STATE OF NORTH CAROLINA **COUNTY OF BURKE**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION** **04-CVS-1490**
CNC ACCESS, INC., **Plaintiff,** **v.** **VICKIE SCRUGGS, RICHARD GREER AND UNIVERSAL MENTAL HEALTH SERVICES, INC.,** **Defendants.**	**DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS**

Plaintiff CNC ("CNC") has moved for summary judgment on all counterclaims asserted by the Defendants.[1] Plaintiff's Motion should be denied because there is sufficient evidence for a reasonable jury to determine that CNC and its agents defamed Defendants, interfered with the business interests of Universal Mental Health Services, Inc. ("Universal"), and engaged in an unfair and deceptive campaign to undermine and harm Defendants.

STATEMENT OF FACTS

As a threshold issue, in its Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment as to All Counterclaims (hereinafter "CNC's Memorandum"), CNC proffered a lengthy statement of facts that does little more than refer back to the allegations contained in its *own* unverified Complaint. These self serving statements, unsupported by actual evidence, should not be considered by this Court in ruling on Plaintiff's Motion. *Soles v. Bd. of Commissioners*, 746 F. Supp 106, 110 (S.D. Ga. 1990) (self-serving statements of fact in movant's brief, not in proper affidavit form, may not be considered in deciding summary judgment). In support of their response to Plaintiff's Motion, Defendants incorporate the

[1] By Notice of Dismissal, filed May 22, 2006, Defendant Scruggs voluntarily dismissed without prejudice her counterclaim for malicious prosecution, thereby rendering moot Plaintiff's motion as to that claim.

testimony and evidence set forth in their Memorandum in Support of Defendants' Joint Motion for Summary Judgment ("Def SJ Memo") and set forth additional relevant facts below.

Key Chronology of Facts Giving Rise to Defendants' Claims[2]

After the sale of CNC to ResCare on July 31, 1997, Richard Greer and his children provided consulting services to CNC, and, in December 1997, ResCare promoted Judy Hardy to State Director--the top position at CNC. (Richard Greer Dep pp 29-32, 37, App 56; CNC Dep Vol I p 8, App 49; Affidavit of Gail Miller ¶ 7) It was apparent, however, that Hardy greatly disliked Greer. (Richard Greer Dep p 68; Affidavit of Patra Lowe ¶ 9; Miller Aff ¶ 8) In fact, she vowed that she would never do "another . . . thing" to put a dime in Richard Greer's pocket. (Richard Greer Dep p 90) One reason Greer believes Hardy was angry (among others) was because, as a non-shareholder, she did not receive a portion of the proceeds from the Greer's sale of CNC to ResCare. (Richard Greer Dep p 68) Whatever the reason, Hardy began making things hard for the Greers at CNC. (Richard Greer Dep pp 31-32, 90) In fact, Hardy admits that she personally persuaded ResCare to end CNC's consulting relationship with Richard Greer in early 1999 because that relationship was "uncomfortable" for her. (CNC Dep Vol II p 278, App 50)

In 2003, at the urging of others in the field, Greer decided to re-enter the business. (Richard Greer Dep pp 37-38) Contrary to the representation in CNC's Memorandum that Richard Greer founded Universal "immediately following" the expiration of his restrictive covenants, Greer did not incorporate Universal until 2003, and Universal did not begin

[2] For the convenience of the court, *all* deposition testimony and exhibits referred to herein will be filed with the Appendix to Defendants' Joint Memorandum in Response to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims. To avoid confusion with the evidence attached to the Appendix to Defendants' own Motion for Summary Judgment filed on April 24, 2006, this second Appendix will begin with App 49. The first time a deposition or exhibit is cited in this Memorandum, its App number will be given. All affidavits are filed separately.

operations until late summer—a full year after the Greer non-competes had expired. (Austin Dep pp 4-5, App 54; Richard Greer Dep pp 37-38)

It is evident that Hardy and CNC had their eyes fixed on Richard Greer and Universal from the very beginning. Before Universal was even incorporated, in March 2003, CNC Regional Manager Tim Miller e-mailed Hardy that Greer had hired an employee and that a CNC employee and long time friend of the Greers, Vicki Scruggs, was attending one of Greer's parties. (CNC Dep Vol II p 286; Def Ex 14, App 68) In July 2003, ResCare executive Freda Smith e-mailed fellow ResCare executive Ralph Gronefeld to report, among other things, that Richard Greer had become licensed, that he was looking to hire staff from the area programs (now LMEs), and that the Greers had offered CNC controller Gail Miller a higher salary at Universal. (Def Ex 13, App 67; CNC Dep Vol II pp 280-285) Smith commented: "We do not need to let the Greers hire away our people who understand this business so intimately." (Def Ex 13)

On September 15, 2003, defendant Vicki Scruggs submitted her resignation to CNC. (Def Ex 39, App 75; CNC Dep Vol IV pp 719-720) Over the next month and a half, approximately fifteen DCS and fourteen clients elected to transfer to Universal. (CNC Dep Vol I pp 96-97, 108; Def Ex 4, App 64; Def Ex 5, App 65; Joy Stigall Depo pp 137-139, App 62; Plaintiff's Responses to Universal's First Set of Interrogatories Response to Interrogatory 5, App 97) (two consumers on Plaintiff's list (Def Ex 4) did not come to Universal and one consumer left before Scruggs)) From this point on, CNC engaged in a campaign to damage the reputations and undermine the business activities of Defendants. The "evidence" from which CNC launched its initial offensive consisted of three unremarkable e-mails. (Def Exs 9a, 9b, and 9c, App 66) None of these e-mails contains any evidence of illegal activity by any of the Defendants, and

CNC did not conduct any investigation to determine what was actually happening. (*Id.*; *see* Def SJ Memo pp 6-8, 40-43) Instead, CNC, through Hardy, called the Foothills LME, initiating the first of five complaints against the Defendants to various government agencies. In response to Hardy's accusations, Foothills conducted a thorough investigation in which Foothills case managers contacted each consumer who transferred to Universal and verified that Hardy's allegations were unfounded. (Affidavit of Amy England ¶ 14; Affidavit of Donna Thomas, ¶ 4)

On October 9, 2003, several weeks after Hardy's complaint to Foothills, CNC filed a separate complaint with the federal Department of Health and Human Services' Office of Civil Rights. (CNC Dep Vol V p 738, App 53; Def Ex 40, App 76) That same day, the company stuffed its employees' paycheck envelopes with a "reminder" that using client information to encourage a consumer to change to another provider could lead to a fine of $250,000 or up to ten years in prison. (CNC Dep Vol IV pp 558-560, App 52; Def Ex 36, App 74)

Twelve days later, on or about October 21, 2003, CNC filed a complaint against Scruggs with the North Carolina Health Care Personnel Registry ("NCHCPR"). (CNC Dep Vol V p 767; Def Ex 43, App 78) This complaint, prepared by CNC Director of Operations Voegeli, accused Scruggs of committing "fraud." (CNC Dep Vol V p 767; Def Ex 43; Voegeli Dep p 127, App 63) CNC was fully aware when it filed this defamatory complaint that the NCHCPR had no jurisdiction over the issues presented in the complaint, but that the NCHCPR did have the capability to *end Scruggs' career*—a result that would have been just "fine" with CNC executives. (CNC Dep Vol V pp 773-775; Voegeli Dep pp 135-138, 196-197; Stigall Dep p 109)

One day later, on October 22, 2003, Hardy called Anne Doucette, a Director at the Western Highlands LME, asked *whether Universal had a contract with the LME*, and told Doucette that Universal agents were taking CNC clients in the Foothills LME area. (Affidavit of

Anne Doucette ¶ 5a) It was not until several months *after* this call, during the first quarter of 2004, that a number of CNC consumers and employees in the Asheville area decided to switch providers to Universal. (Def Exs 9d-h, App 66; Plf Ex 3 p 34, App 96; CNC Dep Vol V p 801) CNC had no evidence that any of these transfers involved any illegal conduct by Defendants. (CNC Dep Vol V pp 788-790; Def Ex 9e-h; *see* Def SJ Memo pp 8-10, 40-43) In fact, CNC's own information reflected that with regard to at least one client, the client's Western Highlands case manager was comfortable with the client's switch to Universal and felt it was "best for the client to have consistency with the worker." (Def Ex 9h) Nonetheless, Hardy contacted Doucette via email and telephone a number of times alleging unethical conduct by Universal, met with Doucette on February 5, 2004, and, on February 17, 2004, filed a written complaint against Universal and Greer in an attempt to get Western Highlands to take action against Universal. (CNC Dep Vol II pp 405-407; Vol IV pp 600-601; Vol V pp 801-832; Def Ex 24, App 71; Def Ex 48, App 81; *see* Doucette Aff ¶ 5 and Ex A thereto)

Still with no evidence of any illegal conduct, on February 6, 2004, Voegeli sent out an e-mail to CNC's regional managers, intending its contents to be broadcast to others. (Voegeli Dep pp 149-157; Def Ex 154, App 91) The e-mail falsely stated, among other things, that CNC had *already filed* a lawsuit against Defendants and that Scruggs "stole" CNC's clients. (*Id.*)

On February 23, 2004, CNC, through Hardy, submitted a fifth complaint, this time against Universal employee James Revels to the NC Board of Licensed Professional Counselors. (CNC Dep Vol V pp 780-781; Def Ex 46) CNC admits that it is unaware of any evidence that supported this complaint. (CNC Dep Vol V pp 780-788)

Just as CNC obsessed about Universal before it started doing business, CNC strategized about Universal after it became operational. (Voegeli Dep pp 179-180) In February 2004,

Hardy wrote a memo to ResCare that set forth a plan to "combat Universal's attempts to hire our staff." (Def Ex 24) The memo ended by detailing "known setbacks for Universal" which included the "impending lawsuit," the "positive reaction on the part of Western Highlands to act" on CNC's complaint, and Universal's "huge expenses compared to revenue." (Def Ex 24) The lawsuit was clearly a key element in CNC's strategy to impair Universal's ability to complete. (CNC Dep Vol III p 538; Def Ex 34, App 73)

CNC knew, however, that its employees and consumers were not leaving because of improper action by Defendants. In March 2004, within months of launching its public campaign accusing Defendants of "stealing" its employees and consumers, CNC's officers told their superiors at ResCare that the high turnover at CNC was due to ResCare's wage freeze and poor benefits. (Def Ex 24; Def Ex. 25, App 72; CNC Dep Vol II pp 405–410; Vol III p 433-439)

On April 26, 2004, the federal Office of Civil Rights dismissed CNC's complaint against Ms. Scruggs. (CNC Dep Vol V pp 747-749; Def Ex 41, App 77) Also in April 2004, Western Highlands, after a thorough investigation, exonerated Universal completely. (Affidavit of Sonia Eldridge, ¶ ¶ 6-10)) Despite Hardy's request that Western Highlands not put its conclusions in writing, Western Highlands issued its determination letter on May 10, 2004. (Eldridge Aff ¶ 11; CNC Dep Vol V p 834; Def Ex 50, App 82)

