IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. 3:12-cv-00510

CLARK MATERIAL HANDLING COMPANY,

Plaintiff,

vs.

TOYOTA MATERIAL HANDLING, U.S.A., INC.,

Defendant.

TOYOTA MATERIAL HANDLING, U.S.A., INC.'S RESPONSE TO CLARK'S MOTION FOR TREBLE DAMAGES, ATTORNEYS' FEES, AND INTEREST

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I. EXECUTIVE SUMMARY

Portions of Clark's post-trial, pre-judgment motion are premature as judgment has not yet been entered and serious post-trial Rule 50 and Rule 59 motions are pending. On the merits, Clark's motion should be denied as Clark has not met its burden for the requested relief.

A. Treble Damages Are Not Warranted

First, treble damages are not available because it cannot be "unfair competition" for a distributor with an enforceable dealer agreement that has sales expectations and allows modification of the dealer's non-exclusive territory, to truthfully tell the dealer: (a) that it does not want the dealer to add another line; (b) that it does not believe the new line will help the dealer achieve its goals; (c), or that the dealer should focus on its under-performing territory. Indeed, it is undisputed that many competitors have dealer agreements that flat out prohibit additional brands; Toyota does not. Moreover, the jury gave mixed verdicts, finding "yes" on Question 4(a) and "no" on Question 4(b) regarding unlawful coercion. And, notwithstanding the jury's "yes" answer to Question 4(a), no witness testified that Toyota threatened to terminate Southeast's non-exclusive Virginia territory; in fact all witnesses testified to the contrary.

Treble damages are not available because the higher standards from case law are not met. *Allied Distributors, Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379-80 (E.D. N.C. 1993) ("The North Carolina courts have warned that application of this statute is not to be 'unfettered.' Some type of egregious or aggravating circumstances must be alleged and proved before the statute's provisions may be applied") (citing *Bhatti v. Buckland,* 328 N.C. 240, 400 S.E.2d 440 (1991)).

B. Attorneys' Fees Are Not Warranted

Second, the attorneys' fees petition is premature as no judgment has been entered. *Ondersma v. Metro. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 91299, 28-29 (N.D. Cal. Dec. 12, 2007) ("To the extent plaintiff seeks fees and costs, the request is premature because judgment has not been entered").

Moreover, on the merits Clark does not meet its burden of proof to recover fees. *Llera v. Security Credit Systems, Inc.,* 93 F.Supp.2d 674, 680 (W.D. N.C.2000) (plaintiff has the burden of proof on this fee issue). The predicate element of a legal finding of willful unfair competition should not be made, as set out in Section III.B below. Per the sole authority cited by Clark on willfulness, to get fees Toyota had to have intended harm; no evidence or even argument supports such a finding.

Moreover, for fees to be assessed, the statute requires Clark to prove "there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-1.1(1). This statutory element cannot be met because – even though Clark's CEO, General Counsel, and Vice President of Business Development all knew Toyota executives – Clark did not attempt to "resolve the matter which constitutes the basis of such suit" before rushing to file suit.

Furthermore, in litigation, Toyota had a *warranted* basis to not settle on Clark's demand of $15million, and which Clark never reduced prior to and throughout trial. Toyota offered $800,000, then increased its offer to $1.5million, and then left that open through the close of evidence. Clark, however, never budged, even after its multi-million dollar brand damages claim was withdrawn. Moreover, notably omitted from Clark's motion, after not receiving the $8million verdict it asked for, Clark finally reduced its demand to $8.5 million after trial, and Toyota has increased its offer to $2million with – once again – no response or reduction from Clark.

Finally, this is a case in which all the sworn testimony prior to trial confirmed that Toyota did not threaten to terminate the Virginia territory. And, as to damages it is undisputed that Clark's damages were wildly overstated given the 30-day terminable at will contract with a no-damages clause, with Clark's damages expert basing his multi-million dollar projections on Cory Thorne's admittedly misleading Exhibit 19 marketing projections that were not based on actual data.

C. Interest Is Premature and Not Warranted

Third, the motion for post-judgment interest is plainly premature given no judgment yet entered. *See* Section 1961(a) ("Interest shall be allowed on any money judgment . . ."). *Hasham v. California State Bd. Of Equalization*, 1998 U.S. Dist. LEXIS 12078 ** 23-24(N.D. Ill. July 30, 1998) ("given the fact that postjudgment interest cannot be calculated until the date of payment of the award, plaintiff's request for an award of postjudgment interest is premature").

As for pre-judgment interest, Clark argues that the Court should award pre-judgment interest in this case to compensate "the injured party for the loss of use of money he would otherwise have had." [Brief at 10, ECF 231] But the multi-million dollar award necessarily includes loss projected future lost profits, as requested by Clark, and interest rates in the relevant time period of 2012-present have been near zero.

II. DISCUSSION – TREBLE DAMAGES

Clark's claims for treble damages fail for multiple reasons, as outlined below.

