STATE OF NORTH CAROLINA
BURKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04-CVS-1490

CNC ACCESS, INC.	
Plaintiff,	
vs.	
VICKIE SCRUGGS, RICHARD GREER AND UNIVERSAL MENTAL HEALTH SERVICES , INC.,	
Defendants.	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

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Plaintiff, CNC/Access, Inc. ("CNC/Access"), by and through its undersigned counsel and pursuant to Rule 56 of the North Carolina Rule of Civil Procedure, hereby files this Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment as to all claims.

INTRODUCTION

As the Detective in Dragnet, Jack Webb (no relation, incidentally) used to say: "Just the facts, ma'am, just the facts." Set forth below are the facts, uncontroverted or uncontrovertible, in this case:

1. In 1986, Defendant Richard Greer ("Greer") incorporated Communication Network Consultants, Inc. ("CNC") in Rhode Island as an engineering consulting firm. (Greer Deposition, p.6)

2. After relocating to North Carolina in 1987, CNC in 1991 began the provision of mental health and ancillary services with its corporate office located in Raleigh, North Carolina. (Greer Deposition, p. 7-8).
3. On September 12, 1996 Defendant Vickie Scruggs ("Scruggs") entered into an Employment Agreement with CNC which contained a three (3) year noncompete covenant within the State of North Carolina and served in the capacity of Staff Supervisor generally responsible for "managing service delivery of clients." (See Exhibit 1 hereto). Services delivery was effected through "direct care staff" also known as "direct care workers."
4. On July 31, 1997, Res-Care, Inc. ("Res-Care"), a provider of residential, training, educational, and support services, acquired CNC from Greer and his son Robert and daughter Alicia for approximately $20 million. (Complaint ¶ 13, Greer Deposition, p. 26). Subsequently because of another acquisition, CNC became known as "CNC/Access."
5. At the time CNC was sold to Res-Care, CNC had offices "pretty much across the state [of North Carolina.]" (Greer Deposition, p. 21, Exhibit 2 hereto)
6. On July 31, 1997, Greer signed a "Noncompetition, Confidentiality and Nonsolicitation Agreement" ("NC & N Agreement") with Res-Care. (See Exhibit 3 hereto).
7. The NC & N Agreement with Res-Care contained a five (5) year "Covenant Not To Compete or Engage in Solicitation" provision.

8. The NC & N Agreement with Res-Care also contained a non-durational "Covenant Not to Disclose Confidential Information" provision setting forth a non-exhaustive definition of "Confidential Information."
9. The "Covenant Not to Compete or Engage in Solicitation" provision of the NC & N Agreement with Res-Care expired in 2002. The "Covenant Not to Disclose Confidential Information" provision is still in effect.
10. The Defendants have never contended that the NC & N Agreement with Res-Care is invalid.
11. Greer, along with his children Robert and Alicia, formed Defendant Universal Mental Health Services, Inc. ("Universal") in early 2003. (Defendants' Memorandum of Law in Support of Joint Motion for Summary Judgment, p.5).
12. Universal, like the Plaintiff, was and is in the business of providing Mental Health, Developmentally Disabled, and Substance Abuse ("MH/DD/SAS") services.
13. On or about August 4, 2003 Universal "started operations." (Defendant's Memorandum of Law in Support of Joint Motion for Summary Judgment, p. 5).
14. On September 15 or 16, 2003 Scruggs left CNC/Access and commenced her employment with Universal. (Scruggs Deposition I, p. 6). [1]
15. When Scruggs came over to Universal on September 15 or 16, 2003, Universal had **no** clients waiting for a direct care worker to provide services to him or her. (Scruggs Deposition I, p. 40, Exhibit 4 hereto). Moreover, Scruggs did not

[1] There were two (2) depositions taken of Scruggs, one prior to the institution of litigation, referred to herein as "Scruggs Deposition I", and one taken on February 28, 2006, referred to herein as "Scruggs Deposition II." By stipulation Scruggs Deposition I can be used for any authorized purpose in this litigation.

remember any CNC/Access employee coming to work for Universal (under her supervision) who came to Universal without a client. (Scruggs Deposition I, p. 39, Exhibit 5 hereto).

16. Prior to September 15, 2003 Universal "did not have any CAP/MR (Community Alternative Program/Mental Retardation) clients" and only one CAP/MR employee, a staff supervisor who lasted a little over a month (from September 2, 2003-October 10, 2003). (Response Numbers 1 and 4 of Universal to Plaintiffs Third Set of Interrogatories and attached Employee List, Exhibits 6 & 7 hereto).
17. Universal had **no** revenue from CAP/MR clients prior to September 15, 2003 (Interrogatory Response Number 11 of Universal to Plaintiff's Third Set of Interrogatories, Exhibit 6 hereto).
18. Seventeen (17) out of eighteen (18) Universal CAP/MR employees came from CNC/Access between September 15, 2003 and October 31, 2003, all but Scruggs bringing CNC/Access clients with them. (See Exhibit 7 hereto).
19. Universal had **no** CBS (Community Based Services) employees or clients at its Asheville office prior to October 2003. (Interrogatory Response Number 8 of Universal to Plaintiff's Third Set of Interrogatories, Exhibits 6 & 8 hereto).
20. Universal had **no** revenue from CBS at its Asheville office prior to October 2003 (Interrogatory Response Number 13 of Universal to Plaintiff's Third Set of Interrogatories, Exhibit 6 hereto).
21. From November 17, 2003 through January 23, 2004, 9 out of 15 CBS employees in the Universal Asheville office came from CNC/Access. From November 17,

2003 through February, 2004, 14 out of 26 CBS employees at the Universal Asheville office came from CNC/Access. (See Exhibit 8 hereto).

