

STATE OF NORTH CAROLINA  
BURKE COUNTY

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

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

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**REPLY BRIEF OF PLAINTIFF TO DEFENDANTS' JOINT MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON  
DEFENDANTS' COUNTERCLAIMS**

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Having read, considered and researched the Defendants' Joint Memorandum In Opposition to Plaintiff's Motion for Summary Judgment On Defendants' Counterclaims, the Plaintiff submits this Reply.

**OVERVIEW**

Quite confident that this Court is waiting with baited breath for the Reply Briefs in this case (to go along with the one hundred fifty (150) pages of prior Briefs), the Plaintiff represents that it is almost wordless at the Defendant's Memorandum In Opposition To Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims. Almost but not quite wordless in view of the spectacular and extravagant accusations, obfuscation and paranoia of the Defendants.

Much like Noam Chomsky who, among other things, has blamed the United States for the Cold War, the Castro regime, the Kennedy assassination, the Khmer Rouge and 9/11, the Defendants, in their almost inimitable employment of the best defense is a specious, shotgun offense, blame the Plaintiff itself for the employee turnover, client defections and resultant loss of income of CNC/Access. Not content merely to shift all blame for the CNC/Access employee turnovers, client defections and loss of income to CNC/Access, the Defendants quite easily segue into wildly assigning culpability to CNC/Access for defaming them, interfering with Universal's prospective economic advantage and engaging in unfair and deceptive trade practices. In a nutshell, the Defendants accuse the Plaintiff of "launching [a] public campaign" against them for "PR" purposes and, further, they contend, in essence, that CNC/Access is an "insensitive", "uncaring", corporate bully engaged in "anti-competitive" conduct.

Is the claim that CNC/Access was simply involved in a public, PR campaign against Universal and its principals supported by any newspaper, periodical or other media reports regarding the allegations against them? Not one media report has been tendered in support of this claim. That some employee of the Plaintiff may have thought that CNC/Access could benefit from a public defense of its business interests hardly constitutes the "launching of [a] public campaign" against Universal.

It is, incidentally, according to the Defendants, also the fault of the Plaintiff that this case has become "expensive", "time consuming" and "protracted." However, CNC/Access (and its bully parent, Res-Care, Inc.) did not force the Defendants to put at least five (5) lawyers on the case. And, of course, it was not CNC/Access, but in fact, the

Defendants, who initially doubted whether any mediation in the case was really worthwhile.

Somehow, in all of this “we are the victim here” mentality, the Defendants in sensational and total defiance of the facts, seem to have overlooked just a few little items such as:

1. On or about August 4, 2003 Universal “started operations.” (Defendant’s Memorandum of Law in Support of Joint Motion for Summary Judgment, p. 5.)
2. On September 15 or 16, 2003 Scruggs left CNC/Access and commenced her employment with Universal. (Scruggs Deposition I, p.6).
3. When Scruggs came over to Universal on September 15 or 16, 2003, Universal had **no** clients waiting for a direct care worker to provide services to him or her. (Scruggs Deposition I, p. 40, Exhibit 4 to Plaintiff’s Memorandum of Law in Opposition to Defendants’ Joint Motion for Summary Judgment, hereinafter referred to as “Pl.’s MOL”.) Moreover, Scruggs did not remember any CNC/Access employee coming to work for Universal (under her supervision) who came to Universal without a client. (Scruggs Deposition I, p. 39, Exhibit 5 to Pl’s MOL).
4. Prior to September 15, 2003 Universal did not have any CAP/MR (Community Alternative Program/Mental Retardation) clients” and only one CAP/MR employee, a staff supervisor who lasted a little over a month (from September 2, 2003 – October 10, 2003). (Response Numbers 1 and

4 of Universal to Plaintiffs Third Set of Interrogatories and attached Employee List, Exhibits 6 & 7 to Pl.'s MOL).