A. Clark Sought Treble Damages Under North Carolina Law *Only* In Its Second Cause of Action

In its Amended Complaint, Clark only asserted one cause of action – its "Second Cause of Action" citing N.C. Gen. Stat. § 75-1.1 - claiming treble damages under North Carolina law. [ECF 24, p. 10, ¶ 44] ("Clark is entitled to recover such damages from Toyota in amounts to be determined, such damages to be trebled pursuant to N.C. Gen. Stat. § 75-16"). In its prayer for relief, Clark only repeated this as to its Second Cause of Action, requesting judgment as follows: "2. Awarding the plaintiff damages in excess of $75,000, such amount to be trebled, plus its attorneys' fees, on its Second Cause of Action, pursuant to N. C. Gen. Stat. §75-16." [ECF 24, p. 14] No other reference was made anywhere in Clark's Amended Complaint to treble damages under North Carolina law, and Clark withdrew its claims under South Carolina law in its trial brief.

Clark now tries to assert – after verdict – that it should be allowed to effectively amend its pleadings to add a treble damages claim to its other causes of action. The Fourth Circuit – in an opinion not cited by Clark - disagrees. Specifically, in *Atl. Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716-17 (4th Cir. 1983), the Fourth Circuit confirmed what common sense dictates: a party cannot after the fact amend its pleadings to add treble damages to a claim for which it did not plead them. The Fourth Circuit explained:

> Rule 54(c) provides that, except in cases of judgment by default, 'every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' As we stated in *Robinson v. Lorillard Corporation,* 444 F.2d 791, 803 (4th Cir.1971), *cert. dismissed,* 404 U.S. 1006 (1971), '[t]his provision has been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved.' *See also New Amsterdam Casualty Co. v. Waller,* 323 F.2d 20, 25 (4th Cir.1963) ("a party's misconception of the legal theory of his case does not work a forfeiture of his legal rights"), *cert. denied,* 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964). Rule 54(c) is not, however, without its limits. A party will not be given relief not specified in its complaint where the 'failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief.' *United States v. Marin,* 651 F.2d 24, 31 (1st Cir.1981). *Accord, Robinson,* 444 F.2d at 803. In particular, a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c). *See Goodman v. Poland,* 395 F. Supp. 660, 685 (D.Md.1975). We believe that this exception to the Rule is applicable in the present case

705 F.2d at 716-17 (4th Cir. 1983) (treble damages denied; district court's refusal to treble the award upheld).

Thus, Clark's current plea for treble damages should be limited to what Clark actually pleaded – the Second Cause of Action asserting unfair competition under Section 75-1.1.

B. Toyota Did Not Commit An "Unfair" Act Under N.C. Gen. Stat. 75-1.1

Clark seeks treble damages by trying to invoke two North Carolina statutes. First, Clark relies on N.C. Gen. Stat. § 75-1.1(a), which provides, "(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Clark does not claim deception, but instead only "unfair" competition.

Then, Clark relies upon N.C. Gen. Stat. § 75-16, which provides, "If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." Clark expressly abandoned any claims for treble damages under any other state's laws in its trial brief.

This potential remedy in the Uniform Deceptive Trade Practices Act was "part of a nationwide wave of *consumer* protection measures that states enacted in the 1960s and early 1970s." (emphasis added). "Defining Unfairness In "Unfair Trade Practices," 90 N.C.L.Rev 2033 (2012). Indeed, Section 75-1.1 is based on a model statute, the Unfair Trade Practices and Consumer Protection Law. *Id.*

Clark acknowledges that it is a legal determination for the Court whether the defendant's conduct constitutes "unfair competition" warranting the additional punitive measure of treble damages. But Clark overstates the impact of the jury's factual findings on this legal determination by the Court. Indeed, as was noted in *Allied Distributors, Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379-80 (E.D. N.C. 1993), "The North Carolina courts have warned that application of this statute is not to be 'unfettered.' Some type of egregious or aggravating circumstances must be alleged and

proved before the statute's provisions may be applied." (citing *Bhatti v. Buckland,* 328 N.C. 240, 400 S.E.2d 440 (1991)).

Where the parties are not in a fiduciary relationship and there is no evidence of attendant circumstances to indicate that the defendant's alleged conduct was "especially egregious or aggravating," Chapter 75 simply does not apply. *See Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, disc. rev. denied, 332 N.C. 482, 421 S.E.2d 350 (1992), *Dalton v. Camp*, 353 N.C. 647, 658, 548 S.E.2d 704 (2001)(the trial court properly granted summary judgment in favor of defendant dismissing claim under N.C.G.S. § 75-1.1.)

By case law, "[A] practice is unfair when it offends established public policy" and "when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367, 533 S.E.2d 827, 832 (2000) (quoting *Warfield v. Hicks*, 91 N.C. App. 1, 8, 370 S.E.2d 689, 693, disc. review denied, 323 N.C. 629, 374 S.E.2d 602 (1988)) (citations omitted). "The fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others." *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 684 (1988).

