

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.)

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

CNC’s Memorandum of Law in Opposition to Defendants’ Joint Motion for Summary Judgment (“CNC Opp Br”), fails to establish a genuine issue of material fact on any of CNC’s claims. CNC’s speculation and conclusory factual statements cannot be used to avoid summary judgment. *Butler v. Berkeley*, 25 N.C.App. 325, 332, 213 S.E.2d 571, 575 (1975); *Kennedy v. Guilford Tech. Comm. College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994) (overruled on other grounds).

ARGUMENT

I. CNC FAILS TO RAISE A GENUINE ISSUE THAT SCRUGGS BREACHED ANY ENFORCEABLE AGREEMENT WITH CNC.

A. CNC Cannot Demonstrate that the Scruggs Noncompete is Enforceable.

Defendants have demonstrated that the Scruggs non-competition provision is overbroad in time, territory, and scope and violates public policy. (Def SJ Memo pp 14-19) *Without citing a single case*, CNC offers four meritless arguments to defend the noncompete’s enforceability.

First, CNC contends that the state-wide territory restriction in Scruggs’ noncompete is not overbroad because Scruggs was “available for assignment” to any CNC offices in the state. (CNC Opp Br p 8) CNC admits, however, that (1) the purpose of CNC’s noncompete is to

protect customer relationships, (2) Scruggs “only worked with Foothills clients” with developmental disabilities in Caldwell, Burke, McDowell and Alexander counties, and (3) Scruggs, at best, had knowledge regarding clients in the Foothills LME. (CNC Dep Vol II p 291, App 102; Vol III p 441-444, App 103)¹ Scruggs’ theoretical availability elsewhere in the state is irrelevant. *Hartman v. W.H. Odell & Assocs.*, 117 N.C. App. 307, 312-13, 450 S.E.2d 912, 917 (1994) (where the concern is the employee’s knowledge of the customer, the noncompete “territory should only be limited to areas in which the employee made contacts during the period of his employment” and an overbroad territory causes the entire noncompete to fail).

Second, CNC asserts that the Scruggs noncompete is not overbroad in duration because “Scruggs was not providing services to consumers.” (CNC Opp Br p 9) CNC not only ignores its own admission that “Qs” like Scruggs visit their consumers at least once a month and that Scruggs had “excellent” relationships with her consumers (CNC Dep Vol II pp 288-209, 400; Vol. IV pp. 641-644, App 104), CNC cannot explain why three years is necessary either way.

Third, CNC argues that the phrase “to compete” “obviously means not to compete in the area of MH/DD/SA since that is the core business [CNC] is engaged in.” (CNC Opp Br p 9) This limited interpretation ignores the plain language of the agreement. It also ignores the undisputed facts that CNC engaged in at least five different service fields: developmental disabilities (a portion of which is CAP-MR), mental health, early childhood intervention, vocational rehabilitation, and services to the elderly, but Scruggs only provided services for CAP-MR consumers. (CNC Dep Vol I pp 37, 56-57, App 101; Vol II p 290) The noncompete, therefore, is patently overbroad in scope by limiting Scruggs from performing work that is “unrelated to that which [s]he did for [CNC].” *VisionAIR, Inc. v. James*, 167 N.C. App. 504,

¹ Deposition testimony and exhibits referenced herein, are, with the exception of Def Exs 29 and 32, found in the Appendix filed herewith and will be referred to the first time cited as “App ___.” To avoid confusion, Defendants have numbered the Appendices filed during Summary Judgment briefing consecutively. Def Exs 29 and 32 are contained in Defendants’ first Appendix.

509, 606 S.E.2d 359, 362-63 (2004).²

Fourth and finally, CNC asserts that the noncompete does not violate North Carolina public policy because Scruggs was not direct care staff and therefore client choice does not apply to her. (CNC Opp Br pp 9-10) This argument ignores CNC's own admissions that "Qs" like Scruggs *do* meet "face-to-face" with consumers for at least an hour each month and that "a lot" of Scruggs' visits were in client homes. (CNC Dep Vol II pp 288-290) CNC also admits that Scruggs was "very good" both to her "families" and her staff (CNC Resp to Scruggs' First Request to Admit, 1 and 2, App 127; CNC Dep Vol II p 400; Vol IV p 641-644) Importantly, from Scruggs' clients' point of view, prohibiting Scruggs from providing services to them through another provider would clearly impede their right of client choice. (Hensley Dep p 53, App 108; Thomas Aff ¶5)³

B. Scruggs Did Not Violate the "Duties Provision" in Her Employment Agreement.

The only evidence cited by CNC on its claim that Scruggs breached the "duties provision" in Section 2.B. of her Employment Agreement is: (1) Scruggs' deposition testimony that *she did not recall* making the statements to employees described by CNC's lawyer (the *opposite* of the proposition CNC says this testimony "supports"); and (2) affidavit testimony by Richard Welser, a former Universal employee, that he "overheard" conversations by *unidentified* members of "Universal's management," at some *unspecified time*, which involved something "to the [e]ffect that they had solicited direct care staff and their clients...to convince them to come over to Universal." (CNC Opp Br p 11-12) This "evidence" does not create a material issue of fact as to whether Scruggs violated the duties provision of her contract *while she was still*

