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

Defendants' Motion for Summary Judgment summarizes Plaintiff's claims and provides an overview of the reasons why those claims fail as a matter of law. Although CNC will undoubtedly attempt to frame its case as a new *Sunbelt*, the undisputed facts show quite the opposite: Defendants did not violate any of CNC's legal rights, and Defendants' actions amounted only to fair and normal competition in the market.

SUMMARY OF FACTS[1]

The dispute before this Court concerns two businesses in the field of services to persons with mental health issues, developmental disabilities, and substance abuse problems. This field is commonly referred to as "MH/DD/SA." (CNC 30(b)(6) Dep ("CNC Dep") Vol IV p. 568 lns 12-15, App. 4)[2] A brief introduction to this field in North Carolina is important to understanding this case.[3]

[1] For purposes of this Motion, Defendants address the facts relevant to summary judgment on Plaintiff's claims only. A plethora of other facts regarding Plaintiff's efforts to harass Universal and its employees and force Universal out of business are relevant to Defendants' counterclaims and therefore will not be addressed here.

[2] All deposition testimony and documents referenced herein can be found in the Appendix to Defendants' Joint Motion for Summary Judgment filed contemporaneously herewith and will be referred to the first time they appear as "App. ___."

[3] For a more exhaustive treatment of this history, please see the Affidavit of Amy England.

I. The MH/DD/SA Field in North Carolina

From the 1970's to the present, North Carolina has gradually but purposefully moved toward privatizing the services the State provides to individuals with mental health, developmental disability, or substance abuse needs. (Affidavit of Amy England ("England Aff.") ¶¶ 6, 8, 10)[4] The first step in this process was setting up a system of local entities (now referred to as Local Management Entities or "LMEs") to oversee the provision of services to MH/DD/SA consumers. (England Aff., ¶¶ 8, 11, 14; CNC Dep Vol I p. 101, App. 1) The actual services are delivered by private sector companies generally referred to as providers ("Providers"). (CNC Dep Vol II p. 211-212, App. 2) Notably, a Provider does not have contracts with consumers but instead contracts with the LMEs or the State itself. (CNC Dep Vol I pp. 100-101, 141; England Aff., ¶ 6)

Because a particularly vulnerable segment of the State's residents comprises the "market" in which Providers operate, the industry is heavily regulated. The consumer's ability to choose among Providers is an undisputed bedrock of public policy in this field. (England Aff., ¶¶ 6, 11; Place Dep p. 33, App.14; CNC Dep Vol III pp. 445-449, App. 3) State and LME rules make it clear that the emphasis of each Provider should be on delivering the best and highest possible quality care to the consumer and that any economic benefit derived by the Provider is residual. (England Aff. ¶ 6) State rules and regulations also define many of the industry's policies, procedures and forms. (Rhoney Dep Vol II pp. 160-161, App. 16; Affidavit of Amy Sills Jones ("Jones Aff") ¶ 9)

The LME is essentially the "gatekeeper" in the provision of services to the consumer. Once the services needed by the consumer have been determined, the LME identifies which Providers are authorized to provide those services so that the consumer may make his or her own

[4] All Affidavits cited herein are being filed contemporaneously herewith.

choice. (CNC Dep Vol I p. 101; Vol II pp. 401-402) The LME then plays an oversight and administrative role in monitoring the delivery of, or modifications to, those services. (CNC Dep Vol II pp. 310-313) The LME also will facilitate a change in Providers when the consumer indicates a desire to move. (CNC Dep Vol II p. 309)

The primary contact a consumer has with the Provider is through the Provider's direct care staff ("DCS") with whom the consumer actually works on a regular basis and, to a lesser extent, the qualified professional or "Q" who supervises service delivery. Defendant Scruggs is a "Q." DCS and consumers generally form a close relationship, and it is common for a consumer to follow his or her DCS when the DCS changes jobs. (CNC Dep Vol II pp. 226-227; Def. Exs. 11, 12, Apps. 25, 26) In fact, "this practice is rampant in North Carolina." (CNC Dep Vol III p. 436; Def. Ex. 25 ¶ 2, App. 32)

Employee turnover in the industry is "huge." (Voegeli Dep pp. 92-93, App. 20) For example, CNC employee turnover has run between fifty percent and sixty percent annually in the past few years and has been as high as seventy-four percent before the events underlying the instant dispute arose. (Steve Greer Dep pp. 38-39 ln 17, App. 12; CNC Dep Vol II p. 366; Def. Ex. 17 p. 16, App. 27). The community of DCS workers is "closely knit" and employees "'shop' the market and know the wage structures and benefit packages of the providers." (Def. Ex. 25 p. 2 ¶ 7; CNC Dep Vol III pp. 433-434; *see also* Devore Dep p. 15, App. 8; Richard Greer Dep p. 61, App. 10) Turnover of Qs occurs as well. (CNC Dep Vol II p. 346)