It is thus not surprising that trebles are often denied. For instance, in *American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc.*, 575 F. Supp. 816, 821 (1983), although the jury found the defendant tortiously interfered with plaintiff's contract, the Court denied treble damages and attorney's fees because the facts of the case did "not constitute such unfair competition, and the unfair acts and practices made unlawful by the Act" and because the plaintiff could "be compensated under traditional contract principles and the jury awarded ample damages to cover any loss sustained."

Similarly, in *Canady v. Crestar Mortg. Corp.,* 109 F.3d 969, 976 (4th Cir. N.C. 1997), the defendant's conduct did not rise to the level of immoral, unethical, oppressive, unscrupulous, or substantially injurious trade practices; therefore, the district court correctly found that plaintiffs were not entitled to treble damages or attorney's fees.

Likewise, in *Allied Distributors, Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379-80 (E.D. N.C. 1993), trebles were denied, with the court explaining:

> In the instant case, plaintiffs would have the court approve treble damages against a beer supplier who, in accordance with a very detailed and specific state statute, objected to the proposed transfer of a beer distributorship. Even a party who *intentionally breaches* a contract is not, without more, liable for such conduct under the North Carolina Unfair Trade Practices Act. *See Pappas v. NCNB National Bank of North Carolina,* 653 F. Supp. 699, 707 (M.D.N.C.1987); *Pee Dee Oil Co. v. Quality Oil Co., Inc.,* 80 N.C.App. 219, 341 S.E.2d 113, 116, *disc. rev. denied,* 317 N.C. 706, 347 S.E.2d 438 (1986).
>
> A sister federal district court recently addressing an analogous situation observed that the United States Supreme Court has recognized the right of a seller freely to exercise its independent discretion as to parties with whom it will deal.' *General United Co. v. American Honda Motor Co., Inc.,* 618 F. Supp. 1452, 1455 (W.D.N.C.1985) (citing *380 *Monsanto Co. v. Spray–Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). The court went on to conclude that 'the Defendant's exercise of reasonable discretion in its business relationships does not constitute an unfair trade practice under N.C.Gen.Stat. § 75–1.1.' *Id.* at 1456. 'The North Carolina legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under [this section], since it provided that any damages suffered by the victim are to be trebled.' *Id.* at 1455.

847 F. Supp. at 379-80.

Furthermore, in *Gen. United Co. v. Am. Honda Motor Co.*, 618 F. Supp. 1452, 1455 (W.D. N.C. 1985), this Court denied treble damages, writing: "The Court also does not believe that the Defendant's actions were unethical, oppressive, unscrupulous, or substantially injurious to consumers. The Defendant simply was exercising its business judgment as a creditor and a seller as

to how and when it should invoke its contractual rights with each of its dealers, depending on the particular circumstances and dealer."

In this case, the following facts are undisputed with respect to Toyota's conduct and the Virginia territory:

- Southeast had contractual obligations to Clark to meet sales goals; [Ex. 11]
- Southeast's territory was non-exclusive; [Ex. 11]
- Clark had the contractual right to modify territory; [Ex. 11]
- Southeast was under-performing in Virginia, and was well aware of its under-performance without any discussions with Toyota; [Tr. 524; 1165][1]
- Southeast asked Toyota repeatedly what Toyota thought about Southeast potentially adding Clark to its line; each time Toyota truthfully answered that it did not want Southeast to do so;
- Toyota told Southeast that it should focus on its under-performing territory;
- No witness testified that Toyota threatened to take away Virginia if Southeast added Clark, and indeed Cory Thorne testified otherwise; [Tr. 390; 406] ("I did not understand it to be a threat);[2] and

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[1] Q. Before Mr. Rufener raised those issues with you, had there been any discussions internally at Southeast that you were underperforming in Virginia and Raleigh.

A. Yes, ma'am.

Q. It wasn't news to you was it?

A. No, ma'am, it was not.

Q. Were you taking efforts prior to Toyota ever saying anything about it, to improve the situation in those locations?

A. Yes, ma'am, we were.

[Tr 524]

[2] Q. And when Mr. Rufener wouldn't give you any assurances about Virginia and whether you would retain Virginia, you understood that he was trying to threaten, intimidate or coerce you, didn't you, sir?

A. I did not.

[Tr. 406]

Q. Do you recall Clark alleging that Toyota coerced Southeast by threatening to terminate Southeast's Virginia territory?

A. I recall reading that, yes, ma'am.

- Everyone at Southeast, including the CEO and sole voting stock owner, all members of the Executive Team, and Cory Thorne ultimately viewed adding Clark as a bad business idea for Southeast. [Trial testimony of Southeast personnel].

Nothing about the above record allows for a legal determination that Toyota acted in an immoral, unethical, oppressive, or unscrupulous manner.