Throughout the spring and early summer of 2004, Universal—still in its infancy as a company—attempted in good faith to defend itself from CNC's assault and to assuage CNC's concerns. Among other things, Universal and Greer invited CNC and their attorneys to a meeting on April 22, 2004 to discuss CNC's threatened lawsuit. Greer hoped the meeting would conclusively demonstrate to CNC that Universal had not engaged in illegal conduct and that the Scruggs non-compete agreement was not an enforceable document. (Affidavit of Richard Greer

¶ 3) Universal also alerted CNC through its attorney that it was about to hire Sherry Douglas, CNC's DD Program Manager in Asheville, and--on its own volition--Universal made sure Douglas initially worked outside of the Asheville area in order to avoid retribution by CNC. (Robert Greer Aff ¶ 11) Universal even allowed CNC to engage in informal discovery in the spring and summer of 2004, again in an effort to mollify CNC's purported concerns. (Richard Greer Aff ¶ 4) As Defendants now know, however, CNC did not want to be mollified; it wanted to create a dispute for "PR mileage." (Def Ex 34)

Despite Defendants' good faith efforts, on August 17, 2004, CNC filed a lawsuit in federal court (eventually re-filed in state court and transferred to this Court). Soon after, on August 24, 2004, CNC filed an "Ethics Violation" charge with the North Carolina Community Support Providers' Council in order to block Universal's application for membership with the Council. (CNC Vol IV pp 608-612, Vol V pp 864-865; Def Ex 55, App 84) The Providers Council is a private organization of North Carolina providers of MH/DD/SA services. (Robert Greer Aff ¶ 4) Membership in the Providers Council gives providers special competitive advantages over nonmembers, including advance notice of recent developments and policies related to their business, immediate notice of possible and actual changes in the law and regulations, and lobbying efforts on behalf of members. (*Id.*) CNC has been a member of the Providers Council for many years. (*Id.*) Although CNC attached to its complaint a copy of its federal lawsuit against Defendants, CNC did not inform the Council of the government agency findings exonerating Defendants--even though the Provider's Council report form specifically requested a list of entities that had "addressed" the alleged violations. (Def Ex 55)

Since filing the lawsuit, CNC's efforts to undermine Defendants have continued. (*See, e.g.,* Def Ex 22, App 70; Voegeli Dep p 82 (concerning trying to convince Alpha Omega

employees not to work with Universal)) ResCare and CNC executives have made the litigation expensive and time-consuming for Defendants by refusing to fully and timely produce documents in discovery and by forcing Defendants to file multiple Motions to Compel. *See* Defendants' Joint Motion to Compel (9/22/05); Defendants' Joint Motion for Reconsideration (3/10/06). Even today, Defendants believe that CNC and ResCare are withholding responsive documents that further evidence their anti-competitive campaign against Defendants.[3] *See id.* Defendants also believe that this protracted and expensive litigation is exactly what CNC intended. (*See, e.g.*, Def Ex 24, p 5 ¶ 4)

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS FOR DEFAMATION.

A. There are Numerous Issues of Disputed Fact on Defendants' Counterclaims for Defamation.

In its Memorandum, CNC globally dismisses the complaints by CNC to governmental agencies and LMEs as subject to a qualified or absolute privilege and addresses only a single statement made by Hardy about Richard Greer ("worthless son of a bitch"). Defendants' defamation claims survive Plaintiff's Motion for Summary Judgment because (1) the evidence shows that CNC made many more defamatory remarks to various private persons and entities and to agents of government agencies; and (2) none of CNC's statements are protected by a privilege.

1. There is Sufficient Evidence for a Jury to Conclude that CNC Made Many Defamatory Statements About Defendants.

North Carolina retains two distinct defamation torts, libel (written communication) and slander (oral communication). As CNC asserts in its own Memorandum, both libel and slander

[3] In addition, Defendants have reason to question whether CNC agents have attempted to alter or manufacture evidence. (*See* McDaniel Dep pp 33-36, App 59; Def Ex 164, App 95; Voegeli Dep pp 186-190)

are considered defamatory *per se* when a party makes a written or oral allegation which, when considered alone, impeaches a party in his trade, business or profession. *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 459-460, 524 S.E.2d 821, 825 (2000); *Averitt v. Rozier,* 119 N.C. App 216, 218, 458 S.E.2d 26, 28 (1995); *Eli Research, Inc. v. United Communications Group, LLC,* 312 F. Supp.2d 748, 761 (M.D.N.C. 2004). The defamatory statements on which Defendants base their defamation claims all fall within the category of defamation *per se.* Therefore, in order to survive CNC's Motion for Summary Judgment on Defendants' defamation claims, Defendants need only show that CNC made false allegations to a third person that impeached them in their trade, business or profession. This is because once a party demonstrates the existence of defamation *per se*, there is a presumption of malice and a conclusive presumption of damage, obviating the need for the plaintiff to plead and prove special damages. *Averitt,* 119 N.C. App at 218, 458 S.E.2d at 28; *Eli Research, Inc.*, 312 F. Supp.2d at 761.

a. Statements to State-Related Organizations and Agencies.

CNC has managed to defame Defendants before not less than five governmental or quasi governmental organizations: the Foothills LME, the Federal DHHS Office of Civil Rights, the North Carolina Health Care Personnel Registry, the Western Highlands LME, and the North Carolina Board of Licensed Professional Counselors.

Foothills Area Program (now LME). Hardy, as CNC's State Director, in her "report" to Amy England at the Foothills LME,[4] told England that Universal was "taking all of our clients and all of our employees," that what Universal was doing was "wrong," and that she wanted England to "look into it" although Hardy's purpose "was just to make her aware [ ] of the situation." (CNC Dep Vol III pp 530-533) England recalls that Hardy stated that Vicki Scruggs "walked out" on her job and was "coercing" consumers to go with her. (England Aff ¶ 13)

[4] At this time, Amy England was still employed with the Foothills LME. (CNC Dep Vol III pp 530-531)

Hardy's statements were false. There is at least a dispute over whether Scruggs "walked out" on her job. According to Scruggs, after she submitted a two week notice, CNC told her to leave. (CNC Dep Vol IV pp 651-652, 719-720; Def Ex 39; 2004 Scruggs Dep pp 12, 33, App 60; Stigall Dep pp 141-142) Further, as Foothills found after conducting a thorough investigation, neither Scruggs nor Universal did anything unethical or wrong. (Thomas Aff ¶¶ 4-6; England Aff ¶¶ 12 and 14)

Federal Department of Health and Human Services Office of Civil Rights ("OCR"). In its complaint to the federal DHHS OCR, CNC falsely alleged that Scruggs (on behalf of Universal) violated HIPAA by contacting consumers and encouraging them to "move their services to Universal" and by using protected health information "for personal gain." (Def Ex 40) These allegations directly impeached Scruggs in her profession and were false. Not surprisingly, the OCR determined that it did not have jurisdiction over Scruggs and that Universal did not violate the privacy rule. (Def Ex 41) As CNC admits, "if anyone's going to know if there's a violation of HIPAA, it's the Office of Civil Rights. (CNC Dep Vol V p 747)

CNC acted in reckless disregard of the truth when it made these allegations. Before filing the complaint with the OCR, CNC did not conduct an investigation other than to review the e-mails at Exhibits 9a, 9b, and 9c, the insignificance of which is discussed in the Memorandum in Support of Defendants' Motion for Summary Judgment. (CNC Dep Vol V p 738-739; Def Ex 40; *see* Def SJ Memo, pp 6-8) Instead, CNC's allegations to the OCR were "all based on the fact that one day [employees and consumers] were there and one day, the next day, they weren't." (CNC Dep Vol V p 739) That is to say, the "evidence" underlying this complaint was Hardy's speculation and "belief" that Defendants had engaged in wrongful conduct. (CNC Dep Vol V p 741)

North Carolina Health Care Personnel Registry ("NCHCPR"). In its complaint to the NCHCPR, CNC, through its agent Tommy Voegeli, made the following statements which are libel *per se*: (1) that Scruggs committed "Fraud against Resident"; (2) that Scruggs committed "Fraud against Facility"; and (3) that "after resigning from CNC/Access Ms. Scruggs went into our clients family homes in an effort to convince them to switch provider agencies. This communication was solely for her personal financial gain." (CNC Dep Vol V p 774; Def Ex 43) The NCHCPR, however, found that CNC's complaint "failed to reveal sufficient justification for initiating a full investigation" because "the allegations do not meet the appropriate guidelines for fraud." (CNC Dep Vol V pp 776-777; Def Ex 44, App 79) Following this response from the NCHCPR, Voegeli wrote a letter of appeal to NCHCPR investigator Karen Durban containing even more defamatory statements about Scruggs and Universal. (Def Ex 153, App 90; Voegeli Dep pp 138-141)

Voegeli, however, had no evidence of fraud at all:

Q. Okay. Fraud against resident, what did you mean when you checked fraud against resident?
A. She was misrepresenting Universal Mental Health to the clients and to the—to the clients, telling them this is a better place to work. As you can read these statements, that's what she's saying.
Q. And that was the fraud?
A. Yes, ma'am. If you're getting personal gain by misrepresenting the facts, that, in my definition, is fraud.
Q. And that was based on Universal—representing that Universal was a better place—
A. Uh-huh.
Q. --to get services?
A. Yes, ma'am.
Q. Anything else?
A. No.
Q. Okay. And then fraud against facility?
A. She stole our clients by representing the fact that her, as she was at Universal, was better (sic).
Q. Anything else?
A. Nope.

(Voegeli Dep p 131-132) Thus, the alleged "fraud" was nothing more than Scruggs representing "that Universal would be a better place to work and a better company to provide services to these clients." (Voegeli Dep pp 114-115; *see also* pp 106, 109–110) The "personal gain" CNC felt Scruggs garnered was a $4,000 raise Scruggs allegedly received when she changed employers to Universal. (Voegeli Dep p 123; CNC Dep Vol V p 774) These "facts" hardly support an allegation of fraud. CNC knew or should have known, therefore, that Scruggs did not defraud any consumer or any facility.

