

STATE OF NORTH CAROLINA

COUNTY OF BURKE

CNC ACCESS, INC.,

Plaintiff,

v.

VICKIE SCRUGGS, RICHARD
GREER AND UNIVERSAL MENTAL
HEALTH SERVICES, INC.,

Defendants.

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

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' JOINT MOTION FOR
SUMMARY JUDGMENT**

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

SUMMARY OF FACTS¹

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

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

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

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

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

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

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

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

⁴ All Affidavits cited herein are being filed contemporaneously herewith.

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

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

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

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

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

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

II. Chronology of the Instant Dispute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

To survive summary judgment on its breach of contract claim, CNC must establish (1) a valid contract; (2) a material breach of the contract; and (3) damages resulting from the breach.

See Claggett v. Wake Forest Univ., 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997).

Summary judgment is warranted on these claims because (a) CNC has no evidence that Scruggs breached Section 2B; and (b) Section 6A violates North Carolina public policy, is overbroad in time, territory and scope, and therefore, is unenforceable.

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

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

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

(Cmplt Ex 1 § 2.B (emphasis added))

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

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

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

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

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

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

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

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

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

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

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

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

CNC admits that the primary purpose of its noncompetition provisions is protection of CNC's relationship with its consumers. (CNC Dep Vol III p. 441 lns 6-15) Therefore, under *Hartman*, the covenant should be limited to areas in which Scruggs made contacts with consumers. Thus, the territory restriction in Scruggs' restrictive covenant far exceeds the area in which she actually had contact with consumers. CNC admits that the geographic scope of Scruggs' work involved *only four counties*: Caldwell, McDowell, Burke and Alexander, but the covenant extends to the entire State of North Carolina. (CNC Dep Vol II p. 291 lns 2-18; Cmpl't Ex 1 § 6A)

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

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

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

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

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

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

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

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

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

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

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

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

(CNC Dep Vol III p. 458 lns 2-7 (emphasis added)) CNC simply cannot justify keeping Scruggs

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

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

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

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

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

and trade secret information to solicit clients, did *not* owe a fiduciary duty to the plaintiff.

Coordinated Health Services, Inc. v. Primary Health Care, Inc., 626 S.E.2d 877 (Table), 2006 WL 539397 (N.C.App.) (Memo App. C) Specifically, the court held that being a Q, supervising DCS, acting as a liaison between the LMEs and families, and having access to confidential patient information “are inadequate to establish [an employee’s] obligations as fiduciary in nature.” *Id.* (quoting *Dalton*, 353 N.C. at 652, 548 S.E.2d at 708). Therefore, the Court of Appeals affirmed the trial court’s grant of summary judgment on this claim in favor of defendants. *Id.*

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

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

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

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

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

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

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

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

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

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

be acquired or duplicated by others.

Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C., 620 S.E.2d 222, 226 (N.C. App. 2005). In addition to proving that the information constitutes a trade secret, a plaintiff must establish a *prima facie* case of “misappropriation” and be able to provide conclusive evidence in response to any rebuttal evidence proffered by the defendant.¹⁰ N.C. Gen. Stat. § 66-155 (2005).

A. CNC’s Allegation that Four Former CNC Employees Misappropriated Names of Clients and Employees “in Their Heads” Fails as a Matter of Undisputed Fact and North Carolina Law.

CNC has withdrawn its allegation that the Defendants misappropriated any *documentary lists* of client or employee names. (Affidavit of Judy Hardy dated December 5, 2005, App. 48; CNC Dep Vol III pp. 521-522) Instead, CNC rests *solely* on the allegation that four former CNC employees retained the names of clients and employees under their supervision in *their memories* and that the names in their minds constitute trade secrets of CNC. (*Id.*) This allegation fails as a matter of law and fact.

North Carolina courts have refused to impose trade secrets restrictions simply on the names of people in a former employee’s memory. In *Kadis v. Britt*, the North Carolina Supreme Court quoted Williston on Contracts as “express[ing its] views”:

By the majority view, the knowledge of a deliveryman, or other personal solicitor, of *the names and addresses of his employer’s customers, gained during the performance of his duties, is not a trade secret*, partly because the information would be readily discoverable, and partly because of the court’s reluctance to deprive the employee of his subjective knowledge acquired in the course of employment.

Id., 224 N.C. 154, 162, 29 S.E.2d 543, 547-548 (1944) (emphasis added). The Supreme Court

¹⁰ A party can initially establish a *prima facie* case of misappropriation by providing “substantial evidence” that the defendant knows of the trade secret and has had a specific opportunity to acquire it or has acquired it “without the express or implied consent or authority of the owner.” N.C. Gen. Stat. § 66-155 (2005). Once the plaintiff establishes *prima facie* evidence of misappropriation, the burden shifts to the defendant who may rebut this evidence by the introduction of substantial evidence that the person against whom relief is sought acquired the information by independent development, reverse engineering, or from a person with a right to disclose the trade secret. *Id.*; see also *Combs & Associates v. Kennedy*, 147 N.C. App. 362, 555 S.E.2d 634 (2001). The defendant may also rebut the plaintiff’s case with other evidence that no misappropriation occurred. See N.C. Gen. Stat. § 66-155 (2005).

also quoted a New York decision that equity “has no power to compel a man who changes employers to wipe clean the slate of his memory.” *Id.* Similarly, in *Novacare Orthotics & Prosthetics East, Inc. v. Speelman*, the North Carolina Court of Appeals rejected an employer’s claim that client names in a former employee’s memory constituted trade secrets, in part because contact information was easily accessible from a telephone book. *Novacare*, 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (2000). Further, in the context of providing medical services and supplies, the Court found that the employee had developed personal relationships with his customers, such that “one could expect that they would follow him to a competing business.” *Id.*, 137 N.C. App. at 478, 528 S.E.2d at 922.

CNC admits that Scruggs, Lowe, Revels, and a fourth former employee of CNC, Sherry Douglas, knew the names of the clients and employees under them by memory, and that the client and employee telephone numbers and addresses were publicly available in a phone book. (CNC Dep Vol III p. 528-529) CNC also admits that CNC did *not* consider Ms. Scruggs’ knowledge of consumers to constitute trade secrets. (CNC Dep Vol IV p. 689) CNC further admits that consumers often follow their DCS workers to new Providers. (CNC Dep Vol II pp. 403-404; Vol III pp. 435-437; Def. Ex. 25) Thus, under *Kadis* and *Novacare*, CNC’s trade secrets claim based on employee and client names in the memories of four former CNC employees fails as a matter of undisputed fact and law.

B. CNC’s Employee Privileging Documents are Not Trade Secrets under North Carolina Law, Nor Can CNC Prove These Documents Were Misappropriated.