Furthermore, it must be remembered that the jury did not find against Toyota on Question 4(b), which shows that even the jury did not consistently find that Toyota engaged in coercion.

In short, a distributor has a right – one could argue a duty – to honestly answer the dealer when it asks its views on adding another brand. And there is nothing immoral, unethical, oppressive, or unscrupulous in the distributor directing its dealer to focus on its under-performing territory for the top brand rather than add a third-tier brand in a fixed-demand market.

C. As Applied To Toyota In This Case, Application Of The Quasi-Punitive Treble Damages Remedy Based On A Legal Determination Of An "Unfair" Act Would Violate The Constitutional Void-For-Vagueness Doctrine

Beyond the merits above, imposing a punitive treble damage award against a distributor for honestly telling its dealer its views and directing the dealer to focus on its under-performing territories would violate federal and state constitutional due process protections under the void-for-vagueness doctrine. Indeed, the U.S. and North Carolina Constitutions protect – as a matter of due process - against enforcement of void statutes or regulations.

North Carolina's "unfair" competition statute – with no more guidance as to treble damages liability than the term "unfair" – has been previously questioned as constitutionally suspect. For

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Q. And what was your position about the allegation that Toyota had coerced you into dropping Clark by threatening to take away your Virginia territory?

A. That it was not an accurate statement.

[Tr. 460]

instance, in *Hammers v. Lowe's Companies, Inc.*, 48 N.C. App. 150, 154 (1980), the North Carolina Court of Appeals wrote:

> It should be noted that no private right of action for treble damages similar to that provided by G.S. 75-16 is available for enforcement of the equally broad language of s 5 of the Federal Trade Commission Act, 15 U.S.C. s 45, *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), enforcement of the Federal Act being by procedures which, in general, put the person accused of violating that Act on notice before penalties or sanctions are applied. *See Marshall v. Miller*, 47 N.C.App. 530, 268 S.E.2d 97 (1980). Unlike the Federal Act, G.S. 75-16 confers upon the plaintiff in a private action the right to recover treble damages, which are punitive in nature, on proof he has been damaged by a violation of the vague language of G.S. 75-1.1 by a defendant who has not knowingly and willfully violated G.S. 75-1.1 and who has had no notice that his conduct may have violated that statute other than such notice as is contained in the vague language of the statute itself. In *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), the only case in which our Supreme Court has approved an award of treble damages under G.S. 75-16 for a violation of G.S. 75-1.1, no question of constitutionality of the penalty provision was raised; in addition, stipulations of the parties and uncontradicted evidence in that case established that the defendants had engaged in conduct which at least three members of the Court considered to be 'outrageous' and to constitute aggravated fraud, clearly a willful violation of G.S. 75-1.1.

Lowe's, 48 N.C. App. At 154 (granting motion to dismiss for failure to state a claim and raising constitutional question regarding trebles under UDPTA)

Indeed, the vagueness is problematic, as one commentator recently observed:

> The liability standards under section 75-1.1 are especially problematic for claims of 'unfair' conduct. For unfairness claims, the case law instructs courts to apply a list of adjectives, such as 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' When courts must decide whether particular conduct is unfair, these adjectives offer no real help. The courts find it difficult to interweave the adjectives with the facts in a meaningful way. Instead, the courts can only announce a violation or its absence. Because of this pattern, the unfairness case law, like the unfairness standard itself, offers no forecast for the outcome of a given case.

"Defining Unfairness In "Unfair Trade Practices," 90 N.C.L.Rev 2033 (2012).

In this particular factual setting, Toyota could not know – based on the vague, standardless statute - that it would be "unfair" and subject to multi-million, punitive-type treble damages, to honestly answer questions from a dealer and to direct a dealer – which owed Toyota the contractual obligation to meet sales goals in Virginia - to focus on meeting those contractually required sales goals.

Thus, in *State v. Martin,* 7 N.C.App. 532, 173 S.E.2d 47 (1970), a North Carolina regulation making it unlawful to "snag" a fish was held unconstitutionally void for vagueness because usage common among fisherman could not necessarily be understood by judges with the duty to apply it. And, within the Fourth Circuit, in *Williams v. W. Virginia Univ. Bd. of Governors*, 782 F. Supp. 2d 219, 226 (N.D. W. Va. 2011), a vague policy was stricken, with the court writing:

> The policy of issuing Trespassing Forms, on its face, is vague and violates plaintiff's procedural due process rights. 'The void-for-vagueness doctrine finds its origin in the constitutional principle of procedural due process. The primary issue raised by the doctrine is whether the particular statute is sufficiently definite to give fair notice to one who would avoid its sanctions, and ascertainable standards to the fact finder who just adjudicate guilt under it. Although vagueness or indefiniteness has been variously defined, perhaps the classic expression of this concept is to be found in *Connally v. General Construction Company,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926), wherein the Supreme Court stated that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' The vagueness doctrine, then, is rooted in a 'rough idea of fairness.' Impermissibly vague laws offend this standard of fairness because they may trap an unwary individual and encourage arbitrary and capricious enforcement.' *Smith v. Sheeter,* 402 F. Supp. 624, 630 (S.D. Ohio 1975). Here, the statute provides for removal of plaintiff—not based on arbitrary or fluctuating standards of behavior—but based on no standards at all.

