

Donald L. Ware
DLW-11
DW 04-048 - 26 Pages

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

VEOLIA WATER NORTH AMERICA)
OPERATING SERVICES, LLC f/k/a U.S.)
FILTER OPERATING SERVICES, INC.,)
)
Plaintiff,)
v.)
THE HALE COUNTY WATER)
AUTHORITY; and WILLIAM MARKS,)
TERRY HAMILTON, RONNIE THOMAS,)
RICHARD MOORE and CHARLES HALL,)
in their official capacity as members of the)
BOARD OF DIRECTORS OF THE HALE)
COUNTY WATER AUTHORITY,)
)
Defendants.)

CIVIL ACTION NO.
2:05-CV-00741-CG-B

**DEFENDANT HALE COUNTY WATER AUTHORITY'S ANSWER
AND AFFIRMATIVE DEFENSES TO COUNTS ONE, TWO,
AND THREE OF THE COMPLAINT AND COUNTERCLAIM**

By way of answer, affirmative defenses, and counterclaim, Defendant Hale County Water Authority ("HCWA") hereby responds as follows to Counts One, Two and Four of the Complaint filed in this action by Plaintiff Veolia Water North America Operating Services, LLC f/k/a U.S. Filter Operating Services, Inc. ("Plaintiff").

ANSWER TO COUNTS ONE, TWO, AND THREE

For answer to the specific counts and paragraphs of Counts One, Two, and Three of Plaintiff's Complaint, HCWA responds as follows:

1. Denied.
2. Upon information and belief, admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. HCWA is unable to admit or deny the allegations of paragraph 6 of the Complaint, to the extent such allegations require an admission.

7. HCWA is unable to admit or deny the allegations of paragraph 7 of the Complaint, to the extent such allegations require an admission.

8. HCWA is unable to admit or deny the allegations of paragraph 8 of the Complaint, to the extent such allegations require an admission.

9. HCWA is unable to admit or deny the allegations of paragraph 9 of the Complaint, to the extent such allegations require an admission.

10. HCWA is unable to admit or deny the allegations of paragraph 10 of the Complaint, to the extent such allegations require an admission.

11. Admitted.

12. HCWA is unable to admit or deny the allegations of paragraph 12 of the Complaint, to the extent such allegations require an admission.

13. HCWA admits that U.S. Filter Operating Services, Inc. executed Exhibit A to the Complaint on or about September 16, 2002, but is unable to admit or deny the remaining allegations of paragraph 13 of the Complaint.

14. HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of paragraph 14.

15. HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of paragraph 15.

16. HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of paragraph 16.

17. HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of paragraph 17.

18. With regard to the first two sentences of paragraph 18, HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of the first two sentences of paragraph 18. With regard to the third sentence of paragraph 18, HCWA admits that Appendix G to Exhibit A to the Complaint purports to state a Termination Schedule, but denies that Plaintiff accurately states the delineated Termination Amount for Contract Year 3 and denies that the Termination Schedule is enforceable. Any and all remaining allegations of paragraph 18 are denied.

19. Denied.

20. With regard to the first two sentence of paragraph 20, HCWA admits that it sent Exhibit B to the Complaint, a written document that speaks for itself, to Plaintiff on or about June 13, 2005. HCWA denies the allegations included in the third sentence of paragraph 20, and further denies any and all remaining allegations of paragraph 20.

21. Denied.

22. With regard to paragraph 22, HCWA admits that on or about June 16, 2005 Plaintiff sent Exhibit C to the Complaint, a written document that speaks for itself, to HCWA and that HCWA sometime thereafter received a copy of Exhibit C to the Complaint. HCWA denies the accuracy of the assertions made by Plaintiff in Exhibit C to the Complaint. Any and all remaining allegations of paragraph 22 are denied.

23. Denied.

24. Denied.

25. HCWA admits that it entered into a contract with a third party to operate and manage HCWA's assets and further admits that the third party thereafter began to perform under the contract. Any and all remaining allegations of paragraph 25 are denied.

26. Denied.

27. Denied.

28. Denied.

29. HCWA admits that it entered into a contract with a third party to operate and manage HCWA's assets and further admits that the third party thereafter began to perform under the contract. Any and all remaining allegations of paragraph 29 are denied.

COUNT I:
BREACH OF CONTRACT

30. For response to paragraph 30 of the Complaint, HCWA incorporates by reference herein its responses to paragraphs 1 through 29 with the same force and effect as if set forth separately and severally herein.

31. HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of paragraph 31.

32. Denied.

33. Denied.

34. Denied.

35. Denied that Plaintiff is entitled to the request relief.

COUNT II:
BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

36. For response to paragraph 36 of the Complaint, HCWA incorporates by reference herein its responses to paragraphs 1 through 35 with the same force and effect as if set forth separately and severally herein.

37. HCWA states that the rights, responsibilities, and obligations of HCWA and Plaintiff with respect to Exhibit A to the Complaint, a written document that speaks for itself, are to be determined by the Court and/or the trier of fact, in accordance with controlling law. Accordingly, HCWA neither admits nor denies the allegations of paragraph 37.

38. Denied.

- 39. Denied.
- 40. Denied that Plaintiff is entitled to the request relief.

COUNT III:
UNJUST ENRICHMENT AND MONEY HAD AND RECEIVED

41. For response to paragraph 41 of the Complaint, HCWA incorporates by reference herein its responses to paragraphs 1 through 40 with the same force and effect as if set forth separately and severally herein.

- 42. Denied.
- 43. Denied.
- 44. Denied.
- 45. Denied that Plaintiff is entitled to the request relief.

COUNT IV:
FRAUDULENT SUPPRESSION

HCWA is contemporaneously moving to dismiss Count Four of the Complaint, as a result of which no answer is required to this Count at this time.

COUNT V:
NEGLIGENCE

HCWA is contemporaneously moving to dismiss Count Five of the Complaint, as a result of which no answer is required to this Count at this time.

AFFIRMATIVE DEFENSES TO COUNTS ONE, TWO, AND THREE

FIRST DEFENSE

Plaintiffs' claims are barred by Plaintiffs numerous material breaches of the Agreement for Operations, Maintenance and Management Services, Exhibit A to the Complaint (the "Agreement").

SECOND DEFENSE

Plaintiff's claims are barred by the doctrines of waiver, estoppel, and unclean hands.

THIRD DEFENSE

The Agreement is unenforceable against HCWA as violative of Alabama's Competitive Bid Law.

FOURTH DEFENSE

Plaintiff committed an anticipatory breach and repudiation of its obligations under the Agreement, thereby excusing HCWA from any further duty, obligation, or performance under the Agreement.

FIFTH DEFENSE

Plaintiff, through its agent David Smith, repudiated its obligations under the Agreement, thereby entitling HCWA to terminate the agreement without breach.

SIXTH DEFENSE

HCWA is entitled to a set-off from Plaintiff.

SEVENTH DEFENSE

HCWA is entitled to a set-off from Plaintiff for debts of Plaintiff that HCWA was forced to pay.

EIGHTH DEFENSE

HCWA is entitled to a set-off from Plaintiff because Plaintiff's negligent performance of the Agreement caused financial losses to HCWA.

NINTH DEFENSE

HCWA is entitled to a set-off from Plaintiff based on Plaintiff's material breaches of the Agreement, including its failure to provide materials and equipment and failure to provide services as provided for in the Agreement.

TENTH DEFENSE

HCWA is entitled to a set-off from Plaintiff based on Plaintiff's conversion of property belonging to HCWA.

ELEVENTH DEFENSE

HCWA is entitled to a set-off from Plaintiff because Plaintiff improperly charged fees and expenses to HCWA that were the responsibility of Plaintiff.

TWELFTH DEFENSE

HCWA is entitled to a set-off from Plaintiff based on the fraudulent conduct of Plaintiff.

THIRTEENTH DEFENSE

The Agreement is unenforceable, in whole or in part, based on the doctrine of mistake.

FOURTEENTH DEFENSE

The Termination Schedule, Appendix G to Exhibit A, constitutes an unenforceable penalty.

FIFTEENTH DEFENSE

The Agreement is unenforceable against HCWA because Plaintiff fraudulently induced HCWA to enter into the Agreement.

COUNTERCLAIM

HCWA, defendant in the above-styled action, asserts the following Counterclaim against Plaintiff pursuant to Rule 13 of the Federal Rules of Civil Procedure:

1. Prior to September 2002, HCWA managed, maintained, and operated its water treatment and distribution facilities, sometimes referred to herein as the “water system,” through its own employees.

2. In approximately August 2002, an employee, servant, or agent of U.S. Filter Operating Services, Inc. (“U.S. Filter”) approached HCWA to discuss the possibility of HCWA entering into a contract with U.S. Filter pursuant to which U.S. Filter would take over the management, maintenance, and operation of HCWA’s water system.