5. Universal had **no** revenue from CAP/MR clients prior to September 15, 2003 (Interrogatory Response Number 11 of Universal to Plaintiff's Third Set of Interrogatories, Exhibit 6 to Pl.'s MOL).
6. Seventeen (17) out of eighteen (18) Universal CAP/MR employees came from CNC/Access between September 15, 2003 and October 31, 2003, all but Scruggs bringing CNC/Access clients with them. (See Exhibit 7 to Pl.'s MOL).
7. Universal had **no** CBS (Community Based Services) employees or clients at its Asheville office prior to October 2003. (Interrogatory Response Number 8 of Universal to Plaintiff's Third Set of Interrogatories, Exhibits 6 & 8 to Pl.'s MOL).
8. Universal had **no** revenue from CBS at its Asheville office prior to October 2003 (Interrogatory Response Number 13 of Universal to Plaintiff's Third Set of Interrogatories, Exhibit 6 to Pl.'s MOL).
9. From November 17, 2003 through January 23, 2004, 9 out of 15 CBS employees in the Universal Asheville office came from CNC/Access. From November 17, 2003 through February, 2004, 14 out of 26 CBS employees at the Universal Asheville office came from CNC/Access. (See Exhibit 8 to Pl.'s MOL.)

10. By January 30, 2004, CNC/Access's Asheville Mental Health office has experienced a one-hundred (100) percent turnover rate. (See Exhibit 23 to Pl.'s MOL.)
11. Dr. Richard Welser ("Welser") was employed by Universal from August, 2003 until December, 2003, when he resigned. Welser states under oath:

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

(Exhibit 9 to Pl.'s MOL.)
12. Greer has opined that he did not believe that "the solicitation of a client that is already under a provider's service" was proper – "that client should not be solicited." (Greer Deposition, p. 71, Exhibit 10 to Pl.'s MOL.)
13. Early Universal Management based Universal personnel policies on a CNC/Access Manual purloined by Greer's brother, Steven, Human Resources Director of CNC/Access, at the request of Greer's son, Robert. (Defendants' Memorandum of Law in Support of Joint Motion for Summary Judgment, p. 5.)
14. In the Fourth Quarter of 2003, Universal had CBS revenues of \$947.14 and total revenues of \$120,039.20. By the Second Quarter of 2004 Universal had CBS revenues of \$422,692.13 and total revenues of \$618,934.43. (See Exhibit 11 to Pl.'s MOL.)

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

## ARGUMENT

### **I. DEFENDANTS’ DEFAMATION COUNTERCLAIMS**

#### **A. Statements By Plaintiff Did Not Impeach Defendants In Their Trade, Business or Profession and Therefore is Not Defamation *Per Se*.**

In order to come within the category of slander *per se* for impeaching a person's trade or profession, the false statement must do more than merely injure a person in his business. The false statement (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. *Long v. Vertical Technologies, Inc.*, 113 N.C. App 598, 439 S.E.2d 797 (1994). In *Long v. Vertical Technologies, Inc.*, the court held that an employer’s statements to third parties that former employees were not doing business in the best interest of the company and that they misused company resources was not enough to meet the requirements for a statement to impeach a person in their trade or profession. 113 N.C. App. 598, 439 S.E.2d 797 (1994). Likewise, in *Tallent v. Blake*, the Court held that a statement by a defendant which indicates that the plaintiff lied in relating the circumstances under which she left her job did not impeach the plaintiff’s occupation. *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E.2d 336 (1982).

It is obvious that the Defendants have tried to cobble together a collage of what they argue to be “defamatory” statements in the desperate hope that one will stick with the Court. (e.g. “Richard and Robert Greer – Yuck.” (See Defendant’s Joint Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment, p.22); “Hardy said that Universal and its owners had a ‘bad reputation’ and that Richard and Robert Greer were ‘crooks and liars’ and ‘unethical.’” (See *Id.* at p.15, Lowe Aff. ¶ 8); “Hardy ...told England that Universal was ‘taking all of our clients and all of our employees,’ that what Universal was doing was ‘wrong,’ ...” (See Defendants’ Joint Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment, p. 9)). It is unreasonable to suggest that any of the examples given by the Defendants contain imputations necessarily hurtful in its effect on their business and even more unreasonable, if even necessary to prove, that these allegedly “defamatory” statements were made with actual malice. If the Plaintiff had made defamatory statements regarding the quality of care that Universal provided their clients or that Universal was incompetent to meet client needs, then it would be plausible to consider whether the statements impeached Universal, Greer, or Scruggs in their trade or occupation. That is clearly not the case here and the Defendants have not cited any evidence that would show such statements were made.

