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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

Case No. 2011-CP-46-000179

EnerSys Delaware Inc. Appellant,

v.

Tammy Hopkins Respondent.

RECORD ON APPEAL

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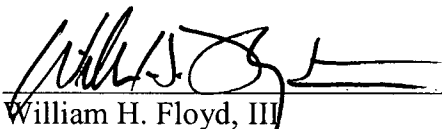
SC Court of Appeals

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.



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November 16, 2011
Columbia, South Carolina

Attorneys for Appellant
EnerSys Delaware Inc.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT
C/A NO.: 2011-CP-43-179
JAMES S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Enersys Delaware, Inc.,

Plaintiff,

vs.

Tammy Hopkins,

Defendant.

ORDER

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Chris L. Hoff
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter was before the court on April 20, 2011, for hearing of the plaintiff's motions for contempt and to disqualify counsel. William H. Floyd, III, Esq., Angus H. Macaulay, Esq., and James A. Byars, Esq., appeared for the plaintiff, and George A. Harper, Esq., appeared on behalf of the defendant.

CONTEMPT OF COURT

The contempt motion is held in abeyance. The defendant and the plaintiff advised the court that both want the data from Yahoo that would supposedly shed light on the whereabouts of emails both claim were improperly deleted. (Defendant admits she deleted, with "approval" of her attorney, "spam" emails she claims had no relation to Enersys.). This was done after the February 10, 2011 hearing on the motion for preliminary injunction. The plaintiff believes she deleted Enersys-related emails and contends that even if she deleted only spam emails, that is a violation of the February 10, 2011 order, as she was ordered to delete no emails whatsoever. Enersys claims that but for the red flag of eighteen (18) days of no emails in any email box,

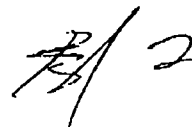
BJ 1

Enersys would not be forced to go to the time and expense of obtaining email account information from Yahoo. On the other hand, defendant claims the Enersys computer expert deleted seventy (70) emails after she turned over her home computer to Enersys.

Enersys maintains the defendant is also in contempt of court for her action and inaction relative to her Blackberry devices. Enersys contends that when the defendant's Blackberry was delivered to its computer expert it was "stripped", i.e., minus its battery and memory card. Defendant testified that when she bought this Blackberry on E-Bay, it had no memory card, and she never obtained one. She claims she bought a new Blackberry on E-Bay, this one also without a memory card. She claims the battery for the first Blackberry was recycled after she bought the second Blackberry.

The defendant has heretofore resisted turning over her second Blackberry for inspection. She testified as to three reasons for this resistance. First, she testified she has no landline and that she needed her phone constantly and that giving up her phone for even one day would cause substantial hardship. Second, she testified she would have to drive to Columbia to turn the phone over, and gasoline would be expensive. Third, she testified she does not want to leave her son unsupervised for an entire day while she waited in Columbia. Upon questioning by the court, the defendant revealed that her son, though unemployed, is twenty years old and of sound mind and body. However, the defendant seems to think he cannot fend for himself for one day. That notion is preposterous and her rationale borders on contempt. The court will rule further on this point pending the results of the Yahoo data recovery discussed herein.

At the hearing, the court ordered the defendant to deliver her second Blackberry in its complete state to the Enersys computer expert on Tuesday, April 26, 2011 at 9:00 a.m. at the



plaintiff's expert's office in Columbia. Enersys will pay the defendant thirty dollars (\$30.00) for gasoline. The court notes that if the defendant failed to cooperate with this inspection, she has done so at her own peril.

Issues concerning any contemptuous conduct on the part of the defendant for deleting other emails will be addressed at a hearing after the Yahoo data is obtained and reviewed. The parties, both having expressed a desire to obtain the Yahoo data, are ordered to cooperate with one another in their efforts to obtain the data and to give all reasonable consents to Yahoo and courts of other states that might be necessary.

DISQUALIFICATION OF COUNSEL

Plaintiff contends defendant's attorney, George A. Harper, Esq., should be disqualified from representing the defendant. Mr. Harper and his former firm, Jackson Lewis, LLP, represented plaintiff from approximately 2000 until 2004 in employment and labor law matters, specifically in litigation concerning its Sumter operations. Plaintiff claims that Mr. Harper obtained confidential knowledge of, and in fact helped develop, personnel policies, procedures, and litigation strategies (all of which plaintiff claims are protected by the attorney-client privilege) regarding employment and labor law disputes. Plaintiff claims that throughout the attorney-client relationship, plaintiff's agents, including Theodore Fries (plaintiff's Director of Administration), communicated numerous client confidences to Mr. Harper related to plaintiff's employment policies and practices, in addition to other confidential communications related to Mr. Harper's representation of plaintiff.

A handwritten signature in black ink, appearing to be 'B/C' or similar, located in the bottom right corner of the page.

Plaintiff cites five particular lawsuits in which Mr. Harper represented plaintiff, but emphasizes his services in one particular case, Enersys, Inc. v. Choice Phillips, 3:01-CV-02582-MJP, which was filed in 2001 and ended in 2004. Plaintiff alleged in the Phillips case that Phillips, plaintiff's Human Resources Manager at the Sumter plant, had defamed the plaintiff and violated the confidentiality agreement that existed between him and plaintiff.

Some background on the Phillips case is perhaps relevant to the issue of disqualification. The cause of action for defamation was based on the allegation that Phillips had published false information that plaintiff had provided illegal assistance to an anti-union committee, and that Phillips had breached the terms of his confidentiality agreement with the plaintiff.

Phillips did not answer the complaint and a default judgment of five-hundred dollars (\$500.00) was entered against him. Subsequently, the judgment was overturned on the ground of fraud, specifically because an Enersys employee gave perjured testimony to the Federal Court that no illegal anti-union assistance had been provided, while in truth Enersys had provided the illegal assistance. Enersys blamed its counsel, the Jackson Lewis law firm, for providing the illegal assistance. Litigation ensued between Enersys and Jackson Lewis, the results of which are unknown to this court.

The court is well aware of the sanctity of the attorney-client privilege. The court has carefully considered the arguments of the plaintiff and the defendant and is compelled to conclude that disqualification is not warranted under Rule 1.9(a) of the Rules of Professional Conduct. Rule 1.9(a) prohibits a lawyer who has formerly represented a client, absent written consent, from thereafter representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former

client...." (emphasis added). Rule 1.9(b) prohibits such representation by a lawyer when his former firm represented the former client. Rule 1.9(c) prohibits a lawyer in such a situation from using or relating information connected to the former representation to the disadvantage of the former client.

In Townsend v. Townsend, 323 SC 309, 474 SE2d 424 (1996), our Supreme Court held that a trial court does have the authority to disqualify counsel if the prohibitions of Rule 1.9 warrant ^{of} disqualification. The Court quoted 1 Hazard & Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, §1.9:10, at 293 (1996) for the proposition that in determining whether a matter was "substantially" related under 1.9, the Court should consider whether the lawyer "would have or reasonably could have learned confidential information in the first representation that would be of significance in the second." Townsend, 474 SE2d at 429. (emphasis added).

The issue in this case is whether Mr. Harper "reasonably could have learned confidential information" while he represented Enersys. Enersys focuses its argument on the assertion that he assisted Enersys in the development of its confidential personnel decisions, agreements, policies, and procedures, and that he was responsible for developing litigation strategy involving those policies and agreements, "many of which remain largely unchanged." (see plaintiff's memorandum, p. 7).¹

In my view, the fact that Mr. Harper assisted in the development of personnel decisions, agreements, policies, procedures, and litigation strategies does not warrant disqualification in this case. There is no similarity between this case and the five cases referenced by the plaintiff, except that they involve disputes with an employee. The fact that the plaintiff developed a certain

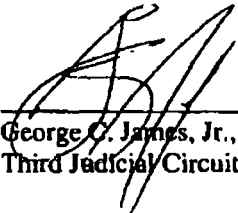
¹ This quoted assertion is from counsel for Enersys but does not appear in the affidavit of Mr. Fries.

method of handling these disputes that has survived over seven years does not warrant disqualification.

Based upon the foregoing, it is:

ORDERED that the plaintiff's motion for contempt is held in abeyance; it is further

ORDERED that the motion to disqualify Mr. Harper is denied.


George C. James, Jr., Circuit Court Judge
Third Judicial Circuit

Date: May 2, 2011
Sumter, SC



STATE OF SOUTH CAROLINA

RECORDED
2011 FEB 25 AM 10:54

COUNTY OF SUMTER

JANEL C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

IN THE CIRCUIT COURT

EnerSys Delaware Inc.,

Case No. 2011-CP-43-000179

Plaintiff,

AMENDED COMPLAINT

v.

Tammy Hopkins,

Defendant.

The Plaintiff, EnerSys Delaware Inc. ("EnerSys"), by and through its undersigned counsel and complaining of the Defendant, Tammy Hopkins, alleges as follows:

PARTIES AND JURISDICTION

1. EnerSys is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business located in the State of Pennsylvania. EnerSys maintains a facility in Sumter County, South Carolina.

2. EnerSys is informed and believes that the Defendant, Tammy Hopkins ("Ms. Hopkins"), is a citizen and resident of Sumter County, South Carolina. Ms. Hopkins has been employed by EnerSys at its facility in Sumter County, South Carolina.

3. This Court has personal jurisdiction over the parties to this action and has subject matter jurisdiction with respect to all causes stated herein. Venue is proper in this forum in that all events surrounding this claim as stated below occurred in Sumter County, South Carolina.

FACTUAL ALLEGATIONS

4. EnerSys is an international company specializing in the manufacture of industrial batteries, among other products. At EnerSys' Sumter, South Carolina facility, employees manufacture heavy steel boxes and trays used to house batteries.

5. Ms. Hopkins has worked for EnerSys as a Junior Accountant since approximately March 2005. In that capacity, Ms. Hopkins had access to confidential EnerSys information, including but not limited to personnel and payroll records regarding current and former Sumter facility employees and sensitive personal information regarding the same. Despite having access to sensitive payroll records, personnel information, and confidential business information, Ms. Hopkins was at no time authorized to access this information outside the scope of her duties in administering the Sumter facility payroll and accounts payable.

6. In connection with her employment at EnerSys, Hopkins signed a Confidentiality Agreement setting forth her obligations both during and after her employment with EnerSys (the "Agreement"). By signing the Agreement, Hopkins acknowledged that, in connection with her work for EnerSys, she would have access to confidential and proprietary information. Specifically, Ms. Hopkins agreed:

1. Confidential or Proprietary Information: I agree that, during or at any time after the period of my employment with the Company, I will not disclose any confidential or proprietary information of the Company or any business unit, division, subsidiary or affiliate thereof, to any person, firm, corporation, association, or other entity (other than to appropriate persons in the Company's organization) for any reason or purpose whatsoever, nor will I make use of any such confidential or proprietary information for my own purpose or for the benefit of any person, firm, corporation or other entity except the Company.

By agreeing to this provision, Ms. Hopkins also expressly agreed that her obligations with respect to confidential or proprietary information extend to EnerSys' "payroll and other

confidential employee matters, or other information relating to the Company's business, books and records and private processes, as they may exist from time to time, which I may have acquired or obtained by virtue of working for the Company."

7. Furthermore, Ms. Hopkins acknowledged that any unauthorized disclosure or misappropriation of such confidential and proprietary information would irreparably harm EnerSys and entitle EnerSys to injunctive relief. Specifically, Ms. Hopkins agreed:

10. Remedies Upon Breach: I recognize and acknowledge that in the event of any default in, or breach of any of the terms, conditions, or provision of this Agreement (either actual or threatened) by me, the Company's remedies at law shall be inadequate. Accordingly, I agree that in such events, the Company shall have the right to specific performance and/or injunctive relief in addition to any and all other remedies and rights at law or in equity, and such rights and remedies shall be cumulative. In the event of a breach of paragraphs 1 or 2 of this Agreement, and if any customers or employees of the Company are lost by the Company due to the breach, the parties hereby stipulate that the court may award compensatory damages.

8. Ms. Hopkins reviewed the Agreement, acknowledged that she would "observe and fully comply with" the terms of the Agreement, and signed the Agreement on or about March 7, 2005.

9. Also in connection with Ms. Hopkins' employment with EnerSys, Ms. Hopkins received and acknowledged receipt by signature of an Employee Handbook (the "Handbook"). The Handbook contained a provision directed to "Confidentiality," which reiterated Ms. Hopkins understanding that she was obligated to guard against the disclosure or transmission of EnerSys' confidential and proprietary information, including its personnel and payroll records.

10. Among the internal policies EnerSys maintains and to which Ms. Hopkins was subject as an employee of EnerSys is a policy directed to employees' use of EnerSys' information systems and email ("IT Policy"). EnerSys' IT Policy provides that employees are

required to use EnerSys' email systems for EnerSys' business purposes only and specifically provides that "Confidential or proprietary information shall not be distributed or relayed over external mail systems such as Internet email." Ms. Hopkins read and acknowledged that she agreed to the IT Policy by her signature on March 7, 2005.

11. In January 2011, Ms. Hopkins was notified by EnerSys that her position was being eliminated due to a restructuring of the accounting department and reorganization of responsibilities. Ms. Hopkins agreed to remain an employee of EnerSys for a period of weeks to assist in the transition.

12. During this transition period, EnerSys received reports from other employees that Ms. Hopkins had verbally divulged confidential payroll-related information outside the scope of her authority and control. As a result, EnerSys began conducting an investigation into Ms. Hopkins' EnerSys email account for the purpose of determining whether Ms. Hopkins was disclosing confidential and proprietary business and/or payroll-related information outside of the EnerSys' network.

