case was tried to the court essentially on the covenant alone. Syncom's request to add the fiduciary count was not granted until the very last moments of the last day of the nine-day trial. *Oct. 15, 2004 Trial Trn. Day 9 of 9*, at 814.

C. No Theaters, No Causation, No Damages

In its brief Syncom argues that the trial court's previous finding of damages – before it was limited by this Court – still stands. That is, Syncom claims that the list of theaters the trial court first used to calculate damages is still viable. Given the limitations the law places on damages for actions that are in restraint of trade and competition, that list has plainly been abandoned.

On remand however, the court in its discretion declined to make a new list limited in accord with the mandate of *Syncom I*. Consequently, there is now before this Court *no* list of theaters, *no* temporal or geographic scope of possible damages, and *no* finding of causation with regard to any theaters or classes of them. From the remand court's award of "zero money damages as against William Hogan," and its statement that "Hogan's misdeeds without the leadership of Wood in all probability would not have cost [Syncom] any loss of business," it must be surmised that such a list of theaters – and causation regarding them – cannot be made.

This Court should thus affirm the remand court's award or "zero money damages as against William Hogan."

V. Fiduciary Duty Claim is Preempted by New Hampshire's Trade Secret Act

Syncom's allegations regarding Mr. Hogan's conduct is that he took information from Syncom and gave it to Wood and Big-E, thereby aiding Wood's efforts to take Syncom's customers. The information included "production rates" – industry standards regarding how much time certain cleaning tasks take – and possibly forms used in the estimation of cleaning jobs. *Syncom I*, 155 N.H. at 77; *Syncom's Brf.* at 10-12.

New Hampshire adopted the Uniform Trade Secrets Act, RSA 350-B in 1990. It "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." RSA 350-B:7, I. The statute "essentially creates a system in which information is classified only as either a protected trade secret or unprotected general knowledge," *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 777 (2006) (quotations omitted), and "preempts claims that are based upon the unauthorized use of information, regardless of whether that information meets the statutory definition of a trade secret." *Id.*

If the information Mr. Hogan gave Big-E was merely "unprotected general knowledge," there cannot be any damage. If it was more than that, as Syncom has alleged, then its fiduciary duty claim is preempted by the statute.

The lower court, however, specifically held that Mr. Hogan did not violate the statute. PLAINTIFF'S SECOND AMENDED REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW (Oct. 14, 2004), *appx. to Syncom's brf.* at 27, 45, proposed finding #141. During the remand proceeding, Mr. Hogan repeatedly brought this issue to the attention of the trial court. DEFENDANT WILLIAM HOGAN'S MEMORANDUM REGARDING WHAT ISSUES ARE TO BE DECIDED ON REMAND (Apr. 30, 2008); DEFENDANT WILLIAM HOGAN'S TRIAL MEMORANDUM OF LAW ON REMAND AND

MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS (Sept. 17, 2008).[6]

Accordingly, this Court should dismiss Syncom's fiduciary duty claim as preempted by the New Hampshire Uniform Trade Secrets Act.

[6]These documents are not appended to this brief because they are voluminous. If preservation of the issue in the remand proceeding is questioned, Mr. Hogan will supply the documents to this Court.

VI. Joint and Several Liability; Apportionment of Fees; Further Fees Unwarranted

After quoting New Hampshire's law of joint and several liability, Syncom argues that "liability of Defendant Hogan was correctly held to be joint and several with Defendant Wood, as a matter of law." *Syncom's Brf.* at 23. But the remand court found "zero money damages as against William Hogan." It thus appears that Syncom is contesting how to divide zero, an operation that is both logically irrelevant and mathematically impossible.

Syncom has not addressed, however, the issue raised in Mr. Hogan's opening brief regarding the remand court's application of the law of joint and several liability to the award of attorneys fees. Syncom thus appears to have waived any objection, and this Court should order that if fees are awarded, they should be apportioned in accord with the request Mr. Hogan made in his opening brief.

Finally Syncom suggests that an award of fees "should be augmented to include an award of all attorney fees incurred by Syncom on remand to the trial court." *Syncom's Brf.* at 20. The request must first be denied for the reasons Mr. Hogan set forth in his opening brief. It should also be denied because Syncom's pursuit of remedies after *Syncom I* is in bad faith. This Court made clear in *Syncom I* that the injunction was too long and too broad; yet Syncom already got its benefit. Whether reformed or not, the period of the covenant ended long ago, and as the remand court recognized by declining to reform, the dispute as a practical matter is moot. Syncom nonetheless pushed Big-E out of the theater cleaning business, drove Wood into bankruptcy, and long ago ensured Mr. Hogan "has very little by way of personal assets." What practical gain could be had from prosecuting this case after *Syncom I* cannot be easily discerned. It appears Syncom is motivated only by vindictiveness, which should not be further rewarded.