Of course, because client choice is paramount, the consumer has the right to go with the worker to the new Provider. (CNC Dep Vol III p. 445) *Indeed, CNC admits that it would violate North Carolina public policy if CNC had a restriction on a DCS prohibiting the DCS from providing services to a consumer who desires such services from that worker at a different*

service Provider. (CNC Dep Vol III pp. 457-458)

It is within this framework that the instant dispute between CNC and Universal arose. Universal is a comparatively small competitor of CNC. CNC currently has approximately 3,500 to 4,000 employees in North Carolina alone. (CNC Dep Vol II p. 298) Universal has approximately 400 employees. (England Aff. ¶ 2) The two companies compete only in the areas of services for persons with developmental disabilities and mental health issues and only in two specific LME catchment areas: "Western Highlands" (serving individuals in the counties of Buncombe, Madison, Mitchell, Yancey, Rutherford, Polk, Transylvania, and Henderson) and "Foothills" (serving individuals in the counties of Caldwell, Burke, McDowell and Alexander). (England Aff. ¶ 2; CNC Dep Vol I pp. 56-57, 108)

II. Chronology of the Instant Dispute

The Sale of CNC. CNC is now a subsidiary of Rescare, Inc., a publicly-traded company engaged in similar services throughout the United States with 2005 net profits of about $18 million. (CNC Dep Vol I p. 42 lns 17-18; Affidavit of Gayle L. Kemp ("Kemp Aff.") ¶ 10) CNC was founded in 1986 by Defendant Richard Greer as a family-run business. (Richard Greer Dep p. 7) On or about July 31, 1997, the Greer family sold CNC to ResCare, Inc. (Richard Greer Dep p. 24) As part of the sale, Richard Greer entered into a Noncompetition, Confidentiality and Nonsolicitation Agreement. (Richard Greer Dep pp. 27-28) Greer then worked as a consultant for CNC, leaving in January 1999. (Richard Greer Dep pp. 31-32; CNC Dep Vol II pp. 276-279) His noncompete with Rescare expired in 2002. (Richard Greer Dep pp. 27, 36-37)

CNC Personnel Policies. After leaving CNC, Richard Greer became involved with a finance company unrelated to the mental health services industry, and Robert Greer eventually became its president. (Robert Greer Dep pp. 31-32, App. 11) Robert's uncle--Steve Greer, then

Human Resources Director at CNC--gave Robert copies of some CNC personnel policies for the finance company's use in preparing its human resources manual. (Robert Greer Dep p. 23; Steve Greer Dep pp. 20-21)

Formation of Universal Mental Health Services, Inc. After a number of years out of the MH/DD/SA business, Richard Greer was encouraged by others in the field to re-enter as a new Provider. (Richard Greer Dep pp. 37-38) At the urging of these people, Richard, along with his children, Robert Greer and Alicia Austin, formed Defendant Universal in early 2003. (*Id.*) On or about March 24, 2003, Universal hired its first employee, Hope Orren, who worked on Universal's policies, procedures and forms. (Richard Greer Dep pp. 39-40; Plf. Ex. 3 p. 43, App. 45; Universal 30(b)(6) Dep ("Universal Dep") p. 113, App. 6) For purposes of its Motion for Summary Judgment, Universal does not dispute that Ms. Orren based some of her work on some of the personnel policies given to Robert Greer by CNC's Director of Human Resources, Steve Greer. Universal started operations a little over four months later on or about August 4, 2003 (Austin Dep pp. 4-5, App. 7), and accepted its first developmental disability consumer on October 1, 2003. (Universal Dep pp. 51-52, Plf. Ex. 3 p. 15)

Vickie Scruggs. Prior to September 2003, Defendant Vickie Scruggs was a "Q" for CNC. A life-long friend of the Greer family, she had been with CNC since 1996. (CNC Vol I pp. 79, 124) Scruggs signed a four-page employment agreement with CNC which contained, among other provisions, a promise to devote her full time and efforts during her employment to her assigned duties and a non-competition provision. (Def. Ex. 3 ¶¶ 2B ¶ 6, App. 21) Scruggs liked the idea of going to work for her old friend and former boss. (2004 Scruggs Dep pp. 6-7, App. 18) Therefore, on September 15, 2003, she submitted her resignation stating that she would work a two week notice. (CNC Dep Vol IV pp. 651-652; Def. Ex. 39, App. 36; 2004 Scruggs

Dep pp. 12, 33) When CNC learned of Scruggs' resignation, two of its top executives asked her to reconsider. (CNC Dep Vol IV pp. 652-654) Then CNC told her that her services were no longer required. (2004 Scruggs Dep p. 12)

When Scruggs left, CNC did not have any protocol or policy by which a DCS or Q informed consumers of their pending departure. (CNC Dep Vol IV pp. 646-647) Accordingly, prior to submitting her resignation, Scruggs consulted with the Director of Case Management Services at the Foothills LME, Amy Sills Jones. (2004 Scruggs Dep pp. 9-10; CNC Dep Vol IV pp. 645-646; Jones Aff. ¶ 7) Foothills, through Ms. Jones, told Scruggs that it was proper for her to tell her consumers and their families that she was leaving CNC and going to Universal. (2004 Scruggs Dep pp. 10 -11; Jones Aff. ¶ 7)

After Ms. Scruggs resigned from CNC, about fifteen DCS and fourteen consumers with whom she had worked in the Foothills area made the decision to transfer to Universal. (CNC Dep Vol I p. 108; Def. Exs. 4, 5, Apps. 22, 23; Stigall Dep pp. 137-139, App. 19) (two consumers on Plf. Ex. 4 did not come to Universal and one consumer left before Ms. Scruggs.)