13. In conducting its investigation into Ms. Hopkins' email account, EnerSys discovered that, in direct violation of the Agreement between Ms. Hopkins and EnerSys and the terms of EnerSys' Handbook and IT Policy, Ms. Hopkins had improperly accessed and downloaded EnerSys' confidential and proprietary payroll information and e-mailed such information, unencrypted, out of EnerSys' protected network and to her personal e-mail address, complicatedone@ymail.com. The payroll information included sensitive personal and business information related to over 500 EnerSys employees nationwide, most of whom were not employees of EnerSys' Sumter County facility. EnerSys discovered that Ms. Hopkins had accessed and transmitted this information on January 21, 2011, just one business day before her

access to any EnerSys payroll-related information was to be terminated as part of the transition to a new accounting model.

14. In her position as a Junior Accountant, Ms. Hopkins was not authorized by EnerSys to access, download, or transmit this information, particularly for employees outside the Sumter County facility, nor did any legitimate business reason exist for her to do so.

15. In addition, EnerSys discovered that Ms. Hopkins used her EnerSys email account to communicate with an employee of a direct competitor of EnerSys and learned that, upon information and belief, Ms. Hopkins transmitted information to that competitor employee of unknown content and origin. Moreover, Ms. Hopkins has improperly sent confidential information via e-mail to one or more current or former employee(s) of EnerSys.

16. Ms. Hopkins has refused to return all confidential information to the Company.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

17. Each and every allegation contained in the preceding paragraphs 1-16 is repeated, realleged, and reasserted as if fully set forth verbatim herein.

18. The Agreement is a valid and enforceable contract between EnerSys and Ms. Hopkins.

19. By engaging in the negligent, wanton, heedless, wrong, reckless, improper, intentional, and/or illegal conduct set forth herein, Ms. Hopkins has materially breached the Agreement.

20. As a direct and proximate result of Ms. Hopkins' negligent, wanton, heedless, wrong, reckless, improper, intentional, and/or illegal breach of the Agreement, EnerSys has suffered actual damages.

21. As a direct and proximate result of Ms. Hopkins' negligent, wanton, heedless, wrong, reckless, improper, intentional, and/or illegal breach of the Agreement, EnerSys is entitled to recover such incurred damages from Ms. Hopkins.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Duty of Good Faith and Fair Dealing)

22. Each and every allegation contained in the preceding paragraphs 1-21 is repeated, realleged, and reasserted as if fully set forth verbatim herein.

23. As set forth above, Ms. Hopkins has materially breached the Agreement, and, as a direct and proximate result of Ms. Hopkins' breach of the Agreement, EnerSys has suffered actual damages.

24. Ms. Hopkins' also breached the implied duty of good faith and fair dealing in the Agreement by engaging in conduct specifically designed and intended to harm and damage EnerSys, reflecting bad faith in the performance of her contractual obligations.

25. As a direct and proximate result of Ms. Hopkins' breach of the implied duty of good faith and fair dealing, EnerSys has suffered actual damages and is entitled to recover such damages from Ms. Hopkins.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

26. Each and every allegation contained in the preceding paragraphs 1-25 is repeated, realleged, and reasserted as if fully set forth verbatim herein.

27. Ms. Hopkins intended to fraudulently breach the Agreement and her breach was accompanied by fraudulent acts, including without limitation, willfully making false and/or misleading statements to EnerSys employees regarding her knowledge of and/or purpose in

accessing confidential and proprietary information and willfully and knowingly accessing and obtaining proprietary information in excess of her authorization.

28. As a direct and proximate result of Ms. Hopkins' breach of contract accompanied by fraudulent acts, EnerSys has suffered actual damages and is entitled to recover such damages from Ms. Hopkins.

FOR A FOURTH CAUSE OF ACTION
(Violation of the South Carolina Trade Secrets Act)

29. Each and every allegation contained in the preceding paragraphs 1-28 is repeated, recalleged, and reasserted as if fully set forth verbatim herein.

30. As set forth above, upon information and belief, Ms. Hopkins has willfully taken possession of confidential and proprietary information belonging to EnerSys which represents trade secrets as defined in the South Carolina Trade Secrets Act.

31. Ms. Hopkins' negligently, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally assumed possession of and/or misappropriated EnerSys' trade secrets by negligent, reckless, improper, intentional, and/or illegal means, including but not limited to conversion, misrepresentation, breach of contract, and breach of loyalty.

32. Ms. Hopkins' acquisition and/or misappropriation includes, but is not limited to, EnerSys' confidential and proprietary payroll and personnel information, misappropriated for the benefit of Ms. Hopkins and to the detriment of EnerSys.

33. As a result of Ms. Hopkins' negligent, wanton, heedless, wrongful, reckless, improper, intentional, and/or illegal actions, EnerSys has suffered actual damages and Ms. Hopkins has been unjustly enriched.

34. As a result of the Ms. Hopkins' negligent, wanton, heedless, wrongful, reckless, improper, intentional, and/or illegal misappropriation of EnerSys' trade secrets, EnerSys seeks an award of actual damages, including the value of the unjust enrichment caused by Ms. Hopkins' misappropriation and benefit there from.

35. As a result of Ms. Hopkins' negligent, wanton, heedless, wrongful, reckless, improper, intentional, and/or illegal actions, EnerSys also seeks an award of punitive damages and attorneys' fees as permitted by the South Carolina Trade Secrets Act.

FOR A FIFTH CAUSE OF ACTION
(Breach of the Duty of Loyalty)

36. Each and every allegation contained in the preceding paragraphs 1-35 is repeated, realleged, and reasserted as if fully set forth verbatim herein.

37. While employed by EnerSys, Ms. Hopkins owed EnerSys a duty of loyalty.

38. Ms. Hopkins negligently, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally breached her duty of loyalty to EnerSys by, among other things, (a) violating the Agreement; (b) accessing EnerSys' confidential and proprietary information in excess of her authority; (c) disclosing EnerSys' confidential and proprietary information to third parties; (d) copying EnerSys' confidential and proprietary information to personal media; (e) forwarding EnerSys' confidential and proprietary information to her personal e-mail accounts; (f) removing EnerSys' confidential and proprietary information from the EnerSys office; and/or (g) attempting to archive and/or destroy other EnerSys confidential and proprietary information.

39. As a result of the negligent, wanton, heedless, wrongful, reckless, improper, intentional, and/or illegal breach of the duty of loyalty by Ms. Hopkins, EnerSys has suffered

actual damages and is entitled to recover such damages from Ms. Hopkins, in addition to any amounts paid to Ms. Hopkins as wages for the period in which she engaged in disloyal acts.

40. EnerSys is also entitled to an award of punitive damages due to the intentional actions of Ms. Hopkins.

FOR A SIXTH CAUSE OF ACTION
(Conversion)

41. Each and every allegation contained in the preceding paragraphs 1-40 is repeated, realleged, and reasserted as if fully set forth verbatim herein.

42. EnerSys owns and is entitled to possession of its confidential and proprietary information.

43. Upon information and belief, Ms. Hopkins is wrongfully in possession of confidential and proprietary information belonging to EnerSys.

44. EnerSys has demanded that Ms. Hopkins return its confidential and proprietary information, but not all of the confidential and proprietary information has been returned.

45. The negligent, wanton, heedless, wrongful, reckless, improper, intentional, and/or illegal actions of Ms. Hopkins constitute a conversion of EnerSys' confidential and proprietary information.

46. EnerSys has suffered actual damages as a result of the negligent, wanton, heedless, wrongful, reckless, improper, intentional, and/or illegal actions of Ms. Hopkins and is entitled to recover such damages from Ms. Hopkins.

47. Because the actions of Ms. Hopkins were reckless, willful, and wanton, EnerSys is also entitled to an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(S.C. Computer Fraud Act)

48. Each and every allegation contained in the preceding paragraphs 1 – 47 is repeated, realleged, and reasserted as fully set forth verbatim herein.

49. Ms. Hopkins willfully, knowingly, maliciously, and without authorization or for an unauthorized purpose directly or indirectly accessed a portion or program of EnerSys' computer system.

50. Ms. Hopkins directly or indirectly accessed a portion or program of EnerSys' computer system for improper or illegal purposes, including upon information and belief one or more of the following: (i) devising or executing a scheme or artifice to defraud; (ii) obtaining money, property, or services by means of false or fraudulent pretenses, representations, promises; or (iii) committing any other crime.

51. As a result, EnerSys has been damaged and is entitled to an award consisting of damages including compensatory damages, restitution, and attorney's fees.

FOR AN EIGHTH CAUSE OF ACTION
(Computer Fraud and Abuse Act)

52. EnerSys realleges the allegations of Paragraphs 1 through 51 above as fully as if set forth herein verbatim.

53. The Federal Computer Fraud and Abuse Act ("CFAA"), makes it a crime, *inter alia*, to (a) intentionally access a computer without authorization or to exceed authorized access, and thereby obtain "information from any protected computer if the conduct involved an interstate or foreign communication;" (b) knowingly and with intent to defraud, access a protected computer without authorization or to exceed authorized access, and by means of such conduct further the intended fraud and obtain anything of value; and (c) "intentionally access[] a protected computer without authorization, and as a result of such conduct," recklessly or

intentionally cause damage. 18 U.S.C. § 1030(3)(c), (a)(4) and (a)(5)(A)(ii) and (iii). EnerSys's computer was a "protected computer" within the meaning of the CFAA.

54. 18 U.S.C. § 1030(g) expressly provides victims of such conduct with a private right of action: "Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief."

55. Ms. Hopkins intentionally accessed EnerSys's computer system without authorization or exceeded any authorized access. Ms. Hopkins was not permitted to download confidential and proprietary information to her work computer or to her personal computer. Through such unauthorized access, Ms. Hopkins has obtained confidential information from a protected computer. Ms. Hopkins' conduct constituted a breach of her fiduciary duties owed to EnerSys and therefore, she did not have authorization or exceeded her authorization as such over EnerSys's computer.

56. Through such unauthorized access, EnerSys has suffered and will continue to suffer economic damage, and losses aggregating more than \$5,000 during a one-year period.

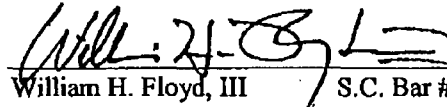
57. As a result, EnerSys has been damaged and is entitled to an award consisting of compensatory damages, restitution, and attorney's fees.

WHEREFORE, Plaintiff EnerSys Delaware Inc., having fully complained, prays for judgment against Defendant Tammy Hopkins with the following particular relief:

1. That Ms. Hopkins be required to account for and immediately return all EnerSys' confidential and proprietary information in her possession, including all originals, hard copies, and electronic copies;
2. That Ms. Hopkins, after returning all confidential and proprietary information to

EnerSys, be required to certify to the Court under oath that she possesses no additional confidential or proprietary information belonging to EnerSys, either originals, hard copies, or electronic copies, and that she has permanently erased from any computer memory, hard drive, or any other means of hard storage or electronic storage, any such confidential and proprietary information belonging to EnerSys;

3. That Ms. Hopkins be required to certify to the Court under oath that she has not and will not transmit EnerSys confidential or proprietary information to any third parties;
4. That Ms. Hopkins be required to disclose to EnerSys the identity of any and all third parties to whom she has previously disclosed EnerSys' confidential or proprietary information;
5. That EnerSys be awarded appropriate equitable relief, including preliminary and permanent injunctive relief;
6. That EnerSys be awarded actual, compensatory, consequential, and special damages;
7. That EnerSys be awarded punitive damages;
8. That EnerSys be awarded attorneys' fees and costs associated with bringing and prosecuting this action;
9. That EnerSys be awarded prejudgment interest; and
10. That EnerSys be awarded such other and further relief as this Court deems just and proper.


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Attorneys for Plaintiff EnerSys Delaware Inc.

February 25, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

IN THE CIRCUIT COURT

ENERSYS DELAWARE INC.,
Plaintiff,

Case No. 2011-CP-43-000179

V.

TAMMY HOPKINS,
Defendant

ANSWER AND COUNTERCLAIM

Defendant, Tammy Hopkins, ("Hopkins") files this Answer and counterclaim to the amended complaint filed by EnerSys Delaware Inc. ("EnerSys" or "Sumter Metals"), files her Counterclaim and would show the Court as follows:

PARTIES AND JURISDICTION

1. Hopkins admits the allegations of Paragraphs 1 through 3 regarding the jurisdiction and venue of this matter.

FACTUAL ALLEGATIONS OF AMENDED COMPLAINT

2. The allegations of paragraph 4 are admitted.
3. Responding to paragraph 5, Hopkins admits she was employed by EnerSys since 2005 and that she had access to certain payroll information for the hourly paid employees in the Sumter facility. Hopkins further admits that if she required access to any payroll information beyond the plant hourly employees, she had to request that access through the corporate headquarters. Any remaining allegations of paragraph 5 are denied.

4. Responding to paragraphs 6, 7, 8 and 9 Hopkins admits she signed a confidentiality agreement as part of her employment and received an Employee Handbook. Hopkins denies she breach any provision in either document and denies the remaining allegations of these paragraphs.
5. Responding to paragraph 10, Hopkins admits she sign a document related to EnerSys' IT policy but denies the remaining allegations of paragraph 10.
6. The allegations of paragraphs 11 through 16 are denied.