Yet, CNC's recklessness did not end there. Voegeli admitted that the *only* "investigation" he performed before filing the NCHCPR complaint was to review the three employee statements now denominated Exhibits 9a, 9b, and 9c; he did *nothing else.* (Voegeli Dep pp 123-129, 132) He did not interview any employees who made the statements, any direct care staff, or any consumers. (*Id.*) CNC's obvious purpose in asserting these complaints was to convince the State to stop Scruggs from being able to work with consumers, an outcome that Voegeli said "would have been fine" with him. (Voegeli Dep pp 137–138)

Equally startling, CNC knew that the NCHCPR *did not have jurisdiction* over Scruggs' conduct and therefore could not address CNC's complaint. (CNC Dep Vol V pp 772–773) Hardy allowed Voegeli to file the complaint anyway based on a wholly inappropriate reason--"Voegeli needed an outlet" because "he was furious." (*Id.*)

Western Highlands Area Program (now LME). On October 22, 2003, even though Universal did not have a contract with Western Highlands at the time, Hardy called Anne Doucette of Western Highlands to find out if Universal had a contract with Western Highlands and to inform Doucette that workers were leaving Universal and taking their clients with them in Foothills. According to Doucette's notes of the call, Hardy falsely stated that Scruggs and

Universal had committed a HIPAA violation and exploited knowledge of consumers. (Doucette Aff ¶ 5a and Ex A) These allegations were followed by other false allegations via email regarding Universal. (*See* January 19, 2004 email from Hardy to Doucette, part of Ex A to Doucette Aff)

Then, in February 2004, CNC submitted a written complaint falsely alleging that in the Western Highlands region "[f]ormer salaried employees of CNC/Access who are now employees of Universal Mental Health have contacted families directly, a violation of confidentiality;" that Universal was not observing client choice; that consumers were being "manipulated/exploited for the personal gain of the employees;" and accusing Universal of somehow getting privileging and credentialing documents on CNC employees so that Universal could have "employees providing services the next day." (Def Ex 48) These statements defamed Universal in its trade. In addition, they were made recklessly. As before, CNC based all of these defamatory statements on five inconsequential e-mails concerning the Asheville office transitions and CNC's false theory that employees and consumers in Asheville were there one day and not the next. (CNC Dep Vol IV pp 636-637; Vol V pp 788-794; Def Exs 9(d)-(h); Def SJ Memo pp 9-10) After conducting its own thorough investigation, including conversations with the families of the consumers, Western Highlands found that Universal had done nothing wrong. (Eldridge Aff ¶¶ 6-11; Doucette Aff ¶6)

Board of Licensed Professional Counselors. CNC made the following false and defamatory statements, among others, in its February 23, 2004 complaint against James Revels, a professional counselor: (1) that Revels violated confidentiality by "active solicitation of clients without their consent" to have their services provided by Universal and by "disclos[ing] confidential client information"; (2) that Revels violated an employment agreement with CNC

"by providing services to CNC/Access clients outside of the timelines stated in the agreement"; and (3) that "Mr. Revels used his knowledge of clients and employees gained through his employment with CNC/Access to market himself to Universal Mental Health for a substantial increase in salary. This marketing was with the understanding that he would use his knowledge and influence to solicit clients to change their services to Universal." (CNC Dep Vol V pp 780-781; Def Ex 46; Revels Aff, ¶¶ 4, 12)

All three of these statements constitute libel *per se*. They impeach Revels and Universal in their profession and business. In addition, they are false. For example, not only is the alleged Revels "employment agreement" unenforceable as a matter of law (*see* Def SJ Memo pp 36-37), but CNC's Director of Operations testified that Revels did not even violate it. (Voegeli Dep p 171) Likewise, CNC knew when it filed its Complaint that Revels left employment with CNC/Access to start his own business and did not become employed by Universal until later. (CNC Dep Vol V p 787) CNC certainly had no evidence that Universal hired Revels with the "understanding that he would use his knowledge and influence to solicit clients to change their services to Universal." (CNC Dep Vol V pp 784-785) On the contrary, Revels' job at CNC was to train staff; he had "virtually no contact with consumers." (Revels Aff ¶ 9) As with its complaint to the OCR, CNC filed its complaint against Revels in reckless disregard of the truth. Hardy admits she was not aware of any evidence to support the allegations against Revels, and she did not think anyone else at the company would know either. (CNC Dep Vol V p 780-788)

b. Statements by CNC Executives to Resigning Employees about Defendants.

In addition to defaming Defendants to government agencies, Plaintiff also engaged in slander as a means to dissuade *resigning* employees from leaving CNC.

Patra Lowe. Patra Lowe, along with James Revels, decided to terminate her employment

with CNC to start her own agency. (Lowe Aff ¶ 11; Revels Aff ¶ 7) After Lowe submitted her resignation, CNC executives Judy Hardy and Tommy Voegeli met with her and insisted that Lowe was actually going to work with Universal and Richard Greer. (Lowe Aff ¶ 8) Hardy told Lowe that anyone who left CNC to go to Universal would be prosecuted if CNC lost even one consumer. (Lowe Aff ¶ 8) Further, Hardy said that Universal and its owners had a "bad reputation" and that Richard and Robert Greer were "crooks and liars" and "unethical." (Lowe Aff ¶ 8)

Sherry Douglas. On June 16, 2004, the day Sherry Douglas submitted her resignation to CNC, she received a visit from Hardy and Voegeli. (Douglas Aff ¶ 10) During this meeting, Hardy and Voegeli threatened Douglas and made the following false statements, among others: (1) that Universal had "a bad reputation throughout the state for being unethical;" (2) that "working for [Universal] would result in a lot of trouble for" her; (3) that Vicki Scruggs was "in serious trouble" (said after making reference to the Federal Anti-Kickback Act); (4) that Scruggs was "tied to the tracks and the train is coming;" and (5) that it was "obvious" that Universal has "not told [Douglas] everything." After she joined Universal, Douglas learned that CNC was pursuing legal action against Scruggs, Greer and Universal, but also discovered that none of the negative things Hardy and Voegeli had said about Scruggs, Greer and Universal were true. (Douglas Aff ¶ 11)

c. Statements to the North Carolina Provider's Council.

In its ethics complaint to the Providers Council against Universal, CNC checked the following ethics principles as "violated": Integrity, Professional Conduct, Promotions and Representation, and Individual and Dignity. (Def Ex 55) CNC falsely checked the box "no" for whether the "unethical behavior" had been "addressed" by another monitoring agency, when in

fact CNC knew at least three government-affiliated agencies had received and addressed complaints from CNC about the Defendants and that all three had found no violation or basis for continuing an investigation. (Def Exs 41, 44, 50) In fact, at CNC's 30(b)(6) deposition, Hardy testified for the company that not only had she not informed the Provider's Council of the outcome of the Western Highlands investigation, but she did not see any reason to inform them. (CNC Dep Vol V pp 867-868)

d. Defamatory Statements by Tommy Voegeli.

CNC's Director of Operations admits that he made numerous additional defamatory statements about Defendants. First, he told others something to the effect that Vicki Scruggs "sold a patient or client list." (Voegeli Dep pp 51-54, 142-143) Voegeli testified that he did not need to say this to "folks inside of CNC" because "they knew it;" thus, by implication, the statement was made to persons outside of CNC. (Voegeli Dep p 53) Second, Voegeli admitted that he has told other people that Scruggs and Universal committed "fraud." (Voegeli Dep pp 141-143) As shown at length above, Voegeli had no reasonable basis for his use of the word "fraud" with regard to Scruggs or Universal.

Third, Voegeli told people that Vicki Scruggs "stole clients." In fact, Voegeli agreed that "stole clients" is a "generally common phrase" for him to use with regard to what he believed Scruggs had done. (Voegeli Dep p 158) Voegeli also stated that Scruggs "stole clients" in e-mails that constitute libel *per se*, including the following e-mail on February 6, 2004:

> I have spoken to a few of you personally but wanted to make sure all of you knew. *We have filed a multi million dollar lawsuit against Richard and Rob Greer and Vickie Scruggs* from Morganton. We are seeking restitution for the damages caused last fall when Vickie *stole 15 clients from the Morganton office*. The parties were notified of the lawsuit yesterday. *You are free to share this information with anyone that you think might be interested.* Additionally, Patra and James of Asheville have received letters advising them to cease and desist. If they continue soliciting our staff and clients they too will be named as parties in

> the lawsuit. Up until now I have not been at liberty to tell you the actions that we have been taking. Rescare authorized Judy to hire the biggest baddest lawyer she could find. She consulted with Rufus Edmiston, former attorney general for North Carolina, and he suggested the attorney that she hired. Our attorney feels that we have a great case and thus is proceeding with vigor. It is going to get very interesting. Have a great weekend. tv

(Voegeli Dep pp 149-150, Def Ex 154 (emphasis added; capitalization corrected)) Voegeli testified that he sent this e-mail to all seven of CNC's regional managers with the intent that this information be "broadcast." (Voegeli Dep p 151) Voegeli's purported goal was to let people know that "there would be repercussions for people who want to come in and steal our client list." (*Id.*)

Again, it goes without saying that these statements impeached Scruggs and Universal in their trade or profession. These statements also were false. When Voegeli made these statements *he and CNC knew* that CNC had no evidence that Scruggs had "stolen clients" but instead "relied" on the three unremarkable e-mails in Exhibit 9 (Def Exs 9a, b, and c) and CNC's own assumptions. (Voegeli Dep pp 138-140; CNC Dep Vol IV p 701) Further, contrary to the explicit statement in the e-mail that a "multi-million dollar lawsuit" had been "filed" against the Defendants, Voegeli knew that a lawsuit *had not been filed*. (Voegeli Dep p 152) CNC did not file a lawsuit *until August 19, 2004*, more than half a year later. (Def Ex 55) Therefore, the false statements published by CNC's Director of Operations constitute defamation *per se* against Defendants.

In summary, each of the groups of statements described above raise genuine issues of disputed fact as to whether CNC made statements which constitute slander and libel *per se.* Thus, Defendants have forecast sufficient evidence of defamation to preclude summary judgment for Plaintiff.

B. CNC Cannot Establish Its Affirmative Defense of Qualified Privilege.

In anticipation of Defendants' evidence, CNC has generally asserted the affirmative defense of "qualified privilege." CNC's defamatory statements, however, are not protected by the cloak of qualified privilege. Even if they were, the privilege was forfeited by CNC's malice and recklessness.

1. CNC Has Failed to Establish Its Entitlement to a Qualified Privilege.

CNC acknowledges that it bears the burden of establishing the essential elements of qualified privilege. (CNC Memorandum, p 7) Those elements are good faith; an interest to be upheld; the statement was limited in its scope to this purpose; a proper occasion; and publication in a proper manner and to proper parties only. *Smith-Price v. Charter Behavioral Health Systems*, 164 N.C. App 349, 356, 595 S.E.2d 778, 783 (2004). As the above discussions of CNC's defamatory statements reveal, none of them were made in "good faith" or "with an interest to be upheld." Further, none of these statements was made with limited scope, on a proper occasion, in a proper manner, or to proper parties only.

For example, Plaintiff concedes that it is not entitled to a qualified privilege to make a defamatory statement to a government agency that *lacks jurisdiction* or *lacks power to redress the grievance*. *See Alexander v. Vann*, 180 N.C. 187, 104 S.E.2d 360, 362 (1920); *Logan v. Hodges*, 146 N.C. 38, 59 S.E. 349, 351 (1907) (cited in Plaintiff's Memorandum at p 11). Yet, CNC submitted the NCHCPR complaint and a follow-up appeal letter *fully aware* that that the NCHCPR did not have jurisdiction over the situation and solely to give CNC's second in command "an outlet" for his anger. (CNC Dep Vol V pp 772–773; Voegeli Dep p 124) Similarly, the federal DHHS Office of Civil Rights did not have jurisdiction over the claims against Scruggs because she is not a covered entity. (Def Ex 41) Thus, these *per se* libel

statements cannot be protected by a qualified privilege as a matter of law.