782 F. Supp. 2d at 226. Furthermore, a punitive damages provision was stricken based on void for vagueness in *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1571 (M.D. Ga. 1990) (punitive damages provision stricken as void for vagueness; "it is the Court's opinion that the Court would be

unable to construe the statute when the Court must guess at its meaning without any reasonable assurance of ever reaching a consistent, workable and rational interpretation").

In this case, how is this Court to determine "unfair" in this setting and assess treble damages which are – according to the North Carolina Court of Appeals, punitive in nature? No standards exist in the statute. The statute – at least as applied to Toyota in this factual setting – is impermissibly vague, and it would violate due process to punish Toyota with treble damages accordingly.

III. DISCUSSION – ATTORNEYS' FEES

Clark's post-verdict, pre-judgment motion for attorneys' fees is premature given the lack of any judgment and the pendency of serious Rule 50 and Rule 59 motions. On the merits, Clark does not meet its burden of proof for fees.

A. The Fee Petition Is Premature; Post-Trial Motions Are Pending; No Judgment Has Been Entered

No judgment has yet been entered, and post-verdict Rule 50 and 59 motions are pending. Accordingly, the attorneys' fees motion is premature. *Ondersma v. Metro. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 91299, 28-29 (N.D. Cal. Dec. 12, 2007) ("To the extent plaintiff seeks fees and costs, the request is premature because judgment has not been entered"); *Poor v. Hill*, 138 N.C. App. 19, 36 (2000) (vacating award of attorney's fees as premature because damages were to be determined on remand).

B. Fees Should Not Be Awarded Because There Was No Willful Violation

In the event that the Court were to reach the merits of the fee petition, Clark, as plaintiff, has the burden of proof to recover attorneys' fees. *Llera v. Security Credit Systems, Inc.,* 93 F.Supp.2d 674, 680 (W.D. N.C. 2000); *Volumetrics Medical Imaging, Inc. v. ATL Ultrasound, Inc.*, 2003 WL

21650004, *4 (M.D. N.C. July 10, 2003). To recover fees, the North Carolina statute relied upon by Clark in its Amended Complaint [ECF 24, p. 14], N.C. Gen. Stat. § 75-16 supplemented by section 16.1, provides:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit;

N.C. Gen. Stat. § 75-16.1.[3]

No willful violation of N.C. Gen. Stat. § 75-16 can be found in this case. Indeed, Clark gives this key predicate short shrift, devoting four brief sentences in one paragraph to the issue, and citing only one case, *Standing v. Midgett*, 850 F. Supp. 396, 404 (E.D. N.C. 1993). But this case actually supports Toyota, with fees being denied. The court explained:

> While a showing of willfulness seems not to be required in order to establish a violation of the Act with respect to ordinary damages, the quoted portion of the statute relating to attorney's fees does require such showing. An act or a failure to act is 'willfully' done *if done voluntarily and intentionally with the view to doing injury to another*. The court is unable to find by a preponderance of the evidence in this case that Midgett's failure to disclose the existence of the Kotarides lien was 'willful.'

850 F. Supp. at 404 (emphasis added).

Here, there is no evidence – nor even any argument by Clark – that Toyota intended to do injury to Clark. Yet that is the required element under the only authority cited by Clark. Fees should be denied accordingly.

[3] Clark withdrew its South Carolina claims in its trial brief, and Clark did not seek fees under N.C. Gen. Stat. § 66-188(b) in its Amended Complaint.

C. Fees Should Not Be Awarded Because There Was Not An Unwarranted Refusal By Toyota To Fully Resolve The Matter Which Constitutes The Basis Of This Suit

1. The Legal Standard

The second predicate for seeking fees is Section § 75-16.1's requirement that "there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." The North Carolina Supreme Court has "observed that statutes authorizing an award of attorney's fees are in derogation of the common law and must therefore be strictly construed." *People Unlimited Consulting, Inc. v. B&A Indus., LLC.*, 158 N.C. App. 744, *3 (2003) (citing *Sunamerica Financial Corp. v. Bonham,* 328 N.C. 254, 400 S.E.2d 435 (1991)).