3. U.S. Filter’s presentation touted the quality and performance of U.S. Filter, essentially portraying the entity as the industry leader and a good corporate citizen. Against this backdrop, U.S. Filter buttressed its sales pitch with a number of promises, each of which was essential to HCWA’s decision to enter into a contract with U.S. Filter.

4. In particular, the promises made to HCWA by U.S. Filter included the following:

- a. That U.S Filter would conduct a meter change out program on existing HCWA water meters to be completed in the first year of the contract, with U.S. Filter obtaining the services of a third-party contractor to perform all installation work;
 - b. That U.S. Filter would provide a leak detection crew with sophisticated leak detection equipment for the purpose of comprehensively testing HCWA's water system infrastructure to detect otherwise undiscoverable leaks;
 - c. That U.S Filter would provide a sophisticated computer management software program to be used in the management and operation of HCWA's water system;
 - d. That HCWA would be the beneficiary of seventy percent of all money saved through U.S. Filter's efforts; and
 - e. That U.S. Filter would actively interact with the citizens of Hale County, Alabama through school visits and other community outreach for the purpose of educating the citizens of Hale County, Alabama on important issues relating to water, including conservation of water.
5. Based on the presentation and promises made by U.S. Filter, HCWA, through its duly appointed board of directors, made the decision to enter into a contract with U.S. Filter.

6. U.S. Filter was responsible for drafting an agreement that reflected the discussions of U.S. Filter and HCWA and did in fact draft the contract that the parties ultimately signed, the Agreement for Operations, Maintenance and Management Services (the "Agreement"). A copy of the executed Agreement was attached to Plaintiff's Complaint in this action as Exhibit A.

7. HCWA, through its former chairman of the board, executed the Agreement on or about September 16, 2002 and U.S. Filter commenced operation and management of HCWA's water system on or about October 2002.

8. As HCWA and its board members understood the contract from discussions with U.S. Filter before and during the negotiation process, and from review of the Agreement, each and every promise made during the sales presentation was incorporated into the Agreement.

9. At that time of the Agreement's execution, U.S. Filter was the North American subsidiary of Vivendi Environment. Vivendi Environment in turn was a subsidiary of and/or a corporation controlled by Vivendi Universal, a French conglomerate that in 2002 was riddled with debt and on the verge of financial collapse. Of particular note, Vivendi Universal's stock price had dropped and its credit rating had fallen to "junk bond" status. These financial troubles were in large part caused by a culture of corporate corruption, exemplified by a civil fraud action by the U.S. Securities and Exchange Commission and class action lawsuits by disgruntled shareholders.

10. Vivendi Universal's financial crisis necessitated a fire-sale of assets. As part of this fire-sale, in approximately December 2002, Vivendi Universal sold its controlling share in and/or spun off Vivendi Environment. Nevertheless, at the time of this asset sale, Vivendi Environment was itself saddled with massive debt. As of 2003, that debt amounted to approximately \$13 billion.

11. In 2003, Vivendi Environment made the decision to change its name to Veolia Environment in an effort to disassociate itself from its former parent corporation.

12. Thereafter in 2003, Veolia Environment implemented a new corporate strategy for its North American business that was focused "on outsourcing services and long-term contracts for both municipalities and industrial companies." As part of the strategy, Veolia Environment determined to sell those assets of U.S. Filter that did not fit within its new area of focus, in order to cut costs and reduce its large debt.

13. Ultimately, in approximately September 2003, Veolia Environment made the decision to sell off the bulk of its U.S. Filter assets, including Everpure and Culligan, certain California farmlands, and its systems and services business. Those assets were sold piece-meal between late 2003 and July 2004 for approximately \$1.9 billion.

14. Thereafter, on or about January 1, 2004, Veolia Environment gave its remaining U.S. Filter assets a new name, Veolia Water North America Operating Services, Inc. By July 6, 2004, Veolia Water North America Operating Services, Inc. changed from a corporation to a

limited liability company, thereby becoming Veolia Water North America Operating Services, LLC, the Plaintiff in this action. Veolia Water North America Operating Services, LLC is referred to herein as "Plaintiff."

15. The time during which Plaintiff managed, maintained, and operated HCWA's water treatment and distribution facilities was plagued with false promises and ongoing material breaches of contract, the adverse effects of which were exacerbated by Plaintiff's continuous efforts to (1) reduce its own operating costs and responsibilities and (2) increase HCWA's costs and responsibilities.