Likewise, CNC cannot establish its burden of proper occasion when, for example, CNC complained *about Universal's behavior in the Foothills LME catchment area* to a Western Highlands LME official at a time when CNC knew Universal had no contract with Western Highlands. (CNC Dep Vol III p 540; Doucette Aff ¶ 5a) This fact necessarily precludes CNC from arguing that its statements to Western Highlands in the fall of 2003 were made on a proper occasion, in a proper manner, and to a proper party.

Given Defendants' discussion of the defamatory statements above, there are clearly genuine issues of fact as to whether CNC can meet its burden of establishing a qualified privilege applicable to any of them. Defendants will not further belabor the Court with a detailed analysis of this failure, however, because even if the Court assumed the qualified privilege applied to any of the statements, there is more than enough evidence of malice and recklessness to overcome Plaintiff's qualified privilege defense.

2. Plaintiff's Ill-Will and Recklessness Undermine its Claim to a Qualified Privilege.

If a defending party is successful in establishing the elements of a qualified privilege as to any statement, the burden shifts to the party alleging defamation to establish "actual malice" to rebut the presumption that the communication was made in good faith and without malice. *Barker*, 136 N.C. App. at 460, 524 S.E.2d at 825. However, in order to show "actual malice," the defamed party need only produce "evidence of *ill-will or personal hostility* on the part of the declarant" or show that the defamatory statement was made "with knowledge that it was false, with *reckless disregard for the truth*, or with a high degree of awareness of its probable falsity." *Barker*, 136 N.C. App. at 460, 524 S.E.2d at 825 (emphasis added); *Clark v. Brown*, 99 N.C. App 255, 263, 393 S.E.2d 134, 138 (1990) (emphasis added).

North Carolina courts have not required significant evidence of "ill-will" or "reckless disregard for the truth" to overcome the presumption arising from the qualified privilege. For example, in *Lee v. Lyerly*, 343 N.C. 115, 468 S.E.2d 60 (1996), the North Carolina Supreme Court reversed summary judgment for the defendant for the "reasons stated in" the dissenting opinion. *Id.*, 343 N.C. at 115, 468 S.E.2d at 61. The dissent merely stated that "actual malice may be proven *by evidence of ill-will or personal hostility* on the part of the declarant," then proceeded to find that, when considered in the light most favorable to the plaintiff, statements by the declarant, the president of the plaintiff's former employer, that if she "did not get rid of Ralph Lee, nobody would" and that "Ralph Lee was too redneck to represent the NCVMA" were *sufficient* evidence of ill-will and personal hostility to create a genuine issue of material fact on "actual malice." *Lee v. Lyerly*, 120 N.C. App 250, 254-255, 461 S.E.2d 775, 778 (1996) (dissent). *See also Barker*, 136 N.C. App. 455, 524 S.E.2d 821 (finding genuine issue of material fact existed as to whether manager's defamatory statements to third parties about employee's conduct were made with ill will or reckless disregard for the truth were manager had a "hit list" of employees he wanted to terminate and failed to adequately investigate whether plaintiff was the person described in complaint by another employee); *Smith-Price*, 164 N.C. App. 349, 595 S.E.2d 778 (reversing summary judgment for declarant where there was evidence that declarant filed sexual harassment claim containing defamatory statements the morning after he was sent home by plaintiff for insubordination and based on evidence that declarant threatened to reveal plaintiff's relationship with another employee to employer).

CNC itself cites several North Carolina cases in which summary judgment was reversed based on minimal evidence of the declarant's ill-will toward the plaintiff. *See, e.g., Averitt*, 119 N.C. App 216, 458 S.E.2d 26 (reversing summary judgment based on qualified privilege where

the source of declarant's statement denied having made statements about plaintiff to declarant); *Clark*, 99 N.C. App 255, 393 S.E.2d 134 (reversing summary judgment for declarant on qualified privilege based on "ample evidence" of ill-will in the nature of declarant's statement to newspaper and because declarant fired plaintiff within days of the newspaper publishing a letter from plaintiff's mother).

There is ample evidence in this case to demonstrate CNC's ill-will toward Defendants or, at a minimum, that CNC published defamatory statements "with reckless disregard for their truth or with a high degree of awareness of its probable falsity."

a. Evidence of Ill-Will.

The evidence of ill-will by CNC against Defendants is abundant. First, the content of the statements themselves reveal ill-will. *See Clark*, 99 N.C. App at 264, 393 S.E.2d at 139. Second, there is evidence that one of CNC's "goals" was to get "PR mileage" and "newspaper coverage" out of its claims against Defendants. (Def Ex 34)

Third, Defendants have substantial additional evidence of CNC's ill-will toward each Defendant. With regard to Scruggs, for example, CNC Executive Tommy Voegeli told her directly that they "lived in a small community" and that he would "ruin her reputation." (2006 Scruggs Dep p 20, App 61) In his deposition, Voegeli admitted that it "would have been fine with me" if Scruggs' career ended as a result of his filing the NCHCPR complaint on behalf of CNC. (Voegeli Dep p 138) Similarly, CNC employee Judy Hensley made harassing calls not just to Scruggs, but to Scruggs' friend. (Hensley Dep pp 80-87, App 58) Scruggs' supervisor at CNC, Joy Stigall, testified that she would "bash" Scruggs around the office, making statements such as "She's a lying cheat. She's a sneak. She's the sneakiest person I've ever met in my life." (Stigall Dep p 104) Stigall's supervisor, Tim Miller, called for a "public hanging (or

outing)" of Scruggs. (Def Ex 153; Voegeli Dep p 149) Hardy suggested Scruggs was not smart enough to come up with the idea of stealing CNC's trade secrets on her own and had little or no value without her consumers. (CNC Dep Vol I pp 127-128; Vol II pp 259-260)

CNC's malice toward Richard Greer is similarly obvious. As discussed in the Statement of Facts, Hardy's heated feelings toward Richard long preceded the events giving rise to this lawsuit. Hardy said she would never do "another …. thing" to put a dime in his pocket. (Richard Greer Dep p 90) Hardy also publicly called Richard Greer a "worthless son of a bitch." (Richard Greer Dep p 79) In July 2003, after receiving notice from CNC's attorney that Richard Greer had the right to raise CNC's rent on a building owned by Greer, Hardy wrote: "I could have spit nails, I was so angry." (Def Ex 66, App 89; Hardy Dep pp 38-39) In an email to her superiors at ResCare, Hardy wrote: "Richard and Robert Greer-Yuck." (*See* October 1, 2003 email from Judy Hardy to Anita Bowles beginning "A bit of history," App 99)[5]

As for Universal, Hardy admitted that she filled out a draft ethics violation form to the Provider's Council simply to vent her "rage and frustration." (CNC Dep Vol V pp 870-871, Def Ex 56, App 85) Getting the Provider's Council to be proactive on ethics issues was just "another bullet to fire" at Universal. (Def Ex 57, App 86; CNC Dep Vol V pp 876, 880) After filing CNC's complaint, Hardy contacted the Provider's Council with these words: "What happened with Universal's application? Please tell me it was rejected." (Def Ex 58, App 87; CNC Dep Vol V pp 880-881) As Hardy put it succinctly: "Every little jab helps." (Def Ex 158, App 92; Voegeli Dep p 174) Indeed, any prospective "setback" for Universal inspired glee on CNC's

[5] This email was produced by ResCare in response to Defendant Scruggs' subpoena. Defendants recognize that it is not authenticated in this Response. Despite Scruggs' Motion to Compel, Scruggs did not receive ResCare's subpoena response until on or about February 27, 2006, one day before the discovery deadline, too late for depositions, and well after the depositions of CNC and Hardy had been taken. In light of these circumstances, Defendants beg the indulgence of the Court in considering this evidence and other similar emails produced by ResCare cited in this Response.

part. Voegeli, for example, wrote ("smiley-face" and all): "can't wait to hear that a universal (sic) employee has come back :)." (Def Ex 63, App 88; Devore Dep p 95, App 55; Hardy Dep p 33-34) He was also delighted to learn that Universal's summer program did not get off the ground and clearly relished the idea of CNC performing a "peer review" on Universal if the LMEs instituted such a program ("wouldn't that be fun?"). (Voegeli Dep pp 181-182; Def Ex 162, App 93; Def Ex 158) Conversely, Voegeli wrote a colleague that he did not want CNC's Morganton office to merge with Hickory because it might "give the impression that universal (sic) won." (Def Ex 163, App 94; Voegeli Dep pp 182-183) Without question, Defendants have advanced more than sufficient evidence to create a triable issue of fact on CNC's "ill-will" toward Defendants.

b. Evidence of Reckless Disregard for Truth.

In addition to establishing "actual malice" through evidence of CNC's ill-will, Defendants also have sufficient evidence to create an issue of material fact on "actual malice" through facts indicating that CNC made the defamatory statements about Defendants "with knowledge that [they were] false, with reckless disregard for the truth, or with a high degree of awareness of [their] probable falsity." *See Barker,* 136 N.C. App. at 461, 524 S.E.2d at 825. As detailed above, CNC never bothered to perform a real investigation into the circumstances regarding the transfer of employees and clients in the last quarter of 2003 and the first quarter of 2004 before publishing defamatory statements about Defendants and complaining to various government organizations. (CNC Dep Vol II pp 324, 334; Def Ex 9; CNC Dep Vol V pp 738-746, 749-750, 753–754, 760–770, 780-782, 788–790, 801-804, 828–839; Voegeli Dep 124-129)

CNC's reckless disregard for the truth is obvious with regard to each of CNC's defamatory statements. For example, with the NCHCPR complaint, CNC tried to have Scruggs'

career taken away from her without performing any investigation (other than looking at exhibits 9a-9c which contained nothing remarkable). (Voegeli Dep 123-140; CNC Dep Vol V pp 772-773) Worse, CNC filed the complaint alleging "fraud" when CNC *knew* that the purported fraud was Scruggs merely representing that Universal was a better place to work and receive services and that her purported "financial gain" was just the $4,000 raise CNC believed she received when she joined Universal. (Voegeli Dep pp 131; CNC Dep Vol V p 774; Def Ex 46, App 80) This conduct was clearly recklessness.

Similarly, CNC subjected James Revels to the possible loss of his license as a professional counselor, but CNC's 30(b)(6) witness could not even recall any alleged evidence against him. (CNC Dep Vol V pp 780-788) Further, even after receiving responses from at least three government agencies that Defendants had done nothing wrong, CNC continued its campaign to defame the Defendants in its statements to Sherry Douglas and to the Provider's Council. (Douglas Aff ¶ 10; CNC Dep Vol IV p 592; Def Ex 55) CNC's willful blindness is demonstrated by Hardy's desire that the Western Highlands investigator *not* prepare and send a written report exonerating Universal. (Eldridge Aff ¶11)

This ample evidence of CNC's ill-will and recklessness inexorably demonstrates that CNC should not be permitted to cloak its defamatory statements in qualified immunity.