CAUSES OF ACTION IN AMENDED COMPLAINT

7. Hopkins denies each and every allegation contained in paragraphs 17 through 57 and denies that Plaintiff is entitled to any relief claimed for each cause of action contained in the Amended Complaint.
8. Any remaining allegations in the amended complaint not specifically admitted are hereby denied

COUNTERCLAIM

This counterclaim is brought pursuant to Rule 13(b) of the South Carolina Rules of Civil Procedure as well as Section 16(b) of the Fair Labor Standards Act of 1938 as amended, ("FLSA") 29 U.S.C. § 201, *et seq.* to address violations of Section 207 of the FLSA and to request this Court to certify this as a collective action pursuant to Section 216(b) to obtain relief for all similarly situated EnerSys employees. This Court has jurisdiction of this counterclaim pursuant to the FLSA because EnerSys is subject to the FLSA and venue is appropriate in this Court because some of the events surrounding this claim occurred in Sumter County, South Carolina

RELEVANT FACTS

1. In March 2005, Hopkins was employed by Sumter Metals (wholly owned by EnerSys) as an account payable clerk. Hopkins also had some responsibilities for processing the payroll for Sumter Metal's hourly paid employees.
2. Initially Hopkins was paid a weekly salary by Sumter Metals. She was not paid for any hours worked in excess of 40 hours within a work week and Sumter Metals kept no records of her hours worked.
3. Hopkins routinely worked between 50 and 55 hours a week and with the knowledge and assent of her immediate supervisors she performed some of her assigned tasks at night and at home.
4. In the fall of 2008, her immediate supervisor, Callie Guiotte, told Hopkins that EnerSys had performed an internal audit of the classification of all of its salaried employees and that she along with "hundreds" of other EnerSys employees were being reclassified as non-exempt from the provisions of the Fair Labor Standards Act.
5. Hopkins asked Guiotte if EnerSys would compensate her for her previous unpaid overtime hours and he said they would not and that if she filed a claim for payment of those hours she would be fired.
6. Guiotte said that EnerSys would give her one weeks pay in lieu of the overtime payments.
7. EnerSys paid Hopkins for one week of additional pay during this time period.

8. Hopkins was instructed by Guiotte to fill out her time sheet to reflect the fact she work 40 hours a week regardless of the actual hours she worked.
9. Pursuant to Guiotte's instructions, Hopkins submitted a time sheet which showed she routinely work the exact same eight hours five days a week.
10. After EnerSys changed Hopkins status from "exempt" to "non-exempt" her job responsibilities did not change.
11. Hopkins continued to work in excess of forty hours most week and Guiotte was aware that she was doing so.
12. EnerSys did not keep accurate records of Hopkins' actual hours worked.
13. On Information and belief, EnerSys identified hundreds of other of its employees that it had been treating as exempt from the timekeeping and overtime pay requirements of the Fair Labor Standards Act who, like Hopkins, were not actually exempt.
14. On information and belief, at the same time EnerSys told Hopkins she was being reclassified as non-exempt it reclassified hundreds of other employees.
15. On information and belief these other employees routinely worked in excess of forty hours a week both before and after they were reclassified.
16. On information and belief, like Hopkins, these employees were working in excess of forty hours a week but EnerSys did not compensate them for the unpaid overtime and did not change their job responsibilities.
17. On information and belief, like Hopkins, EnerSys continued to require these employees to work in excess of forty hours a week but submit a false time report showing they had only worked 40 hours,

18. During the morning of January 17, 2011, EnerSys' regional manager, Bob Aaron phone the Sumter Metals plant manager, Charles Minor and told Minor that he was going to be visiting the plant the next day.
19. During that phone call Aaron asked Minor if Hopkins was still working at Sumter Metals. When Minor said she was, Aaron was displeased and said, "I told you to get rid of her."
20. The next day, Aaron and a corporate personnel officer, Ted Fries, came in the plant and fired Charles Minor.
21. Immediately after Minor was fired, plant personnel came into Hopkins' office; some asked her out to lunch, others said she was "looking hot today" and others said she "made the whole office smell good." Prior to Minor being fired, the plant personnel had never acted in such an overt sexual manner toward Hopkins.
22. Hopkins complained to "Bo" McKinzie, a Sumter Metal shop manager about the employees' behavior.
23. Hopkins had a computer at work which was always on and she was required to tell Callie Guiotte and other Sumter Metals managers what her password was. She was also required to write her password down on a list kept in the Sumter Metals office.
24. As part of her routine job responsibilities, Hopkins would send draft expense reports, accounts payable data, and information regarding plant hourly personnel to her home computer to allow her to work at night. She sent this information with the knowledge and permission of Callie Guiotte and she sent it to her personal "YMAIL" account. Plant personnel, including Guiotte were aware of the address of Hopkins' personal account.

25. On January 21, 2011 at 2:59 P.M. someone used Hopkins' computer at Sumter Metals to send an email to her YMAIL account which, *inter alia*, contained payroll and other personal information for hundreds of EnerSys employees. Access to this information was controlled by EnerSys and required the specific authorization of EnerSys to access and could only be accessed by using the proper codes. Hopkins was never given authorization to access this information and was never given the code necessary to use to acquire it.
26. A person or persons unknown who had access both to Hopkins' computer and the classified payroll and personnel information, downloaded the information, put it on Hopkins' computer and then sent it to her YMAIL account in order to claim that she violated State and Federal law and to support the bring of this action against her.

CAUSE OF ACTION AND CLAIM FOR RELIEF

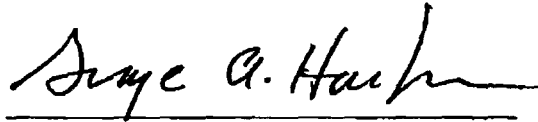
27. The facts alleged in paragraphs 1 through 26 are incorporated herein.
28. EnerSys has violated Section 207 of the FLSA by failing to pay overtime to Hopkins for those hours worked in excess of 40 hours a week and by failing to keep accurate records of her time actually worked.
29. In 2008, as a result of an internal audit, EnerSys was told that it had misclassified Hopkins as well as hundreds of other accounting and sales personnel.
30. EnerSys changed the classification of Hopkins and these other employees from exempt to non-exempt but failed to pay them for any overtime they had already worked.
31. EnerSys did not change the job responsibilities for Hopkins of any of these other individuals and they all (or most) continued to work in excess of 40 hours a week.

32. Hopkins and these other employees were required to submit false time records showing they had only worked 40 hours a week regardless of the actual number of hours they really worked.
33. EnerSys' violated Section 207 of the FLSA and Hopkins and the other similarly situated employees are entitled to payment of one and one-half their normal hourly rate times the number of overtime hours they worked for the period from the filing of this counterclaim back for three years.
34. EnerSys knowingly violated the FLSA and thus its violation is "willful" and Hopkins and other similarly situated employees are entitled to an equal additional amount of their unpaid wages as liquidated damages pursuant to Section 216(a) of the FLSA.
35. Hopkins requests this Court to certify this action as a collective action pursuant to Section 216(b) and to order expedited discovery into the identification and providing notice to all putative class members.
36. Hopkins requests payment of her reasonable and necessary attorneys fees, costs and such other further relief as she may be justly entitled.

CONCLUSION

WHEREFORE, premises considered, Hopkins prays for dismissal of all of EnerSys' claims against her and for judgment against EnerSys for her counterclaim, requests that this Court certify this action as a collective action pursuant to §216(b) of the Fair Labor Standards Act, that she be awarded prejudgment interest, her reasonable and necessary attorneys' fees and costs and such other and further relief as this Court deems just and proper.

Respectfully Submitted,



George A. Harper S.C. Bar # 2718

1229 Lincoln Street
Columbia, SC 29201
803.730.1570
sharperg@mac.com

Attorney for Defendant Tammy Hopkins

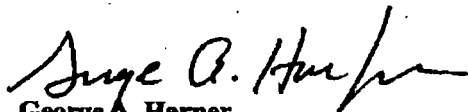
March 21, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer and Counterclaim was served by
United States mail, first-class, postage prepaid upon:

William H. Floyd, III
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29201

This 21st day of March, 2011.


George A. Harper

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE CIRCUIT COURT

EnerSys Delaware Inc.,
Plaintiff,
v.
Tammy Hopkins,
Defendant.

Case No. 2011-CP-43-000179

STATE OF PENNSYLVANIA
COUNTY OF BERKS _____

**AFFIDAVIT OF
THEODORE R. FRIES**

PERSONALLY APPEARED BEFORE ME Theodore R. Fries who, upon
being duly sworn, deposes and says that:

1. My name is Theodore R. Fries, and I am over eighteen years old.
I reside in Reading, Pennsylvania.
2. I am the Director of Administration for EnerSys Americas
("EnerSys"), and I have held that position since April 2002. In that position, I am
responsible for overseeing Human Resources Issues for EnerSys facilities
throughout the United States. EnerSys operates a plant in Sumter County, South
Carolina, where employees make boxes and trays for industrial-grade batteries.
My responsibilities include issues arising from the Sumter operations.
3. In addition to my other duties, I oversee investigations of personnel
issues, and I am directly involved in employment and labor litigation in which
EnerSys is a party. More specifically, I provide information and assistance to

EnerSys attorneys regarding EnerSys' policies and procedures, and I take part in decision-making and direction on behalf of the Company. As a result, I have access to and am familiar with the case files of EnerSys' past employment and labor law litigation, and I have personal knowledge regarding the matters described herein.

4. In the mid-1990s, EnerSys retained counsel from the Greenville office of the law firm Jackson Lewis, LLP, to advise and represent EnerSys in employment and labor matter matters arising from EnerSys' Sumter County plant. In or around 2000, George Harper, Esquire became one of the Jackson Lewis partners responsible for EnerSys' employment law matters in South Carolina. As a result, from approximately 2000-2004, Mr. Harper actively represented and advised EnerSys on numerous employment and labor law matters and lawsuits involving its Sumter operations.

5. I worked closely with Mr. Harper on all EnerSys litigation and personnel matters for which we shared responsibility. In the course of doing so, I often shared confidential EnerSys information with Mr. Harper which I considered to be attorney-client privileged, both related to litigation and to other various personnel policies and procedures impacting EnerSys' Sumter plant.

6. I am aware of at least five litigated labor and employment cases in which Mr. Harper was counsel of record for EnerSys and was therefore a party to numerous EnerSys confidences and confidential communications:

(a) *Singletary v. YUASA, Inc.*: Harper represented YUASA, EnerSys' former entity in Sumter, in the defense of this Americans with

Disability Act case involving a former Sumter County employee.

(b) *Barwick v. EnerSys, Inc.*: Harper represented EnerSys in the defense of this Title VII case, in which a former Sumter plant employee alleged sex discrimination and various state employment causes of action.

(c) *EnerSys, Inc. v. Phillips*: Harper brought this suit on behalf of EnerSys against Choice Phillips, EnerSys' former HR Manager at the Sumter County facility, alleging, among other things, breach of a contract based on a confidentiality agreement, breach accompanied by a fraudulent act, and breach of the duty of good faith and fair dealing.

(d) *International Union v. EnerSys, Inc.*: Harper assisted in the representation of EnerSys in this matter brought by the union of the Sumter County facility against EnerSys for violations of the WARN Act, among other things.

(e) *DuBose v. YUASA, Inc.*: Harper represented YUASA, EnerSys' former entity in Sumter, in the defense of this Americans with Disability Act case involving a former Sumter County employee.

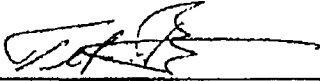
7. In 2004, EnerSys ended its relationship with Jackson Lewis and George Harper and ultimately brought a malpractice action against the firm based on some labor-related advice.

8. On February 2, 2011, I learned that Ms. Hopkins had retained Mr. Harper to represent her in this case involving former EnerSys employee Tammy Hopkins. I immediately recognized Mr. Harper as EnerSys' former labor and employment attorney and remembered the many interactions I had with Mr.

Harper involving EnerSys litigation and personnel matters. EnerSys immediately objected to Mr. Harper's representation. EnerSys has not and will not consent to this representation.

FURTHER AFFIANT SAYETH NOT.

SWORN TO BEFORE ME this
24th day of March, 2011.

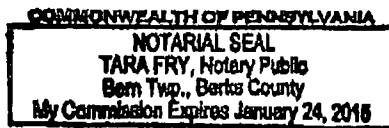


Theodore R. Fries



Notary Public for Pennsylvania

My Commission Expires: 1/24/2015



State of South Carolina)
)
County of Sumter)
)

EnerSys Delaware, Inc.,
Plaintiffs

Transcript of Record
2011-CP-43-000179

vs.
Tammy Hopkins,
Defendant

April 20, 2011
Sumter, S.C.

Before the Honorable George C. James, jr. Judge.

A P P E A R A N C E S:

Mr. William H. Floyd, III,
Attorney for Plaintiff

MR. Angus H. McCaulay,
Attorney for Plaintiff

Mr. George A. Harper,
Attorney for Defendant

Margaret T. Sullivan,
Court Reporter

Tammy Hopkins-recross by Floyd

1 THE COURT: Mr. Harper, do you have a copy
2 of that?

3 MR. HARPER: I haven't seen it, Judge.

4 THE COURT: Okay. You can hand me -- hand
5 one to me. And I've got the clerk's file here.
6 But if you have got the original, I can take that
7 original and a copy.

8 THE COURT: Okay, any other points,
9 Mr. Floyd, on the contempt issues?

10 MR. FLOYD: Nothing further at this time,
11 Your Honor.

12 THE COURT: I will be glad to hear you,
13 Mr. McCaulay, on the motion for disqualification.

14 MR. MCCAULAY: Thank you, Your Honor. May
15 It Please the Court, Mr. Harper previously
16 represented EnerSys for several employment law
17 matters over the course of several years. These
18 representations -- his representation included not
19 only representation on specific employment law
20 cases, but also included general advice on
21 employment issue. As a result of his previous
22 representation, Your Honor, Mr. Harper became
23 aware of EnerSys' policies, its procedures and the
24 course of conduct when dealing with employee
25 issues.

