

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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Advanced Fluid Systems,	:	
	:	
Plaintiff,	:	No. 1:13-cv-03087
vs.	:	
	:	Chief Judge Christopher C. Conner
Kevin Huber,	:	
INSYSMA (Integrated Systems and	:	
Machinery, LLC),	:	
Livingston & Haven, LLC,	:	
Clifton B. Vann IV,	:	
Thomas Aufiero	:	
	:	
Defendants	:	

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**AFS' REPLY BRIEF IN SUPPORT OF  
ITS MOTION FOR SUMMARY JUDGMENT AGAINST  
INSYSMA ON AFS' AFFIRMATIVE CLAIMS**

David G. Concannon  
Law Offices of David G. Concannon, LLC  
200 Eagle Road, Suite 116  
Wayne, PA 19087  
Telephone: (610) 293-8084  
Facsimile: (610) 293-8086

Robert J. LaRocca  
Kohn, Swift & Graf, P.C.  
One South Broad Street, Suite 2100  
Philadelphia, PA 19107  
Telephone: (215) 238-1700  
Facsimile: (215) 238-1968

*Counsel for Advanced Fluid Systems*

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Plaintiff AFS filed its motion for summary judgment on its affirmative claims and supporting materials on June 22, 2016. INSYSMA was granted 10 weeks to respond. AFS files this reply to that responsive brief (ECF- 197).

AFS opening brief and supporting materials made out a *prima facie* case against INSYSMA pursuant to *U.S. v. Donovan*, 661 F.3d 174, 185-187 (3d Cir. 2011). INSYSMA's burden is to "come forward with specific facts showing that there is a genuine issue for trial." *Id.* at 186. Respectfully, INSYSMA has not done so.

## **I. THE SUMMARY JUDGMENT RECORD**

Because INSYSMA and Huber filed the same responses to AFS' Statement of Facts, and to prevent overlap and duplication, AFS refers the Court to the description of the summary judgment record set forth in the text of AFS' reply to Huber's brief. A summary of the Huber/INSYSMA responses to AFS Statement of Facts is attached as **Ex. A**.

## **II. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY**

At p. 8, INSYSMA argues that several Pennsylvania cases have not recognized a tort for aiding and abetting a breach of fiduciary duty. AFS addressed this argument in *ECF 191 pp. 27-30*). *Chicago Title Ins. Co. v. Lexington & Concord Search & Abstract, LLC*, 513 F.Supp.2d 304, 317 (E.D. Pa. 2007) noted that "the vast majority of district courts in this Circuit have reached the same conclusion [that this cause of action exists]" (citing cases). *Accord, Koken v.*

*Steinberg*, 825 A.2d 723, 732 (Pa. Cmwlth 2003); *Sovereign Bank v. Valentino*, 914 A.2d 415, 427 (Pa. Super. 2006) and *Official Comm. Of Unsecured Creditors of Allegheny Health Edu & Research v. PriceWaterhouseCooper*, 989 A.2d 313, 327 n. 14 (Pa. 2010).

INSYSMA'S cases are not on point. *Zafarana v. Pfizer, Inc.*, 724 F.Supp.2d 545, 560 (E.D. Pa. 2010) held the claim had never been pled, counsel cited no cases, and consumers were owed no fiduciary duty. As to *Flood v. Makowski*, 2004 WL 1908221 \*36 (M.D. 2004) Judge Caputo subsequently recognized this claim to exist in *Doe v. Liberatore*, 478 F.supp.2d 742, 759 (M.D. Pa. 2007). *Daniel Boone Area School Dist. V. Lehman Bros.*, 187 F.SSupp.2d 400, 413 (W.D. Pa. 2002) was decided before *Koken, Valentino, PriceWaterhouse*.

INSYSMA next argues that the Second Amended Complaint (**ECF 70**) at Count Ten does not clearly plead a claim for aiding and abetting against INYSMA. (INSYSMA p. 9). To the contrary, the caption of Count Ten reads: "Aiding and Abetting a Breach of Fiduciary Duty (Against All Defendants Except Huber)."