C. Plaintiff's Conduct is Not Protected by an Absolute Privilege.

As an apparent after-thought to qualified privilege, CNC suggests in a single paragraph that an absolute privilege attaches to statements CNC made to "governmental agencies with regulatory authority" because they are acting in a "quasi-judicial context." (CNC Memorandum, p 13) CNC does not specify the governmental agencies to which it is referring. This is irrelevant, however, because none of the statements at issue here were made in the kind of

"quasi-judicial context" which invokes an absolute privilege.

In the two cases cited by CNC in support of its absolute privilege argument, the application of an absolute privilege turned on the fact that a government official or agency *was already conducting an investigation* in the public interest and was therefore exercising a "quasi-judicial" function. This point is critical. First, in *Angel v. Ward*, 43 N.C. App 288, 258 S.E.2d 788 (1979), a private accountant complained to the supervisor of an Internal Revenue Service agent about the agent's job performance and the agent later sued the accountant for defamation. Because the agent's supervisor was already "putting together an evidentiary file to support his superior's decision to terminate plaintiff's employment with the Internal Revenue Service," the court determined that the agent's supervisor was performing a "quasi judicial function" and this circumstance raised the privilege to the status of absolute. *Id.*, 43 N.C. App at 293-294, 258 S.E.2d at 791-792. In other words, because the accountant's statements were made in the context of an *already pending investigation* (the quasi-judicial function), the absolute privilege attached. The court made it clear, however, that "[h]ad the defendant merely mailed the letter to plaintiff's superiors, the communication would have been entitled to a qualified privilege." *Id.*, 43 N.C. App at 293, 258 S.E.2d at 791.

The existence of an on-going government investigation was also the key point of distinction in the second case cited by Plaintiff, *Smith v. MacDonald*, 895 F.2d 147 (4th Cir. 1990). In *Smith*, a private citizen sent two letters to the President of the United States concerning an attorney who was seeking appointment as a U.S. Attorney. The defendant, represented by William Woodward Webb, argued that his letters were entitled to an absolute privilege. *Id.* The Fourth Circuit determined that the President was acting in a "quasi-judicial function" because he was *already engaged* in investigating and evaluating candidates for the office of U.S. Attorney

when he received the defendant's letters. *Smith*, 895 F.2d at 150-151. Using *Angel*, the Fourth Circuit clearly distinguished this situation from one where there was not a pending investigation:

> [E]vidence of the supervisor's *ongoing investigation and solicitation of the letter* in Angel was *necessary to demonstrate* that the supervisor was performing a quasi-judicial function in connection with the performance of his duty with respect to a particular employee, the plaintiff, *at the time* the defendant mailed the letter, and that the letter *was not merely a complaint* about the performance of a public employee *and so entitled to qualified privilege*.

Smith, 895 F.2d at 150, fn 4 (citations omitted; emphasis added). Thus, only because of the existence of a pending quasi-judicial investigation within the appointment process did the Fourth Circuit apply the absolute privilege. *Smith*, 895 F.2d at 151.

In this case, none of CNC's defamatory complaints were made in the context of an already pending investigation or quasi-judicial proceeding by any agency into the conduct of the Defendants. The fact that Plaintiff sent a letter to Anne Doucette, a director at the Western Highlands LME, at her request does not entitle Plaintiff to an absolute privilege on that letter because Plaintiff verbally initiated the complaint with the Western Highlands LME and Doucette was simply asking Plaintiff to put the complaint they had initiated into writing. There was no pending investigation of Defendants occurring at Western Highlands LME before Plaintiff made its complaint. (Doucette Aff ¶¶ 5-6)

Instead, with each complaint, CNC (a private entity) was attempting to *initiate* a government investigation against one or more of the Defendants (a private entity and private citizens) by making the defamatory communications. Therefore, there is no basis whatsoever for the application of an absolute privilege to any statements in this case. CNC's Motion for Summary Judgment on Defendants' defamation claim should be denied.

II. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON DEFENDANT UNIVERSAL'S TORTIOUS INTERFERENCE CLAIM.

Defendant Universal's claim for tortious interference with prospective economic advantage survives Plaintiff's Motion for Summary Judgment if there is a disputed issue of fact that Plaintiff "induced a third party to refrain from entering into a contract with Plaintiff without justification" and that "the contract would have ensued but for [Plaintiff's] interference." *DaimlerChrysler Corporation. v. Kirkhart*, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286 (2002). The evidence shows that Plaintiff interfered with Universal's prospective relationships with the Providers Council, Western Highlands, and at least one employee (Sherry Douglas). (See Def Exs 24, 36, 40, 43, 46, 48, 55, 57, 58, 154; CNC Dep Vol II p 405- 415; CNC Dep Vol II pp 266, 272; Vol III pp 534-535; 801-803; Douglas Aff ¶ 6)

CNC attempts to defeat Universal's claim only by asserting that (1) CNC was justified in its actions because it was merely protecting its business, employees and clients from the actions of the Universal; and (2) Universal has not shown that any contracts would have been consummated but for CNC's unjustified interference. (CNC's Memorandum, p. 23) Plaintiff's attempt must fail because there are issues of material fact upon which a fact finder could conclude that (1) CNC's interference was not justified, due to its improper and anticompetitive motives; and (2) a cause and effect relationship exists between CNC's improper action and its consequential effect on Universal's prospective contractual rights.

A. <u>There is an Issue of Fact as to CNC's Motives for Interfering with Universal's Prospective Contractual Rights.</u>

Justification results when there is "a reasonable and *bona fide* attempt to protect" the interests of the actor. *See United Lab. v. Kuykendall*, 322 N.C. 643, 662, 370 S.E.2d 375, 387 (1988), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993). The term justification is discussed in the

case law as the absence of "legal malice." *Childress v. Abeles*, 240 N.C. 667, 675, 84 S.E.2d 176, 182 (1954). If the interference is for the purpose of "visiting [the party's] personal hatred, ill will, or spite" on the other party, the party's conduct is not justified. *Id.*, 240 N.C. at 675, 84 S.E.2d at 182.

Further, although normal competition does not suffice for legal malice, a party acts with legal malice when it interferes "with the free exercise of another's trade or occupation…by preventing people, *by force, threats or intimidation* from trading with, working for, or continuing him in their employment." *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945) (citations omitted) (emphasis added) (reversing dismissal of complaint). In *Coleman*, the court held that the allegations of the pleadings to the effect that defendants threatened lawsuits against everyone with whom the plaintiff negotiated for the manufacture, sale and use of the patented product were sufficient for legal malice. *Id.* Although no force was used and no personal ill will alleged, the court found that allegations of the pleadings showed that the "persistence" of the defendants' conduct deprived the plaintiff of his patent rights and gained for defendants exclusive use of the patented invention. *Id.*

Similarly, action taken for an anticompetitive purpose can constitute legal malice. *Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App 137, 150, 555 S.E.2d 281, 289 (2001). In *Reichhold*, the individual defendant, while still employed with plaintiff, negotiated with the corporate defendant, who was a competitor of the plaintiff, for employment as a consultant. The individual defendant spent working time in meetings with the corporate defendant and even submitted to the plaintiff expense reimbursement requests related to those meetings. A secretary of the corporate defendant reported to the plaintiff her belief that the defendant was engaged in improper conduct. The plaintiff, believing that the individual defendant was sharing trade

secrets with the corporate defendant, asked the FBI to investigate. The FBI did so, but concluded that, under criminal standards, the allegations of trade secret theft were not substantiated. Despite this, the plaintiff's president ousted the individual defendant, told him that he would never get another job in the industry, and told him that the corporate defendant would never get into the business that the individual defendant was to help establish. The plaintiff also filed a lawsuit against the corporate defendant for trade secret theft and misappropriation of confidential and proprietary information. The corporate defendant, embarrassed and threatened by the plaintiff's allegations, in large part because the plaintiff was a much larger corporation than defendant, abandoned its consulting arrangement with the individual defendant. The plaintiff also sued the individual defendant.

The trial court found from the evidence that the plaintiff brought the lawsuit against the corporate defendant solely for an anti-competitive purpose. *Id.*, 146 N.C. App at 150, 555 S.E.2d at 289. Therefore, the court of appeals held that the plaintiff brought the lawsuit with legal malice and thus without justification. *Id.* The court also held that whether the plaintiff stated a good faith legal claim in the lawsuit was irrelevant. For the justification element of the tortious interference claim, the anti-competitive purpose in plaintiff's action was determinative. *Id.*

In light of applicable case law, the evidence, discussed in detail elsewhere in this brief, shows that CNC acted with legal malice in its course of conduct against Universal. After the departure of Vicki Scruggs from CNC, CNC began a campaign aimed at filing numerous unfounded complaints against Defendants, at times simply to vent rage and always without first confirming that the allegations had any basis in fact. (CNC Dep Vol II pp 324, 334; Vol III pp 433–439; CNC Dep Vol V pp 738-746, 749-750, 753–754, 760–770, 767–773, 780-790, 801-

804, 828–839; 870-872; Def Exs 9, 24, 40, 43, 46, 48, 55 and 56) There is sufficient evidence for a reasonable jury to conclude that CNC did not pursue Universal to stop unlawful conduct by Universal that interfered with CNC's legal rights. The evidence indicates instead that CNC pursued this course of conduct for anti-competitive purposes and ill will towards the Defendants.