² The noncompete would be overbroad in scope even under CNC's limited interpretation of the term "compete" because it would prevent Scruggs from engaging in mental health and drug abuse services—fields in which Scruggs did not work while at CNC. In fact, CNC itself does not engage in substance abuse services. (CNC Dep Vol I p 37)

³ CNC also demonstrates a misunderstanding of the concept of "continuity of care." (CNC Opp Br p 10) The concept does not refer to a consumer simply receiving continuous care, as CNC asserts, but also refers to the continuity of care with the same individual care provider. (See England Aff ¶ 7)

employed at CNC. By contrast, Defendants have shown Scruggs' compliance with Section 2.B.—as confirmed by CNC's own testimony—in Defendants' Summary Judgment Memorandum. (*See* Def SJ Memo pp 13-14) No reasonable jury could conclude otherwise from Scruggs' denial and Welser's vague assertion.

II. CNC CANNOT SHOW MISAPPROPRIATION OF ACTUAL TRADE SECRETS.

A. CNC has Improperly Attempted to Introduce New "Trade Secrets" Information into Its Claim which Should be Stricken

CNC has had a difficult time pinning down exactly what it contends are the trade secrets misappropriated by Defendants. In fact, this Court had to order CNC to:

[I]dentify with specificity and produce all documents, lists, and any non-documentary materials it is claiming comprise trade secrets for purposes of this action. For any non-documentary trade secrets, Plaintiff is to provide Defendants with a written description of the trade secret. Plaintiff is to provide these materials within seven days of the date of this Order.

(Order dated 1/4/06 p 4) In its 30(b)(6) deposition, CNC testified that the alleged trade secrets were those identified in Defendants' Deposition Exhibits 29, 32 and portions of 31. (CNC Dep Vol III pp 478-479, 482-486, 521-522) Those trade secrets consisted solely of (1) "client lists of Scruggs, Lowe, Revels and Douglas (upon information and belief)" and "lists of employees who worked under Scruggs, Lowe, Revels and Douglas;" (2) "training documents and medical files of employees;" and (3) fifty-seven policies and forms contained in the Exhibit 29 binder. (*Id.*; Def Exs 29, 31, and 32, Apps 34, 120, and 35 respectively)

CNC then clarified via an affidavit from Judy Hardy that the "client/employee lists previously provided...were not per se trade secrets misappropriated" by Defendants, but "rather was information within the knowledge of Scruggs when she left CNC Access to go to Universal which information was then used by Scruggs, Universal and the Greers to the business detriment of CNC Access." (12/5/05 Hardy Aff, App 126) The "client/employee lists" that CNC

previously provided simply contain the names of twenty-four consumers and twenty-three employees in the memories of four former employees. (Def Exs 4, App 114; 5, App 115; CNC Dep Vol I pp 96-98; CNC Dep Vol III pp 528-30; Vol IV pp 708-709) This information does not constitute a trade secret under North Carolina law. (See Def SJ Memo pp 22-23; CNC Dep Vol IV p 689)

Ignoring this prior testimony, CNC now tries to avoid summary judgment in its Opposition Brief by adding to client and employee “lists” in the memories of four employees “information regarding current employees, including but not limited to salaries and benefits information” and “information regarding current clients” in employee memories. (CNC Opp Br pp 12-18) It is wholly improper for CNC to assert the existence of what can only be described as new, general trade secrets in a summary judgment response brief after being ordered to produce its trade secrets with specificity. (Order dated 1/4/06, p 4) CNC’s allegations regarding these “trade secrets” should be stricken and disregarded by the Court. Because CNC’s “compilation” argument relies primarily on these newly identified trade secrets (CNC Opp Br pp 12-18), CNC cannot establish the existence of a protectable trade secret under North Carolina law.⁴

B. CNC’s Reliance on *Sunbelt* is Misguided.

CNC also attempts to avoid summary judgment by trying to force the facts of this case into the holdings in *Sunbelt Rentals, Inc. v. Head & Engquist, LLC.*, 2003 WL 21017456 (N.C. Super May 2, 2003) (“*Sunbelt I*”), *aff’d*, 620 S.E.2d 222, 227-228 (2005) (“*Sunbelt II*”). (See CNC Opp Br pp 12-18) CNC’s attempt fails for several reasons.

⁴ CNC’s claim based on these “trade secrets” fails for another reason: CNC has completely failed to identify with *specificity* what it means by “information regarding current employees, including.. salaries and benefits information” and “information regarding current clients.” Therefore, CNC’s trade secret claim could not even survive a motion to dismiss, much less a motion for summary judgment. See *VisionAIR, Inc.*, 167 N.C. App at 510-511, 606 S.E.2d at 364 (to plead misappropriation of trade secrets “a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur.”)