22. By January 30, 2004, CNC/Access's Asheville Mental Health office had experienced a one-hundred (100) percent turnover rate. (See Exhibit 23 hereto).

23. Dr. Richard Welser ("Welser") was employed by Universal from August, 2003 until December, 2003, when he resigned. Welser states under oath:

> "While employed by Universal I overheard conversations of Universal Management to the affect that they had solicited direct care staff and their clients at CNC/Access, Inc. ("CNC") to convince them to come over to Universal. I do not know of my own personal knowledge if this occurred but my sense, from overhearing conversations of Universal Management, is that the solicitation was successful."

(Exhibit 9 hereto).

24. Greer has opined that he did not believe that "the solicitation of a client that is already under a provider's service" was proper- "that client should not be solicited." (Greer Deposition, p.71, Exhibit 10 hereto).

25. Early Universal Management based Universal personnel policies on a CNC/Access Manual purloined by Greer's brother, Steven, Human Resources Director of CNC/Access, at the request of Greer's son, Robert. (Defendants' Memorandum of Law in Support of Joint Motion for Summary Judgment, p. 5).

26. In the Fourth Quarter of 2003, Universal had CBS revenues of $947.14 and total revenues of $120,039.20. By the Second Quarter of 2004 Universal had CBS revenues of $422,692.13 and total revenues of $618,934.43. (See Exhibit 11 hereto).

27. According to the Affidavit of the Director of Finance at CNC/Access, who "was requested to compute the financial loss to CNC/Access as a result of the actions which are the subject of *CNC/Access v. Scruggs, et al.* Case No. 04-CVS-1490" the annualized economic loss to CNC/Access as a proximate result of the actions of the Defendants is $643,705.00. (See Exhibit 12 hereto).

ARGUMENT

I. STANDARD FOR GRANTING OR DENYING A MOTION FOR SUMMARY JUDGMENT.

The Plaintiffs will not insult this Court's intelligence by briefing this standard.

II. BREACH OF CONTRACT CLAIMS AGAINST SCRUGGS

A. Noncompete Covenant

The question this Court must address and resolve as to this allegation is two-fold: (a) Was the Scruggs Employment Agreement of September 12, 1996 (Exhibit 1 hereto) a valid, enforceable contract; and, if so, (b) Is there a genuine issue of material fact as to whether Scruggs violated her Employment Agreement.

An integrated question is whether an Employment Agreement, valid and enforceable when executed, can become by virtue of a change of business circumstances invalid and unenforceable.

When Scruggs signed her Employment Agreement on September 12, 1996, CNC had offices "pretty much across the state [of North Carolina]." (Greer Deposition, p.21, Exhibit 2 hereto). Scruggs's Employment Agreement does not confine her to a specific geographic region of North Carolina. Scruggs was, therefore, available for assignment to provide her staff supervising services anywhere in the State. (See Affidavit of Judy

Hardy, Exhibit 16 hereto). Consequently, the assertion that the noncompete covenant is overbroad as to geographic territory is unavailing. The Plaintiff candidly concedes that as CNC became CNC/Access and the MH/DD/SA business evolved, Scruggs' duties were concentrated in the Western part of North Carolina although she was still available for assignment anywhere CNC/Access did business - - which is still across the State of North Carolina.

With respect to the contention that the noncompete covenant is overbroad in time, the Defendants maintain that three (3) years is too long and that "it is patently unreasonable to prohibit a former employee from providing services to [a] consumer for three years." (Defendant's Memorandum of Law in Support of Joint Motion for Summary Judgment, p.17). However, Scruggs was not providing services to consumers. The consumer ties were in reality to their direct care worker and they probably had very little interest in who supervised that worker.

The simple answer to the question of whether Scruggs was restricted by her Employment Agreement from engaging in even "wholly unrelated" work is that she contractually obligated herself (presumably without a gun pointed at her head) not "to compete" against CNC which obviously means not to compete in the area of MH/DD/SAS since that is the core business it is engaged in. Could the plaintiff prohibit Scruggs from becoming the janitor at Universal? Clearly not because that would not constitute "competition" within any reasonable interpretation of the contractual instrument.

Finally, it is claimed that the Scruggs noncompete violates public policy and, hence, is invalid and unenforceable. This claim is grounded on the undeniable premise

that MH/DD/SAS clients should have freedom of choice in choosing their caregivers. Once again, however, it is a self-evident and uncontroverted fact that Scruggs was and is not a direct care provider; she was and is simply a staff supervisor "managing service delivery of clients." Thus, the noncompete covenant of Scruggs is no more an impingement on freedom of choice as to the provision of direct care services to consumers than a noncompete covenant on a Vice-President of Operations would be.