There is no dispute that Judy Hardy was the ring leader of the actions taken against Universal. CNC admits that Hardy was the person who either initiated, approved or collected most or the complaints and reports against Defendants. (CNC Dep Vol V pp 750–751, 754-757; Def Ex 9(e)-(h)) Further, Hardy was the sole conduit of information from CNC to ResCare and advocated suing Defendants. (CNC Dep Vol II pp 266-272) In the litigation, Hardy handled various issues, including document production, to "protect" the other CNC employees. (Voegeli Dep pp 97-99)

CNC knew that its loss of employees because of wage and benefit issues damaged CNC's ability to compete. (Voegeli Dep pp 72-75, 90-92) With CNC "handcuffed" in competing because of the wage freeze, CNC believed it had to come up with a plan "to combat Universal's attempts to hire [CNC's] staff." (CNC Dep Vol II pp 405–410; Def Ex 24; Voegeli Dep p 74)

Among other things, CNC's plan included letting Asheville employees, including DD Program Manager Sherry Douglas, know about CNC's demand letters on Patra Lowe and James Revels and about the "impending lawsuit." (Def Ex 24, pp 2-3 ¶ 3)) This, CNC hoped, would "protect[] our DD program there" by being a "deterrent" to Ms. Douglas. (*Id.*) CNC also recognized in its "plan" that Universal was a small start up operation with "[h]uge expenses compared to revenue." (Def Ex 24 p 5 ¶4) CNC's plan fit in perfectly with Ron Geary's declaration to Hardy and others, referring to CNC, that "he bought the damn company once and he wasn't going to buy it again." (CNC Dep Vol II pp 273–274)

The nature of CNC's initial contact with Western Highlands LME also reveals CNC's motives. CNC contacted Western Highlands regarding Universal before Universal had a contract with the LME and *well before* consumers in that area transferred to Universal. (Doucette Aff ¶ 5a) Thus, a reasonable jury could conclude that the point of this conduct was not to report improper conduct in which Western Highlands had an interest, but rather to dissuade Western Highlands from granting Universal a contract. (*Id.*)

Further, CNC filed the present lawsuit against Defendants despite knowing that at least three government entities had found no wrongdoing. (CNC Dep Vol III pp 534-536; CNC Dep Vol V pp 746-749, 774–777, 839–844; Def Exs 41, 44, and 50) CNC's purpose in this campaign was to prevent Universal from hiring more employees and to gain "PR mileage" by publicizing in newspapers, to the LMEs and to other providers, CNC's own improper and defamatory characterization of the events. (Def Ex 34; CNC Dep Vol III pp 538-540) The facts and admissions on record lend a strong inference that CNC's motive was not to protect its own business interests but to injure Universal and the Greers and to ruin Universal's ability to compete. CNC's own testimony shows that ResCare was attempting to gain market share in the region through its acquisition of various providers. (CNC Dep Vol II p 298; Vol V pp 886–887; *Godfrey v. Res-Care, Inc.,* 165 N.C. App 68, 598 S.E.2d 396 (2004)) Thus, a reasonable jury could determine that CNC's real motive, spurred by executives at ResCare, was to prevent Universal from being a viable competitor.

In CNC's ethics complaint to the Providers Council, CNC attached a copy of its lawsuit against Defendants, thus giving weight to CNC's statement that it intended to use the lawsuit as a vehicle to get "PR mileage." (Def Ex 55) It is also telling of motive that, as with the filing of its lawsuit, CNC submitted its complaint to the Providers Council despite knowing that the federal

DHHS OCR, the state DHHS (NCHCPR), and Western Highlands all found no wrongdoing. (CNC Dep Vol III pp 534-536; Def Ex 41) Indeed, a reasonable jury could find that CNC purposefully kept this information from the Providers Council by checking the box on the ethics violation form stating that the behavior had not been "addressed" by another monitoring agency. (Def Ex 55) Also, as mentioned above, CNC knew when it filed the ethics violation against Universal that CNC had high turnover, its employees were leaving because of poor wages and benefits at CNC, and that it was not unusual for consumers to follow their direct care providers to a new employer. (Def Ex 25) CNC even used the head of the Providers Council, Bob Hedrick, to report CNC's allegations to other state agencies. (Def Ex 52, App 83; CNC Dep Vol V pp 838-839)

Given these facts, CNC could not have submitted its opposition to the Providers Council to protect its business from improper interference. The more likely explanation for CNC's conduct is the desire of CNC, its parent ResCare, and Hardy personally, to *stop* legitimate competition by Universal and personally harm Greer by causing his business to fail. Hardy's letter to Hedrick asking "[w]hat happened with Universal's application? Please tell me it was rejected," her testimony regarding what she said to the Executive Council about Universal at a Providers Council retreat, and conversations she had with Bob Hedrick, are strong evidence of CNC's improper motive. (Def Ex 58; CNC Dep Vol V pp 852-864) Such a motive is hardly "justified" under the law.

B. <u>There is an Issue of Fact as to Whether a Cause/Effect Relationship Exists between CNC's Improper Action and its Consequential Effect on Defendants' Relationships</u>.

There is also a genuine issue of material fact as to whether the Providers Council would have contracted with Universal but for CNC's interference. The evidence demonstrates that CNC's complaint to the Providers Council had a chilling effect. A letter from the Providers

Council to Robert Greer, Universal's president, states flat out that due to CNC's lawsuit, Universal would not be granted membership until the lawsuit was resolved. (Robert Greer Aff ¶¶ 6-10 and Exs A and B thereto) This letter leaves little doubt, if any, that if CNC had not interfered with Universal's prospective membership in the Providers Council, Universal's application for membership would have been approved and Universal would have received all the benefits of membership.[6]

There also is evidence that CNC's threats interfered with Sherry Douglas accepting employment with Universal. (Douglas Aff ¶ 6; Robert Greer Aff ¶ 11) Indeed, Universal's hiring of Douglas was delayed six months as a result of CNC's persistent threats and unfounded complaints, and when Universal did hire Douglas, it felt constrained from putting her in the position where she was truly needed, for fear of another unfounded complaint by CNC. (*Id.*) Thus, there is sufficient evidence to raise an issue of fact that CNC unjustifiably interfered with Universal's prospective relationships. Accordingly, CNC's Motion for Summary Judgment on Universal's Tortious Interference claims should be denied.

III. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON DEFENDANTS' UNFAIR AND DECEPTIVE TRADE PRACTICE CLAIMS.

There are numerous issues of disputed fact that preclude summary judgment for Plaintiff on Defendants' Unfair and Deceptive Trade Practices Act ("UDTPA") claim. To establish a violation of N.C. Gen. Stat. 75-1.1, the aggrieved party must show: (1) defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and

[6] As to Western Highlands, the evidence shows that there was a delay in Universal getting an amendment to its contract with Western Highlands for expanded services that coincided with CNC's filing of the complaint with Western Highlands. (CNC Dep Vol V p 890-892; Affidavit of Gail Miller Aff, ¶ 4) More importantly, the evidence shows that after CNC met with Anne Doucette on February 5, 2004 to complain about Universal (Doucette Aff. ¶ 6.d.), the number of CBS service authorizations to Universal from Western Highlands decreased and that those authorizations did not begin increasing again until after Western Highlands completed its investigation. (Affidavit of Gail Miller, ¶ ¶ 6-7; Doucette Aff ¶ 7 (Western Highlands completed its investigation and informed Ms. Hardy of the result on April 13, 2004)) Universal has learned, however, that Anne Doucette currently believes that the investigation did not cause a delay in authorizations from Western Highlands.

(3) the act proximately caused injury to plaintiff. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). A practice is unfair if "it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* (citations omitted) The notion of unfairness is broad and defined on a case-by-case basis. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

In its Memorandum, CNC focuses entirely on the first element of the claim (the commission of an unfair or deceptive act) and CNC's act of filing the current lawsuit. (CNC's Memorandum, pp 19-22) CNC ignores a host of other unfair and deceptive acts that go well beyond CNC's filing of the lawsuit and demonstrate that there are substantial issues of disputed fact on Defendants' UDTPA claims which preclude summary judgment.[7]

A. A Reasonable Jury Would Conclude that CNC's Conduct was Unfair and Deceptive.

1. The evidence shows that CNC defamed Defendants and tortiously interfered with Universal's business interests, and each of these tortious acts individually constitutes an unfair and deceptive act.

North Carolina courts have held that if a party is able to maintain a claim for certain torts—such as defamation or tortious interference--a claim may also be had under the UDTPA. *See, e.g., Ellis v Northern Star Co*., 326 N.C. 219, 225, 388 S.E.2d 127, 131 (1990) (holding sufficient evidence to support UDTPA claim based on libel *per se*); *Ausley v. Bishop*, 133 N.C. App 210, 216, 515 S.E.2d 72, 77 (1999) (finding sufficient forecast of evidence at summary judgment to support a UDTPA claim based on slander *per se*); *Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (allowing UDTPA claim based on tortious interference facts). Thus, Defendants incorporate the acts of defamation and tortious interference described above in support of their UDTPA claims. This conduct should be sufficient in itself to defeat CNC's Motion for

[7] Plaintiff CNC also did not plead any affirmative defenses to Defendants' UDTPA claim.

Summary Judgment because CNC does not refute this evidence in its Motion. (CNC Memorandum pp 19-22)

2. The evidence shows that CNC engaged in an anti-competitive and malicious campaign to reduce Universal's ability to effectively compete with it and to harm Defendants.

Taken in the light most favorable to Defendants, the evidence shows that CNC has engaged in a campaign to undermine Universal and the livelihood of its owners and employees by reducing the ability of Universal to effectively compete with it and with the ultimate purpose of harming Defendants. The campaign includes the following unfair and deceptive acts, among others: (1) filing unfounded charges and complaints against Defendants with five government entities (*see, e.g.,* Def Exs 40, 43, and 46); (2) publicizing defamatory statements about Defendants (*see* Section IA above); (3) interfering with Universal's application to join the North Carolina Provider's Council (*see* Section II above); (4) intimidating CNC employees who wished to seek employment with Universal (*see, e.g.,* Def Exs 36, 154; Voegeli Dep p 154, 180); (5) threatening and harassing CNC employees who had accepted employment with Universal (*see, e.g.,* Douglas Aff ¶ 6, 10a-c); (6) falsely publicizing the initiation of a multi-million dollar lawsuit six months before it was filed (*see* Def Ex 154); (7) creating and fomenting a larger-than-life persona of Defendants as villains in the western North Carolina MH/DD/SA community with intent to undermine Universal's ability to effectively compete (*see, e.g.,* Voegeli Dep pp 62-63, 107, 109-110, 150, 158, 174-175, 179-180; Def Exs 153, 154); (8) refusing to engage in good faith dialogue and dispute resolution with Defendants in order to get more "PR mileage" (*see* Def Ex 34); (9) attempting to convince employees at providers other than CNC to not seek employment with Universal (*see* Def Ex 22); and (10) filing a baseless lawsuit against Defendants knowing that CNC had "deeper pockets" than Richard Greer and that the litigation

would force Universal to pour money and staff time into defending itself at its weakest point—the start-up phase (*see* Def SJ Memo; Def Ex 24, 34; CNC Dep Vol V pp 844-845).

A reasonable jury could determine that CNC executives (who already held personal animosity towards Defendants) realized that CNC could not maintain competitive wages against upstart Universal and rather than be bested by Defendants in normal competition, engaged in the unfair acts described above to destroy Defendants' reputation and ability to effectively compete against CNC in the marketplace. Evidence of this campaign includes: (a) Judy Hardy, Tommy Voegeli, and other CNC executives held personal animosity toward Defendants; (b) CNC executives knew in late 2003 and 2004 that CNC could not maintain competitive wages in the market because of pressure from its parent company, ResCare; (c) CNC did not bother to investigate the true facts because it already knew and believed that employees were choosing to leave for higher wages and their own reasons; (d) CNC knew its accusations and claims against Defendants were baseless and asserted with reckless disregard for the rights of Defendants; and (e) CNC's purpose was to gain "PR mileage," intimidate employees from going to Universal, and use Universal as an example to intimidate other providers from hiring CNC employees. This evidence, taken in the light most favorable to Defendants, is more than sufficient to defeat CNC's Motion for Summary Judgment.

a. A reasonable jury could determine that Judy Hardy, Tommy Voegeli, and other CNC executives held personal animosity toward Defendants.