First, the trade secrets in *Sunbelt* were markedly different from those claimed by CNC. In *Sunbelt*, this Court held that a “compilation” of special pricing information, customer information, personnel and salary information, organizational structure, financial projections and forecasts, utilization rates, fleet mix by market, capital and branch budget information, and cost information *when taken together* constituted a “trade secret” which gave a competitor a distinct advantage in the marketplace. *Sunbelt I* at *57. In essence, the “compilation” in *Sunbelt* amounted to BPS’ entire method for conducting business and marketing to its customer base. *See Sunbelt II* at 226-28. By contrast, CNC does not identify a compilation of interrelated information comprising a method that gives CNC a competitive advantage in the marketplace. At best, CNC alleges a few random items cobbled together: (1) completed training and medical forms on some individual direct care staff in only a fraction of CNC’s business; (2) fifty-seven disparate policies and forms contained in Defendants’ Exhibit 29;⁵ (3) “lists” of a relatively small number of CNC’s employees and clients in the memories of Scruggs, Revels, Lowe and Douglas; and (4) CNC’s *new* vague allegation of “client information” and “employee information, including benefits and salary information.” (CNC Opp Br p 13) These bits and pieces do not create a “compilation of information” under the North Carolina Trade Secrets Protection Act. N.C. Gen. Stat. § 66-152(3).

Second, *Sunbelt* still requires that any “compilation of information” meet the required elements for establishing a trade secret under North Carolina law. *Sunbelt II* at 226-228. CNC, however, has completely failed to rebut Defendants’ arguments that the three original alleged trade secrets do not meet these required elements.⁶ (Def SJ Memo pp 21-34) The result is the

⁵ This also is only a portion of CNC’s Policies and Forms Manuals. (*See* Def SJ Memo pp 32-34)

⁶ CNC also has failed to produce evidence sufficient to rebut Defendants’ argument that the employee training and medical files (“Employee Privileging Files”) were not misappropriated. In fact, affidavits of several employees who transferred to Universal confirm that they went through *new training* at Universal and obtained copies of their own testing and training cards. (Adams Aff ¶13, Armstrong Aff ¶9, Burlew Aff ¶12, Justice Aff ¶9)

same even if this Court considers CNC's new alleged customer and employee "information" because CNC fails to cite to any evidence outside of Hardy's Affidavit, an assurance of confidentiality form that concerns *client medical and treatment* information, and the 180-day form agreement for James Revels. (CNC Opp Br pp 13-18) For example, CNC cites no evidence for its conclusory statements that its new "compilation" information is "extremely valuable" or that the alleged trade secrets were "extremely difficult, if not impossible, to duplicate or acquire."⁷ (CNC Opp Br pp 15-16) Conclusory statements in Hardy's affidavit do not constitute evidence and are insufficient to overcome summary judgment. *See Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 208, 381 S.E.2d 698, 701 (1989) (court is to strike portions of affidavit containing conclusions rather than statements of fact); *Paluh v. HSBC Bank USA*, 409 F.Supp.2d 178, 189 (W.D.N.Y. 2006) (vague assertions supported by self-serving statements in non-moving party's affidavit cannot defeat properly supported summary judgment motion).

Third, in *Sunbelt*, top executives and managers who had been involved in every aspect of BPS' business induced BPS branch managers to recruit key BPS employees from within such that much of BPS' confidential business information was walking out the door. *Sunbelt I* at *7-9, 55-57; *Sunbelt II* at 226-228. In this case, the fact that a controller, a program manager, a payroll billing coordinator, two "Qs," and some direct care employees left one of the biggest providers in the state to work for a brand new provider does not demonstrate that a "compilation" of highly valuable business and management information walked out the door. (*See* Section VA1 below; Aff Freeman ¶2; Hughes Aff p 2)

Fourth, the "consumer information" in this case is completely different from the information in *Sunbelt*. In *Sunbelt*, the market was rental of construction and industrial

⁷ Likewise, CNC offers no evidence to support its allegation that "Greer and Scruggs" had "knowledge" of employee and customer "information," including employee "salaries and benefits."

equipment and customers were obtained through the parties' sales forces. Therefore, knowledge of customer identities and requirements assisted the parties in obtaining customers. In the MH/DD/SA market, however, a provider has no use for another provider's "client information." There is no "cold calling" on clients in this industry. (England Aff II ¶4) In addition, contrary to CNC's unsupported assertion that customer information is valuable because it shows "what CNC/Access clients are being charged for certain services" (CNC Opp Br p 15), there is no confidential pricing information in the MH/DD/SA industry because all prices are determined by Medicaid, Medicare, private insurance, and state reimbursement rates. (CNC Dep Vol II p 360; Vol IV pp 631-632; England Aff II ¶4) In fact, in 2003-2004, providers had no control over the "top-line" revenue stream since the number of hours and the type of service authorized for each consumer were determined by the LME, not the provider. (England Aff II ¶4)

Moreover, to the extent there is "client information," it belongs to the client, not the provider. Lest there be any confusion, the "Assurance of Confidentiality Form" CNC references repeatedly is required by the state to protect the client's name and treatment information, not to protect a provider like CNC. (CNC Opp Br p 15, Ex 22; CNC Dep Vol IV pp 617-626; England Aff II ¶5) As CNC admitted, all of this client information is in the possession of the LMEs, such that when a client chooses to transfer to a new provider, this information is conveyed by the LME to the new provider. (CNC Dep Vol IV pp 621-624; *see* Thomas Aff ¶7) In other words, CNC has failed to establish that its "compilation" includes *commercial* "client information" that comes close to the highly valuable mix of information in *Sunbelt*. *Sunbelt I* at *2, 56-57.