1 EnerSys is particularly concerned, Your
2 Honor, with the fact that Mr. Harper previously
3 represented it in the case of the Choice Billups
4 -- excuse me, in the case of EnerSys versus Choice
5 Billups.

6 THE COURT: I read all the information on
7 that specific case that you and Mr. Harper
8 provided.

9 MR. MACAULAY: The point we would want to
10 make; is that, Rule 1.9, makes it clear, Your
11 Honor, that a lawyer cannot represent a new client
12 against a former client in the same or
13 substantially related manner. The rules commonly
14 define substantially related matter as one in
15 which involves the same or similar transaction or
16 legal dispute. And now our concern with, and I
17 can talk more about the Choice Billups. I can
18 talk more about it if you want to.

19 THE COURT: No, I understand what that's
20 about.

21 MR. MCCAULAY: Okay.

22 THE COURT: It's about an alleged
23 slanderous remark that he made.

24 MR. MCCAULAY: No, sir. I respectfully---

25 THE COURT: Over an e-mail?

1 MR. MCCAULAY: No, sir.

2 THE COURT: Is that a different one then?

3 MR. MCCAULAY: In Choice Billups', there
4 are several causes of action in both the Choice
5 Billups case. Very similar to the case that
6 EnerSys has against Ms. Hopkins. The Choice
7 Billups case included claims for breach of
8 contract. Breach of contract accompanied by a
9 fraudulent act. And also breach of the covenant
10 of good faith and fair dealing, which are the same
11 causes of action that EnerSys is bringing against
12 Mr. Harper's client in this case.

13 Both the Choice Billups case and the case
14 that we have brought against Ms. Hopkins involved
15 Ms. Hopkins' alleged breach of a confidentiality
16 agreement. And the breach of a confidentiality
17 agreement in the Choice Billups.

18 THE COURT: Is this the same agreement?

19 MR. MCCAULAY: No, sir. It's a different
20 agreement. It's certainly covering a lot of the
21 same issues. It's also interesting, Your Honor,
22 that the Choice Billups case dealt with the
23 disclosure or the alleged disclosure of
24 confidential payroll information, which is
25 involved also in our claim against Ms. Hopkins in

1 this case here. And so what we feel, Your Honor,
2 is that Mr. Harper's representation in the Choice
3 Billups case -- representation of EnerSys on
4 behalf in the Choice Billups case, is
5 substantially related to the case EnerSys is now
6 bringing against Ms. Hopkins. Who now happens to
7 be Mr. Harper's client.

8 THE COURT: But in the context of what
9 you've said it would have to be the same
10 transaction.

11 MR. MACAULAY: The same or similar
12 transaction, Your Honor. It's not ever going to
13 be the same duplicate of the transaction. It
14 certainly goes into a situation where you talk
15 about a breach of a confidentiality agreement.
16 Three of the same causes of action in both cases.
17 Coupled with the fact that Mr. Harper was EnerSys'
18 employment lawyer. Mr. Harper was the person to
19 whom EnerSys went to when they had to deal with
20 employment issues in their Sumter plant.

21 Now one of the things that Mr. Harper says
22 is that he only worked in the battery plant. He
23 wasn't working in the Sumter Metals plant where
24 Ms. Hopkins was employed. But I think the
25 important thing to keep in mind; is that, the

1 battery plant, Your Honor, and the Sumter Metals
2 plant are two miles apart. They're both owned by
3 EnerSys. They both have the same management, both
4 subject to the same policies.

5 THE COURT: Well during the course of this
6 litigation, wouldn't any lawyer for Ms. Hopkins be
7 entitled to have copies of the agreement that you
8 claim was breached on the EnerSys Policies and
9 Procedures?

10 MR. MCCAULAY: Absolutely, Your Honor.

11 THE COURT: With some confidentiality of
12 course protecting any public disclosure of certain
13 things?

14 MR. MACAULAY: Sure, Your Honor. But it's
15 not the actual agreement that is at issue. It's
16 the background of the agreement.

17 THE COURT: Talk to me about that.

18 MR. MACAULAY: If you look at the
19 comments, and if you look at some of the comments
20 in to Rule 1.9, what it talks about in addition to
21 whether or not Mr. Harper represented EnerSys in
22 the same transaction, but you also look in to what
23 is Mr. Harper's knowledge of EnerSys' course of
24 dealing with it's policies. What you have is the
25 affidavit of Mr. Friers. Mr. Friers said that

1 again that he talked with Mr. Harper all the time
2 about EnerSys' Policies, Procedures. It's course
3 of conduct in dealing with its employees for a
4 long period of time.

5 Like I said it was Mr. Harper was EnerSys'
6 employee. Therefore, Mr. Harper gained essential
7 insight into the inner workings, both confidential
8 attorney/client inner workings of EnerSys. And
9 now essentially Mr. Harper has changed sides.
10 He's now defending Ms. Hopkins in a case that's
11 very similar to a case that he brought against
12 another client on behalf of EnerSys. And there's
13 the possibility, strong possibility. Certainly we
14 look at the affidavit of Mr. Friers; that he can
15 use the confidential attorney/client information
16 that he gained through his previous representation
17 in helping to defend Ms. Hopkins in this case.

18 THE COURT: Without being specific,
19 because I know that you don't want to talk
20 about---

21 MR. MCCAULAY: Absolutely.

22 THE COURT: ---attorney/client privileges.
23 But give me, a question I am dying to ask is; such
24 as.

25 MR. MCCAULAY: Well I think, Your Honor,

1 and of the things that the comments make clear; is
2 that, A: It's going to be hard to sit here and
3 put your finger on specific information that
4 Mr. Harper gained while employed while in
5 representing EnerSys.

6 I think when you consider the fact that as
7 an attorney who is representing a lawyer,
8 representing a client. Not just a client over to
9 one case for a short period of time, they are
10 going to gain insight into that company. And they
11 are going to gain insight in to how that company
12 operates. Insight that could be used to the
13 detriment of that company later on down the road;
14 to the detriment of EnerSys now that Mr. Harper is
15 defending Ms. Hopkins.

16 So I think that, you know, another thing
17 to keep in mind, Your Honor, is that some of the
18 same employees, some of the same folks that
19 Mr. Harper would have been involved with while
20 representing EnerSys, he could theoretically end
21 up deposing them or going against them in this
22 case with Ms. Hopkins.

23 One of the, if you look at the
24 counterclaim that Mr. Harper had brought on behalf
25 of Ms. Hopkins, he mentions several times an

1 individual by the name of Callie Dia.

2 THE COURT: Right.

3 MR. MCCAULAY: Who was the chief
4 accountant, and also Ms. Hopkins supervisor while
5 she was employed with EnerSys. Well it's my
6 understanding that Mr. Yuen has been at EnerSys
7 for a long time.

8 THE COURT: That's a male?

9 MR. MACAULAY: Yes, sir. Who has been at
10 EnerSys for a long time, and would have worked
11 with Mr. Harper who was doing employment work.

12 THE COURT: It's your understanding that
13 he might have, or did he definitely work with him?

14 MR. MCCAULAY: My understanding is that
15 his name has appeared in the information
16 specifically related to Choice Billups.

17 THE COURT: Well you keep saying, my
18 understanding is his name appears, or that he may,
19 or Mr. Harper may have worked with him. Did he
20 work with him?

21 MR. MCCAULAY: I think I'll have to ask
22 Mr. Harper that.

23 THE COURT: Well you can ask Mr. Dia that
24 too.

25 MR. MCCAULAY: Well we can certainly do

1 that. But he was involved -- you know, part of
2 Mr. Harper's claims against EnerSys involved
3 payroll information, things such as that.
4 Certainly Mr. Yuen is going to be an important
5 witness in that case. And my understanding and my
6 belief is that Mr. Harper would have been involved
7 working with Mr. Yuen while he was employed with
8 EnerSys.

9 THE COURT: What if the situation was that
10 Mr. Harper just struck up a some degree of
11 business friendship with these witnesses, and
12 really didn't learn anything, but had some kind of
13 rapport with them that nobody but a lawyer would
14 have? Because when I was in private practice, I
15 work with DOT, DSN all the time.

16 MR. MCCAULAY: Sure.

17 THE COURT: And I would be obtaining
18 information about a particular claim against one
19 of those entities. I might not have necessarily
20 learned any inherently secret information. But I
21 would have struck up a good rapport and a good
22 working relationship with them. A good working
23 relationship with employees of the entity that
24 retains you. That's not enough for
25 disqualification, is it? It not might not look

1 good. And that's another issue. You know the
2 appearance of impropriety.

3 MR. MCCAULAY: Yes, sir.

4 THE COURT: That you have touched on. But
5 just because a lawyer for a company develops a
6 good working relationship with all these employees
7 is not enough for disqualification?

8 MR. MCCAULAY: I think the way I read the
9 comments, Your Honor, to Rule 1.9; is that, when a
10 lawyer has a relationship particularly, as
11 identified to the company as the company's
12 attorney, the person to whom that company goes to
13 for employment advice as Mr. Friers testified to
14 in his deposition, I think it's more than a
15 business relationship.

16 THE COURT: How about the 7 years that
17 have gone by? Wasn't Mr. Harper's firm
18 disassociated with EnerSys back 2004?

19 MR. MCCAULAY: I agree, Your Honor, he
20 was. And one thing I would point out that he was
21 disassociated with EnerSys back in 2004. My
22 understanding is Ms. Hopkins started with EnerSys
23 within the year of 2005.

24 THE COURT: Well that doesn't matter. The
25 dispute came to light in 2010, right?

1 MR. MCCAULAY: Yes, sir. But I'd still --
2 but I also believe that the possibility, very
3 strong here, particularly when you look at Mr.
4 Friers' affidavit, is that during that 4-year
5 period, Mr. Harper gained all kinds of information
6 on the inner workings of the company. Information
7 that regardless over the 7-year period that ended
8 when in 2004, and when we filed this lawsuit that
9 is still going to be there. I think it's also
10 important to keep in mind, two comments that
11 Mr. Harper made.

12 THE COURT: I know more about EnerSys than
13 you do.

14 MR. MCCAULAY: Yes, sir.

15 THE COURT: I don't know what the context
16 was. It might have just been posturing. I don't
17 know. What was the other comment?

18 MR. MACAULAY: Well the other comment is,
19 apparently he said to Mr. Friers as they walked
20 into the courtroom, "We sure did talk on the
21 telephone a lot." I think that what that shows,
22 Your Honor, is that Mr. Friers can testify to
23 that. But what that shows, Your Honor, is that
24 Mr. Harper believes that he has a good
25 understanding of EnerSys. An understanding that

1 arose through his representation of EnerSys with
2 several cases. But not only two cases, but
3 providing general employment advice over the
4 course of 4 years. And I will certainly agree
5 with you that 7 years does seem like a long period
6 of time. But there is no place in the rule where
7 it says that there is going to be a time
8 limitation on when information gained through an
9 attorney/client privilege is no longer going to be
10 applicable.

11 THE COURT: What I was looking for quite
12 frankly, was something that I could sink my teeth
13 in, allude to it or produce it in camera or
14 whatever it might be, something other than a
15 strong possibility. But you're saying that the
16 rule says that there is a strong possibility, I am
17 to determine subjectively, because I don't know
18 all there is to know.

19 MR. MCCAULAY: What the rule says, Your
20 Honor, is that we don't have to point to anything
21 specific, and I can show you where that is the
22 rule.

23 THE COURT: You don't have to, but it
24 would help.

25 MR. MCCAULAY: It certainly would help.

1 But in terms of when you talk about communications
2 that go over the course of four years, you know,
3 particularly back in 2004, it's going to be hard
4 to point to something specifically. But certainly
5 the assumption I think it gets back to this
6 appearance of impropriety that you talked about
7 earlier.

8 You know as far as EnerSys is concerned,
9 you know if Mr. Friers is here, he supplied his
10 affidavit. But, you know, EnerSys is very
11 concerned when its lawyer, it goes to a lawyer in
12 South Carolina, and suddenly they are representing
13 someone against EnerSys in a case very similar to
14 a case that the same lawyer prosecuted on behalf
15 of EnerSys. And that would be the Choice Billups
16 case.

17 THE COURT: Okay. Anything else on that
18 before Mr. Harper talks?

19 MR. MACAULAY: That's all, Your Honor.
20 Thank you.

21 THE COURT: Mr. Harper, one thing that I
22 do disagree with, you raised this issue with them
23 having raised this issue now. This issue was
24 raised a long time ago. So the timeliness of it
25 I'm not concerned about.

1 MR. HARPER: Okay.

2 THE COURT: Because they alerted you to
3 that, a long, long well in the scheme of this
4 lawsuit a long time ago.

5 MR. HARPER: No question. In fact the
6 issue came up when I called Mr. Floyd and
7 identified myself. And I told him that I had a
8 former relationship with EnerSys. So I am the one
9 who brought up. And I know the court has read the
10 submissions. And by the court's questions to
11 Mr. McCaulay, I think it's got a pretty firm grasp
12 of the issue. So I'd only like to address a
13 couple of things that I think are factually, kind
14 of factually important. In fact I get to stand
15 up, and talk because I feel the need to say
16 something.

