STATE OF NORTH CAROLINA

COUNTY OF UNION

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO.: 07-CVS-03186

A-1 PAVEMENT MARKING, LLC,

Plaintiff,

v.

APMI CORPORATION,
LINDA BLOUNT and GARY BLOUNT

Defendants.

A-1 PAVEMENT MARKING, LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiff A-1 Pavement Marking, LLC ("A-1"), moves for entry of judgment on the pleadings or, in the alternative, for dismissal of Defendants' Second, Third, and Fifth Claims for Relief in Defendants' Counterclaims because such claims are barred by their own pleading and admissions in Defendants' Second Defense and First Claim for Relief invoking the "mutual mistake" doctrine and seeking judicial reformation of the Asset Purchase Agreement. In support of its motion, A-1 shows the Court as follows:

1. This action arises from the purchase by A-1 of the assets formerly owned by Defendant APMI Corporation ("APMI"). APMI formerly operated a pavement marking business based in Monroe but sold its assets to A-1, which now operates its pavement marking business from the same location.

2. A-1 and APMI entered an Asset Purchase Agreement and related agreements to accomplish this purchase of assets (the "Transaction").

3. The parties' principal dispute relates to Schedule 2.3 of the Asset Purchase Agreement, which schedule identifies the "Assumed Liabilities" assumed by A-1 in the Transaction.

4. It is undisputed in the pleadings that Schedule 2.3 to the Asset Purchase Agreement, both at the time of the closing of the transaction and at the present time, consists of one page. (Defs. Ans. and Countercl. ¶ 10; Ans. and Countercl. to V. Am. Compl. ¶ 19.) That page states certain Assumed Liabilities under the Asset Purchase Agreement, and does not include the liabilities in dispute in this action.

5. APMI contends that an additional page, consisting of page 2 of APMI's Balance Sheet reflecting certain liabilities, stockholders' equity, and a summary of TOTAL LIABILITIES AND EQUITY "is inadvertently not included" in Schedule 2.3. APMI's Second Defense and First Claim For Relief (as pled in its Answer and Counterclaim and its Answer and Counterclaim to Plaintiff's Verified Amended Complaint) assert "Mutual Mistake" and seek "Reformation" of Schedule 2.3 of the Asset Purchase Agreement.

5. APMI has admitted that A-1 has complied with Schedule 2.3 as it exists at the present and as it has existed since the closing of the Transaction. (Ans. and Countercl. to V. Am. Compl. ¶ 19.)

6. Based on these admissions in APMI's pleadings, judgment should be entered on APMI's Second, Fourth, and Fifth Claims for Relief. All these claims assert that A-1 is in default under the Asset Purchase Agreement, but are predicated on a judicial reformation of the Asset Purchase Agreement and Schedule 2.3.

7. A-1 cannot be deemed to be in default of contractual obligations that it does not have under Schedule 2.3 as it exists at present.

8. A-1 cannot be held liable *ex post facto* for any such default in the event that the Court does, in the future, reform Schedule 2.3 to include page 2 of APMI's Balance Sheet.

9. A-1 also moves for dismissal of Defendants' Third Claim for Relief, Gary Blount's Counterclaim, to the extent that it seeks remedies under the Unfair and Deceptive Trade Practice Act, N.C. Gen. Stat. § 75-1.1. That claim arises from Gary Blount's employment by Plaintiff and is not "in commerce," and thus is outside the scope of N.C. Gen. Stat. § 75-1.1.

WHEREFORE, Plaintiff A-1 respectfully requests that the Court enter judgment on the pleadings in its favor or otherwise dismiss APMI's Second, Fourth, and Fifth Claims for Relief, and dismiss Gary Blount's Third Claim for Relief to the extent it seeks remedies under N.C. Gen. Stat. § 75-1.1.

This the 12th day of May 2008.

McGUIRE WOODS LLP

/s/ Amy R. Worley
Bradley R. Kutrow
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **A-1 PAVEMENT MARKING, LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** was served upon each of the parties or, when represented, upon their attorney of record, electronically and by mailing a copy thereof, postage prepaid, addressed as follows:

Rex C. Morgan, Esq.
BAUCOM, CLAYTOR, BENTON,
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This the 12th day of May 2008.