While AFS inadvertently failed to include the word "INSYSMA" in the text of **ECF 70 Par. 152**, that was a harmless error. INSYSMA understood it was a defendant because it answered Count Ten, including Paragraph 152. (**ECF 77 p. 30**). INSYSMA's motion to dismiss in February, 2014 understood that Count Ten had been pled against INSYSMA. (**Docket No. 43 p. 1 note 3**). AFS' summary judgment motion of October 2014 made clear INSYSMA was a defendant on

Count Ten (**ECF 82, p. 23**), as did this Court's Order denying that motion without prejudice, *Advanced Fluid Sys., Inc. v. Huber*, 1:13-CV-3087, 2015 WL 1729375, at \*1 (M.D. Pa. Apr. 15, 2015). INSYSMA's current cross-motion recites:

On October 20, 2014, AFS filed a Motion for Partial Summary Judgment on Liability. (ECF No. 81). As to INSYSMA, AFS sought summary judgment for misappropriation of trade secrets and *aiding and abetting a breach of fiduciary duty*.

**ECF-173 p. 8** (emphasis added). INSYSMA has known since the inception of the case it is a defendant on Count Ten.

INSYSMA next argues that the entitlement to punitive damages is an "issue of fact." (INSYSMA p. 10). However, INSYSMA fails to identify *what* facts are genuinely disputed on this record that would make this so. "Rule 56(e) does not allow a party resisting the motion to rely merely upon bare assertions, conclusory allegations or suspicions. *Fireman's Ins. Co. of Newark, N. J. v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982).

Here, INSYSMA's conduct certainly went beyond the "gross negligent" category to a level where "the actor knows, or has reason to know...of facts that create a high degree of risk of...harm to another, and proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." *SHV Coal v. Continental Grain*, , 587 A.2d 702, 705 (Pa. 1991). INSYSMA acted with intent.

Finally, INSYSMA's argues it cannot be held liable before Huber filed INSYSMA's formal incorporation papers in Nevada on October 18, 2012 (**AFS**

**Ex. 141)** and that in any event it did not provide Huber with encouragement or substantial assistance (INSYSMA pp. 10-11).

As Judge Buckwalter held, a corporation can be held liable for aiding and abetting a breach of fiduciary duty by pre-incorporation activity, if it has retained the benefit of wrongful conduct:

*Nanodetex Corp. v. Defiant Techs.*, 349 Fed.Appx. 312, 322 (10th Cir.2009) (“[C]orporations are usually prevented from retaining the benefits of wrongful conduct [of promoters] while escaping liability for it.”); *Seibold v. Camulos Partners LP*, No. Civ.A.5176, 2012 WL 4076182, at \*22 n. 10 (Del.Ch. Sept. 17, 2012) (“The Noroton Entities would unquestionably be liable if they were in existence at the time that Seibold took the documents. Because they have benefitted exactly as if they had been in existence at that time, they should be liable in the same way. It is well-established that, if a later formed legal entity accepts benefits from earlier offenses, it may be liable for those offenses.”).

*Synthes, Inc. v. Emerge Med., Inc.*, 25 F.Supp.3d 617, 676 (E.D. Pa. 2014).

Here, INSYSMA engaged in substantial activity to aid and abet Huber’s breach (and benefit from that breach) before October 18, 2012. The record submitted by AFS in moving for summary judgment show acts before October 18, 2012 that included (with reference to INSYSMA’s response, **Ex. A**):

- On October 5, 2012, INSYSMA sent a contract on its letterhead to L&H for services on the gripper arms contract wrongly-diverted from AFS. **AFS Ex. 116, AFS SOF ¶131 (Admitted);**