CNC claims that the completed Employee Privileging Documents for approximately twenty-three employees are trade secrets. (CNC’s Supplemental Response to Universal’ First Set of Interrogatories, No. 7; Def. Ex. 5) These documents contain the following types of information: (1) cards from third party entities like the Red Cross demonstrating training

certification (e.g. child CPR); (2) TB test cards; (3) forms reflecting trainings the employee has taken as required by state regulation; (4) evaluation forms or answer sheets showing the employee passed the state's requirements; (5) employee liability release forms; (6) approved requests for an employee to waive or postpone trainings; and (7) an employee's education, experience, reference check, and clinical supervision experience. (Rhoney Dep Vol III pp. 322-324, App. 17 and Def. Ex. 32, App. 35) This "privileging" information is mandated by North Carolina state regulation as proof that an employee has all of the required medical certifications and training before the employee begins providing services on behalf of a Provider. (Rhoney Dep Vol III pp. 301-306, 326) Thus, CNC has alleged that Scruggs, Revels, and Lowe took photocopies of these completed forms to Universal so employees "could commence work immediately."¹¹ (CNC's Supplemental Response to Universal's First Set of Interrogatories, No. 7; CNC Dep Vol III pp. 524, 527-529; Voegeli Dep p. 49)

1. CNC Cannot Prove that the Employee Privileging Documents Contain Trade Secrets under the Definitions and Factors Applied by North Carolina Law.

CNC's Employee Privileging Documents are not trade secrets as a matter of North Carolina law because the content of these files is generally known inside and outside of CNC to everyone in the industry (because it is *required* by state regulations), has no independent commercial value from not being generally known, took virtually no effort or money to develop, is readily ascertainable through independent development, and was not subject to reasonable efforts to maintain secrecy. *See* N.C. Gen. Stat. § 66-152(3)(a)-(b)(2005). In fact, CNC's attempt to place Employee Privileging documents within the rubric of the Trade Secrets Act

¹¹ CNC includes Sherry Douglas' name with Scruggs, Lowe, and Revels in its discovery response, but the facts are undisputed that Ms. Douglas did not leave CNC until the summer of 2004, she did not work in the same area or perform the same job for Universal that she performed at CNC for at least the first six months of her employment, and CNC does not allege that any of the employees or consumers at issue in this case followed her to Universal. (Revels Aff ¶ 16)

represents a fundamental misunderstanding of the purpose of the Act.

First, CNC cannot prove that the Employee Privileging Documents derive commercial value from not being generally known. CNC's Director of Quality Assurance agreed that there was nothing about a privileging file that she would regard as a CNC "trade secret." (Rhoney Dep Vol III p. 301) Further, she admitted that all of the information collected in these forms is known outside of CNC, and that CNC does not derive commercial value from the privileging files themselves. (Rhoney Dep Vol III pp. 325, 328-329). In fact, anyone who has any familiarity with the industry can readily ascertain the contents of a provider's privileging files because, before a specific employee can work with a client, he must have met the specific training and certification requirements mandated by the State. (Rhoney Dep Vol III pp. 301, 308, 325-326) Simply by holding an employee out as able to care for clients, CNC is broadcasting that a file exists with the information described above. It is the same information that would be in *any provider's* "privileging" file. (Rhoney Dep Vol III pp. 308-309, 325-326) Thus, while CNC may derive commercial value from the fact that its employees meet these training and certification requirements, it *derives no commercial value* from the information *not being generally known or readily ascertainable*. See N.C. Gen. Stat. § 66-152(3)(a)-(b)(2005). The value comes from the fact that the information is *known*.

Second, the "amount of effort or money expended in developing the information" was extremely small; the only cost to prepare the information was the few minutes of time that employees took to fill out the forms or copy third party cards (e.g. Red Cross training or TB test results). CNC cannot claim its cost to send employees for first aid training at the Red Cross or other internal training costs under this factor because none of these expenditures applied to "developing the information." See *Sunbelt Rentals*, 620 S.E.2d at 226.

Third, the Employee Privileging Documents do not meet the test for trade secrets because they were not subject to reasonable efforts to maintain their secrecy. Although CNC does not allow employees to copy their privileging files, they have access to them. (Voegeli Dep pp. 47-48) Further, privileging files are subject to examination by governmental entities and possibly consumers. (Rhoney Dep Vol III p. 327)

Finally, the information in the Employee Privileging Documents can be easily acquired elsewhere and duplicated. All providers know the State's requirements. (Rhoney Dep Vol III p. 308) CNC employees know what documents are contained in their files because they had to participate in putting them there and meeting the requirements. (Voegeli Dep pp. 47-48; Rhoney Dep Vol III pp. 230-231). CNC employees keep their original Red Cross certifications, and TB cards can be copied from the Health Department. (Rhoney Dep Vol III pp. 314-315; CNC Dep Vol V p. 812) CNC even offers its training to the public such that *other providers* can send their new employees to CNC to meet the state training requirements. (Rhoney Dep Vol III pp. 311-313) For all of these reasons, CNC cannot meet the threshold requirements for proving its Employee Privileging Documents are trade secrets under North Carolina law.

2. CNC also Cannot Overcome Defendant's Rebuttal Evidence that CNC's Employee Privileging Documents were Not Misappropriated.

In addition to not being able to show that the Privileging Documents are trade secrets, CNC cannot overcome Defendants' rebuttal evidence that they did not misappropriate these documents. CNC's claim is based on an erroneous assumption that new direct care staff started working "immediately" with consumers in Universal's Morganton and Asheville offices, and therefore Scruggs, Revels, or Lowe must have taken copies of CNC's Employee Privileging Documents. (CNC's Supplemental Response to Universal's First Set of Interrogatories, No. 7; CNC Dep. Vol III p. 524) This is CNC's "here one day/gone the next" theory, and it is

completely unsupported.

CNC *admitted* that it took upwards of a *month* from when Scruggs left CNC on September 15, 2003 to affect the switch of consumers to Universal. (CNC Dep Vol IV, pp. 639-640) This is hardly "here today/gone tomorrow." Further, CNC admitted that it has no evidence Scruggs copied any documents. (CNC Dep. Vol II pp. 259-260) Thus, CNC's claim of misappropriation by Scruggs in Morganton fails.

In Asheville, CNC admitted that it took a "*few days*" to affect the switch of employees to Universal. (CNC Dep. Vol I p. 114) CNC's Director of Quality Assurance testified that "if you pushed it, you could get [a new employee] in in *three days* if you were able to complete all of the requirements and training." (Rhoney Dep. Vol. III pp. 303-305) Additionally, Revels testified that neither he nor Lowe copied any CNC employee privileging documents, new hire training files, or medical documents before they left CNC. (Revels Aff. ¶15) Nor would Lowe or Revels have done this, since they did not even meet the Greers until *after they left* CNC. (Revels Aff. ¶12) Thus, Universal has rebutted CNC's claim of misappropriation completely. *See* N.C. Gen. Stat. § 66-155. CNC has no evidence to the contrary.

C. CNC's Claim that Defendants Misappropriated CNC Policies and Forms in Exhibit 29 Fails as a Matter of Undisputed Fact and North Carolina Trade Secrets Law.