/s/ Amy R. Worley
Bradley R. Kutrow
Amy R. Worley

STATE OF NORTH CAROLINA COUNTY OF UNION	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 07-CVS-3186
A-1 PAVEMENT MARKING, LLC, Plaintiff, vs. APMI CORPORATION, LINDA BLOUNT and GARY BLOUNT, Defendants.	**A-1 PAVEMENT MARKING, LLC'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS, OR, ALTERNATIVELY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Plaintiff, A-1 Pavement Marking, LLC has moved for entry of judgment on the pleadings under Rule 12(c), N.C. R. Civ. P., or in the alternative for dismissal under Rule 12(b)(6), of Defendants' Second, Third, Fourth, and Fifth Claims for Relief in their Counterclaims. These claims are barred as a matter of law by Defendants' own pleading. Defendants admit the written terms of the parties' Asset Purchase Agreement ("APA") as it was signed and now exists, but invoke the "mutual mistake" doctrine in order to seek judicial reformation of the APA. Defendants' Second, Fourth and Fifth Claims for Relief are each predicated on alleged violations of the APA as if it had already been judicially rewritten. Defendants cannot claim that Plaintiff was in default in 2007 of a reformed version of the APA that they admit does not yet exist in 2008 and will not exist unless the Court reforms it.

Additionally, Defendants' Third Claim for Relief seeking additional profitability bonus payments for Gary Blount, pursuant to the Unfair and Deceptive Trade Practices Act, ("UDTPA"), N.C. Gen. Stat. §75-1.1, likewise fails as a matter of law. Mr. Blount was an employee of A-1 and his claim arises out of contract. The UDTPA does not provide an additional cause of action for employment-related or simple breach of contract claims.

I. THE PARTIES' PLEADINGS

This lawsuit arises out of a 2007 dispute concerning terms of an April 21, 2006 APA by which Plaintiff purchased the assets and trade name of Defendant APMI Corporation. APMI was formerly known as A-1 Pavement Marking, Inc. ("APMI" or "Old A-1"). Old A-1 was wholly owned by Linda Blount and managed by her husband Gary Blount. Plaintiff, an LLC owned by Carolyn and Leonard Langevin, purchased the assets and trade name of Old A-1 by way of the APA. (Verified Complaint and Motion for Temporary Restraining Order and Preliminary Injunction, "V. Compl." at ¶ 8.)

A. Allegations of the Verified Amended Complaint

The Terms of the APA

True and accurate copies of the APA and related documents are attached to the Verified Complaint Exhibit A.[1] In consideration for the sale of the assets and trade name, A-1 paid APMI $500,000.00 and executed a promissory note requiring monthly payments to APMI for a total purchase price of $1.5 million. (Verified Amended Complaint, "V. Am. Compl." at. ¶ 11.) Also in connection with the asset sale, Defendant Gary Blount executed a Non-Competition, Confidentiality and Intellectual Property Agreement and Defendant Linda Blount executed a Confidentiality and Non-Competition Agreement. (V. Am. Compl. at ¶ 12.) True and accurate copies of these agreements are also attached to the Verified Complaint and are incorporated into the APA by reference.

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[1] A copy of a written instrument which is an exhibit to a pleading is a part thereof for all purposes. N.C. R. Civ. Pro. 10(c). A court may consider exhibits to a complaint on a motion to dismiss without converting the motion to one for summary judgment. *See, e.g., Governors Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 567 S.E.2d 781 (2002); *Stanback v. Stanback*, 297 N.C. 181, *rev. in part on other grounds*, 297 N.C. 181 (1979).

Section 2.1 of the APA requires that all "Purchased Assets" be delivered to A-1 "free and clear of all Liens." The Purchased Assets included all of the machinery, equipment, vehicles, inventory and other property necessary for A-1 to operate its pavement marking business. (V. Am. Compl. at ¶ 15.)

After the asset sale closed, A-1 learned eventually that certain Purchased Assets nonetheless remained subject to liens of APMI's creditors, and that APMI had apparently breached Sections 2.1 and 4.13 of the APA because APMI failed to deliver those assets "free and clear" of all liens. Further, in Section 4.13 of the APA, APMI and Linda Blount represented and warranted that the Purchased Assets were transferred to A-1 "free and clear of all Liens." (V. Am. Compl. at ¶ 15.)