- INSYSMA was subsequently paid \$41,322 pursuant to this contract, clearly retaining a substantial benefit ¶132 (**Admitted as to amount paid**);
- After the meeting in Charlotte, NC on September 27, 2012 to prepare a joint cylinder bid (AFS SOF ¶¶178) (**Admitted except argues AFS did not own the documents under VCSFA contract**), INSYSMA drafted a joint bid for itself and L&H for the cylinder upgrades, totaling more than \$2.3 million. **AFS Ex. 137 (Admitted)** This document was last modified on October 5, 2012. *Id.* (“INSYSMA” is referred to as “Seamless” or “SEM”, but it is the same entity later named INSYSMA). INSYSMA benefitted from this wrongful conduct because it later received a contract for these same cylinder upgrades worth over \$2 million. **AFS Exs. 192-193 (Admitted)**;
- On October 6, 2012, INSYSMA registered an internet domain name. **AFS Ex. 139 (Admitted)**;
- On October 6, 2012, INSYSMA had an active email account and address. **AFS Ex. 140 (Admitted)**;
- Shortly after Huber’s download of virtually all files from AFS servers on October 8-9, 2012 (¶185 and **AFS Ex. 142**)(**Admitted**), INSYSMA attached its name (asserting possession and ownership) to confidential AFS drawings on October 10, 2012 and subsequently.

**Burkhardt Report pp.8-9 (discussing AFS Exs. 153,158)**

**(Defendants object to Burkhardt Report but offer no countervailing or disputing evidence)<sup>1</sup>;**

- On October 15, 2012, INSYSMA drafted a bid proposal on its letterhead proposed paying INSYSMA for the cylinder upgrade contract, including \$150,000 for “Project Management,” \$75,000 for “Engineering and Simulation,” and a 6% “Finder’s Fee.” ¶192, AFS Ex. 143 and Burkhardt Report p.8 (Admitted except as to Burkhardt analysis of metadata). INSYSMA later retained benefits when it was awarded the \$2 million cylinder upgrade contract, ¶246, AFS Exs. 192-193 (Admitted);
- On October 16, 2012 the INSYSMA email system was used to send an email to Orbital touting INSYSMA and L&H and disparaging AFS. ¶195 and AFS Ex. 144 (Admitted). Again, INSYSMA ultimately benefitted when it was awarded the \$2 million cylinder upgrade contract, paragraph above.

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<sup>1</sup> While INSYSMA has lodged “objections” to Burkhardt’s report, that report is based upon his analysis and investigation, which he is clearly qualified to make as AFS’ IT Manager. INSYSMA has offered no contrary evidence (expert or lay) to contradict Mr. Burkhardt’s analysis. A base conclusory statement of “object” does not defeat summary judgment, *see Fireman’s Ins.*, p. 3 above.

There is no reason in logic or law why INSYSMA should not be fully responsible for wrongful acts in which it participated, beginning on October 5, 2012, where it has benefitted from those actions.

All of the above actions, taken together, are powerful, non-disputed evidence that show why INSYSMA is liable for aiding and abetting Huber's breach.

INSYSMA relies upon *Synthes* conclusion that Marotta's corporation, Emerge, did no more than passively retain benefits. "There is no suggestion that Emerge—as an entity—encouraged or substantially assisted Marotta's actions." 25 F.Supp.3d at 677. Indeed, in the record of that case, Emerge simply received money deposited in a bank account, and passively received materials from Marotta. *See* events listed on p. 677. Emerge *took no affirmative action of any kind*. Here, in contrast, INSYSMA did far more, as outlined above, including sending a final contract to L&H at a time when Huber was a full-time AFS employee. Judge Buckwalter's concern that the two causes of action (breach and aiding and abetting breach) would "merge" (*id.* at 678) only applies in the context where the new corporation is involved in no additional action, which is not this case here.