17 The first time I met Mr. Friers face to
18 face was at the hearing at the preliminary
19 injunction. To my knowledge, while I knew who
20 Callie Dia is, if I -- I don't know that I ever
21 met him. I did talk with Mr. Friers on the phone.
22 And was always sort of interested in how the
23 Plaintiff was interpreting Rule 1.9. Which I have
24 looked at fairly closely. If the prohibition was
25 against a lawyer from ever representing someone

1 they've represented before then clearly I couldn't
2 be here.

3 The rule clearly also doesn't say that,
4 and it goes to what the court is focused on, the
5 matters need to be substantially related. And I
6 thought their memorandum in support of a motion of
7 a substantial relation was helpful in the sense
8 that they now point to the Choice Billups lawsuit
9 as being somehow substantially related to this
10 case.

11 And I pulled off of Pacer, the Federal
12 District Court Service, one of Judge Perry's
13 orders. I think it's the last substantive order
14 entered in the case. I believe it was settled
15 shortly after that order came in and reinstated
16 it. But that order encapsulates what the Choice
17 Billups case was about. It arose out of the
18 anti-union campaign which was involved with the
19 battery plant. The allegation was that Billups
20 had said that EnerSys was paying the anti-union
21 campaign, which would be a violation of the
22 National Labor Relations Act.

23 EnerSys wanted Billups sued for
24 defamation. They claim in stating this, he was
25 misusing their confidential information and a

1 bunch of other things. It couldn't be farther
2 removed from this case. It has nothing to do with
3 Choice.

4 THE COURT: He's saying that the ends and
5 outs of how they handled employment related
6 matters if what you gained inside knowledge of,
7 and that wouldn't be appropriate for you to be
8 stepping in the shoes of someone else that is now
9 a target, so to speak of EnerSys' efforts to
10 enforce an employment agreement.

11 MR. HARPER: And if -- if the matters
12 there is another qualification there. If the
13 matters are substantially related. But a lawyer
14 was involved in employment dispute for a company.
15 And represented a company. In the course of
16 representing that company, the lawyer learned a
17 lot of confidential, financial information about
18 the company. Okay, 6 months, a year later, the
19 lawyer is retained by the chief executive officer
20 of the company's wife in a divorce case. Now the
21 divorce case has nothing to do with the prior
22 lawyer's representation of the company. But in
23 that prior representation, the lawyer was privy to
24 confidential, financial information that a lawyer
25 walking down the street wouldn't know. And based

1 on the fact that the lawyer had that confidential
2 information without even specifying exactly what
3 it is. And that that confidential information
4 could be very useful in the prosecution of a
5 divorce case to the detriment of his former
6 client. Disqualification was warranted. Contrast
7 that with the current situation. Here we are
8 talking about the generic, don't use the
9 confidential information. Okay. Nothing secret
10 about that. Is there anything secret about, and
11 if you misuse our confidential information, we
12 will attempt to enforce it, of course.

13 Other than the base allegation and
14 confidential information that's involved, and
15 misuse of that is involved, there is no connection
16 between those two cases. If Rule 1.9 were
17 interpreted the way the Plaintiff wants to
18 interpret it in this case, then effectively any
19 lawyer would be precluded from representing a case
20 against a former client. Because the first client
21 can always say well, they might have learned
22 something. But that's what the rule states.
23 That's not what the comments make clear. That's
24 not what the rule means. And because they can't
25 sink their teeth in to anything, because there is

1 nothing there, this motion should be denied.

2 THE COURT: Mr. MaCaulay.

3 MR. MCCAULAY: Your Honor, we attached to
4 our supporting memorandum, an amended complaint in
5 the Choice Billups case that was signed by
6 Mr. Harper. And again, I have seen the order
7 Mr. Harper provided to you, I think yesterday.
8 And my understanding is, that's an order that
9 Judge Perry has concurred. I think even after
10 Mr. Harper was employed or was working with
11 EnerSys in that case.

12 The bottom line is, the Choice Billups
13 case dealt with, among other things, a breach of a
14 confidentiality agreement. And he brought on
15 behalf of EnerSys three causes of action against
16 the company. The same cause of action that we
17 have now brought against his client. You know,
18 Your Honor, I would certainly agree that if God
19 forbid Ms. Hopkins were to drive out of this
20 parking lot and were to get t-boned by an EnerSys
21 truck, Mr. Harper could certainly represent her in
22 that action against EnerSys. However, this goes
23 a lot further beyond that. These are
24 substantially related cases in terms of the
25 Choice Billups case and the case of a

1 prosecuting---

2 THE COURT: The generic subject matter.

3 MR. MCCAULAY: Yes, sir. Absolutely.

4 THE COURT: Not specific facts. What she
5 did had nothing to do with what Mr. Billups
6 supposedly did.

7 MR. MCCAULAY: That is correct, Your
8 Honor. But I think it is important to keep in
9 mind that they are very similar transactions.

10 THE COURT: And that's what I'm struggling
11 with, and what I will struggle with until I'll
12 rule, which will be soon. But substantial to you,
13 it's not substantial to him. But what has to be
14 made known and proved to me is that it is
15 substantial enough.

16 MR. MCCAULAY: Yes, sir. And I think it
17 is important to keep in mind, and in looking at
18 comment No. 3, to Rule 1.9.

19 THE COURT: Yes, sir. Did you make copies
20 of those?

21 MR. MCCAULAY: I can provide those. I've
22 got copies here for you.

23 THE COURT: Because I have got access to
24 the comments, but I don't know if they are
25 comments that you have.

1 MR. MCCAULAY: This one says, a former,
2 that you have. If you look at the bottom of the
3 second page, Comment No. 3. "A former client is
4 not required to reveal the confidential
5 information in order to establish a substantial
6 risk that the lawyer's information in order to
7 establish a substantial risk that the lawyer's
8 confidential information to use in the subsequent
9 matter."

10 THE COURT: I am a little bit shooting in
11 the dark.

12 MR. MCCAULAY: Yes, sir. Not just the
13 whole issue of attorney/client privilege in the
14 courtroom and all that kind of stuff. But I think
15 you know, and that's one of our points, that even
16 if you define that the Choice Billups case and the
17 case that we have against Ms. Hopkins are not
18 substantially related, I think it is important to
19 keep in mind and go back and look at the affidavit
20 of Mr. Friers when Mr. Friers talks about there is
21 a long standing relationship over the course of
22 four years. Where again, he had constant
23 communication with Mr. Harper about issues related
24 to EnerSys employees. Mr. Harper was employed at
25 Jackson, Lewis'. It's an employment law firm.

1 He's the person to whom Mr. Friers talks, not just
2 about the cases, but employment issues in general.
3 And so I think this is not just the Choice Billups
4 case.

5 THE COURT: I understand. It's general
6 but specific enough.

7 MR. MCCAULAY: Yes, sir.

8 THE COURT: Okay, let me ask you,
9 Mr. Floyd one question. Where is Mr. McClain?

10 MR. FLOYD: Your Honor, Ken McClain is in
11 Columbia.

12 THE COURT: So I am going to order her
13 take her blackberry over there. The 20-year-old
14 son's situation has nothing to do with anything.
15 You are going to have to pay for her gas. What
16 kind of car do you drive?

17 MS. HOPKINS: A Tahoe.

18 THE COURT: Well that gets about 15 miles
19 to the gallon or less. What street is your office
20 on?

21 MR. FLOYD: Your Honor, Ken McClain's
22 office is close to -- it's on Main Street. We'll
23 be glad to send a courier over to get---

24 THE COURT: Well she wants to get it back
25 the same day. So I am going to order her to take

1 it over to his office on a date -- are you
2 working, ma'am?

3 MS. HOPKINS: No.

4 THE COURT: So your days are pretty much
5 free. Let's just move to next week.

6 MR. FLOYD: Yes, sir.

7 THE COURT: Tuesday of next week suit you?

8 MS. HOPKINS: Yes.

9 THE COURT: Will that suit Mr. McClain you
10 think? I know you don't have his schedule in
11 your blackberry. But can you check with him and
12 see?

13 MR. FLOYD: Yes, Your Honor.

14 THE COURT: I want her to have it there by
15 9 o'clock in the morning. That's -- just call it
16 a 100 miles round trip. It's probably not that
17 much.

18 MR. FLOYD: Yes, sir.

19 THE COURT: I'm going to require you all
20 to pay her \$30 in gas money.

21 MR. FLOYD: Yes, sir.

22 THE COURT: Now I will tell you this, that
23 what, I will happy to sign any order dealing with
24 the ymail account out in California. Now whether
25 or not they honor it, whether you have to go

1 through separate proceedings there to get all
2 that. She wants it, you want it, so it's going to
3 be gotten. The California judge might look at my
4 order and junk it in the trash. Or excuse me,
5 they might, you know, when they say court order,
6 they probably don't mean my order. If they do,
7 I'll sign it. And I'm going to hold any ruling in
8 the attempt in that regard, in abeyance until I
9 see what happens.

10 If she deleted, specifically if she
11 deleted any EnerSys related e-mails or violated my
12 order in any way, time frame, with regard to
13 EnerSys e-mails, I am going to hold her in
14 contempt. If it was spam or junk mail, you know,
15 somebody might say no harm to that fact. But if
16 you're saying its a violation of the order, I'll
17 resolve that. Because your concerns are not
18 whether or not she violated my order, period.
19 That's my concern. If she violated the order with
20 regard to your client, I will hold her in
21 contempt.

22 If your folks deleted any of her e-mails
23 that might in some ways support her counterclaim,
24 and there is some indication that they did that
25 nefariously, Mr. Harper can make a motion along

1 those lines.

2 MR. FLOYD: Yes, Your Honor.

3 THE COURT: That's not technically before
4 me. But I will hold the disqualification issue,
5 frankly that's a law school question. It's an
6 exam question, and I am going to have to take it
7 apart. It's an interesting thing, but we have got
8 a small legal community, and she has the right to
9 representation of her choice buffered by your
10 client's valid concerns about disclosure or
11 osmotically obtaining some confidential
12 information.

13 MR. MCCAULAY: Yes, sir.

14 THE COURT: That's a big word, because
15 that means just by being there.

16 MR. MACAULAY: Thank you, I didn't know
17 what that means.

18 THE COURT: Okay. Is there anything else
19 anybody needs to bring to my attention.

20 MR. MCCAULAY: No, Your Honor. Thank you.

21 THE COURT: Thank you all for coming.

22 MR. MCCAULAY: Thank you, judge.

23 -----End of Requested Transcript of Record---

24

25

3:00-cv-00527-MJP Singletary v. YUSA Inc

Matthew J Perry, presiding

Date filed: 02/14/2000**Date terminated:** 09/30/2003**Date of last filing:** 09/30/2003**Case Summary****Office:** Columbia**Jury Demand:** Plaintiff**Nature of Suit:** 442**Jurisdiction:** Federal Question**County:** Sumter**Origin:** 1**Lead Case:****Related Case:****Def Custody Status:****Flag:** CLOSED**Filed:** 02/14/2000**Demand:** \$0**Cause:** 42:12117 Americans with Disabilities Act**Disposition:** Dismissed - Settled**Terminated:** 09/30/2003**Reopened:**

None

None

Other Court Case: None**Plaintiff:** William L Singletary represented by John Palmer Britton **Phone:** 803-773-7473**Fax:** 803-773-1751**Email:** tammy-bfirmllc@sc.tr.com**Defendant:** YUSA Inc

represented by Stephen F Fisher

Phone: 864-242-9484**Fax:** 864-242-6833**Email:** s.fisher@wldf-law.com**Defendant:** YUSA Inc

represented by George A Harper

Phone: 803-730-1570**Defendant:** YUSA Inc

represented by Robert M Sneed

Phone: 864-235-3077**Fax:** 864-233-0290**Email:** rsneed@robsneedlawfirm.com

PACER Service Center			
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02/04/2011 15:45:16			
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Billable Pages:	1	Cost:	0.08

3:01-cv-00929-DWS -BM Barwick v. EnerSys Inc, et al

Dennis W Shedd, presiding

Bristow Marchant, referral

Date filed: 03/28/2001**Date terminated:** 08/27/2002**Date of last filing:** 09/03/2002**Case Summary****Office:** Columbia**Jury Demand:** Plaintiff**Nature of Suit:** 442**Jurisdiction:** Federal Question**County:** Sumter**Origin:** 1**Lead Case:****Related Case:****Def Custody Status:****Flags:** CLOSED**Filed:** 03/28/2001**Demand:** \$0**Cause:** 42:2000 Job Discrimination (Sex)**Disposition:** Dismissed - Other**Terminated:** 08/27/2002**Reopened:**

None

None

Other Court Case: None**Plaintiff:** Christina D
Barwick**represented by** David E Rothstein**Phone:** 803-251-0202**Fax:** 803-251-0222**Email:** derothstein@mindspring.com**Defendant:** EnerSys
Inc**represented by** Lisa Robette Claxton (Designation
Retained)**Phone:** 864-232-7000**Fax:** 864-235-1381**Email:** claxtonl@jacksonlewis.com**Defendant:** EnerSys
Inc**represented by** George A Harper (Designation
Retained)**Phone:** 803-730-1570

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Billable Pages:	1	Cost:	0.08

3:01-cv-02582-MJP EnerSys Inc v. Phillips

Matthew J Perry, presiding

Date filed: 06/12/2001

Date terminated: 11/16/2004

Date of last filing: 11/16/2004

Case Summary

Office: Columbia
 Jury Demand: Plaintiff
 Nature of Suit: 190
 Jurisdiction: Diversity
 County: Sumter
 Origin: 4
 Lead Case:
 Related Case:
 Def Custody Status:
 Flag: CLOSED

Filed: 06/12/2001
 Demand: \$0
 Cause: 28:1332 Diversity-Contract Dispute
 Disposition: Dismissed - Voluntarily
 Terminated: 11/16/2004
 Reopened: 10/13/2004
 None
 None

Other Court Case: None

Plaintiff: EnerSys Inc	represented by Keith Moss Babcock	Phone: 803-771-8000 Fax: 803-733-3534 Email: kmb@lewisbabcock.com
Plaintiff: EnerSys Inc	represented by Paul H Derrick	Phone: 919-863-8725 Email: pderrick@cshlaw.com
Plaintiff: EnerSys Inc	represented by George A Harper	Phone: 803-730-1570
Plaintiff: EnerSys Inc	represented by Arthur Camden Lewis	Phone: 803-771-8000 Fax: 803-733-3534 Email: acl@lewisbabcock.com
Plaintiff: EnerSys Inc	represented by William A McKinnon	Phone: 803-327-7800 Fax: 803-328-5656 Email: bmckinnon@mcgowanhood.com
Defendant: Choice D Phillips, II	represented by Armand Georges Derfner	Phone: 803-723-2460 Fax: 843-723-7446 Email: aderfner@dawlegal.com
Defendant: Choice D Phillips, II	represented by Albert Peter Shahid, Jr	Phone: 843-853-4500 Fax: 843-853-6124 Email: shahidlo@bellsouth.net
Defendant: Choice D Phillips, II	represented by Peter Wilborn	Phone: 843-723-2460 Fax: 843-723-7446 Email: pwilborn@dawlegal.com

PACER Service Center			
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Description:	Case Summary	Search Criteria:	3:01-cv-02582-MJP
Billable Pages:	1	Cost:	0.08

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED DN

FEB - 8 2002

LARRY W. PROPPS, CLERK
U. S. DISTRICT COURT

ENERSYS, INC. (fka YUASA, INC.),

Plaintiff,

vs.