In its final attempt to find a trade secret, CNC claims that the CNC policies and forms gathered in Exhibit 29 are trade secrets that Universal copied when it prepared its own original forms and policies in 2003. The binder which the parties call Exhibit 29 was prepared by Director of Operations Tommy Voegeli, Director of Quality Assurance Melaina Rhoney, and another CNC manager through a process of comparing CNC forms and policies with forms and policies Universal produced in discovery. (Voegeli Dep pp. 22-23, 97) Although CNC's Policies and Procedures Manual is three inches thick and CNC's Forms Manual is three to four

inches thick (CNC Dep Vol III p. 505), the fifty-seven individual CNC policies and forms in Exhibit 29 represent *all* of the policies and forms that CNC believes are similar or identical to Universal policies.¹² (Voegeli Dep p. 23) Therefore, beyond the client and employee names and Employee Privileging Documents discussed above, the fifty-seven CNC policies and forms contained in Exhibit 29 are the only remaining trade secrets at issue in this lawsuit. Every single one of the six factors North Carolina courts use for assessing the threshold issue of the existence of a trade secret favors Defendants' position that Exhibit 29 contains no trade secrets.

1. The Information in CNC's Policies and Forms in Exhibit 29 is Generally Known Both Inside and Outside of CNC.

The first and second factors used by North Carolina courts to analyze trade secrets assess the extent to which the information is known outside the business and known to employees and others involved inside the business. *See Sunbelt*, 620 S.E.2d at 226. According to CNC's own admissions, all information in the CNC forms and policies in Exhibit 29 is generally known. CNC's Director of Operations who prepared Exhibit 29 admitted that "*none of the information in those policies and forms is confidential.*" (Voegeli Dep p. 32 and *see* pp. 15-16 reflecting Voegeli's involvement in revising CNC policies and forms) Likewise, Melaina Rhoney, CNC's Director of Quality Assurance who was responsible for revising and maintaining CNC's policies and forms, testified after a document by document review of Exhibit 29:

Q. If someone else in the industry wants to find out the very information, I don't care what it is, if they want to find out the information, do you think they can do it?

A. Yes.

(Rhoney Dep Vol III p. 329) As this Court held in 2003, "[b]y definition, a trade secret requires concealed information." *Mechanical Systems & Services*, 2003 WL 22872490 at *8 (Memo

¹² The alleged trade secrets in Exhibit 29 are the policies and forms denoted with *only* a "CNC" bates label; the documents that have both a "UMH" and a "CNC" label were originally produced by Universal and then produced back by CNC in the Exhibit 29 binder.

App. B). If none of the information in the policies and forms in Exhibit 29 is confidential and all of it can be obtained outside of CNC, these documents are *not* trade secrets.

The evidence that the information in Exhibit 29 is “generally known” does not end there. CNC’s Director of Operations, testifying about all of CNC’s policies and procedures, stated that “most” of them are dictated by state and federal standards, and he excluded only some of the operations policies, billing policies, payroll policies, and human resources policies. (Voegeli Dep pp. 16-19) In this industry, many policies derive from state requirements imposed on all provider agencies. (Rhoney Dep Vol II pp. 159-161). While there may be some variations in how each provider implements certain standards (e.g. who is going to do what, referencing job titles, or specifying forms), the standards and requirements for policies are generally the same from provider to provider. (Rhoney Dep Vol II pp. 159-162). Likewise, in developing its forms, CNC relies on state statutes and rules. (CNC Dep Vol II pp. 314-315). Some forms are dictated by state regulation or DHHS, and the types of forms are pretty standard in the MH/DD/SA industry. (CNC Dep Vol II pp. 315-316, Vol III p. 496). CNC’s Director of Operations testified that if he went to another Provider, he would expect to see something similar to the policies and forms contained in Exhibit 29. (Voegeli Dep pp. 33-34) Thus, except for some variations in format and implementation from provider to provider, *the core substance of the policies and forms in Exhibit 29 is generally known—and in many cases mandated--throughout the industry.*

2. CNC Admits that it Does Not Engage in Special Efforts to Ensure the Secrecy of its Policies and Forms.

The third factor courts use to assess whether something is a trade secret—as well as the second element in the statutory definition—is the extent a party has taken measures to guard the information’s secrecy. *See, e.g., Sunbelt Rentals*, 620 S.E.2d at 226. CNC cannot satisfy this factor either. One copy of CNC’s Policy and Procedure Manual and one copy of the Forms

Manual are located at each CNC office and all employees have access to them. (CNC Dep Vol III pp. 500-503) CNC engages in no special efforts to keep the manuals secret. They are not kept in a locked drawer or cabinet. (Voegeli Dep pp. 46-47) When asked what CNC does to maintain the secrecy of its policies and forms, CNC's Director of Operations stated that one CNC manager in each office has possession of the manuals and that a CNC employee usually stays with the manuals when they are reviewed by an LME, but *nothing else*. (Voegeli Dep pp. 44-45). In fact, on his own, CNC's Director of Operations and second in command volunteered that CNC's Policies and Procedures Manual and Forms Manual were "easy to copy and take out" of the office because "they're not kept in a locked box or a locked closet or anything." (Voegeli Dep pp. 46-47)

Further, while CNC has a confidentiality policy and agreement form about *client* information (as required by State regulations), CNC has no policy or agreement regarding confidentiality of policies and forms. (CNC Dep Vol III pp. 516-518; Rhoney Dep Vol III pp. 298-299) Nor do the documents in Exhibit 29 themselves bear any "proprietary" or "confidential" legends. (Def. Ex. 29) CNC's failure to mark documents as confidential or secret and failure to protect them in any formal way demonstrates that they are *not* trade secrets. *See Bruning v. Mills*, 619 S.E.2d 594 (Table), 2005 (Memo App. E) 2429788 at **3 (N.C. App.) *rev. denied*, 2005 N.C. LEXIS 1449 (Dec. 1, 2005) (affirming summary judgment for defendant on trade secrets claim in part based on lack of written policy identifying trade secret items, lack of confidential markings on documents, and lack of any written policy "dealing in any manner" with security of alleged trade secrets).

Moreover, although a CNC employee may stand by a CNC manual when it is reviewed by an LME representative, CNC has no requirement that the LME representative sign any

confidentiality statement or agreement other than for client information. (Rhoney Dep Vol III pp. 298-299, 320-322; CNC Dep Vol III pp. 514-515). Thus, there is no requirement that LMEs not disclose any content of CNC policies and forms to other providers. (Jones Aff. ¶ 10) In addition, when CNC gives presentations to families as a “sales pitch” for CNC services, CNC will “present them with a family packet which has an overview of some of our information, our policies, how we do business, how we’re going to operate.” (Rhoney Dep Vol III p. 320) CNC’s repeated disclosure of the content of its policies and forms demonstrates that these documents are not trade secrets. *See Bank Travel Bank v. McCoy*, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992), *aff’d sub nom*, 4 F.3d. 984 (4th Cir. 1993) (finding that plaintiff’s repeated disclosures of the details of his concept, without any attempt to ensure information’s confidentiality, voided any claim to trade secrets protection). Finally, CNC has let other employees leave CNC with copies of policies and not pursued them. (*See, e.g.*, CNC Dep Vol II pp. 306-309, 384-389, Def. Ex 19, App. 28)

Given these extensive admissions from high-level CNC managers, CNC cannot meet a critical element in its trade secrets claim—that it took reasonable efforts to maintain the secrecy of the policies and forms it claims are trade secrets in Exhibit 29. *See* N.C. Gen. Stat. § 66-152 (3)(b)(2005). For *this reason alone*, CNC’s trade secrets claim based on Exhibit 29 fails as a matter of undisputed fact and law.