Specifically, Section 2.3 of APA defines, "Assumed Liabilities" as only those expressly set forth on Schedule 2.3. Schedule 2.3 was prepared by APMI's attorney and was delivered to A-1 at the closing. Section 2.4 of the APA defines "Excluded Liabilities" as all liabilities of the Seller not expressly assumed by A-1 under Schedule 2.3. Section 2.4 also expressly provides that "the Purchaser [A-1] shall not assume, succeed to or have any responsibility for, any and all Liabilities of the Seller [APMI] other than the Assumed Liabilities." (V. Am. Compl. at ¶¶ 17-18.) In their Answer, Defendants admit these terms of the APA, but contend that Schedule 2.3 is incorrect due to alleged mutual mistake of fact. (Defs.' Answer and Countercl. to the Pl.'s V. Compl. ¶¶ 13-18.)

APMI's Breach of the APA

Despite the express terms of the APA, APMI or its agents either sent APMI's invoices to A-1, or directed or permitted APMI's creditors to send invoices to A-1, demanding that A-1 make payments to APMI's creditors. (V. Compl. at ¶ 21.) Defendant Gary Blount, a former

APMI employee and the husband of its sole shareholder, Linda Blount, continued in that role as A-1's General Manager after Plaintiff purchased the assets of Old A-1. (V. Compl. at ¶ 22.) A-1 alleges that in 2006 and 2007 Defendant Gary Blount improperly initiated or directed payments to be made to APMI's creditors, in direct contravention of the APA. (V. Compl. at ¶ 22.)

In June 2007, Gary Blount voluntarily resigned his position as Plaintiff's General Manager, and shortly thereafter the improper payments to APMI's creditors ceased. (V. Am. Compl. at ¶ 27.) The improper payments of Excluded Liabilities made with A-1's funds to creditors total approximately $250,000. (V. Compl. at ¶ 26.)

In addition to Defendants' alleged misappropriation of funds, APMI also failed to satisfy a lien granted on January 24, 2005 and held by Branch Banking and Trust Company ("BB&T"), on substantially all of the Purchased Assets sold by APMI to A-1 pursuant to the APA. (V. Compl. at ¶ 24.) When A-1 sought asset-backed working capital financing, its lender discovered the BB&T lien. As a result of the lien, A-1 was required to pay BB&T $53,955.20 to satisfy the lien in order to maintain and use and ownership of its assets. (V. Compl. at ¶ 25.)

A-1's Notice to APMI of the Alleged Breach of the APA

September 6, 2007, A-1 notified APMI by letter of these alleged breaches of APMI's agreements and of Gary Blount's alleged wrongful conduct. (V. Compl. at ¶ 27.) A-1 further demanded that APMI satisfy the remaining liens on the Purchased Assets, specifically including the BB&T lien, and that it reimburse A-1 for amounts improperly paid to APMI's creditors. (V. Compl. at ¶ 28.) APMI refused to satisfy the remaining liens on the Purchased Assets or to reimburse A-1 for the payments improperly made to APMI's creditors. (V. Compl. at ¶ 29.)

A-1 Exercises Indemnification Rights Under the APA

Under the APA, if A-1 has an outstanding claim against the Seller Indemnifying Persons (as defined in the APA), A-1 is entitled to withhold a Promissory Note payment in an amount equal to the asserted claim. (V. Compl. at ¶ 33.) Defendants APMI and Linda Blount are each Seller Indemnifying Persons. (V. Compl. at ¶ 34.)

On November 2, 2007, A-1 notified APMI that it was exercising its indemnification rights under APA Section 3.2(b) to withhold the regularly scheduled Promissory Note payment of $18,416.52. (V. Compl. at ¶ 36.) On November 8, 2007, APMI acknowledged receipt of A-1's November 2, 2007 notice and provided a "Notice of Default," commencing the ten-day cure period under the Promissory Note. APMI, through counsel, stated in a letter to A-1's counsel that: "If this default is not cured on or before November 19, 2007, my client will accelerate the entire balance due on the note and take such action as will protect her interest." (V. Compl. at ¶ 37.)