Also relied upon in making the public policy argument is the notion of the need to insure "continuity of care" for the consumer. It is quite clear, however, that a large provider such as the Plaintiff is quite able to fulfill the needs of a client whose direct care worker leaves CNC/Access for whatever reason. In other words, the care for a CNC/Access client will be continued with the most qualified direct care worker in its employ - - who may even become more trusted and valued by a consumer than the direct care worker who left. (See Hardy Affidavit, Exhibit 16 hereto). In any event, there is nothing in the Scruggs's noncompete covenant to suggest that care to consumers would be interrupted if the covenant is enforced.

The question then becomes whether the Plaintiff has forecast sufficient evidence of a breach of the Scruggs's Employment Agreement to survive the Defendants' Joint Motion for Summary Judgment. This question need not detain the Court long as the following excerpt from the second Scruggs deposition shows:

> Q: Going back to your Employment Agreement executed September 12, 1996 with the Greers, what gave you the idea that you could go to work for a competitor within three years of terminating with CNC.
>
> A: I just think everybody has the right to work where they want to work.
>
> Q: Did you honor your bargain? Did you honor your agreement? I mean, you've told me that CNC provided you with salary that's specified. You

> told me that they gave you the sick leave, vacation, benefits, all of that. Now I'm asking you, did you honor your part of the bargain? Did you honor the provision of this agreement (the employment contract)?
>
> A: I guess not.

(Scruggs Deposition II, p. 29-31, Exhibit 14 hereto).

B. Breach of Duties as CNC/Access Employee

The Scruggs's Employment Agreement (Exhibit 1 hereto) also contained, in Section 2.B. thereof, a requirement that she devote her full time to the performance of her duties for CNC/Access and not undertake activities "that would unreasonably or materially interfere with…performance of [her] duties." (See Section 2.B of Scruggs Employment Agreement, Exhibit 1 hereto).

The Plaintiff has avered that even while an employee of CNC/Access, Scruggs was laying the groundwork for her switch to Universal by telling CNC/Access employees that Universal would present a better opportunity for them if they would move their clients from CNC/Access to Universal. In support of this averment the Plaintiff offers the following excerpt from Scruggs Deposition I:

> Q: You don't recall that? Okay.
>
> Well, then you probably won't recall this either, but I'll ask it. Do you deny telling certain CNC employees with whom you had a working relationship that you were going to Universal and Universal presented a better opportunity for you and better opportunity for them if they would move their client over to Universal? You don't recall that either?
>
> A: No.

(Scruggs Deposition I, p. 35, Exhibit 15 hereto). Also, Dr. Richard Welser, who was employed by Universal from August, 2003 until December, 2003 when he resigned, stated in his Affidavit that he "overheard conversations of Universal Management to the affect that they had solicited direct care staff and their clients

at CNC/Access, Inc. ("CNC") to convince them to come over to Universal." (See Exhibit 9 hereto).

Taken together this constitutes at least strong circumstantial evidence from which this Court may infer a violation by Scruggs of Section 2.B. of her Employment Agreement.

III. BREACH OF FIDUCIARY DUTY CLAIM

Having considered the discovery evidence adduced in this case as well as pertinent case law authority, the Plaintiff is now willing to dismiss its breach of fiduciary duty claim.

IV. DEFENDANTS' TRADE SECRETS AND CONFIDENTIALITY AGREEMENT VIOLATIONS.

The North Carolina Trade Secrets Protection Act ("NCTSPA") defines a trade secret as business or technical information that "derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering…[and] is subject to efforts that are reasonable under the circumstances to maintain its secrecy." N.C. Gen. Stat. § 66-152(3)(a)-(b) (2005). In order to withstand a motion for summary judgment, courts have held that a plaintiff must allege facts sufficient to allow a reasonable finder of fact to conclude that the information at issue satisfies both requirements. *Bank Travel Bank v. McCoy*, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992), aff'd sub nom. *Amarigilo-Dunn v. McCoy*, 4 F.3d 984 (4th Cir. 1993). Whether information is a trade secret is a question of fact. *See Wilmington Star-News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 180, 480 S.E.2d 53, 56 (1997). North Carolina courts have used the following six factors in determining if information qualifies as a trade secret:

> (1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C., 620 S.E.2d 222, 226 (N.C. App. 2005). When applying these factors, courts have found that cost history information, price lists, and confidential customer lists all constitute a trade secret protected by the Act. *See Byrd's Lawn & Landscaping, Inc. v. Smith,* 142 N.C. App. 371, 542 S.E.2d 689 (2001); *Wilmington Star-News v. New Hanover Reg'l Med. Ctr.,* 125 N.C. App. 174, 179, 480 S.E.2d 53, 56 (1997); *Drouillard v. Keister Williams Newspaper Servs.* 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992).

CNC/Access has alleged that there are essentially four groups of trade secrets that Defendants stole from CNC/Access and misappropriated in violation of NCTSPA. These four groups are (1) information regarding current employees, including but not limited to, their salaries and benefits information; (2) names and information regarding current clients of CNC/Access; (3) new hire training documents and medical records; and (4) numerous operational, accounting, and personnel polices along with other company forms. The compilation of this information constitutes trade secrets and the actions by Universal to procure, implement and use this information constitutes a misappropriation of these trade secrets under NCTSPA.