CNC executives "believed" that Scruggs had "struck a deal" with Universal to bring her DCS employees and consumers as a condition of her employment because they believed Scruggs "had no value to Universal without the client base." (CNC Dep Vol I pp. 121-124; Voegeli Dep pp. 110-111) Neither CNC nor its parent company, Rescare, bothered to investigate the actual facts. (CNC Dep Vol II pp. 266-272, 324, 334; Vol V pp. 738-740, 749-751, 761-764, App. 5) Instead, it based its belief on statements (two of which were later converted to affidavits) produced by three of its employees and the simple, if wholly inaccurate, perception that "one day [the employees and consumers are] there, one day they're gone." (CNC Dep Vol IV pp. 636-637; Def. Exs. 9(a)–(c), App. 23) To this day those three statements remain CNC's sole evidence of

wrongdoing by Defendants in connection with employees and consumers in the Foothills LME area. (*Id.*) These statements are full of hearsay and therefore are not admissible evidence. Even so, as they comprise CNC's sole evidence, they warrant some attention if for no other reason than they ironically tend to corroborate Defendants' position.

Hensley Statement. On September 19, 2003, CNC employee Judy Hensley wrote a statement regarding a conversation with a consumer's mother about Vickie Scruggs' departure from CNC. (Def. Ex. 9(a)) Hensley records the fact that the mother *did not know* that Ms. Scruggs was leaving on September 15, 2003. Hensley also records that the *consumer's mother* had requested transfer of services from CNC to Universal on September 16th because Universal, through its employee Scruggs, had offered the consumer's DCS more money. (*Id*) As CNC admits, there is, in fact, nothing remarkable about these events. (CNC Dep Vol II p. 418; Rhoney Dep Vol I p. 55, App. 15)

Stigall Statement. CNC employee Joy Stigall, Scruggs' supervisor, made her statement on September 19, 2003. (Def. Ex. 9(b)) In it, Stigall claims that Scruggs' reportedly contacted the guardian and DCS for consumer JS on September 15th to inform her of her departure from CNC. In addition, Stigall claims that the guardian also said Scruggs invited her and her child to come with Scruggs to Universal. Perhaps most importantly, Stigall reveals that the guardian *declined* the offer and stayed with CNC. Thus, even conceding for purposes of this Motion that the contact occurred as recorded by Stigall, nothing came of it—which is to say, by its own admission *CNC has not been damaged.*

Rhoney Statement. In the third and final statement, produced on October 2, 2003 by CNC employee Melaina Rhoney, Ms. Rhoney documents two calls she made to two consumers – SLC and RR – over whom she had clinical responsibility at one time and knew to be long-term clients

of CNC. (Def. Ex. 9(c); Rhoney Dep Vol I p. 48 lns 15-21). At her deposition, Ms. Rhoney stated that she does not have any problem with the RR situation and so that one is not addressed here. (*Id.*, p. 71 lns 4-6). As to the situation involving SLC, Ms. Rhoney first admits that she was unaware that Foothills had a process in place – which included the "client choice" form – to ensure that a guardian/consumer was knowingly choosing to transfer providers. (*Id.*, p. 71 lns 12-17) Second, she was not aware that the client about whom she was concerned had completed the "client choice" form. (Def. Ex. 77, App. 44; Rhoney Dep Vol I p. 72 lns 20-22; p. 73 ln 25 – p. 74 ln 2; p. 77 lns 19-25) Third, although she remained cautious as to whether she was personally comfortable that the policy of "client choice" had been observed, she candidly conceded that it was "a good thing that they [Foothills] would document this;" that the executed form "assures client choice;" and finally, that there was not anything else Foothills could have done to ensure that "client choice" was honored in this specific situation. (*Id.*, p. 72 lns 20-22; p. 77 lns 19-25).