Moreover, “North Carolina cases have held consistently that alleged false statements made by defendants, calling plaintiff ‘dishonest’ or charging that plaintiff was untruthful and an unreliable employee, **are not actionable *per se***. See *Satterfield v. McLellan Stores*, 215 N.C. 582, 2 S.E.2d 709 (1939); *Ringgold v. Land*, 212 N.C. 369, 193 S.E. 267 (1937) (emphasis supplied). Defendants’ cite that Scruggs’ supervisor Joy

Stigall made statements such as “She’s [Scruggs] a lying cheat. She’s a sneak. She’s the sneakiest person I’ve ever met in my life.” (See Defendants’ Joint Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment, p. 21, Stigall Dep p. 104). These statements clearly fall under the aforementioned rule. Moreover, Defendants allege that on multiple occasions, the Plaintiff communicated to third parties that the Defendants were “unethical”, “liars” or committed “fraud.” Even assuming that these statements were made, they are not actionable *per se* under North Carolina case law because all of them go to whether one is truthful or honest and, hence, cannot be actionable *per se*. Such false statements may be actionable *per quod*; if so, some special damages must be pleaded and proved. *See Ringgold*, 212 N.C. 369, 193 S.E. 267 (1937) Defendants have failed to do either.

**B. Even If Statements of Plaintiff Are Defamation *Per Se*, Plaintiff Is Entitled To an Absolute Privilege.**

The Plaintiff, by way of reply to the Defendants’ restrictive reading of *Smith v. McDonald*, 895 F.2d 147 (4<sup>th</sup> Cir. 1990), would only comment that the Fourth Circuit in according absolute privilege status to certain communications to the President of the United States regarding a candidate for the post of United States Attorney was primarily concerned with whether the entity to whom the communications were made was “quasi-judicial” or performing a “quasi-judicial” function. Whether there is an ongoing investigation or not, if the recipient of the communications are “public administrative officers who are required to investigate facts, or ascertain the existence of facts, and draws conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature” (*Smith* quoting from *Angel v. Ward*, 43 N.C. App. 288, 258 S.E.2d 788 (1979)), then the communications are entitled to absolute privilege. The

doctrine of absolute privilege, according to the Fourth Circuit, rests in public policy, *Smith, supra*, a policy “in which the public interest demands the unbridled flow of information that absolute privilege can provide. In this context, the compelling need for truthful information concerning those who voluntarily seek important positions of public trust outweighs the possibility that, as may be the case here, the less than scrupulous will use such an occasion to disseminate malicious falsehoods in furtherance of a personal vendetta.” *Smith, supra*, at 151.

Likewise, in the case at bar, there are profound public interest and trust concerns where a human services provider who receives much if not all of its revenues from the public fisc and offers services to a vulnerable client community (about which confidentiality is a major consideration) is accused of unethical conduct and breach of client confidentiality. If “... the compelling need for truthful information...outweighs the possibility that ...a personal vendetta” may be involved, then for certain the demand for “the unbridled flow of information” envelopes those who are not ethically challenged with absolute privilege.

For the benefit of the Court (and the Defendants), the Plaintiff would note that it invokes and has since day one invoked absolute privilege as to all of its communications to governmental units- which, contrary to the assertion of the Defendants that the Plaintiff lodged the absolute privilege defense as “[a]n apparent afterthought to qualified privilege”, has been a part of its First Defense and Motion to Dismiss since December 2004. (See Motion to Dismiss and Answer to Counterclaims of [Defendants Richard Greer and Universal Mental Health Services, Inc.][Vickie Scruggs]).

**C. Even If Statements By Plaintiff Are Defamation *Per Se* And Not Protected By An Absolute Privilege, They Are Entitled to a Qualified Privilege And Defendant Has Failed to Prove Otherwise.**

The Defendants have presented two reasons why they believe the Plaintiff's statements are not protected by a qualified privilege: (1) The North Carolina Health Care Personnel Registry ("NCHCPR") and the United States Department of Health and Human Services Office of Civil Rights ("USDHHS-OCR") did not have jurisdiction over the complaints lodged with them against Scruggs and Universal and (2) the complaints to Western Highlands were not made on a proper occasion, in a proper manner, and to a proper party because CNC/Access knew Universal did not have contracts with Western Highlands.