3. The Competitive Advantage of CNC’s Policies and Forms is Minimal.

The fourth factor courts consider in determining whether an item is a trade secret is the value of information to the business and its competitors. *See Sunbelt Rentals*, 620 S.E.2d at 226. To the extent having a policy and procedure manual and forms is required for business by the state, CNC’s policies and forms have value. However, such value is limited. First, because state

regulations are constantly changing, the required forms and policies that a provider must have are constantly changing. (Rhoney Dep Vol II p. 179) For example, a recent change in service definitions by DHHS required policy revisions and additions. (Rhoney Dep Vol III pp. 231-232) Thus, there is a limited shelf life for many forms and policies—particularly operations and management policies. (*Id.*) Further, CNC admitted that Universal did not need its policies and forms in order to do business; having them would simply make it “quicker” for Universal to get up and running. (CNC Dep Vol III pp. 511-512) Thus, though the policies and forms have some competitive value, they do not have the kind of competitive value (like the formula for Coke) that warrants trade secrets protection.

4. CNC did Not Expend Significant Money or Effort in Developing the Policies and Forms in Exhibit 29.

Applying the fifth factor, CNC did not expend significant sums of money or effort to develop its policies and forms. *See Sunbelt Rentals*, 620 S.E.2d at 226. CNC testified that the only cost to develop the policies and forms in Exhibit 29 was staff time to create them. (CNC Dep Vol III pp. 487-489) However, Ms. Hardy, CNC’s Executive Director, admitted that she constructed CNC policies from ones she developed when she worked at Foothills. (CNC Dep Vol II pp. 317-319) Ms. Hardy did not think there was anything wrong with her copying these policies for her new employer, CNC, because “It was my work. It was my knowledge.” (CNC Dep Vol II pp. 319-320) CNC’s policies and forms were later revised and updated by other CNC employees to deal with changes in state requirements, to make them more professional, to better meet the state’s requirements, and to make them “nicer looking.” (CNC Dep Vol III pp. 430-433) If CNC were to recreate *all* of its policies and forms from scratch, it would take its staff—according to CNC—five to seven months. (CNC Dep Vol III pp. 487-488) Of course CNC is *only claiming* that the fifty-seven policies and forms in Exhibit 29 (many only one page) are at

issue in this case, so allowing CNC the benefit of calling the alleged trade secrets 100 pages out of the six to seven inches of policies and forms that would take five to seven months to recreate (CNC Dep Vol III p. 505), the actual time and cost involved in developing the alleged trade secrets is not significant.

5. The Information in the CNC Policies and Forms in Exhibit 29 Could Be Acquired or Duplicated Easily.

Finally, the sixth factor in assessing whether an item is a trade secret is the ease or difficulty with which the information could properly be acquired or duplicated by others. CNC admitted that Universal could have *produced its own* policies and forms through independent development or hired a consulting firm in the MH/DD/SA arena to create them. (CNC Dep Vol III pp. 510-512) CNC also admitted that Universal could have gotten a set of policies from another Provider. (CNC Dep Vol III p. 512) A cursory review of the personnel policies in Exhibit 29 (almost half the claimed trade secrets) demonstrates they are standard human resource policies covering topics like vacation, holidays, overtime, and the Family Medical Leave Act. (CNC Dep Ex 29) Policies containing similar information could be found at practically half the companies in the country. Finally, with regard to “duplication,” CNC admits that a former CNC employee like Ms. Rhoney could recreate most of CNC’s forms and policies from memory. (CNC Dep Vol III pp. 497-498)

All of the admissions above demonstrate that Exhibit 29 contains no trade secrets as a matter of law and undisputed fact. Legal research has not revealed any North Carolina case law protecting the specific kinds of policies and forms at issue here. Further, Defendants have shown from CNC’s own admissions that all six trade secret assessment factors cut in Defendants’ favor. In order to avoid beating this horse any further, Defendants will not belabor the Court with a policy by policy and form by form review of all the reasons why each individual document in

Exhibit 29 is not a trade secret. However, CNC admissions in the deposition transcripts are readily available to do just that should the Court have a moment's concern.¹³ (See Rhoney Dep Vol II pp. 186-222, Vol III pp. 235-295; *see also* Steve Greer Dep pp. 56-62; Def. Ex 29) Given CNC's numerous admissions, CNC cannot establish either of the two required threshold elements in the trade secrets statute, and Defendants are entitled to summary judgment on Exhibit 29 as a matter of law.

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

CNC alleges that Defendants tortiously interfered with contracts between CNC and its consumers and employees and with CNC's "prospective economic advantage." (Cmplt. ¶ 53) To survive summary judgment on its tortious interference with contract claim, Plaintiff must show: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) that the defendant knew of the contract; (3) that the defendant intentionally induced the third person not to perform the contract; (4) and in doing so acted without justification; (5) resulting in actual damage to plaintiff. *Beck v. City of Durham*, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (citations omitted). In order to survive summary judgment on its tortious interference with prospective advantage claim, Plaintiff must show that Defendants "induced a third party to refrain from entering into a contract with Plaintiff without justification. Additionally, Plaintiff must show that the contract would have ensued but for Defendants' interference." *DaimlerChrysler Corp. v. Kirkhart*, 148

¹³ Some of this testimony about individual documents not only demonstrates that they are not "trade secrets," but also demonstrates that there was no misappropriation. For example, on the only true operations policy in Exhibit 29, Ms. Rhoney admitted that the corresponding Universal policy was *not* copied from CNC's policy. (Rhoney Dep. Vol II pp. 195-200, App. 16 and Def. Ex. 29 [Bates No. CNC00756-757]). Further, almost half of the claimed "misappropriated" policies in Exhibit 29 are personnel policies. Universal does not dispute that, in 2002, before Universal was ever contemplated or incorporated by Richard Greer, CNC's Director of Human Resources Steve Greer, provided a copy of CNC's human resource policies to his nephew, Robert Greer, with the expectation that they would be used to create a human resources manual for a different company, Universal Finance. (Steve Greer Dep pp. 20-21, 62)

N.C.App. 572, 585, 561 S.E.2d 276, 286 (2002) (citations omitted). CNC cannot establish the first, third and fourth elements of its tortious interference with contract claim. With regard to its tortious interference with prospective advantage claim, CNC cannot establish that Defendants' conduct was without justification or that Defendants prevented the formation of any contract.