Western Highlands. Unrelated to Ms. Scruggs,[5] in January and February 2004, thirteen employees left CNC's Asheville, North Carolina office, including nine DCS. (CNC Dep Vol I pp. 110-111; Def. Exs. 9e, 9f, 9g, and 9h). Most went to work for Universal. (Plf. Ex. 3 p. 34; Def. Ex. 48 p. 5, App. 42) As with Foothills, the consumers followed their DCS workers to Universal. (Def. Ex. 4, 9(d)-(h); Universal Dep pp. 68-77; Def. Ex. 3 p.34; CNC Dep Vol II p. 227, Vol III pp. 436-437; Def. Ex. 25) Also as with Foothills, CNC speculated that something

[5]When CNC began losing employees and consumers in its Asheville office (Western Highlands area), it "suspected" that two former middle-management employees from the Asheville office, Patra Lowe and James Revels, were plotting to "wipe out" Asheville's office. (CNC Dep Vol II pp. 328-330) Not unlike a good many other CNC employees, Lowe and Revels became disenchanted with CNC and resigned to begin their own agency, Carolina Synergy. (Revels Aff. ¶ 11; Fonvielle Dep p. 39-40, App. 9) Importantly, Lowe and Revels worked only in the Asheville area. (CNC Dep Vol III p. 459) After Lowe and Revels had left CNC, Robert Greer returned an earlier "cold call" Revels had made to Richard Greer. The three met several times after which Mr. Greer persuaded Lowe and Revels to work for Universal. Notably, Carolina Synergy never hired a single employee and Lowe and Revels had only incidental contact with consumers while in CNC's employ. (Revels Aff. ¶¶ 7, 9)

nefarious had occurred based solely upon email statements from two of its employees and the "here today, gone tomorrow" factor. (CNC Dep Vol IV pp. 636-637; Vol V pp. 788-794; Def. Ex. 9(d)-(h)).

Fonvielle Statement. The first of these email statements was written by CNC employee Jane Fonvielle. (Def. Ex. 9(h)) Dated January 30, 2004, Fonvielle's email describes a DCS employee, Kim Fordham, who told Fonvielle two weeks earlier that that she was leaving CNC for a "personal reason" and that she did not know if CNC needed to find a DCS to work with her consumer. Fonvielle records that she learned that Fordham was working with her consumer on January 14, 2004. (*Id.).* Fonvielle then contacted the case manager at Western Highlands to learn that the *consumer* authorized the change in Providers and that it was best for the client to have consistency with the worker. Then, on January 19, 2004, Fonvielle contacted the consumer's mother, who confirmed that she switched Providers because she wanted to stay with the same DCS. That is to say, Ms. Fonvielle's statement confirms that both the case manager and guardian were aware of the consumer's desire to stay with the current DCS.

Devore Statement I. In a January 30, 2004 email from Anthony Devore, Devore reports that one of his DCS workers, Larry Grant, had decided to leave CNC for Universal along with Grant's consumer. (Def Ex. 9(f)) Devore goes on to say that he spoke with two different families to learn that they had both decided to transfer to Universal because Universal had a better summer program than CNC. Devore also conveyed that he received a telephone call from a case manager who said that DCS Mandy Armstrong was changing companies and the client had decided to go with her. (*Id.*) As with the other statements, Devore's statement confirms that "client choice" had been honored.

Devore Statement II. The second email from Devore, dated February 17, 2004, confirms

that five of his direct care staff had resigned, or were resigning, for "personal reasons" and were "taking" their clients with them. (Def Ex. 9(e)) Devore contacted each of the consumers involved to learn from them that they had decided to go with the departing DCS. In one case, the family itself had decided Universal had a more attractive program and the DCS had decided to follow them. (*Id.*) Regrettably for CNC's claims, the plot does not thicken any more than that.

Devore Statement III. In Devore's third email, dated February 19, 2004, Devore relates that he received a call three weeks earlier from a Western Highlands *case manager*—again, the "gate keeper" of client choice--informing him that a DCS, Henry Pinto, and his two consumers decided to transfer to Universal. When Devore called Pinto about this, Pinto said he had run into some people from Universal who talked about going to work there. (*Id.*)

With this "evidence," and without upper management investigating the facts further, CNC began churning out complaints or "reports" to governmental authorities in the declared hope that it could put an end to Universal's "poaching." (CNC Dep Vol II pp. 266, 272, 324, 334; Vol III pp. 534-535; Vol V pp. 738-740, 749-751, 761-764, 767, 780-782, 801-803; Def Exs. 40, 43, 46, 48, Apps. 37, 39, 41, 42; Voegeli Dep pp. 124-129) These included submissions to the federal DHHS' Office for Civil Rights, the NC DHHS Health Care Personnel Registry (against Scruggs), the NC Board of Licensed Professional Counselors (against Revels), and the Western Highlands and Foothills LMEs. (*Id.*)

Not one independent agency or authority found any reason whatsoever to criticize, much less sanction, the actions of Defendants Scruggs, Greer or Universal. (CNC Dep Vol III pp. 534-535; Vol V pp. 776-777, 783-784, 834-835, 839-840; Def. Exs. 41, 44, 50, Apps. 38, 40, 43 Both LMEs specifically investigated by speaking with the case managers and consumers (or guardians) involved to assure that nothing untoward had occurred. Neither investigation yielded

a shred of concern about improper conduct by the Defendants. (Id.; Affidavit of Donna Thomas ("Thomas Aff.") ¶ 5; Affidavit of Sonia Eldridge ("Eldridge Aff.") ¶ 7; CNC Dep Vol V pp. 797-798, 835-836.)