CONCLUSION

Based on the foregoing, William Hogan requests this Court leave alone the remand court's award of zero money damages, dismiss the fiduciary duty claim as preempted, and deny Syncom's request for further fees. Mr. Hogan also requests the relief specified in his opening brief.

Respectfully submitted,

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Dated: September 10, 2009

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CERTIFICATION

I hereby certify that on September 10, 2009, copies of the foregoing will be forwarded to William S. Gannon, Esq.; V. Richards Ward Jr., Esq.; and to Joseph F. Hook, Esq.

Dated: September 10, 2009

Joshua L. Gordon, Esq.

APPENDIX

STATE OF NEW HAMPSHIRE

ROCKINGHAM:SS

SUPERIOR COURT
02-E-188

SYNCOM INDUSTRIES, INC.
v.
WOOD ET ALS.

WILLIAM HOGAN'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

The defendant William Hogan requests the court to find and rule as follows:

1. William Hogan was employed by the "Company" in September of 2001. Granted

2. William Hogan entered into a "key employment agreement" with the "Company" on September 13, 2001. Granted

3. The "Company" is not the plaintiff in this case. Denied

4. The key employment agreement included a clause that stated, "during [my] employment with the Company [I] would not become interested or associated, directly or indirectly as principal, agent, employee or consultant with any other company in a similar business:" Granted

5. The key employment agreement also contained a post employment restriction on William Hogan, whether he was terminated "with or without cause." Granted

6. The public policy of New Hampshire encourages free trade and discourages covenants not to compete, National Employment Service Corp. v. Olsten Staffing Service, Inc., 145 NH 158 (2000). A restraint on employment is reasonable only if it is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee, and is not injurious to the public interest." National Employment, *supra*. Granted

7. The post employment restriction on William Hogan's employment was unreasonable as a matter of law, and therefore unenforceable, because: it is overbroad in time (three years), and in geographical area, given the nature of the Company's business, and the employee's limited period of employment; it allows the Company to terminate the employee at any time with or without cause. Denied

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8. In order to induce William Hogan to sign the key employment agreement, the Company agreed to provide medical health insurance and profit sharing to William Hogan.	Denied
9. The Company failed and refused to provide medical health benefits to William Hogan during his employment.	Denied
10. The Company failed and refused to provide profit sharing to William Hogan during his employment.	Granted
11. William Hogan began to seek other employment in December of 2001.	Denied
12. William Hogan worked for the Company for about four and one half months.	Granted
13. William Hogan was terminated by the Company without cause in February of 2002.	Denied
14. At the time of termination, William Hogan had not become interested in or associated with, any other company in a similar business, directly or indirectly as principal, agent, employee or consultant.	Denied
15. Prior to termination, William Hogan had not breached the employment contract.	Denied
16. At the time of termination, the Company failed and refused to pay William Hogan his accumulated wages, and his accumulated expenses incurred on behalf of the Company..	Granted
17. William Hogan was forced to obtain relief through litigation against the Company.	Granted
18. The Company breached its employment agreement with William Hogan prior to termination and after termination because it did not provide medical health insurance and profit sharing during the term of employment, and it failed to pay lawful wages and expenses after termination.	Denied
19. It is not equitable to allow the Company to enforce a restrictive covenant when the Company itself has breached the employment contract. Laconia Clinic, Inc. v. Cullen, 119 NH 804 (1979).	Denied
20. By failing to provide medical benefits and profit sharing to William Hogan, the Company did not provide consideration for the employment contract, and was therefore unenforceable. See, Jostens, Inc. v. Nat'l. Computer Systems, Inc, 318 NW 2d 691 (Minn.,1982), cited in "You're Fired! And Don't Forget Your Non-Compete. The Enforceability of Restrictive Covenants in Involuntary Discharge Cases", Fall 2002, 1 DePaul Bus. and Comm. L.J. 1.	Denied

21. After his termination in February of 2002, William Hogan was unemployed for a period of time and then was employed by a company that did not compete with the Company. Granted

22. The Company sued William Hogan in this matter in May of 2002. Granted

23. At the time of this suit in May of 2002, William Hogan had not breached any terms of the non-competition clause. Denied

24. William Hogan caused no damages to the Company. Denied

25. The equities of the case require that the restrictive covenant is unreasonable and therefore unenforceable. Restatement (Second) of Contracts 188; National Employment, *supra*. Denied

Respectfully Submitted.
William Hogan
By his attorney,

May 10, 2004

Mark F. Sullivan

CERTIFICATION

I certify that I have provided a copy of this pleading to Attorney William Gannon and Attorney James Davis.

May 10, 2004

Mark F. Sullivan

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