A. Summary of *Sunbelt* Case

An explanation and application of *Sunbelt Rentals, Inc. v. Head & Enguist Equipment, L.L.C.* is imperative in this case because in their memorandum of law, the

Defendants failed to address its controlling nature and its factual similarity to the case at bar. In *Sunbelt,* former employees of Sunbelt Rentals left the company and began work for a competitor, H&E. The former employees began to perform similar duties at H&E that they had done with Sunbelt Rentals. They used information they had obtained while working with the plaintiff in order to help the new company break into a new market in seven (7) southeastern cities. This included information regarding specific fleet mixes for each of the proposed branches to coincide with the local rental markets, including specific employee compensation rates. In each location, the defendants were able to convince a significant number of branch managers and key personnel to leave Sunbelt Rentals in order to work for H&E. The trial court found and the North Carolina Court of Appeals court affirmed that "(1) Sunbelt's compilation of information, including its special pricing information, customer information (identity, contacts and requirements of its rental customers), personnel and salary information, organizational structure, financial projections and forecasts, utilization rates, fleet mix by market, capital and branch budget information, and cost information, when taken together constitute trade secrets and (2) that the defendants misappropriated BPS/Sunbelt's trade secret information unlawfully." (emphasis supplied) *Sunbelt,* 620 S.E.2d 222, 226 (N.C. App. 2005).

B. Defendants Misappropriated the Trade Secrets of CNC Which Included a Wide Range of Client and Employee Information and Company Documents and Forms.

1. The client and employee information and company forms and documents constituted a trade secret under the NCTSPA.

As mentioned above, there are numerous factors used to determine if information is considered a trade secret. First, with the exception of pertinent government regulatory agencies, the information contained in the client and employee lists are not generally

known outside of CNC/Access. With respect to the client lists, this information is only known by the direct care staff ("DCS") and their supervisors. (See Exhibit 13 hereto). The DCS and their supervisors are held to a high standard of confidentiality which would prevent those outside of CNC/Access from knowing who their clients are. (See CNC/Access Employee Assurance of Confidentiality Form attached as Exhibit 22 hereto). In addition, the information regarding the employees of CNC/Access is considered confidential and not generally known to those outside of CNC/Access (See Hardy Affidavit, Exhibit 13). Greer and Scruggs had knowledge of this information and used the information in order to poach on the employees of CNC/Access and lure them away to Universal.

Second, the information contained in the client and employee lists is only discreetly disclosed within CNC/Access and employees are aware that the information contained in client lists is to be kept confidential. (See Exhibit 22; Hardy Affidavit, Exhibit 13 hereto). In addition, Greer and Scruggs's knowledge of employee salaries and benefits was confidential and constitutes a trade secret used to recruit and maintain employees.

Third, the information contained in the lists are extremely valuable to the company in that the clients and employees are the crux of the company. Competitors find this information valuable because being able to secure such information would enable them to know who CNC/Access's clients are, what CNC/Access clients are being charged for certain services, and how to contact them. By Universal being able to obtain employee salary information from CNC/Access via Scruggs, it was able to offer the employees better compensation by encouraging them to bring their clients with them to

Universal. In actuality, the recruitment and bidding of CNC/Access employees is essentially Universal's attempt to raid the clients of CNC/Access.

Fourth, CNC/Access access spent enormous amounts of time, effort and money in obtaining clients. Res-Care, Inc. paid approximately $20 million to Greer and his family in 1997 when it acquired CNC/Access. Clearly, the only reason Res-Care paid such a high price to the Greers was for the CNC/Access client base and the potential client base. CNC/Access continues to expend substantial time in order to develop and expand its client base. Moreover, CNC/Access spent valuable resources in developing, drafting, and implementing company policies and forms. (See Exhibit 13 hereto). Universal stole and plagiarized these policies and forms without having to spend the time, money and effort necessary to develop such confidential information.

Lastly, the client and employee lists obtained by Universal from former CNC/Access employees are extremely difficult, if not impossible, to duplicate or acquire. There is only one client list that exists for CNC/Access. The only way for Universal to obtain it would be for former employees of CNC/Access to breach their duty of confidentiality and breach their employment agreement not to compete with CNC/Access within 180 days of leaving. (See Exhibit 21). The employee personnel records are required to be contained in a locked file cabinet and cannot be removed from the CNC/Access premises (Hardy Affidavit, Exhibit 13 hereto). Moreover, it is the written policy of CNC/Access that employees are strictly prohibited from copying or duplicating CNC/Access forms and/or documents for any use other than their work with CNC/Access. (Hardy Affidavit, Exhibit 13 hereto).