CNC Employee Dissatisfaction. In trying to tag Defendants with responsibility as to why CNC employees were leaving, CNC is conveniently ignoring the fact that, in the midst of the foregoing events, CNC executives were separately and vociferously complaining to Rescare that a wage freeze Rescare had implemented was having "a very serious negative effect on all levels of employees." (Defendants' Exhibit 25) In addition to causing the loss of existing employees, the wage freeze made it difficult to attract new employees. (CNC Dep Vol II 397-98, Def. Ex. 25) CNC's State Director described the cessation of CNC's wage and compensation plan (replaced by the wage freeze) as the "most demoralizing event in the thirteen years I have been associated with CNC/Access." (Def. Ex. 25) At the same time, CNC was struggling with other causes of employee dissatisfaction, including lack of benefits and complaints about management (such as the "horrendous" response CNC executives experienced after demanding the return of Christmas party checks from branch offices). (Voegeli Dep pp. 83-87, 90-92; CNC Dep Vol II pp. 375-376)

ARGUMENT

Rule 56(c) of the North Carolina Rules of Civil Procedure mandates the entry of summary judgment against CNC on a claim if CNC cannot make a showing sufficient to establish *every* element essential of its claim. *Hill v. Kinston*, 92 N.C. App. 375, 374 S.E.2d 425, 426 (1988). If CNC fails to make a sufficient showing, there can be no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. *Id.* Importantly here, CNC cannot defeat Defendants' Motion for Summary Judgment by "mere allegations or speculation."

Kennedy v. Guilford Technical Comm. College, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (N.C. App. 1994) (overruled on other grounds). Instead, CNC must show "specific facts...that controvert the facts set forth in the movant's evidentiary forecast." *Id.* CNC cannot do this because Defendants' "evidentiary forecast" is made up primarily of CNC's own admissions.

I. CNC'S BREACH OF CONTRACT CLAIM AGAINST SCRUGGS FAILS BECAUSE CNC HAS NO EVIDENCE THAT SCRUGGS' BREACHED HER DUTIES AS A CNC EMPLOYEE AND THE NONCOMPETE IS VOID UNDER NORTH CAROLINA LAW.

CNC alleges that Scruggs breached her 1996 Employment Agreement ("Agreement") in three ways: (1) disclosing CNC trade secrets and confidential information; (2) violating Section 2B of her Employment Agreement by contacting CNC clients and employees during her employment to encourage them to transfer to Universal; and (3) competing with CNC within three years of her termination in violation of Section 6A of the Agreement. (Cmplt, ¶¶ 20, 25, 33(a-b); CNC Dep Vol I p. 84) As an initial matter, despite CNC's attempt to slide misappropriation of confidential information into its contract claim against Scruggs, the Employment Agreement *does not contain a confidentiality provision or restriction.* (Cmplt Ex. 1.)

As to Scruggs' alleged breach by disclosing "trade secrets, including client information," CNC now admits that Scruggs did not take any client lists. (Affidavit of Judy Hardy dated December 5, 2005, App. 48) CNC also admits that it has no evidence that Scruggs took CNC "trade secrets" other than its assertion that Universal possessed documents that were similar to or duplicated CNC documents. (CNC Dep Vol III p. 522 ln 23–p. 527 ln 13; Vol IV p. 704-p. 707 ln 1, p. 708 ln 11-p. 709 ln 14) Not only does this "evidence" not implicate Scruggs, but these documents are not even trade secrets. (*See* Section III, below) Thus, CNC is left only with its

contention that Scruggs breached Section 2B of her Employment Agreement by contacting clients during employment and breached Section 6A by working for a competitor of CNC.[6]

To survive summary judgment on its breach of contract claim, CNC must establish (1) a valid contract; (2) a material breach of the contract; and (3) damages resulting from the breach. *See Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997). Summary judgment is warranted on these claims because (a) CNC has no evidence that Scruggs breached Section 2B; and (b) Section 6A violates North Carolina public policy, is overbroad in time, territory and scope, and therefore, is unenforceable.

A. CNC Has No Evidence to Support Its General Claim that Scruggs Violated Section 2B of Her Employment Agreement.

Section 2B of Scruggs' Employment Agreement states that Scruggs:

> agrees that during and throughout the terms of this Employment Agreement, he/she will devote to the business his/her full time and efforts necessary for the performance of the duties and responsibilities to be performed by him/her under the terms of this Employment Agreement, and that during such time he/she will not undertake any activities, business or otherwise, that would *unreasonably or materially interfere with or limit* the complete carrying out, fulfillment or performance of *his duties and responsibilities hereunder.*

(Cmplt Ex 1 § 2.B (emphasis added))

In assessing claims for breach of an employment agreement provision similar to this one, North Carolina courts look to the plain language in the contract and require the employer to prove a violation of those specific terms. *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 358 S.E.2d 107, 108 (1987) (holding employer failed to prove breach of contract under its terms). Scruggs' Employment Agreement specifies that she was "generally" responsible for "managing service delivery of clients." (Cmplt Ex. 1 § 2.A.) By CNC's own