There is significant evidence that Judy Hardy, Tommy Voegeli, and other CNC executives personally wanted to make sure that Defendants failed. This evidence is set forth in detail above, and therefore Defendants will not discuss it again here. (*See* Section IB2; *see, e.g.,* Richard Greer Dep p 68; CNC Dep Vol V pp 773, 871; Def Exs 58, 66, 140, 153, 158, 162)

b. A reasonable jury could determine that CNC executives knew in late 2003 and

2004 that CNC could not maintain competitive wages in the market because of pressure from their parent company ResCare.

In the MH/DD/SA world, wages for direct care staff are low and margins tight. (Voegeli Dep pp 77-78, 86-87, 183) The industry norm for turnover is "huge," as employees "flip" to other providers in search of higher pay. (CNC Dep Vol II p 411; Voegeli Dep pp 92-93) Competitors who offer wage rates that are too high typically end up going out of business. (Voegeli Dep pp 77-78, 87) According to CNC, this is a "volume" business where consumers generate the revenue and hold the real value. (CNC Dep Vol II p 408; Voegeli Dep p 183) Although in response to a Request for Admission CNC *denied* that clients "often" follow their DCS workers to new providers (presumably because such an admission undermined CNC's "assumption" that Defendants acted improperly with clients), Hardy wrote in her May 3, 2004 memo to ResCare: "when a direct care employee terminates, the client often goes with the employee, taking the revenues with him/her." (CNC's Response to First Set of Requests for Admissions from Scruggs, Request 39, App 98; Def Ex 25 p 1) Hardy added, "this practice is rampant in North Carolina…." (Def Ex 25) Thus, when employees left—often followed by their revenue-producing clients—CNC revenues went down.

In late 2003 and 2004—the same time period during which CNC executives were aggressively and publicly attacking Defendants--privately CNC executives were bemoaning the reality of their competitive situation. In an e-mail to ResCare dated October 9, 2003, Hardy wrote that CNC was losing "a lot of revenue" because it could not meet the "salary demands" of employees. (10/09/03 email from Judy Hardy to Anita Bowles [ResCare Subpoena Response], App 100) Further, in May 2004, Hardy wrote a memorandum pleading for ResCare to lift its wage freeze and revive CNC's wage and compensation plan--"the major employment 'perk' [CNC] had to offer for recruitment and retention." (Def Ex 25 p 2) In her memo, she argued

that CNC's wages were "not as competitive as they need[ed] to be in the western part of the state."

> Our industry, in addition to being highly competitive, is also closely knit. Employees "shop" the market and know the wage structures and benefit packages of the providers. *This was evidenced by the statement made by Universal's attorney that dissatisfaction with not getting raises was one of the primary reasons employees chose to seek employment with Universal.* The cessation of the wage and compensation plan has been the most demoralizing event in the thirteen years I have been associated with CNC/Access. *The negative impact on employees has been profound as they perceive that something of value has been taken away with no replacement of anything of comparable value.*

(Def Ex 25 pp 2-3 (emphasis added)) Likewise, with regard to the loss of an office coordinator, Voegeli testified: "with the freeze on, and with ResCare ha[ving] us handcuffed, there was no way I was going to be able to compete." (Voegeli Dep p 74-75)

Given this evidence, a reasonable jury could determine—in combination with the evidence below--that CNC used its size and weight in the industry to undermine Defendants competitively when they were at their weakest point—the start-up phase.

c. A reasonable jury could determine that CNC did not bother to investigate the true facts because it already knew and believed that employees were choosing to leave for higher wages and other reasons.

There is significant evidence that CNC executives did not bother to investigate the true facts because they already knew and believed that employees were choosing to leave CNC for Universal and other providers on their own. This is perhaps most clearly evidenced by Hardy's frank appeal to ResCare to lift the wage freeze (quoted above). She could have used CNC's public mantra that Universal was "soliciting" or "stealing" employees when she analyzed CNC's competitive situation. Instead, Hardy adopted a phrase from Universal's attorney that "dissatisfaction with not getting raises was one of the primary reasons *employees chose to seek employment with Universal*." (Def Ex 25 (emphasis added)) Thus, it appears CNC knew full

well that many CNC employees were "choos[ing] to seek employment with Universal" themselves.

Further, CNC not only knew—but admits it believed—that its employees were transferring to Universal because Universal was offering higher wages. (CNC Dep Vol II p 409) CNC also knew that the wage problem was compounded by other employee issues, such as a lack of good benefits and issues with management. (Voegeli Dep pp 85-86, 90-92) For example, Mr. Voegeli testified that CNC had to take back checks handed out to its branches for 2003 office Christmas parties, spurring employees to refer to CNC as "the Grinch that stole Christmas." (Voegeli Dep pp 91-92) Voegeli described this situation as "horrendous." (*Id.*) Thus, CNC clearly knew during this time frame that employees were independently deciding to leave CNC in search of better wages, benefits, and/or managers at other providers.

Since the evidence demonstrates that CNC believed employees were choosing to leave CNC for higher wages (CNC Dep Vol II p 409), it is quite logical that CNC would not bother to perform any reasonable investigation of the facts before launching an assault on Defendants. This is born out by the evidence. At most, CNC compiled the information contained at Exhibit 9. However, as shown in Defendants' original Memorandum in Support of Defendants' Summary Judgment Motion, Exhibit 9 contains nothing more than some hearsay statements about several employee and client transfers to Universal in Morganton and Asheville. (Def SJ Memo pp 6-10, 43) These e-mails (and related affidavits) do not demonstrate that Defendants did something illegal. (*Id.*) Further, the Foothills and Western Highlands LMEs performed careful investigations of CNC's allegations and *both LMEs determined that Defendants had not engaged in any improper conduct.* (Thomas Aff ¶¶ 4,6; Eldridge Aff ¶¶ 6, 7, 11; Doucette Aff ¶ 6) CNC admitted it had no reason to doubt the outcome of these two investigations. (CNC Dep

Vol V pp 797-798, 835-836) Given CNC's lack of a reasonable investigation into the truth of its allegations against Defendants, a reasonable jury could easily determine that the facts did not really matter to CNC because it's purpose was not to discern the facts—CNC's purpose was to undermine Universal's ability to compete effectively against it and to harm Defendants.

d. A reasonable jury could determine that CNC knew its accusations and claims against Defendants were baseless and asserted with reckless disregard for the rights of Defendants.

The baselessness of CNC's claims is evident in the following exchange in the CNC 30(b)(6) deposition. CNC's designee, Hardy, testified that the "whole crux" of CNC's *entire lawsuit* is its argument that employees and consumers were "here today, gone tomorrow":

Q. What other evidence does CNC have, other than the before and after picture?

A. Well, *the before and after picture is the deal, is the whole crux of this whole lawsuit to begin with. One day they're there, one day they're not. I mean, everything else is just extraneous.*

(CNC Dep Vol V p 789) Not only is this "here today, gone tomorrow" a ridiculous basis upon which to bring a multi-million dollar lawsuit, but CNC also knew it was *not true as a factual proposition*.

As shown in Defendants' Memorandum in Support of Defendants' Joint Motion for Summary Judgment, CNC knew that it had taken employees and clients "upwards of a month" to transfer to Universal in Morganton and at least several days in Asheville. (Def SJ Memo pp 26-27, 42; CNC Dep Vol I p 114, Vol IV pp 639-640) In addition, for the twenty-three employees from Morganton and Asheville whom CNC alleges Universal "stole," Universal's records reflect various hire dates over the course of a month in Morganton and more than a month in Asheville. (Plf Ex 3 pp 31, 34; Def Ex 5)

There is additional evidence that CNC knew that its legal claims lacked merit.[8] For example, CNC admitted that it had no evidence of any conspiracy by Defendants to only hire Scruggs if she brought clients other than its conjecture that Scruggs was not worth anything without clients. (CNC Dep Vol I pp 122-124, 128-130) CNC also admitted that trying to restrict a former employee from working with the same consumer at another provider would violate North Carolina's public policy of client choice. (CNC Dep Vol III p 458; *see* Def SJ Memo, pp 17-19 and Section IIIB) Further, CNC admitted that it had no evidence that Scruggs, Greer or others copied any documents beyond CNC's assumptions, and CNC's Director of Operations admitted that it's alleged "trade secrets" binder contained "no confidential information." (Voegeli Dep p 32) Finally, CNC knew that at least three government-affiliated entities had found no inappropriate conduct by Defendants. (Def Exs 41, 44, 50) Nonetheless, CNC engaged in the conduct described above and filed this lawsuit.

Based on all of this evidence, a reasonable jury easily could determine that CNC had no legitimate factual or legal basis for its wholesale attack on Defendants and that CNC engaged in numerous unfair and deceptive acts to undermine Defendants as competitors.

e. A reasonable jury could determine that, in addition to personal animosity toward Defendants, CNC executives engaged in the unfair acts above to gain "PR mileage," to intimidate employees from going to Universal, and to use Universal as an example to intimidate other providers from hiring CNC employees.

In addition to all of the substantial evidence and issues of fact above, there is other evidence of CNC's anti-competitive motives. First, there is direct evidence that CNC's goals in its activities against Defendants were anti-competitive. In a February 18, 2004 e-mail chain between CNC and ResCare executives, Judy Hardy wrote:

[8] CNC admitted that all of the conduct upon which its legal claims are based occurred prior to May 2004, and that there was no additional evidence after May 2004 that led CNC to believe its claims had merit. (CNC Dep Vol V pp 843-844)

> I've rethought our strategy—We should go ahead and get numbers together for Woody, but do we want to seem so eager to settle? If we agree to settle at this point, *we won't meet some of the goals we discussed. I would like the suit to be filed so we can get some PR mileage out of it, newspaper coverage, let the area programs know what's going on, send a message to other sleezeball providers across the State.* I'm not saying we shouldn't settle but *would you agree we should posture a bit before doing so?*

(Def Ex 34 (emphasis added)) Martin Miller, Hardy's supervisor at ResCare, responded "I agree with the strategy. But let Woody have some input before you make the final decision. *As long as nothing happens to lessen our leverage*, I think your strategy *would accomplish a lot*." (Def Ex 34 (emphasis added)) This evidence alone indicates that CNC's purpose in filing the lawsuit was not to redress alleged wrongs, but to get "PR mileage," harm Universal's competitive reputation in the state, and intimidate other providers into not touching CNC's employees.