Defendants miss the essence of the purpose of the NCTSPA and its application and explanation in the *Sunbelt* case. Defendants attempt to view each individual item in a vacuum and argue, inappropriately and selectively, that, item-by-item, CNC/Access's information is not a secret. (See Defendants' Memorandum of Law in Support of Joint Motion for Summary Judgment, pp. 21-33). No doubt the recipe to Coco-Cola ® would not appear a "secret" if evaluated one ingredient at a time; it is the combination of ingredients that is the valuable secret. Likewise, CNC/Access's business information "ingredients" were not generally known or readily ascertainable. *See Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549, 560 (D. Conn. 1964)("that every ingredient is known to the industry is not controlling, for the secret may consist of the method of combining them which produces a product superior…"). The evidence properly shows that the combination of not one, or two, but all of "CNC/Access's recipe" ingredients, taken together, constitute trade secrets. Universal accumulated confidential information from CNC/Access which had significant value to them. This information was developed over the years by CNC/Access, was not readily available in the marketplace, and could not be easily obtained through legitimate means without cost.

Defendants posit the argument that the names and information regarding employees and clients were not trade secrets because the information was contained in the employees' heads and the information was publicly available in a telephone book. (See Defendant's Memorandum of Law in Support of Joint Motion for Summary Judgment, pp. 23). Instead of citing the preeminent case in North Carolina on this issue (*Sunbelt)*, the defendants cite hornbooks and New York cases in order to bolster their arguments. Defendants fail to acknowledge that in *Sunbelt*, the North Carolina Court of

Appeals (as well as this Court) recognized the fact that information can be contained in one's head and there is no requirement that a plaintiff produce hard documentary evidence. *Sunbelt,* 620 S.E.2d 222, 228 (N.C. App. 2005). The Court in *Sunbelt* held, "Most of the information about fleet usage was in the heads of the key management people hired away. They knew the essential needs to get up and running, and, if they did not, the salesmen who were hired know the customer requirements." Moreover, the Court in *Sunbelt* held that the customer contact information together with various other business information was a trade secret. *Id.* at 228. The customer information retained by the former employees of Sunbelt could have been accessible from a public telephone book; however, the court in *Sunbelt* did not find this fact of any significance and held that the information still constituted a trade secret. It is the compilation of these customer contacts that makes the information a trade secret and not the individual contacts standing alone.

2. The Greer 1997 Noncompetition, Confidentiality And Nonsolicitation Agreement With Res-Care Further Prescribes And Proscribes the Confidential Information Subject to Non-Disclosure.

The Defendants conveniently overlook Section 2. of the Noncompetiton, Confidentiality and Nonsoliciation Agreement (referred to herein as "the NC & N Agreement"), signed by Greer on July 31, 1997. (See Exhibit 3 hereto). By executing the NC & N Agreement Greer contractually obligated himself not to disclose or use, directly or indirectly, for his own benefit or the benefit of any other "Person" (defined as including another corporation such as Universal) any confidential information defined in Section 2, "whether or not constituting a trade secret", "[a]t any time following the date [of the NC & N Agreement]." (Exhibit 3 hereto). Under Section 2. of the NC & N,

confidential information includes, but is not limited to: "(b) customer lists and information relating to (i) any client or student of any Res-Care Company or (ii) any client or student of the operation of any other Person for whose operations any Res-Care Company provides management services;…(d) company records, operations methods, and company polices and procedures, including manuals and forms;…(h) personnel information, employee payroll and benefits data." (See Section 2. of Exhibit 3 hereto.)

3. Definitive Circumstantial Evidence Shows the Trade Secrets of CNC/Access Were Misappropriated in Violation of NCTSPA.

N.C. Gen. Stat. § 66-152 (1) defines misappropriation of a trade secret as "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66-152(1) (2005). The acquisition of information concerning employees and clients by Universal was certainly not consented to, nor was the information the result of Universal's independent development or disclosed by a person with a right to do so.

In *Sunbelt,* the Court used circumstantial evidence in order to show that misappropriation occurred. *Sunbelt,* 620 S.E.2d 222, 230 (N.C. App. 2005). This circumstantial evidence consisted of the fact that the defendant made a significant profit in its first year of operation- based on its taking of plaintiff's employees, trade secrets, and customers- and the plaintiffs experienced a concurrent, substantial decrease in business. *Id.* at 230. With regards to this evidence the Court said, "this occurrence alone is circumstantial evidence of the defendants' use and disclosure of BPS trade secret information." *Id.* at 230. This same type of evidence is present in this case.

a. Numerous Employees of CNC/Access Were Targeted and Procured by Scruggs and Universal.

On September 15 or 16, 2003 Scruggs left CNC/Access and commenced her employment with Universal (Scruggs Deposition I, p.6). When Scruggs arrived at Universal on September 15 or 16, 2003, Universal had no clients waiting for a direct care worker to provide services to him or her. (Scruggs Deposition I, p. 40, Exhibit 4 hereto). Prior to September 15, 2003, Universal "did not have any CAP/MR (Community Alternative Program/Mental Retardation) clients" and only one CAP/MR employee, a staff supervisor who lasted a little over a month (from September 2, 2003-October 10, 2003). (See Exhibit 7 hereto.) Seventeen (17) out of Eighteen (18) Universal CAP/MR employees came from CNC/Access between September 15, 2003 and October 31, 2003, all but Scruggs bringing CNC/Access clients with them. (See Exhibit 7 hereto). Moreover, Universal had no CBS (Community Based Services) employees or clients at its Asheville office prior to October 2003. (Exhibit 8 hereto). From November 17, 2003 through January 23, 2004, nine (9) out of fifteen (15) CBS employees in the Universal Asheville office came from CNC/Access. From November 17, 2003 through February, 2004, fourteen (14) out of twenty-six (26) CBS employees at the Universal Asheville office came from CNC/Access. (See Exhibit 8 hereto). This massive exodus of CNC/Access employees to Universal is explained by Dr. Richard Welser, an employee of Universal from August, 2003 until December, 2003, under oath:

> "While employed by Universal I overheard conversations of Universal Management to the affect that they have solicited direct care staff and their clients at CNC/Access, Inc. to convince them to come over to Universal. I do not know of my personal knowledge if this occurred but my sense, from overhearing conversations of Universal Management, is that the solicitation was successful."

(See Exhibit 9 hereto). This statistical information is remarkable and constitutes, at least, strong circumstantial evidence of the active solicitation of CNC/Access employees and clients by Universal. The personal knowledge of Scruggs enabled Universal to effectively poach on the employees of CNC/Access and, derivatively, their clients. The departure of these employees severely injured CNC/Access, causing a 100% turnover rate in the Asheville Mental Health office (See Exhibit 23 hereto). This result could only have been the intention of defendants or the product of callous disregard for the consequences.

b. Universal recorded extraordinary revenue increases in an extremely short amount of time.

Universal had no revenue from CAP/MR clients prior to September 15, 2003. (Exhibit 11 hereto.) In addition, Universal had no revenue from CBS at its Asheville office prior to October 2003 (Interrogatory Response Number 13 of Universal to Plaintiffs Third Set of Interrogatories, Exhibit 11 hereto). In the Fourth Quarter of 2003, Universal had CBS revenues of $947.14 and total revenues of $120,039.20. By the second quarter of 2004 Universal had CBS revenues of $422,692.13 and total revenues of $618,934.43. (See Exhibit 11 hereto). No matter what type of business one is involved in, these revenue increases are astounding. Concurrently, CNC/Access lost the income derived from those clients who switched to Universal, computed to be $643,705.00 annually. See Affidavit of Lynne Place, Exhibit 12 hereto.

V. DEFENDANTS' TORTIOUS INTERFERENCE WITH CONTRACT

Even a cursory review of the Scruggs Employment Agreement (Exhibit 1 hereto) reveals that both Greer and his son, Robert, were signatories. Additionally, Scruggs testified to this effect:

You did sign an Employment Agreement with CNC back in September of 1996; isn't that correct:

A. Yes.

Q. Okay. And that agreement was executed not just by you, but by the CEO of CNC at the time? I don't think it was CNC/Access. I think it was just CNC.

A. Just CNC.

Q. It was. And the CEO of CNC at that time was Richard Greer; am I correct?

A. Yes.

Q. And he would have – He signed this document?

A. Yes.

Q. And it's also signed by Robert Greer, is that correct, or do you remember?

A. I - -

Q. Let me just show it to you. I mean, it will speak for itself. I just - - Would that be Robert Greer's - -

A. Yes.

(Scruggs deposition II, p. 5, Exhibit 16 hereto)

Accordingly, it would be disingenuous to argue that Greer and Universal were unaware of Scruggs's Employment Agreement contractual obligations, particularly her noncompete covenant. Moreover, Scruggs has admitted that she did not honor the provisions of her Employment Agreement. (See Exhibit 14 hereto).

Having gone to work for the Greers at Universal in complete violation of the noncompete covenant in her Employment Agreement to which the Greers were signatories establishes beyond peradventure that Greer and Universal tortiously interfered with a valid, enforceable contract.

The following recollection of Judy Hardy, the State Director of CNC/Access, also speaks volumes about the circumstances surrounding Scruggs's departure from CNC/Access for Universal:

A. Okay. My recollection is that a phone call was made to the corporate office that Vickie was resigning. Tommy Voegeli and I got in the car and drove up to the Morganton

> office, which is a distance of about a mile, mile and a half, maybe two miles. We sat down. We talked with Vickie. We asked Vickie if she would consider staying. She said, let me think about it. We got back in the car, we drove those mile and a half, two miles back to our office. When we got there, we had a phone call that Vickie had packed her stuff and had left.
>
> (Hardy deposition, p. 652, Exhibit 17 hereto)

> I heard the - - I was part of the conversation of, Vickie, will you possibly reconsider your resignation? Vickie's response of, yes, I'll – let me have a little bit of time to think about it. And within five minutes she's out the door.
>
> (Hardy deposition, pp. 653 – 654, Exhibit 18 hereto)

Certainly a fair and reasonable inference to be drawn from these circumstances is that Scruggs's employment with Universal was a "done deal" as of September 15, 2003 and to believe that Greer and Universal were not parties to Scruggs's departure from CNC/Access and her ensuing role as prime poacher for Universal is to turn a blind eye to the reality of the situation.