[6] To the extent CNC may attempt to contend that Scruggs or any other employee breached an "Assurance of Confidentiality," CNC has no claim. CNC admits that the Assurance is simply a state-mandated form by which an employee acknowledges that she is supposed to keep client information confidential; it does not constitute a contract. (CNC Dep. Vol IV p. 624-627; Def. Ex. 28, App. 33)

admissions, it is clear that Scruggs did not breach Section 2B. First, CNC has admitted that "through the course of her employment with CNC," Scruggs generally had excellent relationships with both staff and clients with whom she worked. (CNC Response to Scruggs' First Requests to Admit, 1 and 2, App. 46), *see also* CNC Dep Vol II p. 400 lns 9-19; Vol IV p. 641 ln 25–p. 644 ln 1) CNC also admitted that it has no evidence that Scruggs solicited either employees or clients while still employed with it. Rather, CNC simply speculates that she did. (CNC Dep Vol I p. 103 - p. 104 ln 14) Scruggs did her job while she was employed and was "very good" both to her "families" and her staff. (CNC Response to Scruggs' First Request to Admit, 1 and 2; CNC Dep Vol I p. 102 lns 13-23; Vol II p. 400 lns 12-14) In sum, CNC has admitted that Scruggs fulfilled her duties under Section 2B.

B. CNC's Non-Compete Covenant Against Scruggs is Unenforceable Because Its Terms are Overbroad and Because It is in Violation of Public Policy.

"Covenants not to compete between an employer and employee are not viewed favorably in modern law." *VisionAIR, Inc. v. James,* 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004). To establish that its noncompete is enforceable, CNC must show that the covenant is: (1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) not against public policy. *Whittaker General Medical Corp. v. Daniel,* 324 N.C. 523, 525, 379 S.E.2d 824, 826 (1989). CNC also has the burden of proving that the scope of the covenant is reasonable. *Hartman v. W.H. Odell Associates,* 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994). The reasonableness of a non-competition covenant is a matter of law for the court to decide. *Beasley v. Banks*, 90 N.C. App. 458, 460, 368 S.E.2d 885, 886 (1988).

The non-competition provision is set forth in Section 6.A of Scruggs' Employment Agreement and purports to prohibit Scruggs as follows:

> during the time this Employment Agreement is in effect and for a period of three (3) years thereafter, the Employee shall not, directly or indirectly, individually or as an employee, partner, officer, director or stockholder or in any other capacity whatsoever of any person, firm, partnership or corporation, compete with the Company within the State of North Carolina.

(Cmplt Ex. 1 § 6.A) Section 6A is overbroad in just about every way it could be—in time, territory and scope. In addition, it violates North Carolina public policy. With four strikes against it, Section 6.A is invalid, and CNC cannot establish even the first element of its breach of contract claim.

1. The Restrictive Covenant is Overbroad in Time and Territory.

North Carolina courts analyze time and territory restrictions in tandem. *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000). "Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable. A longer period of time is acceptable where the geographic restriction is relatively small, and vice versa." *Id.*

> One of the primary purposes of a covenant not to compete is to protect the relationship between an employer and its customers. Accordingly, to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *maintaining* [its] customers.

Hartman, 117 N.C. App. at 312, 450 S.E.2d at 917 (internal citations omitted). "Where the alleged primary concern is the employee's knowledge of the customers, the territory should only be limited to areas in which the employee made contacts during the period of his employment." *Id.*, 117 N.C. App. at 313, 450 S.E.2d at 917. "If the territory is too broad, the entire covenant fails since equity will neither enforce nor reform an overreaching and unreasonable covenant." *Id.*, 117 N.C. App. at 312, 450 S.E.2d at 917.

CNC admits that the primary purpose of its noncompetition provisions is protection of CNC's relationship with its consumers. (CNC Dep Vol III p. 441 lns 6-15) Therefore, under *Hartman*, the covenant should be limited to areas in which Scruggs made contacts with consumers. Thus, the territory restriction in Scruggs' restrictive covenant far exceeds the area in which she actually had contact with consumers. CNC admits that the geographic scope of Scruggs' work involved *only four counties*: Caldwell, McDowell, Burke and Alexander, but the covenant extends to the entire State of North Carolina. (CNC Dep Vol II p. 291 lns 2-18; Cmplt Ex 1 § 6A)

The overbreadth of the geographic area covered by the covenant is reason enough for the covenant to be voidable. When read in conjunction with the three-year time period, the covenant becomes completely untenable. The North Carolina Court of Appeals has recently held that even where a covenant's three-year time period may be valid standing alone, it was unreasonable when coupled with an unnecessarily broad territorial restriction. *Carolina Pride Carwash, Inc. v. Kendrick*, 618 S.E.2d 875 (Table) 2005 WL 2276904**3 (N.C. App.) (Memo App. A).[7] Such is the case now before the Court.