Likewise, CNC's newly alleged "employee information, including salary and benefits" does not improve CNC's "compilation" argument. MH/DD/SA direct care staff are hourly employees who generally work with one client. (CNC Dep Vol I pp 96-97; Def Ex 4 and 5; England Aff II ¶6) CNC has admitted that employees "shop the market" looking for better pay

and benefits. (CNC Dep Vol III, pp 433-439; Def Ex 25, App 119) Direct care staff who apply for jobs with other providers can and do share their current wage rates and request higher pay. (See England Aff II ¶6) There is nothing confidential about this. CNC itself admits that “[e]mployees... know the wage structures and benefit packages of the providers.” (Def Ex 25; CNC Dep Vol III pp 433-434) Thus, CNC cannot establish that its alleged trade secrets—whether alone or together and even including the new ones--meet the requirements of the North Carolina Trade Secrets Protection Act.⁸

III. CNC HAS FAILED TO PRODUCE EVIDENCE THAT RICHARD GREER BREACHED HIS CONFIDENTIALITY AGREEMENT.

CNC’s Opposition Brief advances no evidence to refute Defendants’ arguments that Greer did not breach any confidentiality obligations to CNC. (See Def SJ Memo pp 43-45) As such, summary judgment against CNC is warranted on this claim.

IV. CNC’S TORTIOUS INTERFERENCE CLAIMS FAIL AS A MATTER OF LAW AND UNDISPUTED FACT.

CNC asserts three arguments in an attempt to avoid summary judgment on its tortious interference claims. None of these arguments have any merit.

CNC first asserts that because the Greers signed Scruggs’ employment agreement and Scruggs went to work for Universal, it is established “beyond peradventure that Greer and Universal tortiously interfered with a valid, enforceable contract.” (CNC Opp Br p 22) Among other things, this statement ignores the fact that Scruggs’ noncompete is unenforceable as a matter of law. (See Def SJ Memo pp 14-19; *see also* Section I above) It also ignores the fact that the public policy of North Carolina changed to client choice *after* Scruggs signed her noncompete. (See CNC Dep Vol III pp 445-449; England Aff II ¶3; Def Ex 3, App 113)

⁸ CNC also argues that the number of employees and Universal’s revenue increase demonstrate “misappropriation.” Since CNC has not established the existence of a trade secret, Defendants deal with these arguments in Section V.

Further, CNC’s conclusory statement ignores North Carolina case law requiring CNC to put forth evidence that Universal “lacked justification” in hiring Scruggs—evidence it has not produced. *See Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 222, 367 S.E.2d 647, 651 (1988).

Second, although not altogether clear, CNC appears to be arguing that its claim for tortious interference with prospective advantage “does not require the existence of a contract” and therefore only requires evidence that CNC lost client relationships. (CNC’s Opp Br pp 23-24) This argument ignores North Carolina law holding that a party cannot survive summary judgment on a tortious interference with prospective advantage claim without showing that Defendants “induced a third party to refrain from entering into a contract with Plaintiff without justification,” and that “the contract would have ensued but for Defendants’ interference.” *DaimlerChrysler Corp v. Kirkhart*, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286 (2002).

Third, despite CNC’s conclusory statement that Universal “stole” CNC’s client relationships (CNC Opp Br pp 24), there is simply no evidence that any client of CNC came to Universal for any reason other than his or her own choice. The investigations and conclusions of Western Highlands and Foothills confirm this. (Thomas Aff ¶4; Eldridge Aff ¶¶ 6-10)

Finally, it is noteworthy that CNC has ignored all of the other arguments in Defendants’ Summary Judgment Memorandum. (Def SJ Memo pp 34-43) CNC’s failure to address the essential element of “lack of justification” alone warrants summary judgment on both of CNC’s tortious interference claims. (*See* Def SJ Memo pp 35, 37-43)

V. CNC’S EVIDENCE FAILS TO SHOW THAT DEFENDANTS ENGAGED IN ANY UNFAIR TRADE PRACTICE.

A. CNC’s Reliance on Sunbelt is Misplaced.

CNC relies on a superficial reading of *Sunbelt*. *Sunbelt* involved a “unique fact situation

unlikely to be replicated.” *Sunbelt I* at *58. Important to the analysis were the following facts *in combination*: (1) use of BPS managers to recruit BPS employees (many from within); (2) the magnitude of the raid; and (3) the coordinated timing of the departures. *Id.* at *6.

1. Unlike *Sunbelt*, there is no evidence of former executives or managers recruiting other “key” CNC employees to recruit from within CNC.