Thus, plaintiffs often are unable to meet their burden to show an unwarranted refusal to settle. For instance, in *Food Lion Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1997 WL 715017, at *1 (M.D. N.C. Aug. 29, 1997), the court denied fees, writing, "In this case, the Court does not find that there was an unwarranted refusal to fully resolve this matter. This case involved some unique questions of law, especially as applied to these facts. The Defendants had valid reason to refuse to settle this matter and to litigate it to conclusion. Because the refusal to resolve the matter was not unwarranted, no award of attorney's fees will be made." Similarly, in *Bridgetree, Inc. v. Red F Marketing, Inc.*, 2013 WL 443698., * 20-21 (W.D. N.C. 2013), this Court denied a motion for attorney's fees under UDTPA because defendant negotiated in good faith.[4]

A review of the settlement history in this case reveals that Clark cannot meet its burden of proof to show unwarranted refusal to settle.

[4] It takes bad conduct to get fees. *See Envirosafe Paints, Inc. v. Conklin*, 172 N.C. App. 591 (2005) (an unwarranted refusal to settle was found when defendant failed to appear for the mediation conference and respond to discovery).

2. The Complete Settlement History

Clark's rendition of the settlement history is incomplete and inaccurate. The actual, complete history follows.

a. Clark Did Not Know What Was Going On Pre-Suit

Prior to rushing to file suit on August 14, 2012, Clark admittedly did not know what was going on because Cory Thorne had been lying to both Clark and Toyota; this is undisputed. Clark received the termination letter from Thorne in late July 2012, and lacked information. As Clark's CEO testified at trial, "We've got to find out what's going on here." [Tr. 98] Clark's Vice President of Business Development, who was most engaged in the Southeast discussions, echoed this, testifying, "I'm trying to figure out what's going on here. * * * So I'm trying to figure some of this out. This one wasn't in the play book. [Tr. 231]

b. Clark's Executives Knew Toyota Executives, But Did Not Seek Information or To Resolve the Matter Pre-Suit

Clark could have inquired of Toyota to find out "what's going on" because Clark executives knew Toyota's executives very well. Indeed, Brett Wood, the Chairman of Toyota Material Handling USA and its prior president, has known Clark's General Counsel, Michael Grossman, and Vice President of Business, for many years. [Ex. A, Wood Declaration] Brett has served with Scott Johnson on the Executive Committee and Board of Directors of the Industrial Truck Association ("ITA") for many years, meeting three times annually. [*Id.*]

Likewise, Toyota's president Jeff Rufener has known Michael Grossman and Scott Johnson of Clark for many years. [Ex. B, Rufener Declaration] Jeff visited Clark in May after being at a Toyota even in Kentucky, and met Clark's CEO Dennis Lawrence, who along with Scott Johnson took Jeff on a tour of Clark's facilities and had dinner together. [*Id.*]

It is common courtesy in the industry for executives of competitors to contact each other before possible litigation. [Ex. A] For instance, Brett Wood contacted the president of competitor Linde Corporation before a lawsuit was filed regarding an employee, and executives from Crown Corporation contacted Brett before filing a lawsuit with a Toyota dealer. [*Id.*]

Despite Clark not "knowing what's going on," and despite Clark's CEO, General Counsel, and Vice President of Business Development knowing Toyota executives, no one from Clark contacted Toyota prior to rushing to file suit on August 14, 2012. [Exs. A, B]

c. Mediation

The parties engaged in mediation in this case. No written demand was made by Clark prior to mediation, and Clark merely indicated at mediation that it had $10million of damages and was seeking treble damages. No subsequent demands were made until Toyota requested a demand prior to trial.

d. Clark Would Not Make A Demand Prior To Trial, And Finally Made A $15 Million Demand After Toyota Repeatedly Requested A Demand

The undersigned appeared as new lead counsel in January, and took responsibility for complying with the Court's pre-trial order, including the requirement that two weeks prior to trial – thus by February 3, 2015 – the parties "discuss the possibility of settlement." [Ex. C] To that end, on January 23rd in an email to Clark's counsel the undersigned wrote regarding settlement, "Happy to talk with you on this front when we connect, and suggest in advance Plaintiff submit a demand." Opposing counsel responded by email that day, "You inquired about a settlement demand. Cindy, Jerry and Paul can fill you in, but in view of the fact that Toyota has essentially made no settlement offer, we believe it's Toyota's turn to do so." [*Id.*]

The undersigned responded the next day, "In terms of settlement, the defense team does not recall any demand being made in mediation. In any event, we welcome a current demand and, upon

receipt, will promptly consult with our client." On January 26, Clark's counsel responded, "During the mediation, Clark made a $10 Million demand. Toyota did not reply with a monetary offer. Clark's $10 Million demand is not a current position. In view of Toyota's lack of response during the mediation, we continue to believe it's Toyota's turn to make a meaningful offer." The undersigned responded that Toyota would waive fees and costs. [*Id.*]

During a call with counsel on January 28th, Clark's counsel said, "Well, that's where Toyota was prior to summary judgment denial, and if there's nothing to talk about and Toyota will never budge, then there's no sense me bidding against myself." The undersigned said, "Tami, you are plaintiff and haven't made a demand. I don't know what Toyota might do with a current demand, but I know that absent a demand there is no offer." [*Id.*]