A. CNC Cannot Show the Existence of a Valid Actual or Prospective Contract to Base Its Claims Upon.

1. CNC does not contract with clients and admits that there was no interference with prospective employee contracts.

CNC admits that it does “not have a contract with [its] clients.” (CNC Dep Vol I p. 141 In 19) Therefore, *both* of CNC's claims of tortious interference *with regard to clients* fail as a matter of law. *See DaimlerChrysler*, 148 N.C.App. at 584-585, 561 S.E.2d at 285-286 (plaintiff failed to show likelihood of success on merits because it could not identify any contract that third party had been induced not to perform or enter into). As to CNC's *employees*, CNC does not allege that any of the Defendants prevented employees from entering into any agreement with it. (CNC Vol I p. 141) Therefore, CNC's tortious interference *with prospective advantage claim* with regard to employees also must fail. *See DaimlerChrysler Corp.*, 148 N.C.App. at 585, 561 S.E.2d at 286.

2. CNC's employee contracts are invalid.

CNC's claim for tortious interference with employee contracts must fail as well. Without exception, all of the employees who left CNC to work for Universal were “at will.” The North Carolina Court of Appeals dealt with the same issue in *Coordinated Health Services*. In that case, the Court held that a tortious interference with contract claim would not lie where the plaintiff could demonstrate only that the defendants, a corporate competitor and two former employees of plaintiff, “offered the plaintiff's employees job opportunities which induced them

to terminate their *terminable at will* contracts....” *Coordinated Health Services*, 626 S.E.2d 877 (Table), 2006 WL 539397 at **4 (quoting *People’s Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 650 (1988)) (emphasis added) (Memo App. D). Therefore, the “at-will” relationships between CNC and its employees in this case cannot support a tortious interference with contract claim.

Without at-will agreements, the only contracts that arguably existed between CNC and its employees were covenants not to compete. (CNC Dep Vol I pp. 135-140) As demonstrated at length above in Section I, Scruggs’ covenant not to compete is unenforceable as a matter of law and therefore cannot form the basis of a tortious interference claim. CNC points to only one other form of non-compete covenant - - the half-page 180-day “Employment Agreement” (the “180-Day Form”) attached to CNC’s Complaint and signed by Patra Constante Lowe and James Revels.¹⁴ (Cmplt, Exs 3, 4; Def. Ex. 28, App. 33) For at least four independent reasons this “180-Day Form” non-compete is unenforceable as a matter of law.

First, the 180-Day Form restricts the CNC employee from providing services to *any* “client or former client for whom CNC, Inc. has provided services within the past twelve (12) months,” regardless of whether the employee ever had any contact with the client. (Def. Ex. 28) CNC has thousands of clients. However, “[a] client-based limitation cannot extend beyond contacts made during the period of the employee’s employment.” *See Farr Associates v. Baskin*, 138 N.C. App. at 282, 530 S.E. 2d 878, 883 (2000). Because the 180-Day Form is not limited to the clients with whom the employee actually dealt, it is overbroad and unenforceable.

Second, the 180-Day Form purports to restrict employees from providing services of *any kind* to any clients or former clients of CNC, even if the employees never provided that type of

¹⁴ To the extent CNC is attempting to claim that DCS employees had this 180-Day Form, all of the arguments below against Lowe and Revels’ 180-Day Form non-compete would apply to other employees hired by Universal who signed such a document as well. (CNC Dep Vol I p. 138-141, Def. Ex. 6, App. 24)

service during their employment. Under *VisionAir*, this makes the 180-Day Form unenforceable. *VisionAIR*, 167 N.C. App. at 508-509, 606 S.E.2d at 362-363.

Third, the 180-Day Form violates North Carolina public policy, as shown above with regard to the Scruggs non-compete. (See Section I) Fourth and finally, because the 180-Day Form is not part of an employment agreement, it is a “naked” restraint on trade and unenforceable as a matter of law. See *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 78, 185 S.E.2d 278, 283 (refusing to enforce “naked” non-compete which was not subordinate part of employment agreement and had no purpose other than restraint of trade). Because CNC cannot show that it had an enforceable contract not to compete with its employees, it cannot establish the first element of its tortious interference with contract claim. See *DaimlerChrysler Corp.*, 148 N.C.App. at 584, 561 S.E.2d at 285. As a result, summary judgment on CNC’s tortious interference claim is proper.

B. CNC Cannot Prove that Defendants Engaged in Any Conduct with a Wrongful Purpose, and Therefore Defendants’ Competition was Justified.

Even if CNC could show that it had some existing or prospective valid contract that would support a claim for tortious interference (which is denied), CNC’s claims for tortious interference *still* fail because CNC cannot establish that Defendants committed any acts of interference with malice or that Defendants acted without legal justification.¹⁵ “Generally speaking, interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors.” *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (N.C. 1992).

The North Carolina Supreme Court confirmed this principle in *Hooks*, 322 N.C. 216, 367

¹⁵ Defendants contend that CNC cannot establish the third element of tortious interference—intentional inducement not to perform the contract. However, for the sake of brevity and because the underlying factual basis for the defense is the same, Defendants have consolidated their arguments on element three with element four—lack of justification.

S.E.2d 647 (1988). In *Hooks*, the defendant was a former supervisor of the plaintiff who went to work for a competitor to develop business in the same region he worked for plaintiff. The defendant offered jobs to the plaintiff's employees (who had non-compete agreements with plaintiff) on behalf of his new employer and assigned them to work in the same regions they were assigned with the plaintiff. The Court, granting the defendant's motion to dismiss, held that the defendant's alleged conduct was legally justified and could not support a tortious interference claim. *Hooks*, 322 N.C. at 222, 367 S.E.2d at 650. In doing so, the court provided the following analysis:

In determining whether an actor's conduct is justified, consideration is given to the following: the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor and the contractual interests of the other party. *If the defendant's only motive is a malicious wish to injure the plaintiff, his actions are not justified. If, however, the defendant is acting for a legitimate business purpose, his actions are privileged.* Numerous authorities have recognized that competition in business constitutes justifiable interference in another's business relations and *is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful.*

Hooks, 367 S.E.2d at 220-221, 367 S.E.2d at 650 (internal citations omitted) (emphasis added).

Thus, despite the plaintiff's allegation of interference with employee non-compete agreements, the Supreme Court concluded "that the hiring and placing of the plaintiff's former employees by the defendant for the purpose of developing the territory assigned to him by a company competing with the plaintiff amounted to *justifiable* interference." *Id.* 322 N.C. at 222, 367 S.E. 2d at 651 (emphasis added). In a subsequent case, the North Carolina Supreme Court explained that courts must look for a "wrong purpose" which "exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interests of the defendants which is involved."

United Laboratories v. Kuykendall, 322 N.C. 643, 662, 370 S.E.2d 375, 387 (applying *Hooks* and finding defendants acted without justification) *See also Sunbelt Rentals, Inc. v. Head &*

Engquist Equipment, L.L.C., 2003 WL 21017456 at *54 (applying *Hooks* and *Kuykendall*) (Memo App. F).

Applying these legal standards, CNC cannot prove tortious interference because (1) CNC has admitted that its employees left as a result of normal competition, and (2) CNC has no evidence of any malice or wrongful purpose on the part of Defendants.