Sunbelt involved an intentional scheme by top officers and executives to undermine BPS *from within* by surreptitiously turning branch managers into recruiters of key personnel *while they were still employed* by BPS. *Sunbelt I* at *6, 14, 21, 31, 33, 51-52. BPS had little or no chance to make counteroffers to departing employees. *Id.* at *13. The defendants then used the resulting weakness of the BPS branches as a sales pitch to remaining employees and customers, further weakening BPS. *Id.* at *22, 26. This Court held that “[t]he surreptitious and intentional use of BPS employees to solicit other key employees while both the soliciting and the solicited employees were still employed by BPS is an unfair trade practice.” *Id.* at *51. There is not even a modicum of such evidence in this case.

First and foremost, CNC has produced absolutely no evidence that any of the employees who chose to apply for jobs with Universal were ever recruited by Scruggs or any other Universal agent *from within CNC*. (CNC Dep Vol I pp 103-104, 128-130; Def SJ Memo pp 41-42) Although Plaintiff is trying to compare Richard Greer to the executives in *Sunbelt*, it is undisputed that Greer did not re-enter the MH/DD/SA field until after his noncompete provision expired *five years* after the sale of CNC. (CNC Dep Vol V pp 881-882, App 105)

Second, CNC does not otherwise argue that any transferring employees were “key” employees who worked against it from within—for good reason. Far from being the top echelon employees as in *Sunbelt*, this case involves only two CNC employees hired by Universal who

can be characterized as managers: Gail Miller and Sherry Douglas.⁹ Neither of these employees nor Scruggs had the power of the key players in *Sunbelt*.

Miller, who was a CNC controller (not a CFO), moved to Universal in early September 2003 to do accounting work not just for Defendant Universal, but for other affiliated companies. (Miller Dep pp 6-9, App 109)¹⁰ Far from engaging in surreptitious conduct, Miller had conversations about staying at CNC with several CNC executives for two months before finally deciding to go to Universal. (*Id.* at pp 17-25; CNC Dep Vol V p 886) In addition, CNC candidly admits that it has no evidence that her departure harmed CNC. (CNC Dep Vol II pp 284-285)

Universal hired Sherry Douglas (a program manager in CNC's Asheville office) in June 2004, nine months after Scruggs' hire. (Douglas Aff ¶3-4) Douglas' hire was also anything but surreptitious: Universal notified CNC of its intent to hire her and *voluntarily* placed her in a position different from the one she performed at CNC in order to avoid a confrontation with CNC. (Robert Greer Aff ¶11) CNC executives also met with Douglas in an attempt to get her to stay. (CNC Dep Vol II p 338) Interestingly, after this meeting, Douglas felt that she had no choice but to leave CNC. (Douglas Aff ¶10e)

As a "Q," Vicki Scruggs was merely a first line supervisor of direct care staff working in the Morganton office. (*See* Def Memo SJ pp 5, 16; England Aff II ¶7) CNC regarded her as a "marginal" employee who had little or no value as an employee without "her clients." (CNC Dep Vol I pp 121-124; Vol II p 418; Vol IV p 627; Voegeli Dep pp 110-111, App 112) In CNC's

⁹ Defendants exclude from this list James Revels and Patra Lowe because these employees left CNC in the fall of 2003 to form their own company after becoming dissatisfied with CNC. (Revels Aff ¶ 11; Lowe Aff ¶ 6-7; Fonvielle Dep p. 39-40, App 106) Further, Revels and Lowe did not meet or speak with the Greers for the first time until *after they left CNC*. (Revels Aff ¶ 13; Lowe Aff ¶ 9)

¹⁰ Miller was motivated to switch employers because CNC's office had moved from Lenoir to Morganton, leaving her uncomfortably far from her daughter's daycare facility. (Miller Dep pp 15-16) She also felt that she had "maxed out" her advancement at CNC, and Universal offered a better opportunity. (Miller Dep at pp 16-17)

opinion, Scruggs was not particularly bright and had “no business sense and poor clinical skills.” (CNC Dep Vol I pp 123-127; Vol II p 185, p 418; Def Ex 24, App 118; Vol III p 498; Vol IV p 642) Also far from being surreptitious, Scruggs submitted a written resignation on September 15, 2003 offering to work a two-week notice and CNC’s Hardy and Voegeli had an opportunity to speak with her about reconsidering. (CNC Dep Vol IV pp 652-654; Def Ex 39, App 122)

These three employees, with only a tenuous connection to one another, hardly come close to the conspiratorial BPS executives and branch managers wreaking havoc in the *Sunbelt* case.

2. The size and impact of employee departures to Universal is insignificant in this industry and does not reflect the existence of an “unfair trade practice.”

CNC’s argument relies heavily on numbers of employees who “left in a short time” and Universal’s revenue changes. (CNC Opp Br pp 20-21, 26, 29-30) Neither of these are sufficient to defeat summary judgment on CNC’s unfair trade practices claim.