That same day, Clark's counsel wrote by email, "During our conference call today, you asked for a current demand from Clark. As I expressed during the call, Toyota's offers at mediation and today were insulting, and we see no real intent on Toyota's part to engage in settlement negotiations. We'd be happy to make a current demand if Toyota chooses to be serious about settlement and puts a meaningful offer on the table." [*Id.*] The undersigned responded within one hour, writing: "Tami, Thanks. No insult is warranted from a strong position in settlement. Plaintiff is the one seeking money. It is customary – and no doubt expected by the Court - for Plaintiff to make a demand. Upon receipt of a demand, it will be considered in good faith and responded to. Best regards. John." [*Id.*] Clark's counsel responded with a $15million demand that day.

e. Toyota Made An $800,000 Offer, To Which Clark Made No Counter

In response to this demand, Toyota made a significant offer of $800,000 on February 12. [Exs. A, B, C] Toyota did this by Brett Wood reaching out to Clark's CEO, Dennis Lawrence. [Ex. A] Clark, however, did not reduce its demand in response, and reiterated its $15million demand the next day, saying that Clark felt their "brand has been damaged." [*Id.*]

f. Toyota Bid Against Itself Raising Its Offer to $1.5 Million; Again Clark Made No Counter

Toyota nonetheless increased its demand – in essence bidding against itself and nearly doubling its offer – to $1.5million, by Brett Wood calling Dennis Lawrence. [*Id.*] Again, Clark made no counter-demand, and reiterated its $15million demand. [Exs. A, B, C]

g. Toyota Left Its $1.5 Million Offer On The Table Even Through Clark's Withdraw Of Its Multi-Million Dollar "Brand Damages" Claim, But Clark Still Made No Counter Despite Further Outreach From Toyota

Toyota left its $1.5 million offer on the table during evidence through trial. [*Id.*] On February 21, the day after Clark withdrew its multi-million dollar "brand damages" claim in light of the *Daubert* hearing on February 20, Brett Wood and Dennis Lawrence talked by phone. Brett noted that if Clark desired to resolve the matter, a new demand from Clark closer to the current Toyota offer would be necessary. Again, Clark did not reduce its $15million demand. [Exs. A, B, C]

During the second week of trial, Toyota's president Jeff Rufener reached out to Clark's CEO, Dennis Lawrence, to discuss settlement. [Ex. B] Again, no counter-demand was made by Clark; Lawrence indicated Clark's demand remained at $15million. With the expense of trial having been incurred, and with no counter-demand having been made, Jeff Rufener thereafter notified Clark by call to Dennis Lawrence that the Toyota offer of $1.5million would expire on February 26, the day before closing arguments. No counter-demand was received in response. [Ex. B]

h. Clark's Post-Verdict Demand Of $8.5 Million Is Above The $8 Million Damages It Sought From the Jury

The jury returned a mixed verdict, finding for Clark on interference claims and coercion, but against Clark as to Question 4(b) with respect to unlawfully coercing Southeast into ending its

relationship with Clark by demanding a retraction or denial of the ForkliftAction article. [ECF 228] The jury awarded substantially less than the $8million in claimed damages sought by Clark, instead awarding just over $3million. [*Id.*] Toyota promptly renewed its Rule 50 motion, and also orally moved under Rule 59 for remittitur/new trial. The Court expressly ruled that it was not entering judgment yet. The Court had indicated during trial that it had concerns with Clark's damages claim. [Ex. C] On March 5, Clark for the first time since January 28 and its $15million demand made a new settlement offer of $8.5 million. [Ex. C]

i. Toyota's $2Million Post-Verdict Offer Is Reasonable Given The Procedural Context

Two business days later, the undersigned responded on behalf of Toyota with a $2million dollar offer with explanatory letter. [Ex. A to Ex. C Declaration] The letter stated in part:

> Notwithstanding the above history, Clark has now tendered a demand of $8.5 million that exceeds the amount of damages it requested from the jury, and vastly exceeds the jury's $3million verdict. Although we welcome the first reduction in Clark's demand since January 28, respectfully we believe the demand is excessive and does not square with the probable eventual outcome of this matter, whether through post-trial rulings or appeal. Moreover, with the verdict now public, and with the market not really reacting to the verdict, any premium for avoiding trial publicity is gone. Moreover, the expense of trial has now been incurred.
>
> In considering whether and how to respond to the new counter-demand, we have carefully considered the procedural posture of the case, the significant issues that confront Clark post-trial, and our assessment of the Fourth Circuit's treatment of various issues preserved for appeal. For instance, it is undisputed that Clark's damages are based on Palatnik's projection of damages, which has no basis in fact, and relies on admittedly misleading, marketing projections that lack data. Beyond all the other interesting and significant post-trial and appellate issues, this one certainly will be corrected. Furthermore, the trebling and fee enhancements are, in our judgment based on the law and facts, likely to go in Toyota's favor, and any deception ruling is ultimately reviewed *de novo* on appeal.
>
> Although countering with no offer or a low-dollar offer would be supported by the law, facts, and procedural posture, in a good faith effort to resolve this matter, Toyota offers the sum of Two Million

> Dollars ($2,000.000.00). This offer will expire at the close of business on Friday, March 13, 2015, unless earlier withdrawn.