CHOICE PHILLIPS, II,

Defendant

Case No.: 3:01-2582-10

AMENDED COMPLAINT
(Jury Trial Requested)

Plaintiff, EnerSys, Inc. (fka Yuasa, Inc.) ("Plaintiff" or the "Company"), brings this action against Defendant, Choice Phillips, II ("Defendant"), and complains as follows:

NATURE OF THE ACTION

1. This is a civil action arising out of Defendant's breach of an agreement between the parties, as well as Defendant's tortious conduct in matters related to the breach.

JURISDICTION

2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1332.

VENUE

3. A substantial portion of the events giving rise to this action occurred in this judicial district. Thus, venue is proper in the District of South Carolina pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. EnerSys is a Delaware corporation authorized to conduct business in the State of South Carolina. It operates and regularly does business from its offices located at 2315 Cains Mill Road, Sumter, South Carolina ("Sumter Plant").

5. Defendant is a citizen and resident of the State of Arkansas.

14

FACTS

6. On or about January 24, 2000, Defendant began working for Plaintiff, then known as Yuasa, Inc., as its Human Resource Manager at the Sumter Plant.

7. As Human Resource Manager, Defendant was a management official at the Sumter Plant.

8. On the day his employment began, January 24, 2000, Defendant signed a two-page document entitled "Agreement," a copy of which is incorporated herein as Exhibit A.

9. Defendant received consideration from Plaintiff that he would not otherwise have received but for his promises under the Agreement.

10. In paragraph 1 of the Agreement, Defendant agreed that he would not disclose certain confidential information to anyone outside the Company, either during or subsequent to his employment as a management official with Plaintiff.

11. Defendant's employment with Plaintiff was terminated on March 31, 2000.

12. On March 31, 2000, Defendant signed a two-page document entitled "Salary Continuance Agreement," a copy of which is incorporated herein as Exhibit B.

13. Defendant received additional consideration from Plaintiff that he would not otherwise have received but for his promises under the Salary Continuance Agreement.

14. In paragraph 3(a) of the Salary Continuance Agreement, Defendant agreed that he would treat as confidential, hold inviolate, and keep secret all information of whatever kind obtained by him during the course of his employment as a management official with Plaintiff.

15. Between March 31, 2000, and May 10, 2001, Defendant spoke or met with individuals who are not affiliated with Plaintiff and discussed information obtained by him during the course of his employment as a management official with Plaintiff.

16. On one or more dates between March 31, 2000, and May 10, 2001, Defendant had a conversation or meeting with representatives of IUE-CWA, AFL-CIO ("Union").

17. During such conversation(s) or meeting(s), Defendant and representatives of the Union discussed information obtained by Defendant during the course of his employment as a management official with Plaintiff.

18. Some or all of the disclosures made by Defendant during any of these conversations between March 31, 2000, and May 10, 2001, are prohibited by the Agreement.

19. Some or all of the disclosures made by Defendant between March 31, 2000, and May 10, 2001, are prohibited by the Salary Continuance Agreement.

20. Defendant admitted under oath during an arbitration hearing on May 10, 2001, that he had, subsequent to March 31, 2000, spoken with individuals not affiliated with Plaintiff regarding information obtained during the course of his employment as a management official with Plaintiff.

21. During one or more of such conversations or meetings between March 31, 2000, and May 10, 2001, Defendant stated to those present that one or more management officials of Plaintiff committed unlawful and dishonest acts in connection with matters of Company business.

22. During and after his employment with Plaintiff, Defendant made false and defamatory statements regarding Plaintiff to other EnerSys employees, members and representatives of the Union, and citizens of Sumter, South Carolina. These false and defamatory statements, include, but are not limited to, the following:

- (1) Plaintiff gave money to be used in the decertification effort to the leader of the group of employees seeking to have the Union decertified, and

(2) Plaintiff fraudulently altered documents related to the Company's profit sharing program ("gainsharing program").

23. These false statements alleged that the Company violated provisions of the National Labor Relations Act and committed fraud in depriving its employees of sums of money to which they would have otherwise been entitled pursuant to the gainsharing program. As such, Defendant's statements charged Plaintiff with unfitness in its business.

24. Defendant's false and defamatory statements to Plaintiff's employees, members of Local #175, and citizens of Sumter, South Carolina, were not privileged.

25. In making these false and defamatory statements, Defendant intended to and did harm the business reputation of Plaintiff.

26. Defendant's false and defamatory statements were published with actual and implied malice and with intentional or reckless disregard of Plaintiff's rights.

**FIRST CAUSE OF ACTION
(Defamation)**

27. Plaintiff reiterates and incorporates by reference the foregoing allegations of this Complaint.

28. Defendant's statements that Plaintiff's management officials engaged in unlawful and dishonest acts in connection with matters of Company business were false.

29. Defendant's statements were published with actual and implied malice, and with intentional or reckless disregard of Plaintiff's rights.

30. Defendant's statements constituted slander *per se*.

31. Defendant's statements resulted in legally-presumed and special damages to Plaintiff, for which Plaintiff is entitled to recover actual and punitive damages.

**SECOND CAUSE OF ACTION
(Breach of Contract)**

32. Plaintiff reiterates and incorporates by reference the foregoing allegations of this Complaint.

33. The Agreement constitutes a contract between Plaintiff and Defendant.

34. The Salary Continuance Agreement constitutes a contract between Plaintiff and Defendant.

35. Defendant's conduct breached the terms of his contracts with Plaintiff, and Defendant is liable to Plaintiff for actual damages resulting from the breach of said contracts.

**THIRD CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)**

36. Plaintiff reiterates and incorporates by reference the foregoing allegations of this Complaint.

37. In breaching the terms of his contracts with Plaintiff, Defendant acted with fraudulent and dishonest intent and committed one or more fraudulent, dishonest, and unfair acts.

38. Defendant is liable to Plaintiff for actual damages resulting from said breach of contract with fraudulent intent, as well as for punitive damages.

**FOURTH CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing)**

39. Plaintiff reiterates and incorporates by reference the foregoing allegations of this Complaint.

40. Implicit in the contracts between Plaintiff and Defendant are covenants of good faith and fair dealing.

41. In breaching the terms of his contracts with Plaintiff, Defendant breached the implied covenants of good faith and fair dealing, and Defendant is liable to Plaintiff for actual damages resulting from the breach of said covenants.

WHEREFORE, Plaintiff requests relief in the following particulars:

- a. Actual damages in an amount to be determined at trial;
- b. Punitive damages in an amount to be determined at trial;
- c. Attorneys' fees and costs;
- d. Such other and further relief as the Court may deem appropriate.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
2100 Landmark Building
301 North Main Street
Greenville, South Carolina 29601-2122
(864) 232-7000

By: _____

George A. Harper
Federal Id. No. 1728

Tracy Hulsey
Federal Id. No. 6609

ATTORNEYS FOR PLAINTIFF

This 8th day of February, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED

JUN 13 2002

LARRY W. PROPP, CLERK
U. S. DISTRICT COURT

INTERNATIONAL UNION OF ELECTRONICS,)
ELECTRICAL, SALARIED, MACHINE AND)
FURNITURE WORKERS, AFL-CIO (IUE-CWA),)
its LOCAL #175, and JOHN LEVY)

Plaintiffs,)

-vs-)

C.A. No. 3:01-4766-22

ENERSYS, INC., YUASA, INC., YUASA)
BATTERY, INC., YUASA HOLDINGS, INC.,)
YUASA CAPITAL, INC., YUASA NETWORK)
SYSTEMS, INC., ADVANCED POWER)
SYSTEMS, INC., YUASA-EXIDE RESEARCH)
AND DEVELOPMENT CENTER, YUASA-)
EXIDE, INC., GLOBAL & YUASA BATTERY,)
INC., YUASA TRADING COMPANY, LTD.,)
YUASA-YI, INC., AND YUASA CORP.,)

Defendants.)

ENERSYS, INC.'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant EnerSys, Inc. ("EnerSys" or "Defendant"), by and through its undersigned counsel, respectfully moves for summary judgment on the Complaint of Plaintiff International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (IUE-CWA) and its Local #174 ("the Union"), which alleges one cause of action for violation of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* ("WARN Act"). This motion is made on

the grounds that the pleadings, documents, and affidavits show there is no genuine issue as to any material facts and EnerSys is entitled to judgment as a matter of law. The reasons for and authority in support of this motion are more fully set forth in the accompanying memorandum of law filed contemporaneously with this Motion. EnerSys respectfully requests that the Court enter an Order granting Defendant summary judgment on the Union's WARN Act claim.

Respectfully submitted this the 13th day of June, 2002,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
2100 Landmark Building
301 North Main Street
Greenville, South Carolina 29601-2122
(864) 232-7000

By: 
George A. Harper, Federal I.D. No. 1728
Lisa R. Claxton, Federal I.D. No. 6700
K. Scott Katrosh, Federal I.D. No. 7137

ATTORNEYS FOR DEFENDANT
ENERSYS, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing DEFENDANT ENERSYS' MOTION FOR SUMMARY JUDGMENT was served upon all parties by depositing the same in the United States Mail, first class postage prepaid and addressed as follows:

Armand Derfner
Derfner & Wilborn
P.O. Box 600
Charleston, SC 29402

Stephen M. Koslow
Counsel, IUE-CWA, AFL-CIO
1275 K Street NW, Suite 600
Washington, DC 20005-4064

This the 13th day of June, 2002.


George A. Harper

3:01-cv-04812-CMC DuBose v. Yussa Inc, et al
Cameron McGowan Currie, presiding
Date filed: 12/19/2001
Date terminated: 03/31/2004
Date of last filing: 05/07/2004

Case Summary

Office: Columbia
Jury Demand: Plaintiff
Nature of Suit: 442
Jurisdiction: Federal Question
County: Sumter
Origin: 1
Lead Case:
Related Case:
Def Custody Status:
Flag: CLOSED

Filed: 12/19/2001
Demand: \$0
Cause: 42:12117 Americans with Disabilities Act
Disposition: Dismissed - Settled
Terminated: 03/31/2004
Reopened:
None
None

Other Court Case: None

Plaintiff: Carl L DuBose, Sr represented by Rebecca G Fulmer **Phone:** 803-765-0555

Fax: 803-765-0300

Email: irvinlaw@scbar.org

Plaintiff: Carl L DuBose, Sr represented by Wilmot B Irvin

Phone: 803-765-0555

Fax: 803-765-0300

Email: irvinlaw@sc.rr.com

Defendant: Yussa Inc

represented by George A Harper

Phone: 803-730-1570

Defendant: Yussa Inc

represented by K Scott Katrosh

Phone: 864-241-7006

Fax: 864-271-7502

Email: skatrosh@gwblawfirm.com

PACER Service Center			
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Billable Pages:	1	Cost:	0.08

NEXSEN|PRUET

William H. Floyd, III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

February 7, 2011

VIA U.S. MAIL AND FACSIMILE: (803) 799-9628

George Harper, Esquire
1239 Lincoln Street
Columbia, SC 29201

Re: *EnerSys Delaware Inc. v. Tammy Hopkins*
Case No. 2011-CP-43-000179

Dear George:

Please allow this letter to serve as a follow-up to my e-mail of Wednesday afternoon and our conversations on Wednesday and Thursday afternoons in which I relayed EnerSys' request that you recuse yourself from representing the Defendant, Ms. Hopkins, in the above-referenced litigation. EnerSys does not consent to your current representation and expects you to honor the attorney-client privilege and confidences owed by you to EnerSys. It is our hope that you will re-consider your refusal to recuse yourself

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

As you know, this is an employment-related dispute involving EnerSys and Ms. Hopkins, a former employee in Sumter. As you related to me during our second phone conversation, for several years you defended EnerSys, as a member of Jackson Lewis law firm, in numerous employment litigation cases. In doing so, you advised, represented or interacted with a number of EnerSys employees and managers. Indeed, you represented one or more witnesses involved in the case at hand, such as Ted Fries, who has filed an Affidavit. According to EnerSys and public records, you served as counsel of record for EnerSys in several federal court lawsuits in South Carolina involving Sumter employees and multiple employment issues such as discrimination, breach of contract, etc.