With respect to the claim of tortious interference with prospective economic advantage, it is axiomatic that this cause of action does not require the existence of a contract. The protection afforded by this tort is more expansive, reaching potentially advantageous contractual relationships like the prospect of obtaining employment or employees; selling or buying land, chattels, or services; or continuing a business or customary relationship not amounting to a formal contract. Restatement (Second) of Torts § 766 B cmt. c.; Owens v. Pepsi-Cola Bottling Co., 330 N.C. 666, 412 S.E. 2d 636 (1992). The Plaintiff need not prove the prospect of obtaining a contract; it is enough if

she has a probable prospect of economic gain. Dan Dobbs, The Law of Torts at 1275 (2000).

It is beyond dispute that CNC/Access had relationships with the clients stolen by Universal. See Affidavit of Judy Hardy, Exhibit 13 hereto. It is likewise indisputable that these clients represented financial gain to CNC/Access in that it derived income from providing services to those clients. The loss of that income to CNC/Access was not insubstantial. (See Affidavit of Lynne Place, Exhibit 12 hereto). Consequently, the Plaintiff has established the evidentiary and legal basis for its claim of tortious interference with prospective economic advantage.

VI. DEFENDANTS' UNFAIR AND DECEPTIVE BUSINESS PRACTICES

A. Defendants' Actions Violated the UDTPA Because They Threatened and Exceeded the Bounds of Ethical Competition.

Defendants' contentions that their actions constitute competitive freedom or the right to work are untenable. To the contrary, there is a limit to what is fair and ethical competition in North Carolina and "acquiring" a business by raiding it of its vital parts instead of paying for it, is unfair and detrimental to healthy competition. Greer's gluttonous plan to poach on a company that he had already been paid $20 million to sell was unfair, deceptive, and stifled competition.

To establish a violation of N.C. Gen. Stat. § 75-1.1, Plaintiff must show that: (1) Defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused injury to Plaintiff. *See Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794 561 S.E.2d 905, 910 (2002). A practice is "unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Sunbelt Rentals,* 620 S.E.2d at 230. Whether Defendants performed the alleged acts is a

question of fact; whether those acts constitute an unfair or deceptive trade is a question of law. *See State Properties, LLC v. Ray*, 155 N.C. App. 65, 74, 574 S.E.2d 180, 187 (2002). No bright line exists to determine what is unfair and what is not.

The UDTPA's purpose was "to provide civil legal means to maintain ethical standards of dealing between persons engaged in business…" N.C. Gen. Stat. §75-1.1 (1975) (cited in *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991)). "The Act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce. Unfair methods of competition…would not promote good faith at any level of commerce." *United Labortories v. Kuykendall*, 102 N.C. App. 484, 491, 403 S.E.2d 104, 109 (1998) (citations omitted).

What is unfair or deceptive depends on the facts of each case, viewed against the background of actual human experience and by the actual and intended effects upon others. *Johnson v. Phoenix Mut. Ins.*, 300 N.C. 247, 262-63, 266 S.E.2d 610, 621 (1980), *overruled on other grounds by Myers &Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385, 391-92 (1988). A practice is unfair when it offends established public policy or when it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers. *Id.* Although the UDTPA does not extend to "run-of-the-mill" employment disputes, the "mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade practice claim." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001).

This Court, in *Sunbelt*, found that the "evidence showed key BPS employees were solicited to work for defendants *en masse.*" *Sunbelt*, 620 S.E.2d 222, 230 (2005). The

Court used this evidence as a factor in determining that the defendants' employment hiring scheme constituted an unfair and deceptive trade practice. As stated in prior sections, the sheer number of CNC/Access employees who were hired away by Universal in such a short amount of time is remarkable.[2] It is undeniably true that the solicitation of employees from CNC/Access occurred *en masse*, considering the fact that seventeen (17) out of eighteen (18) CAP/MR employees came to Universal from CNC/Access between September 15, 2003 and October 31, 2003. (*See* Exhibit 7 hereto.) In addition, Universal recruited fourteen (14) more CNC/Access CBS employees out of its total twenty-six (26) CBS employees between November 17, 2003 and February 2004 to work in the Asheville office. (See Exhibit 8 hereto). This raiding of the CNC/Access employees in Asheville caused the Asheville office to suffer a 100% turnover rate within just a few short months. (See Exhibit 23 hereto).

An example of the tactics used by Scruggs and Universal is evidenced by the hand written notes of Scruggs **to the mother of a CNC/Access client** which states, "We will be willing to negotiate on any offer CNC/Access presents!" (See Exhibit 19 hereto). This direct contact with CNC/Access clients is evidenced and further corroborated by the statement of Judy Hensley, a CNC/Access employee, in which she states: "Wanda telephoned me on Wednesday to tell me that Vickie Scruggs had contacted her on Tuesday and offered her more money and hours to her PC worker, Teresa Downs and that was why she was changing providers." This direct contact to CNC/Access clients could

[2] Defendants assert that the Plaintiff's wage structure, as imposed by its parent, Res-Care, was a cause of the CNC/Access employee turnover. While admittedly frustrating, the CNC/Access State Director states in her Affidavit:

"Up to the time that Universal stole our clients and employees, I am not aware of any employee associated with the Asheville office or Morganton office who expressed dissatisfaction with their wages, working condiditions or CNC/Access."