16. The Agreement in particular required U.S. Filter to "retain a third party contractor to replace all [water] meters within the first year." Ex. A ¶ 4.2. U.S. Filter consciously disregarded this clear obligation and instead used employees assigned to work on HCWA's water system to change out meters. Once these employees were taken away from their other job responsibilities, leaks began to increase. Ultimately, HCWA was forced to expend monies to hire a third-party contractor to work on reducing leaks because U.S. Filter was not adequately performing its obligations under the Agreement to maintain the water system. In addition, the meter change out program was not completed within one year and, indeed, neither U.S. Filter nor Plaintiff ever finished performing all aspects of the contracted for meter change, despite having been responsible for the water system for over two and a half years.

17. Despite having both orally promised and contractually agreed to implement a water meter change out program within one year using a third-party contractor, U.S. Filter never intended to provide the promised performance.

18. Paragraph 4.2 similarly required U.S. Filter to provide “[a] leak detection crew . . . to do an extensive leak detection audit of the entire water system using computerized correlating equipment, and make repairs accordingly.” U.S. Filter and Plaintiff never provided “a leak detection crew,” never performed the “extensive leak detection audit,” and never used “computerized correlating equipment,” nor did they ever intend to provide the promised performance.

19. Plaintiff further breached the staffing requirements of the Agreement found in paragraph 2.1. Under this provision, Plaintiff was obligated to provide “employees who have met appropriate licensing and certification requirements of the State of Alabama.” Beginning in approximately February 2005, at which time Plaintiff removed its Senior Project Manager from the HCWA project, no employees working on the HCWA project held the proper certifications required by the State of Alabama. In addition, at least during the period beginning in or around February 2005, Plaintiff failed to employ sufficient staff and/or sufficiently trained staff to perform its obligations under the Agreement.

20. The Agreement’s staffing requirements additionally required Plaintiff to provide a “Project Manager and his designee [who] will be on call 24 hours per day seven days a week for all customer complaints as well as any needed repairs.” Beginning in approximately February

2005, Plaintiff replaced its Senior Project Manager with a new Senior Project Manager, J.R. Parrish. The previous Senior Project Manager worked out of HCWA's office in Greensboro. J.R. Parrish, however, worked in Hoover, Alabama, where he was assigned to run a separate project. Parrish only visited the HCWA project one day per week. In addition, he was not on call as required and indeed was functionally unreachable for customer problems and complaints. HCWA customers who were unable to reach J.R. Parrish frequently began to contact members of HCWA's board of directors to complain about issues with their water service.

21. Compounding the staffing problems was Plaintiff's unilateral decision to use employees assigned to the HCWA project to work on other projects, thereby reducing the amount of time such employees were available to work on HCWA's water system. Specifically, employees of Plaintiff assigned to the HCWA project began to work on separate projects run by Plaintiff in Marion, Alabama and Perry County Alabama.

22. Reduction in staffing and availability of employees, including the change in Senior Project Manager, was a part of Plaintiff's overall efforts to slash its costs of operating and managing the HCWA water system to improve bottom line profitability, regardless of the detrimental effects such cuts would have on HCWA. Most notably, Plaintiff cut out the previous Senior Project Manager's salary and benefits altogether by "replacing him" with a person already employed by Plaintiff. J.R. Parrish, the replacement, upon information and belief, did not have a rural water background, was not certified in water, and was simply incapable of managing HCWA's water system.

23. As Plaintiff implemented its cost cutting measures, the operation and efficiency of HCWA's water system greatly deteriorated. Leaks within the water system greatly increased and the financial solvency and stability of the water system came into jeopardy. Customer complaints greatly escalating as a direct result of the deterioration, which complaints, as noted above, Plaintiff's Senior Project Manager failed and/or refused to handle.

24. When HCWA raised staffing and other problems with Plaintiff, HCWA was told that it would simply have to accept the arrangements and that Plaintiff had no intention of changing course. Indeed, when HCWA specifically complained that Plaintiff was not adhering to the letter of the Agreement, David Smith, Plaintiff's Regional Vice President, told HCWA that the Agreement "was not worth the paper it was written on." HCWA understood Smith's assertion to mean that, regardless of what obligations Plaintiff agreed to in the Agreement, Plaintiff would unilaterally decide which obligations of the Agreement it intended to fulfill and that HCWA was powerless to influence Plaintiff's decisions.