Upon information and belief, you also counseled EnerSys regarding a variety of employment-related matters such as employment policies, employment agreements, handbooks, and procedures – some of the same issues at issue in Ms. Hopkins' case. Further, upon information and belief, some of your employment-law

1230 Main Street
Suite 700 (29201)
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Attorneys and Counselors at Law

R 000071

George Harper, Esquire
February 7, 2011
Page 2

advice was the focus of a subsequent lawsuit brought by EnerSys against your former law firm.

We have just begun reviewing the extent of your prior representation of EnerSys, so more facts will be learned. For now, though, I tend to agree with your comment during our second conversation on Wednesday, that "[you] know more about EnerSys than [I] do." That is a good summary of why there is a problem here and why, on behalf of EnerSys, we respectfully request that you recuse yourself and withdraw from representing the Defendant in the above-referenced matter.

Otherwise, please be advised that we will have to file an appropriate motion seeking to remedy this problem.

Sincerely,



William H. Floyd, III

WHF/gpc
Enclosures
cc: Angus Macaulay, Esquire

AGREEMENT

Choice Phillips II

Full Name of Employee

Location


Social Security Number

Division Name (if applicable)

In consideration of my employment with Yuasa, Inc. (hereinafter called the Company), the compensation paid to me as an employee and the facilities and data made available to me by the Company, I agree:

- 1) I shall not disclose or publish any Confidential Matter to anyone outside the company, either during or subsequent to my employment, except as required by my duties with the Company or upon written consent of the Company. Confidential Matter is any information not generally known by or available to the public about or belonging to the Company, its parents, affiliates, subsidiaries, and/or other companies to whom the Company may have an obligation to maintain information in confidence. It includes any matter of a technical nature, such as "Know-how", inventions, innovations, improvements, discoveries, formulae, processes, machines, articles of manufacture, and research reports. It also includes matter of a business nature, such as information about costs, profits, sales costs of customers, computer programs, business methods, plans for future development, and any other matter of a similar nature.
- 2) I shall notify the Company in writing before I make any disclosure or perform any work for or on behalf of the Company that appears to conflict with my personal rights in an invention conceived or in obligations incurred by me prior to or outside the scope of this agreement. In absence of this notice, the Company may assume that no such conflicting right or obligation.
- 3) I shall communicate promptly and fully to the Company all Confidential matter that I may solely or jointly conceive or develop during the course of my employment. I shall make and maintain adequate and current records of all Confidential matter, such as, notebooks, disclosures of inventions, sketches, drawings, memos, models, manuals, letters, data, designs, blueprints, customer lists, or reports and these records shall be and remain the property of the Company.
- 4) Upon termination of my employment or this agreement, I shall deliver to the Company all records and other materials relating to Confidential Matter that are in my possession or under my control (including all copies).
- 5) I hereby assign, transfer, and convey to the Company my entire right, title, and interest in all and any information of a technical nature, including ideas, inventions and improvements, or information of a business nature, patentable or not, hereafter made, developed, or conceived solely or jointly by me during my employment with the Company that relates in any manner to the actual or anticipated business of the Company, its parents, affiliates, and subsidiaries, or relates to its actual or anticipated research and development, or is suggested by or results from any tasks assigned to me, or work performed by me for or on behalf of the Company, its parents, affiliates, or subsidiaries.

- 6) Either during or subsequent to my employment, upon the request and at the expense of the Company or its designee, I shall make application for trademarks, copyrights, patents, or other legal means of intellectual property protection in the United States of America or any foreign countries designated by the Company or this designee (said application being for information assigned transferred, and conveyed to the Company under paragraph 5); I shall execute all required papers and assign all such applications to the Company or its designee forthwith and without charge; I shall give the Company or its designee all reasonable assistance in preparing such applications; and I shall do all that may reasonably be required to protect the rights of the Company or its designee and to vest in it or its designee the applications, trademarks, copyrights, patents or other intellectual property protection herein provided for.
- 7) Should any part or provision of this Agreement be held unenforceable or in conflict with the law of the jurisdiction of execution, the validity of the remaining parts of provisions shall not be affected by such holding.

Chirice Phillips II
Signature

1/24/00
Date

THE COMPANY

Ralph M. Aden
By

HR Admin.
Title

AGREEMENT

In consideration of my employment by and during my employment with Enersys Inc. or an affiliated company ("the Company") I hereby agree as follows:

1. Confidential or Proprietary Information. I agree that, during or at any time after the period of my employment with the Company I will not disclose any confidential or proprietary information of the Company or any business unit, division, subsidiary or affiliate thereof, to any person, firm, corporation, association or other entity (other than to appropriate persons in the Company's organization) for any reason or purpose whatsoever, nor will I make use of any such confidential or proprietary information for my own purpose or for the benefit of any person, firm, corporation or other entity except the Company.

For purposes of this Agreement, the term "confidential or proprietary information" shall include, but not be limited to, the Company's existing or potential customers, customer lists, market studies, market plans and strategies, pricing formulas, financial information, new product plans, product manufacturing methods, technical information, ideas, concepts, inventions, discoveries, formulas, processes, designs, specifications, drawings, prototypes, samples, improvements, developments, applications, engineering data, manufacturing data, trademarks, trade names and trade secrets, whether or not the same are or may be patented, registered or otherwise publicly patented, sources of supply and manufacturing services, payroll and other confidential employee matters, or other information relating to the Company's business, books and records and private processes, as they may exist from time to time, which I may have acquired or obtained by virtue of working for the Company.

2. Non-solicitation of Customers and Employees. During the term of my employment with the Company and for a period of one (1) year thereafter, I will not solicit, divert or attempt to divert from the Company any customer or employee whose business or services the Company has enjoyed, solicited or employed at any time during the one (1) year period immediately prior to my separation from the Company.

3. Non-retention of Material. Upon termination of employment, I will promptly deliver to the Company all manuals, letters, notes, notebooks, price lists, customer lists, reports and copies thereof and all written materials of a confidential or proprietary nature relating to the Company's business which are in my possession or under my control. I also agree not to retain any copies, duplications, reproductions or excerpts of the foregoing materials.

4. Solicitations. I agree not to solicit for personal use any type of gift, paid travel, personal inducement, tickets to an event, invitations or contributions from a supplier or vendor or from any other third party with whom the Company presently does business or may in the future do business. I understand that I may not accept personal favors or benefits from a supplier or vendor or from any other third party dealing with the Company that could influence or could give suspicion of influencing my business judgment. I acknowledge that violation of this provision will result in disciplinary action up to and including discharge as determined by the Company in its sole discretion. The above does not apply to unsolicited gifts or entertainment of nominal value.

5. Inventions/Developments. I agree to hold in confidence and to disclose to the Company fully and promptly in writing all inventions, improvements, discoveries, formulas, processes, technical information, systems, designs, trademarks, trade names, service marks and suggestions relating in any way to the business of the Company whether patented, patentable or unpatentable ("Developments") which, during the period of my employment by the Company are made, developed or conceived by me, either solely or jointly with others in the course of such employment or with the use of the Company's time, materials or facilities, or relating to any subject matter with which my work with the Company is or may be concerned, or relating to any problems arising in the Company's business of which I have been or may become informed by reason of my said employment.

I hereby assign, and agree to assign to the Company during my employment and thereafter, all my rights to and evidence of such rights to the Developments, whether or not patent applications are filed thereon. I agree, whenever requested to do so by the Company during my employment or thereafter, without charge to the Company, but at its expense, to grant the Company or its nominee my entire interest in any or all of such Developments by executing, acknowledging and delivering all documents and by rendering all assistance such as giving testimony in support of a particular invention, which the Company may deem necessary or proper for that purpose and for the purpose of perfecting in the Company's title to patents, copyrights or other rights therefore and reissues, renewals, continuations, divisions, or extensions of such rights, both domestic and foreign.

6. Notice to Future Employers. I agree that for a period one (1) year following the end of my employment by the Company, I will inform each new employer, prior to accepting employment by them, of the existence of this agreement and provide said employer with a copy of this agreement prior to accepting employment by them.
7. Previous Employment Information. I agree that I have not and will not disclose or use in connection with my employment by the Company any proprietary or confidential information that I have acquired from previous employers. I have notified the Company in writing all prior obligations or restrictions placed upon me during prior employment or association.
8. Conflict of Interest. I agree that during my employment by the Company not to participate in any manner whatsoever, directly or indirectly, competes with the Company, or has any business relationship with the Company, or which conflicts in any way with the interest of the Company, without the express written authorization of the Chairman, President and CEO of the Company. This covenant shall not apply to the ownership of less than 1% of the outstanding securities of any competitor of the Company, customer or supplier whose shares of stock are traded on a nationally recognized stock exchange or over-the-counter market.
9. Termination of Employment. Nothing in this Agreement shall be construed to constitute an agreement or commitment of employment by the Company for any particular period of time or to limit in any way the right of the Company or myself to terminate my employment at will. This Agreement supersedes and rescinds any and all agreements with the Company, whether verbal, written, or otherwise expressed or implied. Termination of employment shall not relieve me of any of my obligations contained in this Agreement that continue in full force and effect after termination of my employment.
10. Remedies Upon Breach. I recognize and acknowledge that in the event of any default in, or breach of any of the terms, conditions and provisions of this Agreement (either actual or threatened) by me, the Company's remedies at law shall be inadequate. Accordingly, I agree that in such events, the Company shall have the right to specific performance and/or injunctive relief in addition to any and all other remedies and rights at law or equity, and such rights and remedies shall be cumulative. In the event of a breach of paragraph 1. or 2. of this Agreement, and if any customers or employees of the Company are lost by the Company due to the breach, the parties hereby stipulate that the court may award compensatory damages.
11. Waiver. Failure to insist upon strict compliance of any of the terms, covenants or conditions contained in this Agreement shall not operate as a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any right or power hereunder at any one or more time be deemed a waiver or relinquishment of such right or power at any other time.
12. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable, then the unenforceable provision shall be severed and the remainder of this Agreement shall be enforced as though the unenforceable provisions were not included.
13. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their legal representatives, heirs, and successors as well as the Company's, subsidiaries, affiliates and

assigns. I acknowledge that I may not assign any of my rights or delegate any of my duties under this Agreement.

14. Applicable Law. This Agreement shall be construed according to the laws of the Commonwealth of Pennsylvania.

15. General. This Agreement contains the entire understanding of the parties relating to the subject matters addressed herein, and supercedes any prior agreements. This Agreement may not be amended, modified or waived, except by a writing signed by myself and the Chairman, President and CEO of the Company

I acknowledge that I have this day received and read a copy of this Agreement, that I understand its provisions, and that I will observe and fully comply with its provisions.

Employee Name (Print):

Tammy Hopkins

Tammy Hopkins
Signature

3-7-05
Date

Witness Name (Print):

Callie Guilleotte

Callie Guilleotte
Signature

3/7/05
Date

FILED

NOV 16 2004

LARRY W. PROPPS, CLERK
COLUMBIA, S. C.

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

ENERSYS, INC.,

Plaintiff,

-VS-

CHOICE PHILLIPS,

Defendant.

C.A. No. 3:01-2582-10

ORDER SETTING ASIDE JUDGMENT ON GROUNDS OF FRAUD

Pursuant to Rule 60(b)(3), Fed. R. Civ. P., defendant moves for relief from the judgment obtained by plaintiff in this case on the ground that it was obtained by fraud. It is now clear that the plaintiff made false allegations and knowingly presented false testimony in order to gain that judgment. For the reasons set forth in greater detail below, the Court grants the motion. The judgment is set aside and this case is reopened.

Background

Plaintiff and its predecessors operated a battery manufacturing plant in Sumter, South Carolina. The plant has been the subject of frequent litigation between the company and a labor union representing the employees., including a protracted arbitration,¹ an NLRB complaint against the company, and a suit against the company under the WARN Act (Workers Adjustment &

¹ (1) *Yuasa, Inc. v. International Union*, C.A. No. 04:99-2003 (D.S.C. Nov. 23, 1999), *rev'd*, 224 F.3d 316 (4th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001), *on remand*, Order of Jan. 25, 2001 (Currie, J.). (2) *EnerSys, Inc. v. International Union*, C.A. No. 3:01-3387-22 (D.S.C. Nov. 25, 2002)(Currie, J.). (3) *EnerSys, Inc. v. International Union*, C.A. No. 3:02-622-22 (D.S.C. Oct. 23, 2003)(Currie, J.).

Retraining Notification Act) after the plant closed in 2001. These matters were resolved earlier this year by a settlement payment by the company in the amount of \$7,750,000.² A significant issue in some of this litigation related to an "anti-union committee" of employees who were seeking to have the union decertified.

Defendant Choice Phillips was the company's former human resources manager. After his termination, he allegedly made statements (and testified at the arbitration hearing) accusing the company of having provided illegal assistance to the anti-union committee.³ In June 2001, the company brought this suit against him for making these statements, alleging that his statements were false and that they defamed and damaged the company as well as violating the terms of confidentiality agreements Phillips had signed.