As to the first of the Defendants' reasons, Judy Hardy (the Plaintiff's State Director, hereinafter "Hardy") did not know whether or not the USDHHS-OCR had jurisdiction over the conduct of Scruggs and that is the whole reason she lodged the complaint with them. Hardy, operating in good faith, filed the complaint in order for USDHHS-OCR to make a determination as to the actions of Universal and Scruggs. As referenced by Defendants' in their Joint Memorandum of Law and stated in the deposition of CNC, "if anyone's going to know if there is a violation of HIPAA, it's the Office of Civil Rights." (CNC Dep Vol V p. 747, Defendants' Joint Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 10 ). The Defendants also allege that NCHCPR did not have jurisdiction to entertain the complaint submitted by Tommy Voegeli (the Plaintiff's Deputy Director, hereinafter "Voegeli") concerning the actions of Scruggs. (See Defendant's Joint Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 18) However, in the response letter to the

complaint lodged with it, Karen Durban of NCHCPR states “I would appreciate you contacting me if you disagree with our assessment of the case or have reason to believe a **full investigation should be initiated.**” (See Exhibit 1 hereto). This response certainly does not suggest that NCHCPR did not have jurisdiction, but rather indicates that it did, in fact, have jurisdiction to initiate a full investigation and the power to redress the grievance. It is because of this letter that Voegeli then sent a response letter in an attempt to persuade the NCHCPR to reconsider its decision and conduct a full investigation. (See Exhibit 2 hereto).

Secondly, Defendants argue that Universal had no contract with Western Highlands when CNC/Access lodged its complaint and, therefore, the statements to Western Highlands were not made on a proper occasion, in a proper manner, and to a proper party. This assertion is blatantly contradicted by Defendants when they discuss their Tortious Interference claim in their Joint Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment. (See p. 33, footnote 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.” (emphasis supplied, CNC Dep Vol V p. 890-892; Affidavit of Gail Miller Aff, ¶ 4)). Basic logic certainly allows an inference that if the complaint allegedly delayed Universal getting an amendment to its contract with Western Highlands, then a contract must have existed at the time the complaint was made and, therefore, CNC/Access’s statements to Western Highlands were made on a proper occasion, in a proper manner, and to a proper party (since Anne Doucette was a

Director of Western Highlands who actually requested the submission of the CNC/Access complaint in writing.)

**D. The Actions Outlined By Defendants' Fail To Meet The Standard Required For Actual Malice And Therefore Have Failed To Rebut The Plaintiff's Defense of Qualified Privilege.**

Having met the requirements for the qualified privilege to apply and having shown that there was no excessive publication, the burden is on the Defendants to prove that the statements were false and made with actual malice. *See Clark v. Brown*, 99 N.C. App. 255, 393 S.E.2d 134, rev. denied, 327 N.C. 426, 395 S.E.2d 675 (1990). Defendants have done neither.

To be actionable, a defamatory statement must be false. *See Long*, 113 N.C. App. at 602-3, 439 S.E.2d at 801. Truth is a complete defense. *Id.*, 439 S.E.2d at 801. Although Defendants allege that several statements to various government and regulatory agencies were false, the evidence shows otherwise. For example, Defendants claim that in Hardy's report to Amy England at the Foothills LME, Hardy 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." (See Def. Joint Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims, p. 9). Well, the facts establish that CNC/Access had a 100% turnover rate in its Asheville office and seventeen (17) out of eighteen (18) Universal CAP/MR employees in Morganton came from CNC/Access between September 15, 2003 and October 31, 2003, all but Scruggs bringing CNC/Access clients with them. (See Exhibits 7 and 23 to Plaintiff's MOL). The facts have also established that Scruggs and the former employees of CNC/Access were all subject to an employment agreement which

contained a covenant not to compete for some specific duration. Scruggs' duration was three (3) years and the other employees was for one hundred eighty (180) days. So, for Hardy to report that Universal was "taking all of our clients and all of our employees" was a true statement and her subjective belief that the breaching of the employment contracts by former employees constituted a "wrong" act was also true. (See also Affidavit of Dr. Richard Welsler, Exhibit 9 to Plaintiff's MOL)

Likewise the Defendants have failed to prove that the alleged statements were made with actual malice. CNC/Access had legitimate and good faith reasons for lodging complaints with the various government and regulatory agencies. CNC/Access had very valid concerns over the possibility that client confidentiality was being breached as well as legitimate concerns over former employees breaching their employment agreements and engaging in unethical behavior. These valid and legitimate business interests are represented by Voegeli's comments in his complaint to the Health Care Personnel Registry Section of the North Carolina Department of Health and Human Services: "We at CNC/Access feel obligated to fight for the rights of our clients and to defend our company from these unethical and unlawful behaviors." (See Exhibit 2 hereto).