25. The efforts of Plaintiff (including its predecessor U.S. Filter) to squeeze every possible penny of profit out of HCWA and its customers were not limited to simply staffing issues, however. Plaintiff wrongfully passed on expenses to HCWA that were the responsibility of Plaintiff, including routine maintenance costs for Plaintiff's vehicles. Further, Plaintiff improperly charged additional fees to HCWA for performing services that were already provided for in the Agreement. Thus, Plaintiff forced HCWA to pay for services that Plaintiff already had a responsibility to perform. To make matters worse, Plaintiff billed HCWA for services that it was not even performing. Additionally, Plaintiff, through deceit and manipulation, influenced

HCWA to expend money on unnecessary capitol improvement projects in order to reduce the cost of Plaintiff's performance under the Agreement.

26. To the extent HCWA agreed to and/or acquiesced in any of Plaintiff's above efforts to wrongfully obtain additional monies from HCWA, such agreement and/or acquiescence was the result of a mistaken understanding of legal and factual issues surrounding the Agreement and/or outright deception on the part of Plaintiff.

27. Plaintiff and U.S. Filter failed to implement any community educational or outreach programs, as promised, and U.S. Filter never intended to do so.

28. Plaintiff and U.S. Filter never provided any management software, despite promising to do so and obligating themselves to do so in the Agreement. At the time of contracting, U.S. Filter never intended to provide the agreed upon computer software.

29. HCWA never received the promised water savings from Plaintiff, as promised, and U.S. Filter never intended to provide any such savings from the start.

30. With regard to any notice of termination provisions under the Agreement, HCWA either complied with such obligations or HCWA was excused from such obligations because of Plaintiff's material breaches and/or repudiation of the Agreement.

31. Further, with regard to the Termination Schedule attached to the Agreement, such amounts do not represent the amounts Plaintiff or U.S. Filter spent or incurred at the commencement of the Agreement. Specifically, Plaintiff and U.S. Filter did not provide all of the equipment listed on Appendix F, incurred no initial costs for the purchase of water, and did not provide all of the itemized equipment. Rather than being an accurate itemization of Plaintiff's start up costs, the Termination Schedule is nothing more than a sham liquidated damages provision, the purpose of which was to deter HCWA from terminating the Agreement and/or punish HCWA for terminating the Agreement.

32. Based on the Plaintiff's numerous material breaches, its effective abandonment of its responsibilities under the Agreement, and its refusal to rectify these problems despite requests from HCWA, HCWA was left with no choice but to terminate the Agreement. Several days prior to the designated date of termination, Plaintiff not only abandoned the HCWA project, but it further instructed its employees to remove property that belonged to HCWA.

33. Following its abandonment of HCWA's water system, Plaintiff also abandoned its obligation to pay for substantial invoices that were Plaintiff's responsibility. Because such invoices were in the name of HCWA, upon Plaintiff's failure to make such payments, HCWA was forced to do so. Upon information and belief, HCWA has paid in excess of \$100,000 in invoices that were the sole responsibility of Plaintiff.

34. Further, Plaintiff's Regional Vice President David Smith misappropriated and removed HCWA's corporate minutes from HCWA's offices. These corporate minutes are

invaluable and have never been returned. Smith obtained possession of the corporate minutes through fraud and deception for the purpose of concealing and/or eliminating information adverse to Plaintiff and helpful to HCWA.

COUNT ONE – BREACH OF CONTRACT

35. HCWA repeats and realleges paragraphs 1 through 34 as if fully set forth herein.

36. Plaintiff and its predecessor U.S. Filter breached the Agreement, causing injury to HCWA, for the reasons set forth above.

37. Plaintiff and its predecessor U.S. Filter further breached the implied covenant of good faith and fair dealing that required them to perform under the contract to achieve the purpose of the contract rather than use such contract as a means of extracting huge profits out of HCWA and its customers.

38. HCWA is entitled to an award of reasonable attorney's fees pursuant to the Agreement for the attorney's fees that are incurred in maintaining this Counterclaim and in defending against Plaintiff's Complaint.

39. WHEREFORE, HCWA claims all compensatory damages allowed pursuant to Alabama law for the breach of the Agreement by Plaintiff and its predecessor, including attorney's fees, plus costs and any such other relief as this Court deems appropriate.

COUNT TWO – FRAUDULENT INDUCEMENT

40. HCWA repeats and realleges paragraphs 1 through 34 as if fully set forth herein.

41. Plaintiff's predecessor U.S. Filter fraudulently induced HCWA to enter into the Agreement through false promises and representations that U.S. Filter never intended to follow through on.

42. U.S. Filter's representations were false and made with knowledge of their falsity, recklessly, or negligently.

43. In reasonable reliance upon these false representations, HCWA agreed to execute the contract. Absent such false representations, HCWA would not have entered into the Agreement.