### **III. MISAPPROPRIATION OF TRADE SECRETS**

#### **A. Identifying Misappropriated Documents**

INSYSMA first argues that trade secrets must be identified in the record with reasonable particularity (INSYSMA p. 12). As INSYSMA notes, **AFS SOF ¶¶202-210** specifically identify AFS trade secrets INSYSMA is implicated in

misappropriating. They occurred while Huber remained a full-time AFS employee. They are:

- On October 23, 2012, INSYSMA substituted its name for AFS on each and every page of the 31 page misappropriated AFS “Weld History Report,” which listed the location, description and certification for more than 900 welds on the AFS TELHS. *Compare AFS Ex. 151* (AFS original) with **AFS 152** (INSYSMA name). This document was emailed to L&H on October 23, 2012. **See AFS SOF ¶203 (Admitted except argues that VCSFA owns these documents);**
- On October 23, 2012, INSYSMA substituted its name for AFS on each of the 15 pages of misappropriated AFS Weld Maps, made by AFS engineers for the Pipe Assemblies, which show where on the TELHS each of the 900 welds is located. *Compare AFS Ex. 153* (INSYSMA version) *with AFS Ex. 154* (AFS original). This document (postdated to November, 2012 but created on October 23, 2012, **Burkhardt Report pp. 8-9**) was emailed to L&H on October 23, 2012. **See AFS SOF ¶204 (Admitted as to all exhibits, object to one sentence re Burkhardt, and argues VCSFA owned these drawings);**

- On October 23, 2012, INSY SMA substituted its name for AFS on the 11 page misappropriated AFS TELHS NDE (“Non Destructive Evaluation”) Plan. This Plan certifies that all pipe welds and pressure vessels (components subject to high pressure) have been inspected and documented as having welds tested and certified per ASME standards. The AFS original is **AFS Ex. 156**. The one INSY SMA altered is **AFS Ex. 155**. (While it is post-dated to November, 2012, metadata confirms it was last modified October 23, 2012, **Burkhardt Report p. 9**). This document was sent to L&H on October 23, 2012. **AFS SOF ¶¶ 206-207 (Admitted as to AFS Ex. 155 and 156, objection only to Burkhardt Report and argues that VCSFA owns these drawings);**
- On October 23, 2012, INSY SMA substituted its name for AFS on seven pages of misappropriated AFS tubing drawings. *Compare AFS Ex. 157* (AFS originals) *with* **AFS Ex. 158** (INSY SMA copy). These drawings showed the tubing size, wall thickness and exact connection point of the non-welded tube assemblies that carry fluid through the TELHS. This INSY SMA document was post-dated to November 2012, but metadata establishes its actual date of October 10, 2012 (**Burkhardt Report p. 8**). It was sent to L&H on October 23, 2012. **AFS SOF ¶¶208-209 (Admitted as to Exs. 157-158, objection only**

**to Burkhardt Report and argues VCSFA owned these documents).**

These are more than clearly identified, and clearly show misappropriation by INSYSMA (as well as by Huber and L&H). And the fact that INSYSMA sought to conceal its conduct by post-dating the weld maps, tubing drawings, and NDE Plan to November 10, 2012—the day after Huber’s original scheduled last day at AFS (**AFS SOF ¶187**)—further confirms why INSYSMA’s misconduct was willful.

INSYSMA is incorrect, however, in stating on p. 12 that these are “the only acts of misappropriation” attributable to INSYSMA. The record shows substantial additional acts, as summarized on pp. 15-16 below.

INSYSMA cites Judge O’Neill’s case, *Syngy Inc. v. ZS Assocs Inc.*, 2015 WL 899408 \*6 (E.D. Pa. March 3, 2015), which found that plaintiff had adequately identified its trade secrets in a summary judgment context, where the identification was far less precise than here. (INSYSMA incorrectly claims this case involved “pleading”, whereas it involves summary judgment). Here, the **Dan Vaughn Declaration ¶¶35-39** specifically described the above items, why they were impossible to lawfully duplicate, and constitute AFS’ protected trade secrets. AFS IT Manager Chad Burkhardt reported on how these items had been misappropriated and discovered on Huber’s hard drive. **Burkhardt Report pp. 1-3, 8-9**. And **AFS SOF ¶¶202-208** describes them in detail. There is no basis for INSYSMA to argue lack of “identification.”