1. CNC has Admitted that Employees Left as a Result of Normal Competition.

CNC has admitted away its tortuous interference claims. First, CNC admits that there was nothing wrong with Greer competing with CNC. (CNC Dep Vol II p. 281) CNC also admits that there was nothing wrong with Universal hiring former employees of CNC. (CNC Dep Vol II p. 281) Second, CNC admits *the underlying reality as to why its employees left* for greener pastures at Universal:

Q. So was the feeling that one of the reasons employees were leaving was because of wages?

A. One of the reasons—*The reason* we felt they were leaving is because Universal was paying more in order to entice them to come over to them.

(CNC Dep Vol II p. 409) (emphasis added) CNC admits, however, that there is nothing wrong with a provider offering and paying an employee more money to come to work for them (CNC Dep Vol II p. 242), and candidly admits that there was nothing wrong with *Universal* offering more money to recruit CNC employees:

Q. Was it wrong for Universal, in CNC's opinion, to pay or offer more money to employees in order to get them to be -- to come over to Universal?

A. No.

(CNC Dep Vol II p. 418 lns 7-10; see also Rhoney Dep Vol I p. 55)

As if admitting this was not enough, CNC's Director of Operations admits that there was nothing wrong with a Universal agent getting information to CNC employees about going to work for Universal:

- Q. If an employee, a CNC direct care staff who works with Vickie says, well, I might be interested in going to Universal, too, is it acceptable at that point for Vickie to say, well, I'll have somebody call you or we can look into that?
- A. It has to be driven by the client. Now, if that *employee* wants to go over by himself, sure.

(Voegeli Dep p. 110 ln 25–p. 111 ln 6) (emphasis added) By CNC's own admissions, Defendants' activities were not wrongful.

The undisputed evidence also demonstrates that *CNC's own competitive conduct* during the relevant time period had as great an impact on its loss of employees as any act of the Defendants. CNC admits that in 2002--before Universal entered the market--CNC instituted a wage freeze which significantly affected its ability to attract and retain employees. In a May 3, 2004 memorandum from Judy Hardy to CNC's parent company, ResCare, Hardy wrote:

The wage freeze has had a very serious negative effect on all levels of employees. ... Our industry, in addition to being highly competitive, is also closely knit. Employees "shop" the market and know the wage structures and benefit packages of the providers. ... The cessation of the wage and compensation plan has been the most demoralizing event in the thirteen years I have been associated with CNC/Access. The negative impact on employees has been profound as they perceive that something of value has been taken away with no replacement of anything of comparable value.

(Def. Ex. 25 pp.1-3) CNC also admits that it experienced high employee turnover during the period that Universal was beginning its operations and that this turnover was due, in large part, to its employees' unhappiness with CNC's wages and benefits. (CNC Dep Vol II p. 410 lns 5-11, Def. Exs. 22, 23 and 25, Apps. 29, 30, 32)

2. CNC has No Evidence of Any Malice or Wrongful Purpose on the Part of Defendants.

In light of the admissions and undisputed facts above, none of CNC's purported "evidence" proves that Defendants engaged in any conduct that was not "a reasonable and *bona fide* attempt to protect" their own interests. *See Kuykendall*, 322 N.C. at 662, 370 S.E.2d at 387. CNC has asserted three bases for its claims: (1) CNC speculates that Scruggs and Greer "struck

a deal” by which Universal offered to employ her and pay her a higher salary if she would “bring her employees and clients;” (2) with regard to employees and consumers, CNC asserts “one day they’re there, one day they’re gone;” and (3) CNC relies on “Exhibit 9” (summarized in the Statement of Facts above). (CNC Dep Vol I pp. 128-130; Vol IV pp. 636-637, 708; Def. Ex. 9) None of this “evidence” proves any intentional act of inducement not to perform or enter a contract, nor does it establish lack of justification.

First, CNC’s own testimony demonstrates that CNC’s claim is not based on any conduct of Greer or Universal and that CNC has *no evidence* of an alleged “deal” between Scruggs and Greer:

- Q. Who at Universal are you alleging encouraged employees to transfer to Universal?
- A. I'm alleging that Richard Greer encouraged Vickie Scruggs, who then encouraged clients and employees.
- Q. Okay. Is the same evidence that we went over about Vickie going to the parties hosted by Richard Greer the same evidence that leads you to believe that Richard Greer influenced Vickie to encourage the employees to transfer to Universal?
- A. Yes.
- Q. Is CNC alleging that Universal encouraged consumers directly to transfer to Universal?
- A. Universal as an entity?
- Q. Correct.
- A. No.
- Q. And is CNC alleging that Richard Greer directly encouraged consumers to transfer --
- A. No.
- Q. --to Universal?
- How is CNC alleging that Universal and Greer were involved in the consumers transferring to Universal?
- A. Again, the same way, through Vickie Scruggs.
- Q. So am I correct that CNC's contention is that Richard Greer, via the deal that you speculate was struck between Ms. Scruggs and Richard Greer at one of these parties she went to, that they would employ her if she brought her clients and employees with her, is how Universal and Richard Greer indirectly encouraged consumers to transfer to Universal?
- A. Yes, through Vickie Scruggs.

(CNC Dep Vol I p. 128-130)

- Q. Well, correct me if I'm wrong, what I understand your testimony to be is that you believe that Universal struck a deal with Vickie that Universal would employ Vickie if she

brought her clients and employees with her because Universal didn't have any CAP-MR program in existence at the time?

A. Yes.

Q. And so you speculate that Universal's motivation in hiring Vickie must have been because they wanted to get her clients and employees?

A. Yes. It is my opinion and belief that Vickie had no value to Universal without the client base.

Q. But CNC does not have any evidence other --

A. No, I have no evidence other than what appears to be obvious.

Q. Okay. But there's no documents?

A. No.

Q. No one told you that?

A. No.

(CNC Dep Vol I pp. 123-124)

Second, CNC relies on its notion that with regard to employees and consumers, "one day they're there, one day they're gone." (CNC Dep Vol IV p. 637) For example, this appears to be the only basis for CNC's claim concerning employees in Asheville:

Q. What evidence does CNC have that the employees on Defendant's Exhibit 5, Nos. 16 through 23, were enticed by Patra Lowe and James Revels to come to Universal?

A. The same scenario. We had a certain amount of clients on a certain given day and, within a very few days later, all of those clients and all of those employees were being served and working for Universal.

Q. Any other evidence?

A. No.

(CNC Dep Vol I p. 114 lns 13-21). CNC's "evidence" is pure speculation. CNC admits that the client transitions in Morganton took upwards of a *month* (CNC Dep. Vol IV pp. 639-640), and in Asheville transitions took "a very few days." (CNC Dep Vol I p. 114) This proves nothing because CNC's own Director of Quality Assurance testified that a new hire "off the street" could be trained in just *three days*. (Rhoney Dep Vol III pp. 303-305) Further, *even if the transitions had occurred in a short time period*, such evidence certainly is not sufficient to show any *malice* or *lack of a bona fide purpose* on the part of Defendants. To pull anything malicious out CNC's "here today, gone tomorrow" argument requires speculation or conjecture on the part of the fact

finder, which is impermissible. *Young and Through Young v. Fun Services-Carolina*, 122 N.C.App. 157, 162, 468 S.E.2d 260, 263 (1996).