First, CNC complains that the departure of *thirty-one*¹¹ employees (primarily direct care staff) “devastated” its business. (CNC Opp Br pp 20-21, 29) This number does not support an unfair trade practice claim because departures of large numbers of direct care staff are not “atypical” in the MH/DD/SA industry. *See Sunbelt I* at *4, 22. In fact, CNC’s Director of Operations testified that employee turnover in the industry is “huge.” (Voegeli Dep pp 92-93) CNC’s own turnover rate typically runs at least 50% *annually* and has run as high as 74%. (Steve Greer Dep pp 38-39, App 107; CNC Dep Vol II p 366; Def. Ex. 17 p 16, App 116; CNC’s Resp. to UMH’s First Set of Irr, No. 9, App 128) Given that CNC has several thousand employees in North Carolina, thirty-one employees leaving in approximately half a year is not significant. (*See* CNC Dep Vol II p 298) Indeed, CNC admits that since 2003 it has *lost 754*

¹¹ CNC has consistently alleged only twenty-three employees as being at issue. (Def Ex 5; CNC Dep Vol I pp 96-97) Further, even of the 31 employees listed in Plaintiff’s Ex. 8, Debra Plemmons was unemployed for six months prior to coming to Universal and Amy West was terminated by CNC. These employees therefore could not be part of some “mass exodus.”

employees in just the few geographic areas where CNC and Universal compete. (CNC’s Resp to Universal’s Second Set of Requests for Admission, No 1, App 130) Moreover, over the last few years, CNC has experienced at least three other departures of supervisory employees “with” direct care staff and consumers, including one situation that involved the transfer of more consumers. (CNC Dep Vol II pp 245-247, 301-303, 306-309, 384-386; Def Ex 19, App 117)

CNC repeatedly and inaccurately attempts to argue that Defendants “caus[ed] a 100% turnover of its Asheville office.” (CNC Opp Br pp. 21, 26) CNC neglects to mention several important undisputed facts: (1) this statement is based on a January 30, 2004 e-mail by Judy Hardy (CNC Opp Br Ex 23) which *excludes direct care staff*— the employees who are the primary focus of CNC’s argument (CNC Opp Br pp 20, 26; Def Ex 5); (2) Hardy’s e-mail *includes Lowe and Revels*, employees who left CNC for their own reasons before they ever met or spoke with the Greers (Revels Aff ¶¶11, 13; Lowe Aff ¶¶6-9); (3) CNC’s exhibit on Universal’s Asheville office (CNC Opp Br Ex 8) shows that the vast majority of employees Universal hired in 2004 and 2005 were not former CNC employees; and (4) according to CNC’s turnover charts, CNC “inactivated” eighteen other employees from its Asheville office alone during the same time period (November 17, 2003 through February 2004). (CNC’s Resp to Scruggs’ First Set of Irr, App 129 (names highlighted by Defendants’ counsel); Def Ex 48, App 123, p 5 (regarding Jeff Bonito)). Finally, unlike the facts in *Sunbelt*, the undisputed evidence reflects that some CNC employees were responding to *advertisements* in the Asheville-Citizen Times. (Armstrong Aff ¶5, Burlew Aff ¶8, Justice Aff ¶7; *see also* Adams Aff ¶6) *See Sunbelt I* at *40 (focusing on H&E’s limited recruiting activities apart from wrongful “plan” against BPS). These numbers do not support CNC’s unfair trade practice claim.

In addition to numbers, this Court in *Sunbelt* considered other issues in determining that defendants had engaged in a raid of significant “magnitude.” *Id.* at *6. For example, unlike the

plaintiff in *Sunbelt*, CNC advances no argument that the allegedly “raided” employees were “key” to its operations. *See id.* Similarly, unlike the six branches involved in *Sunbelt*, this case involves two unrelated offices out of forty-five CNC offices across North Carolina. *See id.* at *22. (CNC Dep Vol I p 25)

Finally, in an attempt to analogize itself to *Sunbelt*, CNC argues that it was “devastated” by Universal financially. (CNC Opp Br pp 21, 29-30) In *Sunbelt*, defendant H&E, an existing company, saw its AWP fleet business go from revenues of \$7.2 million and a pre-tax loss of \$289,000 to \$23.4 million in revenues and a pre-tax profit of \$3.4 million a year later. *Sunbelt I*, at *47, 52. In the same period BPS’ revenue decreased dramatically. *Id.* In this case, CNC delivers the not-so-remarkable news that Universal, a start-up, had a revenue increase of less than \$500,000 between January 1, 2004 and June 30, 2004. (CNC Opp Br 21 Ex 11) CNC presents no evidence that this revenue growth is atypical for a start-up company. *See Sunbelt I* at *48, 61. Further, this increase merely reflects *revenue* stream. In fact, Universal suffered pre-tax losses for 2003 and in every quarter in 2004. (Second Gail Miller Aff ¶¶ 3-4)

Moreover, CNC fails to provide its own financial position during the same time frame for comparison. Instead, CNC merely offers a calculation of annualized damages from the transfer of specific clients, then claims to be “devastated.” (CNC Opp Br pp 29-30) In fact, rather than suffering a “crippling” setback, CNC’s Asheville office is now its biggest revenue generator. (CNC Dep Vol II p 361; Vol III p 540-545; Def Ex 35, App 121) CNC also admits that many other factors unrelated to Universal negatively impacted its revenues. (CNC Dep Vol III pp 540-545; Place Dep pp 50-52, App 110; Def Exs 35, 124, App 124) One of these reasons is the lack of competitive wages in the Western part of North Carolina. (Def Ex 35) Therefore, CNC has failed to prove that any actions by Defendants caused it to suffer an impact that “devastated” its ability to compete. Nor, incidentally, was CNC “devastated” due to a lack of employee “depth”

as experienced in *Sunbelt*. *Sunbelt I*, at *9. Indeed, one need look no further than CNC's assertion in its brief that finding a direct care worker to replace a departing one would not be a problem for such a "large provider." (CNC Opp Br p 10)