APMI Wrongfully Converts A-1 Assets and Equipment

On the night of November 8, APMI or persons acting as its agent wrongfully entered and trespassed on A-1's place of business, and surreptitiously removed several large motor vehicles, expensive pavement marking equipment, and other supplies used in A-1's business. (V. Compl. at ¶ 39.) APMI or its agents then converted and misappropriated these assets including several tons of thermoplastic pavement marking material that were not subject to an APMI security interest. (V. Compl. at ¶ 40.) The value of the assets converted and misappropriated by APMI was significantly in excess of the $18,416.52 monthly payment about which APMI had given Notice of Default. (V. Compl. at ¶ 41.)

The Temporary Restraining Order

In response to APMI's clandestine "repossession" of A-1's assets, A-1 filed its Verified Complaint and Motion for Temporary Restraining Order on November 13, 2007. That same day, Union County Superior Court Judge Kimberly Taylor entered a Temporary Retraining Order requiring Defendants APMI, Linda Blount and Gary Blount to, *inter alia,* return all "assets subject to the [APA] and related contracts to the premises of A-1 in the same condition as they were on November 7, 2007." Judge Taylor also ordered that Defendants refrain from any violation of their covenants not to compete. Meanwhile, A-1 made the disputed Promissory Note payment, curing any alleged default. On December 10, 2007, the parties entered into a Consent Preliminary Injunction in order to preserve the status quo during the course of this litigation.

B. Defendants' Answer, Defenses and Counterclaims

Throughout the litigation, the parties have filed amended pleadings, including: Plaintiff's Verified Amended Complaint, filed January 24, 2008, Defendants' Answer and Counterclaim to Plaintiff's Verified Amended Complaint, filed February 7, 2008, and Plaintiff's Answer to Defendants' Counterclaims, filed February 19, 2008. Copies of these pleadings have been electronically filed with the Business Court.

Defendants Seek to Reform the Terms of the APA to Include Long-Term Liabilities.

In response to Plaintiff's allegations in the Verified Complaint and Motion for Temporary Restraining Order and Plaintiff's Verified Amended Complaint, Defendants admit the terms they claim of the APA as they are written, but plead the affirmative defense of "Mutual Mistake." Defendants alleged that certain long term liabilities were inadvertently admitted from Schedule 2.3 of the APA by mutual mistake of the parties. (Defs.' Answer and Countercl., Second Defense Mut. Mistake.) Defendants claim specifically that both parties intended that Schedule

2.3 should have enumerated other long-term liabilities, and the fact that Schedule 2.3 plainly does not do so was a "mutual mistake" warranting judicial reformation of the contract. (Defs.' Answer and Countercl., Second Defense, Mut. Mistake.) Defendants contend that an additional page of Schedule 2.3 was inadvertently omitted and that the actual schedule of assumed "long-term liabilities" is included as page 2 of Schedule 4.7. (Defs.' Answer and Countercl., ¶¶ 13-15; Second Defense, Mut. Mistake.)

Consistent with Defendants' admission that the APA and Schedule 2.3 do not read as they wish, and Defendants' affirmative defense of Mutual Mistake, Defendants plead that "this court enter an Order reforming the [APA] to reflect the true intention and agreement of the parties and to include within the document at the proper location the correct and accurate Schedules and Exhibits, including the list of long-term liabilities which both parties agreed the Plaintiff would pay (Exhibit "A") to be placed as page 2 of Schedule 2.3, the signature page of the Promissory Note, and any other documents omitted or misplaced by mistake of the parties." (Defs.' Answer and Countercl. to Pl.'s V. Am. Compl., pg. 7, ¶ 2.)

Defendants Also Allege that Plaintiff Has Breached the APA in 2007 As If Had Already Been Judicially Reformed.

In addition to seeking judicial reformation of the APA, which would require the parties to move forward in compliance with the terms of the judicially-reformed contract, Defendants assert counterclaims alleging default and breach of the APA and related documents as if the APA had already been reformed. Specifically, Defendant APMI's Second Claim for Relief alleges that A-1's refusal to pay the liabilities that are not included on Schedule 2.3 as written constitutes a default of the Promissory Note and Security Agreement. Based on the same alleged "default," Defendants seeks in their Fourth Claim for Relief to cancel their non-competition agreements. The same supposed default is pled as a breach of contract in Defendants' Fifth Claim for Relief.