Third and finally, CNC attempts to support its allegation of tortious interference with hearsay statements in Defendants' Exhibit 9, discussed in detail in the Statement of Facts. (CNC Dep Vol I pp. 101-102, 114-115; Def. Ex. 9) There is nothing in Exhibit 9 that suggests Defendants engaged in conduct motivated by anything other than a legitimate business purpose.¹⁶ In fact, the allegations contained in Exhibit 9 were thoroughly investigated by both the Foothills and Western Highlands LMEs, and neither entity found any inappropriate conduct on the part of Defendants. (CNC Vol III pp. 534-535; Thomas Aff. ¶ 5; Eldridge Aff. ¶ 7) There is certainly no evidence in Exhibit 9 that Defendants had some malicious desire to take down CNC.

Like the defendant in *Hooks*, Defendants were simply engaged in normal competition. "The free enterprise system demands that competing employers be allowed to vie for the services of the 'best and brightest' employees without fear of subsequent litigation for tortious interference." *Hooks*, 322 N.C. at 222, 367 S.E.2d at 651. Defendants' interference, if it can be characterized as interference at all, is based squarely in valid competitive motivation and as such is justified. For all of the reasons above, Defendants are entitled to summary judgment on CNC's claims for tortious interference with contract and with prospective economic advantage.

V. CNC'S CLAIM FOR BREACH OF COVENANT NOT TO DISCLOSE AGAINST RICHARD GREER FAILS BECAUSE CNC HAS NO EVIDENCE OF BREACH OR DAMAGE CAUSED BY GREER.

In Count VI, CNC alleges that Defendant Richard Greer breached his 1997

¹⁶ The individuals responsible for making out the statements and writing the emails found in Exhibit 9 have themselves admitted that Defendants either did nothing improper with regard to solicitation of clients or employees, or, that they did not know (or could only speculate) of any improper action taken by Defendants. (Hensley Dep p. 129, App. 13; Stigall Dep pp. 145-146; Rhoney Dep Vol pp. 55-57, 70-72; Devore Dep pp. 76, 78-79, 92.)

Confidentiality Agreement by “utilizing CNC’s confidential Trade Secrets Information for the benefit of Universal” and “otherwise misappropriating CNC’s confidential client information.” (Cmplt ¶ 68) To state a claim for breach of a confidentiality agreement, as in any other contract case, the plaintiff must prove the existence of a valid contract between the parties, that defendant breached the contract, and that damages resulted from such breach. *See Claggett*, 126 N.C. App. at 608, 486 S.E.2d at 446 (affirming dismissal of breach of employment agreement claim). In response to an interrogatory to identify the trade secrets allegedly misappropriated by Richard Greer, CNC identified the three groups of alleged trade secrets already analyzed and refuted at length in Section III above. (CNC’s Supplement Response to Universal Interrogatory 7) Thus, in response to this claim against Greer personally, Greer incorporates all of the summary judgment arguments in Section III above.

However, even if the Court were to allow CNC’s trade secrets claim to survive as to Universal or Scruggs, all claims for misappropriation of trade secrets or confidential information *against Greer* should fail because of CNC’s admissions, its complete lack of evidence of a breach by Greer, and the following undisputed facts. First, CNC has admitted that CNC is *not* contending Richard Greer personally misappropriated *any* trade secrets of CNC. (CNC Dep Vol III p. 523) Second, CNC does not contend *Richard Greer* took any documents from CNC. (CNC Dep Vol III pp. 521-530) Third, CNC admitted that the only confidential information misappropriated by *any* of the Defendants—including Greer--are the alleged trade secrets items analyzed at length in Section III above. (CNC Dep Vol III pp. 473-479)

These admissions demonstrate that CNC’s entire breach of confidentiality agreement claim against Greer is based purely on CNC’s assumption that Greer personally gave someone a *directive* to misappropriate a CNC trade secret. However, CNC has unequivocally admitted that

it has “no evidence” of any directive by Greer to copy any documents other than an opinion that Ms. Scruggs “would not have thought of it herself.” (CNC Dep Vol II, pp. 259-260) Further, the undisputed evidence demonstrates that Greer has had only minimal day-to-day involvement in running Universal. (Richard Greer Dep pp. 49-50) Greer left CNC in 1999. (Richard Greer Dep p. 31) During the five years following the sale of CNC, Greer built a restaurant and golf course. (Richard Greer Dep pp. 31-34) Although Greer has been the CEO of Universal since its incorporation, he has spent little time in the office and currently runs a horse ranch seven days a week. (Richard Greer Dep pp. 49-51) Given Greer’s minimal day-to-day involvement in Universal and CNC’s utter lack of any evidence that Greer *personally* committed any act in breach of his confidentiality agreement, Greer is entitled to summary judgment on this claim.

VI. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON CNC’S CLAIM FOR UNFAIR TRADE PRACTICES BECAUSE CNC CANNOT PROVE DEFENDANTS COMMITTED AN “UNFAIR OR DECEPTIVE ACT” WHICH WAS THE PROXIMATE CAUSE OF INJURY TO CNC.

To survive summary judgment on its unfair trade practice claim, CNC must show that: (1) Defendants committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to CNC. *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711. Whether an act is unfair or deceptive is a question of law for the Court to determine. *Id.* A practice is “unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive.” *Sunbelt Rentals*, 620 S.E.2d at 230.

CNC summarizes its unfair trade practices claim as, simply, Defendants “stole” consumers and employees and copied documents that were CNC property. (CNC Dep Vol II pp. 258-261) In other words, CNC’s unfair trade practice claim rests on its trade secrets and tortious interference claims. Because those claims fail as a matter of law (*see* Sections III and IV above), summary judgment is warranted on CNC’s unfair trade practice claim as well. *See, e.g., Combs*

& Associates, 147 N.C. App. at 374, 555 S.E.2d at 642 (dismissing unfair trade claim based on same facts as tortious interference and trade secret claims). Even if CNC could survive summary judgment on those claims, however, CNC's unfair and deceptive trade practices claim fails because CNC cannot establish the first and third elements of an unfair trade practices claim.

A. The Conduct Alleged by CNC is Not “Unfair or Deceptive” under Chapter 75-1.1.

1. The Alleged “Theft” of Employees and Consumers is Not an Unfair Trade Practice.

Simply hiring a competitor's employees, paying them more, and having them serve the same clients they served for the competitor does not constitute an unfair or deceptive trade practices under North Carolina law. Both this Court and the Court of Appeals have been careful to protect conduct involving normal competition from an unfair trade practice claim:

The appellate court decisions dealing with unfair competition and conversion of business and employees demonstrate an awareness that competition is healthy and not to be unduly discouraged. Those decisions also evidence a desire to permit employees the greatest freedom of movement in order to maximize their job opportunities.... Nothing in this opinion should be read to depart from the trends evident in those decisions.

Sunbelt Rentals, 620 S.E.2d at 230 (quoting this Court at 2003 WL 21017456 at *53) .