Further, CNC's own testimony shows that a three-year covenant is excessive. CNC consumers leave for a variety of reasons and CNC considers a *long term* consumer to be one who stays at least *two years*. (CNC Dep Vol II p. 265 ln 25–p. 266 ln 5; Vol IV p. 641 lns 11-24; Def. Exs. 11, 12) Qs like Scruggs visit their consumers at least once a month (CNC Dep Vol II pp. 288-289), such that a new Q could easily establish a relationship with a consumer in one year. Thus, a three-year covenant—even if limited to the territory a Q serves--is much longer than necessary to protect CNC.

Finally, given that CNC's *annual* rate of turnover averages from fifty to sixty percent,

[7] Unpublished cases are attached hereto at Appendices A through F ("Memo App. ___").

that a consumer often will follow his DCS to a new Provider, and that a consumer is considered "long term" after only *two* years, it is patently unreasonable to prohibit a former employee from providing services to that consumer for *three* years. (CNC Dep Vol II p. 362 lns 23-25, p. 366 lns 5-23; Vol IV p. 641; Def. Ex. 17 p. 15; Steve Greer Dep pp. 38-39) Reading the time and territory restrictions of the Scruggs non-compete together, CNC cannot meet its burden of proving that Scruggs' three-year statewide restriction is reasonable in this case.

2. CNC's Restrictive Covenant is Overbroad in Scope of Activities Restricted.

To be valid, restrictions on an employee's future employability "must be no wider in scope than is necessary to protect the business of the employer." *VisionAIR, Inc.*, 167 N.C. App. at 508, 606 S.E.2d at 362. A restrictive covenant is overbroad in scope if it would prevent the employee from doing even "wholly unrelated" work with similar companies. *Id.*, 167 N.C. App. at 509, 606 S.E.2d at 362-363 (finding covenant overbroad). By restricting Scruggs from "competing" with CNC, the non-compete prohibits Scruggs from engaging in even "wholly unrelated" work or services for another Provider. Under *VisionAIR*, this fact alone makes the non-compete unenforceable.

3. CNC's Noncompete Is Unenforceable Because it Violates Public Policy.

Even if CNC's covenant were not overbroad, it would be unenforceable because it violates public policy, the fifth factor in establishing an enforceable restrictive covenant. *Whittaker*, 324 N.C. at 525, 379 S.E.2d at 826. North Carolina courts recognize that ensuring patients have sufficient choice between caregivers is a primary public policy concern. *See, e.g., Statesville Medical Group, P.A. v. Dickey*, 106 N.C. App. 669, 418 S.E.2d 256 (1992); *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989). It is undisputed that client choice is an important public policy in

North Carolina in the MH/DD/SA field. "Client choice" permeates North Carolina statutes and regulations governing the provision of MH/DD/SA services. *See N.C. Gen. Stat. 122C-71(a)* (recognizing "as a matter of public policy the fundamental right of an individual to control the decisions relating to the individual's mental health care"); *"State Plan 2003: Blue Print for Change,"* July 1, 2003 Chapter 4, Local Systems Supporting and Serving our Citizens and Communities, p. 114, England Aff. Ex A) ("Making sure that consumers have choices of services/supports and service providers is one of the driving forces behind the reform movement.... *The option to choose is especially important when the provider works very closely with the individuals...* ") (emphasis added). Thus, as a matter of State public policy, members of the public receiving MH/DD/SA services are entitled to choose who will provide treatment to them. A secondary and related public policy is *continuity of care* for the consumer. *See, e.g.,* Foothills Local Business Plan, Section IV, Service Management, p. 31, Attachment IV-3.g.(1) Policy regarding continuity of care (England Aff. Ex. B) ("Foothills Area Program will support continuity of care when transitioning between services and promote the continuation of services...."); Foothills Local Business Plan, Section IV, Service Management, p. 12 (England Aff. Ex. B) (highlighting that processes "will assist clients to continue receiving needed specialty supports and services without interruption.")

To its credit, CNC not only does not dispute the importance of "client choice" in the industry, but in fact emphasizes it. (CNC Dep Vol III p. 445 ln 21 – p. 449 ln 15) Indeed, CNC admits that restrictive covenants would violate this important public policy. To wit:

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 lns 2-7 (emphasis added)) CNC simply cannot justify keeping Scruggs

or any other former CNC employee from providing services to consumers. Accordingly, CNC's breach of contract and non-compete covenant claims fail as a matter of law.

II. CNC CANNOT SHOW THAT DEFENDANTS GREER AND SCRUGGS OWED ANY FIDUCIARY DUTIES TO CNC, AND THEREFORE SUMMARY JUDGMENT ON CNC'S BREACH OF FIDUCIARY DUTY CLAIM IS PROPER.

In Count II of the Complaint, CNC alleges that Scruggs and Richard Greer held positions of trust and confidence with CNC and that they breached their fiduciary duties by a variety of acts. (Cmplt ¶39) CNC's claim of breach of fiduciary duty fails as a matter of law for the simple reason that Defendants Greer and Scruggs did not owe any fiduciary duty to CNC.