Phillips did not answer the complaint nor an amended complaint. Plaintiff EnerSys moved for a default judgment and, to establish damages, presented an affidavit and testimony by its human resources manager at that time, Darryl Davids. In his affidavit and his sworn testimony, Davids said that Phillips had falsely accused EnerSys of providing illegal assistance to the anti-union committee and that this false accusation had forced EnerSys to expend time (including 80-100 hours of time spent by Davids investigating the matter) and legal fees (which Davids estimated at \$100,000) to combat Phillips' statements, "to prove that these allegations were not

² The settlement was approved in *IUE-CWA v. EnerSys*, C.A. No. 3:01-4766-10 (D.S.C. August 11, 2004).

³ Such assistance could be illegal as an unfair labor practice, 29 U.S.C. § 158(a), and/or as a felony. 29 U.S.C. § 186(a)(3).

true.”⁴ EnerSys’ counsel at that time, the Jackson Lewis firm, repeated the charges against Phillips in a brief, in oral argument and in conferences with the Court. On September 30, 2003, this Court entered a judgment for plaintiff in the amount of \$500.

Facts surrounding this motion

Defendant filed this motion on August 31, 2004, less than one year after entry of the judgment from which he seeks relief. The Court received briefs and heard oral argument from the parties on October 13, 2004. To support this motion, defendant relied on the record in this case, as well as pleadings and record items in other cases both in this court and in a lawsuit pending in the Court of Common Pleas of Greenville County between plaintiff and its former counsel, Jackson Lewis, LLP. At the hearing, defendant’s counsel detailed the proof that has come to light since entry of the judgment in this case.

(1) In depositions in the WARN Act case, *IUE-CWA v. EnerSys*, C.A. No. 3:01-4766-10 (D.S.C.), Tom Brown, the head of the anti-union committee, testified that he had received assistance from one Darrell Jennewine, including fliers that he had distributed throughout the plant, and also testified that he had received envelopes of money – although he did not testify directly about who gave him the money. Jennewine was also deposed and testified that he had been paid by EnerSys to provide assistance to Brown and the anti-union committee. After those depositions, EnerSys moved to amend its answer in that case to admit that it may have violated the National Labor Relations Act.

(2) In the Greenville County lawsuit, plaintiff alleged in its complaint that it did give illegal

⁴ Affidavit of Darryl Davids, Dec. 30, 2001; Transcript of Hearing of Jan. 23, 2002, pp. 8-9.

assistance to the anti-union committee, but says it was the fault of its then-counsel, the Jackson Lewis law firm. *EnerSys Delaware, Inc. v. Jackson Lewis LLP*, C.A. No. 2004-CP-23-2685 (Greenville Co. Common Pleas).⁵

(3) In a deposition in the Greenville County case, Darryl Davids – the person who provided the testimony on which the judgment against Phillips was based – has given a detailed contradiction of his testimony before this Court. In that deposition, which Phillips has filed with this Court, Davids testified that EnerSys gave illegal assistance to the anti-union committee in its effort to decertify the union, that he participated in that assistance, that he knew EnerSys was employing a Mr. X (Darrell Jennewine) from the very beginning of his employment at EnerSys, that he knew it was illegal, and that he was instructed to work carefully so as not to “get caught.”⁶

Thus, there is clear and convincing proof of the fraud in obtaining the judgment now being challenged. The facts are essentially undisputed, because EnerSys’ present counsel, with commendable candor, agreed that EnerSys provided assistance to the anti-union committee and that EnerSys’ allegations in its complaint and the testimony it presented to this Court (accusing Phillips of making false statements) were false. Tr. Oct. 13, 2004, 45, 53.

Legal analysis

1. Rule 60(b)(3)



⁵ In that lawsuit, Jackson Lewis agrees that there was illegal conduct but blames it on EnerSys. Jackson Lewis is not a party to this suit or this motion. The Court notes that Phillips has filed a separate suit against both EnerSys and Jackson Lewis, alleging that they conspired together to file this suit and obtain this judgment against him based on allegations and evidence they both knew to be false. *Phillips v. EnerSys Delaware, Inc., and Jackson Lewis, LLP*, C.A. No. 3:04-1870-10 (D.S.C. filed June 12, 2004).

⁶ See, e.g. Davids’ deposition at 30. This deposition has not been concluded. Jackson Lewis has examined Mr. Davids, but EnerSys has not examined him.

Plainly, this judgment was obtained by fraud. It unquestionably calls for an application of Rule 60(b)(3), Fed.R.Civ.P., which allows a judgment to be set aside for:

"fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

To qualify under Rule 60(b)(3), a motion must be filed within one year, as this motion was. Once that is done, if there is clear and convincing proof that a judgment was obtained by fraud, the should be set aside, as the Fourth Circuit has held in a very similar case. *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1355 (4th Cir. 1982)(company judgment against union which was obtained by company's false testimony would have been set aside if the motion had been filed within the one year period of Rule 60(b)(3)).

In the *Great Coastal Express* case, the company fabricated evidence of union violence, presented false testimony and thus gained a verdict by fraud. Judgment was entered in 1972. Six years later, the union discovered the fraud and perjury and moved for relief from the judgment. The district court and the court of appeals held that relief under Rule 60(b)(3) was unavailable because the motion had been filed more than one year after the judgment, but that the judgment would have been set aside if the one-year provision of Rule 60(b)(3) had been met:

"Rule 60(b)(3) allows a court to relieve a party from a final judgment on the grounds of 'fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.' A motion under Rule 60(b)(3), however, must be made within one year after the judgment was entered. Thus, the Rule suggests that equitable considerations prevail in such cases for one year, and that the interest in finality of judgments prevails thereafter." [675 F.2d at 1355.]

"We are in complete accord with the conclusions of the district

court that 60(b)(3) would have provided relief in this case had the union's motion been timely. . . ." *Ibid.*

In another case, the Fourth Circuit again emphasized that judgments subject to attack under Rule 60(b)(3) do not carry the same legitimacy as judgments attacked under other portions of Rule 60(b). Noting that Rule 60(b)(3) focuses on "judgments which were unfairly procured," the Fourth Circuit reversed a district court for failing to set aside a judgment tainted by discovery abuse (arguably a lesser transgression than presenting perjured testimony):

"When wrongful secretion of discovery material makes it inequitable for the withholder to retain the benefit of the verdict, the aggrieved party should not be required to assemble a further showing." *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994).

2. **Dowell and the four threshold requirements**

EnerSys does not deny the perjured testimony but makes several procedural arguments. First, it asserts that Phillips has failed to meet a four-part threshold test the Fourth Circuit set out in *Dowell v. State Farm Co.*, 993 F.2d 46 (4th Cir. 1993): "timeliness," "a meritorious defense," "lack of unfair prejudice to the opposing party," and "exceptional circumstances." 993 F.2d at 48. The Court is satisfied that defendant does satisfy these requirements.⁷

a. **Timeliness.** Met here because less than a year has passed. Plaintiff concedes that this test is met.

b. **Meritorious defense.** As to the defamation allegations, defendant clearly has a

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⁷ This Court will apply the *Dowell* tests here even though there is some doubt about whether the *Dowell* requirements apply in a fraud-based challenge because they are not mentioned in *Great Coastal* nor in *Schultz v. Butcher* ("the aggrieved party should not be required to assemble a further showing"). See also Judge Norton's decision holding the *Dowell* test inapplicable to a challenge based on Rule 60(b)(4). *Vinten v. Jeantot Marine Alliances*, 191 F.Supp.2d 642, 648-50 (D.S.C. 2002).

meritorious defense and counsel for plaintiff concedes this. However, plaintiff argues that defendant does not have a meritorious defense as to the other causes of action in this complaint, which are contract-related claims based on Phillips' alleged violation of his confidentiality agreements.⁸ The Court finds to the contrary. Defendant asserts two basic grounds why his statements alleging company misconduct (the only statements attributed to him) did not violate these agreements. First, he argues that the contracts were standard trade-secret and proprietary-information agreements that did not cover the type of statements alleged here. Second, he argues that if these agreements were in fact intended to bar statements alleging company wrongdoing, they were void or unenforceable as against public policy, citing *EEOC v. Astra USA*, 94 F.3d 738 (1st Cir. 1996).

The Court has reviewed the confidentiality agreements, which are attached to plaintiff's complaint, and finds that the disagreement between the parties presents a triable issue and that defendant has a defense that may prevail at trial. That is all that the "meritorious defense" requirement demands. See *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994).

c. No prejudice to opposing party. Merely taking away a judgment that the adverse party – which committed the fraud – had obtained is not prejudice. See *Vinten v. Jeantot Marine Alliances*, *supra*, at 649. Plaintiff concedes that this test is met here.

d. Exceptional circumstances. The fraud here plainly qualifies as an exceptional circumstance. Although plaintiff argued that there was no fraud because defendant knew plaintiff's statements were false, this Court cannot countenance a view that lying to the Court and

⁸ Plaintiff agrees that defendant's testimony in the arbitration hearings is not a violation but targets statements alleged made by defendant outside a testimonial forum.

presenting a witness who lies to the Court are regarded as anything other than exceptional and extraordinary.

Adding to the exceptional circumstances is the fact that plaintiff used every opportunity to repeatedly press its false claim. After making the false allegations in the complaint, it filed an amended complaint making these allegations again. After presenting a false affidavit by Darryl Davids, it called him to the witness stand to repeat the same knowingly false testimony. After its counsel filed a brief relying on the false evidence, counsel repeated those assertions in open court. After plaintiff secured entry of default, it presented its false allegations to the NLRB as true. And, after this case had been inactive for some time, plaintiff pressed forward once again and obtained by fraud the judgment now at issue. Plaintiff spared no effort to achieve its goal.

3. Additional arguments by EnerSys

Plaintiff's major argument is that its fraud affected only the defamation cause of action, whereas the judgment may have been based on a contract cause of action not affected by the fraud. The Court rejects this "harmless error" argument on several grounds.

First, there is no basis in the procedural history for thinking that this judgment was based on anything other than the defamation claim and the allegations that defendant had made false statements. Plaintiff told this Court at the January 23, 2002 hearing and in the affidavit and brief it filed that it was seeking judgment on the defamation claim. Second, plaintiff also asked the NLRB to exclude Phillips' testimony from its complaint on the ground that the default in this case showed his statements were false as a matter of law.⁹ In *Great Coastal Express*, the Fourth

 ⁹ See EnerSys' Memorandum in Support of its Motion for Partial Summary Judgment, filed Dec. 29, 2001, in the NLRB case of *EnerSys & International Union of Electronic, Electrical, etc., etc.*, Nos. 11-CA-18624 and other numbers.

Circuit rejected a similar "harmless error" argument by noting that the company had relied on the fraudulent matter in its original brief. Quoting the Supreme Court in a similar case, the Fourth Circuit said "they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness," quoting *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 247 (1944). Finally, there was no basis for the judgment other than the defamation claim. No damages were proved on the contract claims, and while nominal damages may be awarded in contract without proof of damages, the \$500 judgment was substantial damages not nominal. See *Hinson v. A.T. Slatore Constr. Co.*, 236 S.C. 125, 113 S.E.2d 341 (1960).

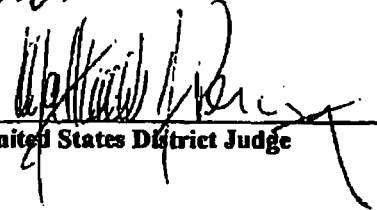
Even if the connection between the fraud and the judgment were weaker, it would still suffice to set it aside. The Fourth Circuit has made it clear that a judgment must be set aside if it *may* have been infected by the fraud. In *Great Coastal Express*, the wrongdoer presented a similar argument that the judgment might not have been based on the fraudulent testimony but might have been based on a separate, "untainted" cause of action. The Fourth Circuit rejected that argument because "there is the possibility that the perjury and fabricated evidence at issue may have been considered by the jury," and because "we cannot say with complete confidence that the fraud was harmlessly excised from the case." *Great Coastal Express*, 675 F.2d at 1354.

Conclusion and Relief

The record before this Court demands relief under Rule 60(b)(3). Defendant's motion is granted and the following relief is ordered:

- a) The judgment is set aside under Rule 60(b)(3).
- b) The entry of default is set aside under Rule 55(c).
- c) Defendant shall answer or otherwise plead within ten days.

SO ORDERED this 15 day of November, 2004.



Steven United States District Judge

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

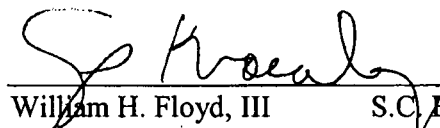
Case No. 2011-CP-46-000179

EnerSys Delaware, Inc. Appellant,
v.
Tammy Hopkins Respondent.

PROOF OF SERVICE

Pursuant to S.C.A.C.R. 210(a), I hereby certify that I have served a copy of the Record on Appeal on the Respondent by causing to be hand-delivered a copy of the same on November 16, 2011, at the office of Respondent's Counsel of Record, George Harper, Esq., 1229 Lincoln Street, Columbia, South Carolina 29201.

November 16, 2011



William H. Floyd, III S.C. Bar #10246

Angus Macaulay S.C. Bar #15044

NEXSEN PRUET, LLC

1230 Main Street, Suite 700 (29201)

Post Office Drawer 2426

Columbia, South Carolina 29202

803.771.8900

WFloyd@nexsenpruet.com

AMacaulay@nexsenpruet.com

Attorneys for Appellant

EnerSys Delaware Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
NOV 16 2011
SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

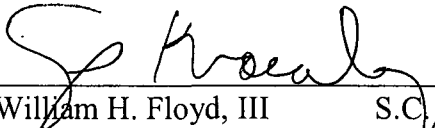
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November 16, 2011



William H. Floyd, III S.C. Bar #10246
Angus Macaulay S.C. Bar #15044
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Attorneys for Appellant
EnerSys Delaware Inc.