CNC tries to mold the undisputed facts in this case into something unfair by throwing around such inflammatory terms as “stole” and “raid.” (CNC Dep Vol II pp. 260, 411) However, CNC's definition of “raid” — a “reason to believe or suspect that Universal's staff had been in contact with our staff, actively trying to get them to come to work for them and bring the clients with them”—does not rise to the level of an unfair trade practice. (CNC Dep Vol II p. 411) First, as discussed above, CNC has admitted that there was nothing wrong with Defendants contacting and offering employment to CNC's employees. (CNC Dep Vol II p. 418; Voegeli Dep pp. 110-111) Second, CNC has no evidence whatsoever and merely speculates that Defendants conditioned employment with Universal on an employee bringing the client with them. (CNC

Dep Vol I pp. 122-124) Thus, CNC has no evidence that Defendants engaged in “raiding” *even* under CNC’s own loose definition of the word, much less evidence that Defendants engaged in an unfair trade practice as defined under the law.

Actually, CNC has no evidentiary basis for accusing Defendants of “stealing” employees or consumers at all. As the admissions in Section IVB above demonstrate, Universal did not engage in any conduct outside of normal competition. CNC candidly admits that its employees went to Universal simply because “Universal was paying more in order to entice them to come over to them.” (CNC Dep Vol II p. 409) CNC also admits that it is not uncommon for consumers to follow their DCS workers to another provider. (CNC Dep Vol III pp. 435-437, Def. Ex. 25) In a capitalist society, Universal’s conduct in offering direct care staff a higher rate of pay (and the simple fact that a consumer chose to follow his or her direct care worker to Universal) cannot possibly constitute an unfair or deceptive trade practice. In fact, this is *exactly the kind of conduct* that our courts—in cases like *Sunbelt*--intend to protect. *See Sunbelt Rentals*, 620 S.E.2d at 230.

Finally, CNC also cannot suggest that the volume and speed of the employee and client transitions in this case somehow demonstrate “unfair” conduct. To the contrary, it appears to be part and parcel of the business. Turnover in the MH/DD/SA industry is “huge.” (Voegeli Dep 92-93) According to CNC, “[e]mployees are going to flip around because that’s just the nature of this business.” (CNC Dep Vol II p. 411) At least three separate times in the last five years, other supervisory employees have left CNC, sometimes taking CNC’s policies and forms, only to be followed soon after by groups of DCS employees and consumers. In each case, CNC took little or no action. (CNC Dep Vol II pp. 245-247, 301-303, 306-309, 384-386, Def. Ex. 19, App. 28) These three scenarios and CNC’s failure to pursue demonstrate that such conduct is not

abnormal in this market.

2. The Alleged “Copying” of CNC Documents is Not an Unfair Trade Practice.

CNC’s second alleged basis for its unfair trade practices claim is that Defendants “copied” CNC documents. The documents that CNC alleges were copied are (1) the Employee Privileging Documents on approximately twenty-three employees allegedly copied by Scruggs in Morganton and Lowe and/or Revels in Asheville; and (2) the fifty-seven forms and policies contained in Exhibit 29. (CNC Dep Vol III pp. 478-479) Although Ms. Hardy used the word “stolen” in reference to these documents, CNC has made no contention--nor is there any evidence--that any CNC documents were removed from CNC or that CNC was *deprived* of any documents.

The simple act of copying another company’s documents is not an unfair trade practice. This is especially true here. CNC’s Director of Human Resources provided a group of “standard” CNC personnel policies to Robert Greer for use with Universal Finance. (Steve Greer Dep pp. 20-21, 56, 62) Almost *half* of Exhibit 29 consists of standard human resources policies. Moreover, according to CNC’s Director of Operations, nothing in Exhibit 29 contains confidential information (Voegeli Dep p. 32), and according to CNC’s Director of Quality Assurance, all of the information in the Employee Privileging Documents is known outside of CNC (Rhoney Dep Vol III pp. 328-329). The simple act of “copying” documents or information that are publicly available--without more--is not actionable under Chapter 75-1. *Cf. Iconbazaar L.L.C. v. America Online, Inc.*, 308 F. Supp. 2d 630, 637 (M.D.N.C. 2004) (holding that Chapter 75-1.1 claim was preempted by federal copyright law); *Sears, Roebuck & Co. v. Stiffel Company*, 376 U.S. 225 (1964) (holding that a state may not prohibit the copying of an uncopyrighted article available to the public or award damages for such copying). Thus, CNC cannot establish

an unfair trade practice simply by asserting that Universal has similar or even identical policies and forms to CNC or by speculating that Universal “must have” copied Employee Privileging Documents because employees were “here today/gone tomorrow.” (*See* Section IIIB2 above)

Finally, CNC’s *highest executive* agreed that simply copying policies and forms is not unethical. Specifically, during the 30b6 deposition of CNC, Ms. Hardy testified that *she* did nothing “wrong” in 1991 when she brought to CNC copies of policies and forms that she prepared for her former employer, Foothills. (CNC Dep Vol II pp. 317-320) Ms. Hardy’s attempted distinction that she personally drafted the Foothills policies and forms and therefore they were “her work” is irrelevant. (CNC Dep Vol II pp. 319-320) If it was not unfair and deceptive for Hardy to copy her prior employer’s policies and procedures when she went to CNC, the alleged act of copying CNC policies and forms in Exhibit 29 cannot rise to the level of an “unfair and deceptive” practice either.

B. CNC Cannot Show that the Alleged Conduct Proximately Caused Injury to CNC.

Even if Defendant had engaged in unfair or deceptive conduct, which is denied, CNC cannot establish the third element of its unfair trade practices claim--that the alleged “unfair” conduct of Defendants was the proximate cause of injury to CNC. CNC admits that its damages resulted solely from the loss of *consumers*. (CNC Dep Vol II p. 407 lns 7-12) CNC admits, however, that it has no evidence that it lost any consumer to Universal as a result of solicitation by Defendants. (CNC Dep Vol I pp. 123-124, 128-130, Vol II pp. 407-408, Vol V p. 763–767 ln 7)

Likewise, CNC admits that its policies, procedures, forms and training do not help attract consumers. (CNC Dep Vol III pp. 491-495) In fact, the only injury that CNC speculates would result from a competitor copying CNC forms and policies would be that it “made it quicker” for

the competitor to begin competing. (CNC Dep Vol III pp. 512-513) Universal first started putting its manual together in April 2003 and did not have its first developmental disability consumer until October 1, 2003, a time span well within the five to seven months that CNC contends it would take to create *all* of its policies and forms. (CNC Dep Vol III pp. 487-488, 505; Richard Greer Dep pp. 39-40; Universal Dep pp. 51-52, 113; Plf. Ex. 3 pp. 15, 43) Thus the “injury” identified by CNC from copying policies did not even occur.

CNC’s unfair trade practices claim, like CNC’s other claims, is built upon speculation, conjecture and belief. Such a house of cards cannot survive summary judgment.

CONCLUSION

For the reasons stated above, summary judgment in favor of Defendants is warranted on all of Plaintiff’s claims.

This the 21st day of April, 2006.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **MEMORANDUM IN SUPPORT OF 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:

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This the 21st day of April, 2006.

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