INSYSMA's two other cases do not support any contention that AFS lacked adequate identification. In *Dow Chem. Canada Inc. v. HRD Corp.*, 909 F.Supp.2d 340, 347 (D. Del. 2012), *aff'd*, 587 Fed.Appx. 741 (3d Cir. 2014) Dow gave the most conclusory description of some of its supposed trade secrets, such as:

Trade Secret 40—HRD gave Dow the concept of using dual catalysts to manufacture a 2-pack product.

And in *Gentex Corp. v. Sutter*, WL 467313, at \*1 (M.D. Pa. Feb. 23, 2009), Judge Caputo simply held plaintiff had adequately identified the trade secrets in a supplemental interrogatory answer, with no further description of the identification.

### **B. The VCSFA Contract and Trade Secrecy**

At pp. 13-16, INSYSMA sets forth an argument that the AFS/VCSFA contract deprives AFS of standing to assert a misappropriation claim. AFS has addressed this argument in *ECF-191 pp. 1-5*.

At pp. 16-20, INSYSMA sets forth an argument as to whether AFS adequately maintained confidentiality. AFS has addressed this argument in *ECF-191 pp. 5-17*.

### **C. Reverse Engineering Was Impossible**

At p. 21, INSYSMA claims the AFS misappropriated engineering drawings could have been reverse engineered. AFS has addressed this argument in *ECF-191 pp. 22-27*. If they could have been, why didn't defendants do it? The literal

impossibility of reverse engineering gave defendants a strong motive to misappropriate.

**D. The Record Shows Misappropriation by INSYSMA**

At p. 21 (second paragraph), INSYSMA claims the record shows no misappropriation by it. To the contrary, pp. 9-10 above cite to the record evidence that shows clear misappropriation. Pp. 15-16 below show many additional acts. INSYSMA, which acknowledges some of this evidence (INSYSMA p. 12, second paragraph, first sentence) does not address *any* of it.

**E. The Right to Exemplary Damages**

INSYSMA argues there is no basis for exemplary damages under PUTSA. To the contrary, PUTSA provides they are available for “willful and malicious conduct” (12 Pa.C.S.A. §5304), and PUTA defines that as follows:

**“Willful and malicious.”** Such intentional acts or gross neglect of duty as to evince a reckless indifference of the rights of others on the part of the wrongdoer, and an entire want of care so as to raise the presumption that the person at fault is conscious of the consequences of his carelessness.

12 Pa.C.S.A. § 5302. INSYSMA’s actions were “intentional” because the acts on pp. 8-10 above followed immediately after Huber’s massive misappropriation of AFS’ server on October 8-9, 2012 (AFS SOF ¶¶182-185 and AFS Ex. 142), and the acts on pp. 15-16 show a long, continuous pattern of wrongful conduct. And INSYSMA displayed “consciousness” of wrongdoing by post-dating

misappropriated documents to November 10, 2012, to make it appear they arose after Huber had left AFS' employment (see pp. 9-10 above).

INSYSMA claims AFS' entitlement to exemplary damages "makes no sense" because the Court has not yet awarded compensatory damages. (INSYSMA p. 22). That argument mixes apples and oranges. AFS did not move for the amount of compensatory damages, which will be the subject of a short bench trial (*see* ECF-155).<sup>2</sup> AFS *did* move for summary judgment on its *entitlement* to exemplary damages, because the record is clear that the PUTSA standard has been met. While the amount of both compensatory and exemplary damages will be set by the Court following bench trial, AFS' right to such damages if not fairly in dispute on this record.

#### **F. INSYSMA Caused Harm**

INSYSMA's final argument is a purely formalistic one, namely that AFS claims defendants' actions diverted the gripper arms and cylinder arms contracts "by September 17-18, 2012" and INSYSMA was only incorporated on September 18, 2012 (**AFS Ex. 141**), so INSYSMA cannot legally be the cause of any harm. (INSYSMA pp. 22-23).