Second, there is evidence that CNC executives designed business strategies which focused on undermining Defendants competitively and intimidating their own employees from seeking out employment with Universal. For example, CNC held strategy sessions about Universal that included discussions of making reports to the NCHCPR, Western Highlands, and the Licensed Board of Professionals. (Voegeli Dep pp 179-180) In at least one of these strategy sessions, CNC executives discussed holding meetings with employees about HIPAA violations which appear designed to frighten CNC employees from inquiring about jobs with Universal. (Voegeli Dep pp 179-180; Def Ex 24; 10/9/03 e-mail from Deena Ombres to Hardy (produced by ResCare in response to Scruggs subpoena, App 100)) CNC's cover was that CNC was simply "try[ing] to stop the rape, pillage and plunder where [Defendants] were stealing our business." (Voegeli Dep pp 179-180)

Moreover, in February 2004 Judy Hardy prepared a memo to ResCare entitled "Universal Mental Health" which summarized CNC's "areas of vulnerability" and set forth "strategies in

place and recommendations for further actions." (Def Ex 24) In recounting the "actions taken by CNC" in the Western Highlands area, Hardy described its actions in making CNC "middle management staff aware of the impending lawsuit" and sending letters to Lowe and Revels as a potential "deterrent" against CNC's DD Program Manager, Sherry Douglas, leaving. (*Id.*) Hardy ended the memorandum listing "[k]nown setbacks for Universal," including "the impending lawsuit," "[p]ositive reaction on the part of Western Highlands to act upon our complaint," and "[h]uge expenses compared to revenue." (*Id.*) CNC also knew that it was backed by the money of a national publicly-traded parent company and could outlast Universal in litigation, as evidenced in part by CNC's admission of a comment from a ResCare executive that "ResCare's pockets are deeper than Universal." (Def Ex 24; CNC Dep Vol V pp 844-845) Thus, there are clear issues of fact as to whether CNC filed the lawsuit and agency complaints with intent to harm Universal competitively while Universal was most vulnerable and had "huge expenses compared to revenue."

Third, the evidence also suggests that CNC executives intentionally created a larger-than-life persona of Defendants as villains in the MH/DD/SA community in order to undermine Universal competitively and harm Defendants. For example, on February 6, 2006, Voegeli sent an e-mail to his seven regional managers falsely stating that a multi-million dollar lawsuit had been "filed" against Defendants "seeking restitution for damages caused last fall when Vickie stole 15 clients from the Morganton office." (Def Ex 154) Voegeli sent this e-mail with intent that it be "broadcast" to all CNC employees who might enter into a dialogue with Universal:

Q. Did you expect this announcement would have a negative effect on Universal Mental Health's reputation professionally?
A. My intent was to let our employees know that they—if they got into a solicitation or agreement *or dialogue with Universal* about possible employment and they were thinking of stealing our caseloads, there would be actions taken against them, too.
Q. Did you ever tell employees that?

A. I didn't.
Q. Did other people?
A. I hope so.

(Voegeli Dep p 154 (emphasis added)) Similarly, in his deposition as well as in e-mails Voegeli described the situation in dramatic, "good versus evil" terms—words he no doubt used publicly and internally at CNC: Judy "hire[d] the biggest baddest lawyer she could find," CNC "had to stop the rape, pillage, and plunder," "it was blitzkrieg," and "[a]re you going to sit there and watch your business go out the door? You know, you're at Dunkirk. You got your back to the English Channel. What are you going to do?" (Voegeli Dep pp 62, 107, 109-110, 150, 158, 174-175, 179-180; Def Exs 153, 154) Evidence that CNC publicized the existence of a lawsuit that had not been filed and invoked language like this—in combination with Hardy's "Universal" memo and "PR mileage" e-mail—leads to the conclusion that CNC's motive was not to redress alleged past wrongs, as CNC asserts, but instead to harm Defendants, keep employees from going to Universal in the future, and to make Universal an example for other providers who might consider hiring CNC's employees.

This is particularly apparent once the players are put in their actual competitive context. Universal was and remains a very small competitor in the market. Even today, CNC has some 4,000 employees in North Carolina compared to Universals' meager 400 employees. (CNC Dep Vol II p 298; England Aff ¶ 2) Universal only competes in a few of the catchment areas in the state, whereas CNC competes throughout the state. (England Aff ¶ 2; CNC Dep Vol I pp 25, 27, 108) Further, at best the transfer of *only twenty-three employees* and *twenty-four consumers* are at issue in this lawsuit. (CNC Dep Vol I pp 88-97; Def Exs 4 and 5) While CNC has tried to label this volume as "unprecedented," it is hardly a significant number given the several thousand employees CNC has in North Carolina, the extraordinary turnover of employees CNC

admits it experiences every year (over 50% annually), and the many consumers CNC serves. (*See* Exhibit 25; Voegeli Dep pp 106-107; Plaintiff's Responses to Universal's First Set of Interrogatories, Response to Interrogatory 9, App 97) Finally, evidence that other groups of employees and consumers have left in the past with CNC taking little or no action demonstrates that CNC's focus on Universal was not because of some unprecedented volume of departures. (CNC Dep Vol II pp 245-247, 301-303, 306-309, 384-386; Def Ex 19, App 69)

Fourth, there is significant evidence that CNC's actions go so far beyond normal competition that they indicate anti-competitive purpose and malice in themselves. Perhaps one of the best examples of this is CNC's complaint against Scruggs to the NCHCPR. As shown in Section IA, CNC knew that the NCHCPR did not have jurisdiction over Scruggs, yet it allowed Voegeli to file a written complaint alleging Scruggs committed "fraud" as an "outlet" for his anger. (CNC Dep Vol V pp 772-773) Voegeli repeatedly argued that Scruggs "represented that Universal would be a better umbrella for her employees and staff to work under than CNC/Access, and that's just out and out fraud, for her own personal gain." (Voegeli Dep p 106; *see* Voegeli Dep pp 109-110, 114-115, 131-132) Voegeli's testimony that Scruggs' "fraud" was representing that Universal "would be a better place for people to work" when "Universal didn't hold a candle to CNC" demonstrates the ridiculousness of this position. (Voegeli Dep pp 109–110) The utter recklessness of CNC's conduct in dragging the Defendants mercilessly through government investigations and this lawsuit based on such a preposterous position constitutes anti-competitive behavior in itself.

Another example of actions well beyond normal competition is CNC's effort to *stop the employees of another provider*, Alpha Omega, from becoming employed by Universal. In a February 2, 2005 e-mail from Regional Manager Terrie Filer to Judy Hardy, Filer reported that

Universal had been hiring Alpha Omega employees and that CNC employees were "trying very hard to convince [Alpha Omega employees] to stay with Alpha." (Def Ex 22) CNC cannot possibly claim that such interference was necessary to protect its own business interests.

All of this evidence taken together creates a sufficient basis on which a jury could conclude that CNC used its size and weight in the industry to engage in an anti-competitive campaign to undermine Universal as a competitor and harm Defendants.

B. <u>CNC is Not Entitled to Summary Judgment Based on its Memorandum Argument that CNC's Conduct in Filing the Lawsuit was Not an Unfair and Deceptive Act</u>.

In its Memorandum, CNC's only deals with the portion of Defendants' UDTPA claim that concerns the lawsuit. Specifically, CNC argues that its filing of this case against Defendants cannot be an unfair act because the "cornerstone of the lawsuit" is Scruggs' failure to honor the covenant not to compete in her CNC employment agreement. (CNC Memorandum pp 19-21) In essence, CNC is asking the Court to dismiss all of Defendants' UDTPA claims simply by arguing that the purported "cornerstone" claim of its lawsuit *does* have merit. This argument fails because it ignores all of the substantial evidence of unfair and deceptive acts above. It also mischaracterizes Scruggs' testimony.

First, CNC claims that Scruggs "admits" that she did not "adhere to her employment contract." (CNC Memorandum p 21) In doing so, however, CNC neglects to mention that Scruggs later clarified this testimony by stating, "Well I think I honored the provisions...the only thing I did not do was not work at another provider agency after I left CNC." (2006 Scruggs Dep pp 34–35) Scruggs did not believe that this was "dishonoring" the agreement, and she believed she could work wherever she wanted to in North Carolina. (*Id.*)

Second, as shown at length in the Memorandum in Support of Defendants' Joint Motion for Summary Judgment, the Scruggs non-compete is completely unenforceable as a matter of law

because it is overbroad in time, territory, and scope, and because it violates North Carolina public policy. (*See* Def SJ Memo, pp 14-19) With regard to public policy, Hardy, CNC's 30(b)(6) witness, admitted that North Carolina changed its public policy to client choice in the late 1990s. (CNC Dep Vol III pp 445-449) She also admitted that enforcing restrictive covenants would violate this important public policy:

Q. If a consumer says, I want to go to [another service provider] and have services provided to me by my direct care provider, *would it violate consumer choice if that—if CNC had a restriction on that direct care provider from providing services for that consumer?*
A. Yes.

(CNC Dep Vol III p 458 (emphasis added); *see* Def SJ Memo, pp 17-19) Likewise, CNC's Director of Operations agreed that clients have complete choice over who their workers are and which provider they choose, that this is mandated by the state's client choice rules, and that if a client and employee decide to go to another provider based on client choice, the original provider "can't stop it." (Voegeli Dep pp 80-82) Thus, CNC knew when it filed the lawsuit that the Scruggs non-compete was unenforceable under North Carolina's new client choice rules and that any attempt by CNC to enforce the non-compete in court would violate public policy.

One final point must be made here. In making its argument against Defendants' UDTPA claims, CNC stated:

> [T]he principle basis of this lawsuit revolves around the fact that Scruggs breached the non-competition clause of her employment contract with CNC. All other claims in the CNC/Access lawsuit flow from Scruggs' failure to adhere to her employment contract as well as the actions of the other Defendants complicit in this failure.

(CNC Memorandum p 21) This is a stunning admission. If the entire lawsuit and all of CNC's claims flow from *Scruggs' alleged non-compete breach in Morganton*, as CNC argues here, why has CNC forced Defendants to spend hundreds of thousands of dollars seeking discovery and litigating all of CNC's other claims? For example, there is no factual relationship whatsoever

between CNC's allegation that Scruggs breached her non-compete and CNC's baseless allegation that Universal managers Lowe and Revels misappropriated trade secrets by copying personnel documents on Asheville employees, and that Richard Greer owed a "fiduciary duty" to CNC or breached an old confidentiality agreement with CNC. (*See* Def SJ Memo pp 19-21, 23-27, 43-45) Thus, CNC's admission that the entire lawsuit and all of CNC's claims flow from the Scruggs non-compete claim actually *demonstrates* the reckless and unfair nature of CNC's conduct in filing this multi-million dollar lawsuit.

CONCLUSION

For the reasons stated above, CNC's Motion for Summary Judgment should be denied.

RULE 4.2 CERTIFICATION

Pursuant to North Carolina Business Court Local rules 4.2, the undersigned counsel for Defendants Universal Mental Health Service, Inc. and Richard Greer hereby confirms that the content of Defendants' Joint Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims is acceptable to and has been agreed upon by Philip J. Roth, Jr., attorney of record for Defendant Vicki Scruggs.

Respectfully submitted, this 22nd day of May, 2006.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS** has been served this day by electronic service through the North Carolina Business Court electronic filing system and by depositing copies thereof in a depository under the exclusive care and custody of the United States Postal Service in postage prepaid envelopes and properly addressed as follows:

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This the 22nd day of May, 2006.

/s/ Karin M. McGinnis
Karin M. McGinnis