See Paragraph 15 of Hardy Affidavit, Exhibit 13 hereto.

only be the result of Scruggs using confidential information that she obtained from CNC/Access. Finally, as already mentioned, the Affidavit of Dr. Richard Welser substantiates that there was a scheme or enterprise in place at Universal to solicit CNC/Access employees and their clients: "While employed by Universal I overheard conversations of Universal Management to the affect that they had solicited direct care staff and their clients at CNC/Access, Inc. to convince them to come over to Universal." (See Exhibit 12 hereto).

The mass recruitment of CNC/Access employees is made even worse by the fact that Greer and Scruggs knew that each direct care worker was subject to an employment agreement. The employment agreement of each direct care worker contained the following provision: "I agree that for a period of one hundred eighty (180) days after my employment with CNC, Inc. ceases, I may not provide services to a client of CNC, Inc., either directly or through any other service provider. A CNC, Inc. client shall mean a client or former client for whom CNC, Inc. has provided services within the past (12) months." (See Exhibit 21 hereto). This provision was blatantly disregarded by both the direct care worker and the management at Universal. Except for Scruggs, all seventeen (17) Universal CAP/MR employees that came from CNC/Access between September 15, 2003 and October 31, 2003 brought clients with them and began performing services for those clients immediately upon arrival to Universal. (See Exhibit 7 hereto). Considering their extensive experience with CNC/Access operations and employee hiring procedures, neither Scruggs nor Greer can attempt to make a straight-faced argument that they did not know of the direct care workers' employment agreements and the provisions therein.

Moreover, and equally offensive, is the fact that many of CNC/Access's policies and forms were blatantly plagiarized by Universal. In fact, as Exhibits 20(a)-(e) demonstrate, Universal's policies and forms are so similar to CNC/Access's policies and forms, there can be no doubt that the documents were stolen by former CNC/Access employees and plagiarized by Universal. By plagiarizing the company policies and forms of CNC/Access, Universal was able to organize the company quickly without spending the time, money, and effort necessary to develop such information. The acceptance and implementation of stolen CNC/Access forms and policies by Universal is an unfair and deceptive business practice. When the plagiarizing of CNC/Access's policies and forms are viewed along with the solicitation of CNC/Access employees and clients, it becomes even more patent that Universal systematically attempted to initiate and grow its business at the expense of CNC/Access.

Defendants profess to worship at the alter of capitalism and free enterprise when, in fact, what they embody is quintessential robber baron ethos. Defendants profess to be doing nothing more than enabling clients to exercise freedom of choice as to their provider of service. Yet, the truth of the matter is that by systematically luring employees away from CNC Access, employees to whom vulnerable and fragile clients have become attached, if only emotionally, Universal has circumscribed and inhibited freedom of choice. That is, which provider is chosen by a client or his guardian is dictated not so much by what the provider has to offer or what is in the client's best interest but by ties to the employees. It is these ties, often emotional in nature, which the Defendants have so carefully, sadly, and shamefully exploited to their advantage. It has been said by Plaintiff's representatives in this case that the method by which Universal

chose to build its business manifested not client driven choice but rather employee driven choice. In reality, the choice was greed driven, greed of conniving individuals attempting to build a business, not fairly and ethically, but by raiding and stealing from a company for which they were paid only six (6) years earlier the sum of Twenty Million Dollars ($20 million).

Defendants' have completely mischaracterized and obviously misunderstand the purpose of the UDTPA and the holding in *Sunbelt* if they believe, as they stated in their memorandum of law, that "this is exactly the kind of conduct that our courts-in cases like *Sunbelt*-intend to protect." (See Defendants' Memorandum of Law in Support of Joint Motion for Summary Judgment, p.47). A reasonable person would recognize that the purpose of UDTPA and the holding in *Sunbelt* is to protect companies from the unethical actions of others who attempt to raid companies of their employees, clients, and organizational structure in order to avoid having to exert their own hard work and resources. Universal should not be allowed to undermine the principles of fair competition and trade practice for their own personal gain without having to face serious consequences. To use language from *Sunbelt,* the Defendant's conduct has "devastated, rather than competed with" the Plaintiff's existing company. *Sunbelt,* 620 S.E.2d 222, 231 (N.C. App. 2005).

This devastation is evidenced not only by the massive employee turnover rates but also by the extraordinary increases in revenue by Universal and the concurrent dramatic decrease in clients and revenues of CNC/Access. The financial numbers in this case are truly remarkable. As previously mentioned, in the Fourth Quarter of 2003, Universal had CBS revenues of $914.14 and total revenues of $120,039.20. By the Second Quarter of

2004 Universal had CBS revenues of $422,692.13 and total revenues of $618,934.43. (See Exhibit 11). The result of the massive poaching of CNC/Access' employees and their clients by Universal was an annual loss of $643,705.00 to CNC/Access. (See Exhibit 12).

VII. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that Defendants' Joint Motion for Summary Judgment be denied as to all claims, except as to the Breach of Fiduciary Duty Claim which the Plaintiff voluntarily dismisses.

This the 22nd day of May, 2006

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CERTIFICATE OF SERVICE

This is to certify that the undersigned attorney has served a copy of the ***Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment*** by depositing a copy of same in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, properly addressed as follows:

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