3. There is no evidence of "coordinated timing" in the movement of employees and consumers from CNC to Universal.

Finally, of concern in *Sunbelt* was evidence that the defendants planned to compete by decimating at least six BPS branches at a time when plaintiff was at its weakest point competitively and succeeded in doing so in a remarkably short period of time. *Sunbelt I* at *6, 22. In this case, however, CNC has produced *no evidence* to show that Defendants plotted some "scheme" to time departures together to harm CNC. In fact, affidavits of a number of the direct care staff who transferred to Universal reflect the lack of any "group walk out." (Adams Aff ¶¶4-12, Anderson Aff ¶¶5-10, Armstrong Aff ¶¶4-8, Bumgarner Aff ¶¶4-16, Burlew Aff ¶4-¶11, Justice Aff ¶¶6-10; Sparkes Aff ¶¶3-6) Certainly Miller, Scruggs and Douglas left separately. (See Section VA1 above)

Moreover, CNC's asserted "timing evidence" does not prove "coordinated timing." Specifically, CNC argues that seventeen direct care employees transferred to Universal between September 15, 2003 and October 31, 2003 in Morganton and fourteen direct care employees transferred between November 17, 2003 and February 2004 in Asheville. (CNC Opp Br pp 20-21) This evidence does not prove "coordinated timing" given the following undisputed facts: (1) CNC has a 50% plus *annual* turnover rate (CNC's Resp. to UMH's First Set of Irr., No. 9); (2) CNC had several thousand employees in 2003 (CNC Dep Vol II p 298); (3) direct care staff tend to "shop the market" for better jobs (CNC Dep Vol III pp 433-434, Def Ex 25); and (4) during this time frame CNC was concerned that it could not compete for employees because of the wage freeze (10/9/03 e-mail from Judy Hardy to Anita Bowles (ResCare Subpoena

Response), App 125; CNC Dep Vol III, pp 433-439; Def Ex 25; Voegeli Dep pp 74-75).

Further, the evidence described above that *eighteen other employees* left CNC's Asheville office *during the same time frame* that CNC argues fourteen employees went to Universal demonstrates the reality of turnover in this industry. (CNC's Resp to Scruggs First Set of Irr, No ___) CNC even admits that "the reason" it believed employees were leaving was because Universal was "paying more." (CNC Dep Vol II p 409) The employees at issue left CNC for a variety of reasons, including higher wages, problems with management, and to follow a client. (Adams Aff ¶¶4,-9; Anderson Aff ¶¶6-7; Armstrong Aff ¶4; Bumgarner Aff¶¶5-6; Burlew Aff ¶¶4-6; Justice Aff¶6; Sparkes Aff ¶3) Unable to produce the *combination* of significant evidence necessary to prove unfair competition, CNC cannot defeat Defendants' Motion for Summary Judgment. *See Sunbelt I* at *6.

CNC's Other Asserted "Evidence" of Unfair Trade Practices Does Not Create an Issue of Fact.

In addition to attempting to analogize this case to *Sunbelt*, CNC advances a few other arguments which likewise fail to create an issue of fact on CNC's unfair trade practice claim.

First, CNC attempts to use a note written by Scruggs to the mother of a client (Wanda) and a statement by CNC direct care employee Judy Hensley to argue that Scruggs' contact with Wanda "*could only be the result of Scruggs using confidential information* which she obtained from CNC/Access." (CNC Opp Br pp 26-27) However, Hensley herself testified that *she*—not Vicki Scruggs—*first informed* the mother that Scruggs was leaving CNC for Universal. (Hensley Dep pp 62, 64) Further, it is undisputed that the note was the result of the mother's *request for a written statement* from both Universal and CNC to see which provider would pay more money to one of her son's direct care workers, Teresa Downs. (2006 Scruggs Dep pp 16-17, 32, App 111; *see* Hensley Dep. pp 53-55) On the note Scruggs simply told the mother that

Universal was willing to “negotiate on any offer CNC/Access presents.” (2006 Scruggs Dep pp 17, 32; CNC Opp Br Ex 19) It is appropriate in this industry for a provider to respond to a client’s request for a “bid” of how much the provider will pay the client’s direct care staff person. (Voegeli Dep pp 76-78) As relayed by CNC employee Hensley, the mother said she chose Universal “because it would be more money for Teresa [Downs]” and the mother wanted to “stay with Vickie [Scruggs] because she had been her case manager” and offered continuity of care for her son. (Hensley Dep p 53) The appropriateness of Scruggs’ handling of this situation was confirmed by a Foothills LME investigation. (Thomas Aff ¶5) Thus, far from proving an unfair trade practice by Scruggs or Universal, this interaction is a good example of *client choice*.