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<sup>2</sup> Dan Vaughn, AFS' Vice President and Head of Engineering, served a damages report setting out AFS' lost profits on the two contracts in suit, and was deposed on this subject. AFS also retained an expert on damage calculations, Dr. Jonathan Cunitz, to validate Mr. Vaughn's methodology. He also served a report, but defendants chose not to depose him. Their combined testimony will take about ½ day, including anticipated cross-examination.

As an initial matter, INSYSMA has its dates wrong. The decision to award the gripper arm contract to L&H and not AFS was made during the week of September 24, 2012 (**AFS SOF ¶133**), after INSYSMA formally existed. Similarly, the earliest indications AFS had been eliminated from the cylinder upgrade contract is Mr. Edwards' email of September 18, 2012 (**AFS SOF ¶173**) and Mr. Fava's report for the week of September 24, 2012 (**AFS SOF ¶177**). All these dates are on or after when INSYSMA was formally in existence.

Second, for reasons set forth on p. 4 above, the formal date of incorporation is not dispositive for liability purposes.

Third, and as a larger matter, INSYSMA continued to participate in the scheme, and to receive the fruits of both contracts from which AFS had wrongfully been eliminated, after October 18, 2012:

- INSYSMA misappropriated AFS documents on September 23, 2012 (pp. 8-10 above);
- It worked to submit a joint INSYSMA/L&H bid to Orbital for the cylinder upgrades on November 2, 2012 (**AFS Ex. 173** and **AFS SOF ¶229** (“this proposal reflects a collaborative effort between S3 Group [L&H] and Integrated Systems and Machinery, subsequently referenced as INSYSMA.”) (**Admitted**);

- In doing so, INSYSMA explicitly acknowledged misappropriations from AFS, by stating this estimate “is based upon labor and material costs incurred on the first build.” **AFS Ex. 173 (Admitted);**
- In January, 2013, INSYSMA submitted to Orbital a Firm Fixed Price proposal for the cylinder contract. **AFS Ex. 183 and AFS SOF ¶243 (Admitted except makes argument that VCSFA, not AFS, owns these drawings).** It again acknowledged misappropriated AFS engineering drawings by stating that its “design reference” were the 20 pages of AFS 30-161-13 drawings.
- INSYSMA submitted to Orbital on March 5, 2012 a “Best and Final Offer” for the cylinder upgrade work, and explicitly again stated its offer had relied upon these same misappropriated AFS engineering drawings. **AFS SOF ¶253 (Admitted except argues that VCSFA, not AFS, owns these drawings).**
- Its efforts culminated in INSYSMA being awarded the \$2 million cylinder upgrade contract in March, 2013 (**AFS Ex. 192, 193 (Admitted).**)
- INSYSMA also received from L&H a total \$41,322 on October 31, 2012 and February 13, 2013 pursuant to the October 5, 2012 gripper

arms contract. **AFS Ex. 116, 180, and AFS SOF ¶¶131-132**

**(Admitted).**

In sum, INSYSMA engaged in a sustained, continuous course of wrongful conduct that greatly enriched itself, and should be held liable for exemplary and well as compensatory damages.

Date: September 15, 2016

Respectfully submitted,

/s/ David G. Concannon  
David G. Concannon  
Law Offices of David G. Concannon, LLC  
200 Eagle Road, Suite 116  
Wayne, PA 19087  
Telephone: (610) 293-8084  
Facsimile: (610) 293-8086

/s/ Robert J. LaRocca  
Robert J. LaRocca  
Kohn, Swift & Graf, P.C.  
One South Broad Street, Suite 2100  
Philadelphia, PA 19107  
Telephone: (215) 238-1700  
Facsimile: (215) 238-1968

*Counsel for Advanced Fluid Systems*

## **CERTIFICATION OF WORD COUNT AND CERTIFICATE OF SERVICE**

I certify that the text, including footnotes, of the foregoing memorandum is fewer than the 3,500 word limit for reply briefs pursuant to ECF-155 ¶2.

I certify that all counsel of record and Kevin Huber *pro se* were served through the Court's ECF system on September 15, 2016.

*/s/ Robert J. LaRocca*

Robert J. LaRocca