As a matter of public policy, it would be unjust to allow Universal to assert that the Plaintiff acted with ill-will, when, in fact, the incitement to lodge the complaints was generated by Universal's egregious conduct of poaching on CNC/Access employees and their clients and stealing its policies, procedures and forms. For example, to do so, would be analogous to allowing the school bully who has stolen a student's lunch everyday for a week to assert that the student who reported him to the principal and told others of his conduct acted with actual malice because he did not like him and was fed up with his

conduct. Universal knowingly targeted CNC/Access employees and clients (see Affidavit of Dr. Richard Welser) and it was more than reasonable for Universal, Scruggs, and Greer to expect that such actions would prompt CNC/Access to lodge formal complaints and chatter to occur within the provider community. Plaintiff would hope that it would not be the precedent of this Court to allow a Defendant who commits wrongful acts that they know will incite and anger a particular entity, to hide behind and assert that the Plaintiff acted with ill-will when it attempted to redress its grievance.

## **II. UNIVERSAL CLAIM FOR TORTIOUS INTERFERENCE**

Universal claims that the Plaintiff interfered with its prospective relationships with the North Carolina Community Support Provider's Council ("the Provider's Council" or "the Council"), Western Highlands LME ("Western Highlands") and at least one employee (Sherry Douglas). The interference, says Universal, was "for anti-competitive purposes" and "Judy Hardy [the Plaintiff's State Director] was the ring leader."<sup>1</sup>

As to the alleged tortious interference with the Provider's Council, the Plaintiff would merely remind the Court that while a plaintiff need not prove the prospect of obtaining a contract, there must be some probability of economic gain. Moreover, while the probability of economic gain need not be shown with certainty, a realistic prospect of future profit is required. Dan B. Dobbs, The Law of Torts at 1275 (2000); Walker v. Sloan, 137 N.C. App. 387, 529 S.E. 2d 236 (2000). The Providers Council is a 501 ( c ) (6) trade association whose members derive absolutely no economic gain or profit whatsoever. Members do not enter into a contract or engage in a business relationship

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<sup>1</sup> Not that it really matters but the assertion that Ms. Hardy was the "ring leader" is belied both by the October 24, 2003 e-mail from Martin Miller to Ralph Grovesfield and Ron Geary, all top executives with Res-Care, Geary being CEO, and the Affidavit of David Waskey, attached hereto as Exhibits 3 & 4.

with the Provider's Council, they simply are members. The Council lobbies the North Carolina General Assembly and various Executive agencies for its entire industry (without, obviously, any member/nonmember differentiation), and it provides pertinent information to its members. For further information on the Council, the Court is referred to its website at [www.ncproviderscouncil.org](http://www.ncproviderscouncil.org). The only conceivable economic gain from the Council would take the form of a service rate change which may or may not be attributable to the Council's lobbying efforts, but this possible economic gain is so attenuated, speculative and conjectural as to be meaningless. Moreover, a service rate change would benefit members and non-members alike.

It is not clear whether the Defendants are arguing that CNC/Access interfered with Universal's legal right to contract with Western Highlands or whether CNC/Access interfered with Universal "getting an amendment to its contract with Western Highlands." See Footnote 6, p. 33 of Defendants' Joint Memorandum In Opposition To Plaintiff's Motion For Summary Judgment On Defendants' Counterclaims (referred to hereinafter as "DJMIO"). What is clear, however, is that Anne Doucette, a Director at Western Highlands, by her own admission "currently believes that the investigation [which ensued after CNC/Access filed its complaint] did not cause a delay in authorizations from Western Highlands." See last sentence of Footnote 6, p. 33 of DJMIO. Hence, no harm, no foul.