Thus Defendant APMI seeks to recover "judgment as against the Plaintiff for the entire amount owed on the Promissory Note, including accrued and unpaid interest, collection and enforcement costs and attorney's fees and disbursements[,]" which would be available under the APA only in the event of a default. (Defs.' Answer and Countercl. to Pl.'s V. Am. Compl., pg. 7, ¶ 3; V. Comp. Ex. A, Promissory Note.) Yet these alleged defaults presume a reformed version of Schedule 2.3.

Defendant Gary Blount's Bonus Claim

Defendant Gary Blount also seeks to recover additional monies allegedly owed to him for a profitability-based bonus, which he claims A-1 improperly calculated. (Defs.' Answer and Countercl. to Pl.'s V. Am. Compl., pg. 7, ¶ 5.) Not only does Defendant Blount seek $10,000 in alleged actual damages for his bonus claim, he also seeks to recover "treble damages pursuant to Chapter 75 of the North Carolina General Statutes and his attorneys' fees in connection therewith based upon the unfair and deceptive trade practices of Plaintiff in diverting income or taxing improper expenses to avoid paying the bonus which was owed to Gary Blount." (Defs.' Answer and Countercl. to Pl.'s V. Am. Compl., pg. 7, ¶ 6.)

II. LEGAL ANALYSIS AND ARGUMENT

As will be discussed in detail below, under North Carolina law, the written terms of a contract control until such time as they are judicially reformed. It is undisputed that A-1 has complied with the pertinent terms of the APA as written. It is further undisputed that the APA has not been reformed. Accordingly, Defendants' claims for breach of the not-yet-reformed APA fail to state a claim upon which relief can be granted as a matter of law and should be dismissed. Additionally, Defendant Gary Blount's UDTPA bonus claim fails as a matter of law,

because the claim arises out of the employer/employee context. For these reasons, Mr. Blount's UDTPA bonus claims should be dismissed.

A. A PARTY TO A JUDICIALLY REFORMED CONTRACT CANNOT BREACH THE TERMS OF THAT CONTRACT UNTIL AFTER SUCH TIME AS THE COURT HAS REFORMED THE CONTRACT.

It is a well-established principle of law in North Carolina that prior to judicial reformation by a Court acting in equity, parties are governed by the written terms of their contracts. Indeed, a written contract "accepted by plaintiff [or counter-plaintiff] stands as embodying the contract and the rights of the parties must be determined by its terms until the contract is reformed by the court." *Graham v. Ins. Co.*, 176 N.C. 313, 97 S.E. 6, *8 (1918). *See also, Floars v. Aetna Life Ins. Co.*, 144 N.C. 232, 56 S.E. 915, 917 (1907) (same); *Burton v. Life & Casualty Ins. Co. of Tenn.*, 198 N.C. 498, 152 S.E. 396, 397 (1930) (same).

Here, Defendants allege that the parties intended to include certain long-term liabilities in Schedule 2.3 of the APA, an allegation which Plaintiff denies. Nonetheless, even if the Court finds Defendants' position persuasive and reforms the APA on the basis of a mutual mistake between the parties, Defendants' counterclaims against A-1 for breach of the reformed APA must fail as a matter of law because they are premature and anticipatory. A-1 has complied with the terms of the APA to the letter, as it is currently written. Until such time as the Court decides whether to reform the APA, A-1 cannot possibly be in breach or default of the reformed contract terms. As the North Carolina Supreme Court concisely stated in *Graham* and *Floars*, the terms of the original written agreement must control until the Court reforms them.

Put another way, Plaintiff cannot be held liable for exercising its rights under the written terms of the APA when that conduct was entirely consistent with the written terms of the APA in force at the time. Accordingly, Defendants' counterclaims for breach of the not-yet-reformed

APA should be dismissed for failure to state a claim upon which relief may be granted as a matter of law.

B. **EMPLOYMENT-RELATED AND SIMPLE CONTRACT CLAIMS ARE OUTSIDE THE SCOPE OF THE UDTPA. THUS, DEFENDANT GARY BLOUNT'S BONUS CLAIM DOES NOT STATE AN UDTPA CLAIM AS A MATTER OF LAW AND SHOULD BE DISMISSED.**

The UDTPA was originally based on language in the Federal Trade Commission Act, under which the Federal Trade Commission acts to protect consumer interests. Since its adoption in 1969, however, the UDTPA has expanded from its consumer protection roots such that it is now asserted in almost every type of commercial dispute. Notwithstanding the UDTPA's broad application it remains clear that UDTPA's reach does not extend to (1) employer/employee relations, and (2) simple breaches of contract.