In 2001, the North Carolina Supreme Court made clear that a fiduciary relationship does not exist unless there is a "special confidence reposed" on one side, and "*resulting domination and influence on the other.*" *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-708 (2001). The existence of a fiduciary relationship is "specifically limited in the context of employment situations." *Id.*, 353 N.C. at 651, 548 S.E.2d at 708 (granting summary judgment for former manager on fiduciary duty claim). Since *Dalton*, the principle that management employees generally do not exercise domination and influence over the company sufficient to create a fiduciary relationship has become entrenched in North Carolina law. *See, e.g., Mechanical Systems & Services, Inc., v. Carolina Air Solutions, L.L.C.*, 2003 WL 22872490, *8 (N.C. Super. Dec. 3, 2003) *appeal dismissed*, 168 N.C. App. 240, 607 S.E. 2d 55 (2005)(Memo App. B); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C*, 2002 WL 31002955 at *7 and *8 (N.C. Super. July 10, 2002) (Memo App. C).

Recently, in a case that is eerily similar to the one before this Court, the North Carolina Court of Appeals held that two Qs (qualified professionals) in the MH/DD/SA field who left the plaintiff's employ, hired away plaintiff's employees, and allegedly used plaintiff's confidential

and trade secret information to solicit clients, did *not* owe a fiduciary duty to the plaintiff. *Coordinated Health Services, Inc. v. Primary Health Care, Inc.*, 626 S.E.2d 877 (Table), 2006 WL 539397 (N.C.App.) (Memo App. C) Specifically, the court held that being a Q, supervising DCS, acting as a liaison between the LMEs and families, and having access to confidential patient information "are inadequate to establish [an employee's] obligations as fiduciary in nature." *Id.* (*quoting Dalton*, 353 N.C. at 652, 548 S.E.2d at 708). Therefore, the Court of Appeals affirmed the trial court's grant of summary judgment on this claim in favor of defendants. *Id.*

In light of *Dalton* and *Coordinated Health Services*, there can be no dispute that Defendants Scruggs and Greer did not have a fiduciary relationship with CNC. CNC admits that after January 1999, Greer *had no relationship at all* with CNC relevant to this case. (CNC Dep Vol I p. 38 ln 21–p. 39 ln 5 (Greer's only relationship with CNC after January 1999 was as owner of a company that leased office space to CNC.)) CNC admits that Greer had no control over or even influence on the decisions of CNC. (CNC Dep Vol II p. 293 ln 23–p. 294 ln 10) Similarly, CNC admits that Scruggs did not have control over decisions of CNC. (CNC Dep Vol II p. 291-293) In CNC's opinion, Scruggs was not particularly bright, had "no business sense and poor clinical skills," and had no value without her clients. (CNC Dep Vol I p. 123 ln 25–p. 127 lns 25–20; Vol II p. 185, p. 418 lns 11–20, Def. Ex. 24, App. 31; Vol III p. 498 lns 9–20; Vol IV p. 642 lns 16–21) Finally, Scruggs' Employment Agreement expressly states that she is ". . . subject at all times to the control and direction" of CNC's President, Board of Directors, "and such other supervisors as may be designated from time to time." (Cmplt. Ex. 1 ¶ 2A, Def. Ex. 3 ¶ 2A) (*See also* CNC Dep Vol II p. 293 lns 20–22) Because CNC admits that neither Greer nor Scruggs had domination and control over CNC, CNC's claim for breach of fiduciary

duty fails as a matter of law, and summary judgment for Defendants on this claim is proper.

III. CNC'S TRADE SECRETS CLAIM FAILS AS A MATTER OF LAW AND UNDISPUTED FACT.

CNC claims the following three groups of trade secrets in this lawsuit:[8]

- Client and employee names in the memories of former CNC employees Scruggs, Lowe, Revels, and Douglas;
- New hire training documents and medical cards [hereinafter "Employee Privileging Documents"]; and
- one operations policy, one accounting policy, 26 personnel policies, and 29 other forms and MH/DD/SA requirements documents which CNC produced on October 19, 2005 in a white binder [hereinafter "Exhibit 29").

(CNC's Supplemental Response to Universal's First Set of Interrogatories, No. 7, App. 47; CNC Dep Vol III pp. 478-479, 521-522) None of these three groups of information are trade secrets under North Carolina law.[9]

The North Carolina Trade Secrets Protection Act (the "Act") defines a trade secret as business or technical information that "derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering . . . [and] is subject to efforts that are reasonable under the circumstances to maintain its secrecy." N.C. Gen. Stat. § 66-152(3)(a)-(b)(2005). North Carolina courts consider six factors when determining whether information qualifies as a trade secret:

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

[8] Defendants have filed Def. Exs. 29 and 32 under seal even though CNC has not marked them confidential under the Protective Order and even though Defendants do not agree that CNC's policies, procedures, forms, etc. are not trade secrets. Such filing is not intended to waive Defendants' arguments on trade secrets.

[9] Exhibit 29 includes a number of Universal policies with no similar CNC policy which appear to have been included in the binder in error. (*See, e.g.*, Voegeli Dep p. 35; Def. Ex. 29, App. 34) It is elementary that CNC cannot claim that a Universal document constitutes a CNC trade secret.