Finally, Universal asserts that "threats" by CNC/Access interfered with Sherry Douglas accepting employment with Universal – where she currently works, by the way. The interference, according to Universal and Ms. Douglas, took the form of "threats" that violations of HIPPA could result in fines or jail (true), that violations of the Federal Anti-

Kickback Act could result in federal charges (true), that Vickie Scruggs was in serious trouble (true unless one considers being a defendant fun) and that if she “walked out” and several weeks later twenty (20) to thirty (30) clients left CNC/Access, then “serious legal issues” would occur (true). Statements of fact should hardly be considered “threats” particularly in a competitive business environment and particularly given the conduct of Universal since September 15, 2003 as attested to by Dr. Welser and supported by clear and convincing circumstantial evidence. In any event, Ms. Douglas and Universal somehow found the courage to overcome these “threats”, most of which appear to have been made on June 16, 2004, according to Ms. Douglas’s Affidavit, and, she became an employee of Universal on June 17, 2004, one day after submitting her resignation from CNC/Access. Query as to what economic loss Ms. Douglas (or Universal) could establish or, more importantly at this juncture, what economic loss have they forecast?

At any rate, it is clear that the Defendant’ tortious interference claims are supported by neither law nor facts and summary judgment should be rendered on these claims in favor of the Plaintiff. There is not, to quote the highly quotable Wade Smith, a spider web of evidence to support these claims – nor any law.

### **III. DEFENDANTS’ CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES**

Once again unleashing a barrage of delusional, “we are the victim here” paranoia, the Defendants set forth, “among others” (which are not identified, by the way), ten (10) alleged Chapter 75 violative acts or practices ranging from the claimed defamatory communications and tortious interference to “creating and fomenting a larger-than-life persona of Defendants as villains in the western North Carolina MH/DD/SA

community....” Defendants’ Joint Memorandum In Opposition To Plaintiff’s Motion For Summary Judgment On Defendants’ Counterclaims, pp. 35-36.

That CNC/Access and its parent Res-Care would mount a campaign of the type imagined by the Defendants is manifestation of self-aggrandizement of huge proportion and belied by the fact that Universal is a relatively small competitor of CNC/Access although it is certainly clear that it harbored desires to be a major player and, hence, attempted to build its business at the expense of the Plaintiff. See Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C., 620 S.E. 2d 222 (2005).

However, the Plaintiff does feel compelled to respond to several allegations made by the Defendants. First of all, in addition to the defamation and tortious interference claims asserted, the Defendants claim that CNC/Access undermined the livelihood of Universal owners and employees. Once again, the Defendants conveniently ignore the fact that the *owners* were paid over Twenty Million Dollars and 00/100 (\$20,000,000.00) for their company in 1997. Additionally, the *owners* continued to remain employed by CNC/Access under consulting agreements until they eventually departed (or were asked to depart) in 1999. Within a year after their noncompete provisions with CNC expired, the *owners* formed Universal with offices located in the same geographic area as several of CNC/Access’s offices and began systematically luring CNC/Access employees and their clients to Universal. Incredibly, the Defendants insist that CNC/Access undermined the livelihood of Universal owners and employees despite that the fact the majority of the employees already had jobs and were working under reasonable noncompete provisions (180 days) with CNC/Access. The Defendants would like this Court to conclude that Universal did nothing wrong by hiring Vickie Scruggs away from CNC/Access, by

systematically luring seventeen (17) out of eighteen (18) CAP/MR employees away from CNC/Access along with their clients in less than a two-month span, and fourteen (14) out of twenty-six (26) CBS employees in a three-month span along with their clients at the Asheville location. Moreover, Universal had little or no revenue in these two (2) areas prior to employing all of the CNC/Access employees. It is the Defendants' view that CNC/Access was acting unfairly and "anti-competitively" by filing claims with governmental agencies and by reminding its employees that they should not seek employment with Universal while operating under noncompete provisions. In fact, Universal used CNC/Access like a farm system in professional baseball where the players are groomed and then get called up to the majors for a better job and better pay. The only problem is that Universal is another team and not the major league affiliate of CNC/Access.

The Defendants are also correct in asserting that CNC/Access executives, including Hardy and Voegeli, were slightly irritated at the actions and conduct of Universal, the Greers and Scruggs. This should not come as a profound revelation when the Defendants' principal strategy for starting its business consisted of stealing everything that wasn't nailed down at CNC/Access.

The Defendants contend that employees were choosing to leave CNC/Access for higher wages but fail to mention that Universal initiated contact with the CNC/Access employees and was the party who would attempt to find out what CNC/Access was paying an employee and then raise the offer. As this Court concluded in Sunbelt, "[t]he surreptitious way in which the BPS employees were solicited may have actually deprived them of the opportunity to see what Sunbelt would offer them to stay." Sunbelt, supra, at

230-231. In addition, Universal ignores the fact that it was hiring CNC/Access employees away from CNC/Access in direct violation of their noncompete agreements (which it summarily dismisses as unenforceable). Moreover, the Defendants fail to note that the reason so many CNC/Access employees transferred to Universal was because Universal was able to gain access to inside information at CNC/Access thereby allowing them to maintain an unfair competitive advantage.