North Carolina courts have repeatedly held that employer/employee disputes are outside the intended scope of the UDTPA. Because the UDTPA was enacted to promote fairness in dealings between buyers and sellers, courts have concluded that it was not meant to cover typical employer/employee disputes. *See Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119, *disc. rev. denied,* 305 N.C. 305 N.C. 759 (1982) (employee unsuccessfully brought UDTPA claim against employer for harassment and termination following the filing of a workers compensation claim). *See also, Dalton v. Camp,* 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001) (employer unsuccessfully sued former manager under the UDTPA for seeking an exclusive publishing contract with a third party); *Schlieper v. Johnson,* 2007 NCBC 29 (N.C. Super. Ct. Aug. 31, 2007) (although the plaintiffs contended they were business partners and not

employees, the facts and circumstances showed an employee/employer relationship, which barred the UDTPA claim).[2]

Additionally, courts routinely dismiss UDTPA claims asserted in simple breach of contract cases. Following the Fourth Circuit Court of Appeals' lead, North Carolina appellate courts have held that "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to support a UDTPA claim." *Branch Banking and Trust Co. v. Thompson,* 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992). "Substantial aggravating circumstances must attend a breach of contract to permit recovery as a [UDTPA claim.]" *Burrell v. Sparkkles Reconstruction,* __ N.C. App. __, 657 S.E.2d. 712, 717 (March 4, 2008). "A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under the [UDTPA]." *Branch Banking and Trust,* 107 N.C. App at 62.

Gary Blount, who as General Manager was an employee of A-1, cannot bring a UDTPA claim for miscalculation of his profitability bonus, which arises directly out of the employee/ employer relationship. Indeed, there may be nothing so intrinsic to the employee/employer relationship as the manner and calculation of an employee's wages or bonus. Blount does not allege in his Counterclaims or Answer any facts that would take his claims outside the employee/employer context. As such, his UDTPA profitability bonus claims should be dismissed as a matter of law.

Moreover, Blount's UDTPA bonus claims arise out of his Employment Agreement, which renders it a contract-based claim. A true and accurate copy of Blount's Employment Agreement is attached to Plaintiff's Verified Complaint and Motion for Temporary Restraining

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[2] In *Schlieper,* Judge Tennille noted a line of cases (the "*Sara Lee* cases") where courts have allowed UDTPA claims in instances where an employee is involved in extra-employer commerce. In this case, Mr. Blount's claim arises solely out of his profitability-based bonus, which he pleads was to be based on profits of the business that employed him. His is thus a purely employee-employer claim.

Order at Tab 8. Exhibit A to Blount's Employment Agreement sets forth the "bonus measurement" or the formula by which Blount's employee bonus would be calculated based upon the profitability of A-1. Indeed, even an intentional breach of a contract does not rise to level required by the North Carolina courts to sustain an UDTPA claim. Blount may have a breach of contract claim, but he does not have any additional claim and remedy under the UDTPA.

III. CONCLUSION

For the reasons stated above, Defendants' Counterclaims for breach of the APA and Gary Blount's employment-based bonus claim under the UDTPA fail as a matter of law and should be dismissed as a matter of law.

This the 12th day of May 2008.

McGUIRE WOODS LLP

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Attorneys for the Plaintiff
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CERTIFICATE OF COMPLIANCE WITH N.C. BUS. CT. RULE 15.8

The undersigned hereby certifies that the foregoing document **A-1 PAVEMENT MARKING, LLC'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** has a word count of less than 7, 500 words which complies with North Carolina Business Court, Rule 15.8.

This the 12th day of May 2008.

/s/ Amy R. Worley
Bradley R. Kutrow
Amy R. Worley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **A-1 PAVEMENT MARKING, LLC'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** was served upon each of the parties or, when represented, upon their attorney of record, electronically and by mailing a copy thereof, postage prepaid, addressed as follows:

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