44. HCWA suffered substantial injury as a result of this fraud, having been driven to the verge of financial collapse by U.S. Filter and Plaintiff.

45. The fraudulent conduct of U.S. Filter and Plaintiff is part of a pattern and practice of false promises being made to obtain contracts and of exploitation of small municipal water and waste water systems.

46. WHEREFORE, HCWA claims all compensatory damages allowed pursuant to Alabama law, punitive damages, attorney's fees, costs, and any such other relief as this Court deems appropriate

COUNT THREE – PROMSSORY FRAUD

47. HCWA repeats and realleges paragraphs 1 through 34 as if fully set forth herein.

48. Plaintiff's predecessor U.S. Filter committed promissory fraud by falsely promising to provide contractual performance in the future with no intention of ever performing.

49. At the time it made the false promises, U.S. Filter had an intent to deceive HCWA and HCWA was in fact deceived.

50. In reasonable reliance upon these false promises, HCWA agreed to execute the contract. Absent such false promises, HCWA would not have entered into the Agreement.

51. HCWA suffered substantial injury as a result of this promissory fraud, having been driven to the verge of financial collapse by U.S. Filter and Plaintiff.

52. The fraudulent conduct of U.S. Filter and Plaintiff is part of a pattern and practice of false promises being made to obtain contracts and of exploitation of small municipal water and waste water systems.

53. WHEREFORE, HCWA claims all compensatory damages allowed pursuant to Alabama law, punitive damages, attorney's fees, costs, and any such other relief as this Court deems appropriate

**COUNT FOUR – UNJUST ENRICHMENT, MONEY HAD
AND RECEIVED, AND PAYMENT BY MISTAKE**

54. HCWA repeats and realleges paragraphs 1 through 34 as if fully set forth herein.

55. Throughout the time U.S. Filter and Plaintiff operated HCWA's water system, HCWA made substantial monthly payments to them based on an understanding and belief that (1) such payments were due and payable under the Agreement, (2) U.S. Filter and Plaintiff had taken all steps necessary in order to receive such payments, and (3) the invoices and/or requests for payment of Plaintiff and U.S. Filter represented the actual work performed and/or expenses incurred by Plaintiff and U.S. Filter.

56. HCWA later discovered that some or all of the payments made to Plaintiff and U.S. Filter should not have been made because Plaintiff and U.S. Filter did not provide the performance owed under the Agreement, charged HCWA for expenses that were not owed, and added amounts to the invoices that were not due.

57. Based on these facts, Plaintiff and its predecessor U.S. Filter hold money which in equity and good conscience should be returned to HCWA.

58. Such payments were made to Plaintiff and U.S. Filter based on the expectation that Plaintiff and U.S. Filter would deliver on the promises and contractual obligations.

59. Additionally or alternatively, HCWA made payments to Plaintiff and U.S. Filter mistakenly, without knowledge of the true facts and/or based on fraud.

60. Plaintiff will be unjustly enriched if it is allowed to retain such monies.

61. WHEREFORE, HCWA claims all compensatory damages allowed pursuant to Alabama law, including attorney's fees, plus costs and any such other relief as this Court deems appropriate.

COUNT FIVE – TRESPASS TO CHATTEL/CONVERSION

62. HCWA repeats and realleges paragraphs 1 through 34 as if fully set forth herein.

63. By taking property belonging to HCWA following termination of the Agreement, Plaintiff committed a trespass to chattel or alternatively converted property belonging to HCWA.

64. Plaintiff further committed a trespass to chattel or alternatively converted property belonging to HCWA when its Regional Vice President misappropriated HCWA's corporate minutes.

65. Plaintiff's actions were done willfully, intentionally, and/or maliciously.

66. WHEREFORE, HCWA claims all compensatory damages allowed pursuant to Alabama law, punitive damages, attorney's fees, costs, and any such other relief as this Court deems appropriate.

RELIEF REQUESTED

WHEREFORE, HCWA respectfully requests that the trier of fact and/or this Court award it the following relief:

- (1) The entry of judgment in favor of HCWA and against Plaintiff on the Counterclaim;
- (2) An award of compensatory and punitive damages;
- (3) An award of reasonable attorney's fees and costs; and
- (4) Such other relief as this Court deems appropriate.

JURY DEMAND

HCWA demands trial by struck jury.

Respectfully submitted,

s Floyd D. Gaines
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OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

H. Thomas Wells (WELLH8511)
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