The Defendants argue with a straight face that CNC/Access knew that its accusations and claims against them were baseless and were asserted with reckless disregard for the rights of the Defendants. The Defendants actually state in their memorandum that it took employees and clients “upwards of a month” to transfer to Universal in Morganton and at least several days in Asheville. Defendants’ Joint Memorandum In Opposition To Plaintiff’s Motion For Summary Judgment On Defendants’ Counterclaims, p.40. This acknowledgement could be perceived by a reasonable person as a clear admission that Universal targeted and succeeded in luring away employees and clients in a very short period of time. (See Affidavit of Dr. Richard Welsler, Exhibit 9 to Plaintiff’s MOL). Not surprisingly, the Defendants use this argument to suggest that they did nothing out of the ordinary.

The Defendants continue to rehash and restate their argument that CNC executives engaged in unfair acts 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/Access employees. The Defendants suggest that certain of CNC/Access’s meetings were designed to “frighten” employees and to discuss providing reports to

governmental agencies about the conduct of Universal. However, these alleged improprieties do not rise to the level of unfair and deceptive trade practices.

The Defendants also appear to be shocked and offended that Hardy and others employed by CNC/Access and Res-Care would be annoyed by and would discuss impending litigation against the Defendants even though all such conversations stayed in-house. Again, without restating the Plaintiff's position over and over, Universal was viewed as nothing more than a minor competitor at best attempting to build its business at the expense of CNC/Access. The Plaintiff simply decided to fight back and not allow another company to take unfair advantage of what had taken so long to build. The Defendants believe that the ill-will of several CNC/Access executives was a significant reason in the filing of the governmental complaints and this lawsuit.<sup>2</sup> However, had the Defendants not stolen employees, clients, policies, manuals and forms, there never would have been any animosity.

The Defendants accuse the Plaintiff of "mischaracterizing" Scruggs's deposition testimony that she indeed did not honor her Employment Agreement. How one can "mischaracterize" a direct quote is puzzling at the least.

“ Q. ....Now I'm asking you, did you honor your part of the bargain?  
Did you honor the provisions in this agreement [Employment Agreement]?  
A. I guess not.”

Scruggs Deposition II, p.31

The rehabilitation clarification urged on this Court somehow omits the following testimony:

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<sup>2</sup> Whatever ill-will of CNC/Access employees toward the Defendants had absolutely nothing to do with the institution of this lawsuit. See Waskey Affidavit, attached as Exhibit 4 hereto.

“ Well, I think I honored the provisions, but I guess my thoughts were that I didn’t honor it totally because I left employment, because I left employment.” (emphasis supplied)

Scruggs Deposition II, p. 34

Finally, summary judgment is appropriate as to the Defendants’ Chapter 75 claims for the independent reason that the Defendants have failed to establish a genuine issue of material fact regarding whether the Plaintiff’s alleged conduct caused actual injuries.

A claim for unfair and deceptive trade practices in violation of N.C. Gen. Stat. Sect. 75-1.1 must establish “(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which *proximately caused actual injury* to the plaintiff or to his business.” McLamb v. T.P. Inc., 619 S.E.2d 577, 582 (N.C. App. 2005) (emphasis added). Proximate cause “necessarily includes two elements: (1) whether the action of the tort-feasor was the ‘cause-in-fact’ of Plaintiff’s injuries; and (2) whether the tort-feasor’s liability should as a matter of public policy extend to those injuries.” (July Order at 8, n.7 (quoting Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F.Supp. 956, 960 n.3 (M.D.N.C. 1997) (internal citations omitted)).) The Defendants’ Chapter 75 claims fail, inter alia, because they do not include any forecasted evidence that the Plaintiff caused them actual harm or injury over and above “undermining the livelihood of Universal owners and employees.”.

#### **IV. CONCLUSION**

For the reasons already set forth in this and other filings with the Court, the Plaintiff urges this Court to render summary judgment in its favor on all the Defendants’ Counterclaims.

This the 2<sup>nd</sup> day of June, 2006.

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**CERTIFICATE OF SERVICE**

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

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