The second issue raised by CNC also highlights CNC’s apparent desperation to find evidence. (CNC Opp Br p 27) After nearly two years of discovery, CNC’s case appears in its Opposition Brief to be extremely dependent upon two paragraphs in the Affidavit of Richard Welser.¹² CNC refers to Welser’s words *at least four times* for the proposition that Welser “overheard conversations of Universal Management to the affect (sic) that they had solicited direct care staff and their clients at CNC/Access, Inc. . . .” Welser *concedes* that he does not have any personal knowledge of whether this *actually happened*, but his “sense” is that the “solicitation was successful.” (Welser Aff ¶¶4 and 5) Welser’s affidavit is so hopelessly vague that it is worthless as evidence. The affidavit fails to offer any clues as to *when* the alleged conversations occurred, the *context* of the statements (i.e. whether the discussion involved a normal client presentation arranged by an LME), *who* he considered to be “Universal Management” (and whether the alleged statements were made by persons who could bind Universal), and *what language* was actually used (i.e. the affidavit does not even establish that anyone used the word “solicit”—it merely states Welser’s *conclusion* that he overheard

¹² Further, CNC never listed Welser as a “knowledgeable person” in its responses to Defendants’ discovery requests.

conversations “to the affect (sic) that they had solicited...”). This affidavit should be stricken or completely disregarded. *See Ward*, 325 N.C. at 208, 381 S.E.2d at 701. Further, even if what Welser reported was true, CNC fails to show how this constitutes an unfair trade practice.

Third, CNC argues that the “mass recruitment of CNC/Access employees is made even worse by the fact that Greer and Scruggs knew that each direct care worker was subject to an employment agreement.” (CNC Opp Br p 27) CNC cites to *no evidence* that Greer and Scruggs “knew” this—in fact this entire paragraph cites to *no evidence* beyond a copy of *James Revels’* 180-day noncompete and a chart of Universal employees. (*Id.*) Nor has CNC put into evidence any noncompetes actually *signed* by any of the employees at issue. Finally, it does not matter whether or not Defendants knew direct care staff signed these documents because they are unenforceable as a matter of law on the four grounds stated in Defendants’ Summary Judgment Memorandum, and CNC has made no arguments to the contrary. (Def SJ Memo pp 36-37)

Fourth, CNC attempts to show an unfair trade practice by arguing that “Universal’s policies and forms are so similar to CNC/Access’ policies and forms, there can be no doubt that the documents were stolen by former CNC/Access employees and plagiarized by Universal.” (CNC Opp Br p 28) The fifty-seven documents CNC alleges were copied are primarily standard forms and policies--often dictated by the state--and HR policies which do not contain information “confidential” to CNC. (*See* Def SJ Memo pp 28-34; Voegeli Dep pp 16-19, 32-34; CNC Dep Vol III p 496) In fact, five of the six documents included by CNC in its Exhibit 20 are standard human resources policies. CNC also wholly ignores the fact that Universal did *not* “organize the company quickly” and fails to address the remaining arguments on this issue in Defendants’ Memorandum. (*See* Def SJ Memo pp 48-50)

Finally, CNC argues that Defendants “systematically lur[ed] employees away from CNC Access, employees to whom vulnerable and fragile clients have become attached” and that

Defendants have “carefully, sadly, and shamefully exploited” the emotional ties between direct care providers and clients. (CNC Opp Br p 28) Not only are these statements inflammatory, but CNC wrongly assumes that consumers and their families are not able to make decisions in their own best interests. (*See Douglas Aff ¶12*) North Carolina’s public policy on client choice recognizes that clients and their guardians have the right—and the ability—to choose who provides their services. (*England Aff II ¶3*) The discussion above about a mother’s effort to ensure her son’s direct care worker was well-paid demonstrates that these clients are not as easily “exploited” as CNC claims. The employees and clients at issue here are intelligent people who have made up their own minds. CNC simply does not like the result.

CONCLUSION

Defendants are entitled to Summary Judgment on all of CNC’s Claims.

This the 2nd day of June, 2006.

OF COUNSEL
Sarah J. Kromer
SARAH J. KROMER PLLC
6525 Morrison Boulevard, Suite 400
Charlotte, NC 28211
Telephone: (704) 688-5040

/s/ Karin M. McGinnis
Karin M. McGinnis
Michael T. Champion
MOORE & VAN ALLEN PLLC
100 North Tryon Street, Suite 4700
Charlotte, NC 28202-4003
Telephone: (704) 331-1000

COUNSEL FOR DEFENDANTS GREER AND
UNIVERSAL MENTAL HEALTH, INC.

/s/ Philip J. Roth, Jr.
Philip J. Roth, Jr., Esq.
Marshall & Roth, PLLC
90 Southside Avenue, Suite 150
Asheville, NC 28801
(828) 281-2120

COUNSEL FOR DEFENDANT SCRUGGS

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **MEMORANDUM IN REPLY TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT** 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:

William Woodward Webb, Sr., Esq.
William Woodward Webb, Jr., Esq.
Rufus Edminsten
The Edminsten & Webb Law Firm
Post Office Box 1509
Raleigh, NC 27602

This the 2nd day of June, 2006.

/s/ Karin M. McGinnis _____
Karin M. McGinnis