Clark has not responded to the increased $2million offer. [Ex. C]

3. Clark Did Not Even Give Toyota An Opportunity To Resolve "The Matter Which Constitutes The Basis Of This Suit" Prior To Filing The Action

As is evident from the history above, Clark did not even try to resolve the matter before rushing to file suit a mere three weeks after Southeast's termination letter. The plain language of the statute only all allows fees if the defendant committed an unlawful refusal to resolve "the matter which constitutes the basis of this suit." § 75-16.1. In this setting, the "matter which constitutes the basis of this suit" is Toyota's alleged interference and coercion in July 2012 with the Clark/Southeast agreement. Clark made no effort whatsoever to resolve that matter prior to suit.

4. Toyota's Settlement Approach Was Not An "Unwarranted Refusal" To Resolve The Matter Which Constitutes The Basis Of This Suit

Even if the plain language of the statute were not followed and the course of settlement discussions during the lawsuit (rather than before) were considered, Clark fails to prove that Toyota's settlement efforts were an unwarranted refusal to settle. Indeed, as the Middle District of North Carolina wrote in denying fees in this context:

> In this regard, VMI merely states that "ATL's highest settlement offer prior to trial was for no more than 1% of the actual and punitive damages awarded by the jury," and argues that this discrepancy serves as an undeniable indication that ATL unwarrantedly refused to settle the matter. The Court does not agree that an unwarranted refusal to settle can be demonstrated solely from a proportional comparison between the jury's ultimate award and Defendant's highest offer of settlement. Plaintiff's reliance on this factor alone is not demonstrative of an unwarranted refusal to settle. Defendant, on the other hand, has presented evidence on this issue in the form of a sworn affidavit-with several exhibits-which chronicles the settlement efforts between the parties.

> As with the other two statutory factors, a plaintiff must prove that a defendant unwarrantedly refused to settle by a preponderance of the evidence. *Id.* at 676. Given the only evidence before the Court on this issue, it appears that Defendant exhibited no less enthusiasm about reaching settlement than Plaintiff. Defendant's settlement efforts as detailed in the affidavit certainly do not amount to an unwarranted refusal to fully resolve the matter. Accordingly, the Court finds that VMI has failed to show, by a preponderance of the evidence, that all three statutory factors required for an award of attorneys' fees under North Carolina's UDTPA are present in this case.
>
> Therefore, the Court will deny Plaintiff's Motion to the extent that it requests an award of attorneys' fees based upon the alleged unwarranted refusal of Defendant to fully settle this matter.

Volumetrics Medical Imaging, Inc. v. ATL Ultrasound, Inc., 2003 WL 21650004 (M.D. N.C. July 10, 2003)

Here, Toyota had (and still has) good reason not to succumb to Clark's substantial settlement demands. This is a case in which all the sworn testimony prior to trial confirmed that Toyota did not threaten to terminate the Virginia territory. And, Clark's damages were wildly overstated given the 30-day terminable at will contract with a no-damages clause, with Clark's damages expert basing his multi-million dollar projections on Cory Thorne's admittedly misleading Exhibit 19 marketing projections that were not based on actual data.

Further, the actual settlement history reveals that Toyota – not Clark – has acted in good faith seeking to resolve the matter. A pre-trial demand had to be coaxed out of Clark, and that $15million demand never once changed while Toyota bid against itself and reached out repeatedly to Clark to explore settlement. Clark has simply failed to prove an "unwarranted refusal" to settle.

D. The Court, In Its Discretion, Should Deny Fees To Clark

Even if the Court were to somehow find that willfulness exists, and that Clark has met its burden of proof on "unwarranted refusal to settle," the Court in its discretion should still not award fees. Clark is a large, prosperous multinational corporation, not a consumer unable to fund litigation. Clark made no effort to resolve this matter prior to litigation, and made no reasonable efforts during litigation, insisting on $15million and never once budging from that position.

E. If The Court Were To Award Fees, Limited Discovery Is First Warranted As To Amounts

Finally, if fees were to be awarded, a reasonable period of time (not four business days from Clark's motion) is warranted for Toyota to review and reach agreement on or brief Clark's proposed rates, hours, tasks performed, etc. Neither Toyota nor the Court is required to take Clark's $2million fee petition at face value without meaningful review first. It would be appropriate for Clark to first provide Toyota with its engagement letters and invoices, and for Toyota to have a reasonable period of time such as 14 days to review, negotiate those matters, and, where no agreement is reached, respond.

IV. DISCUSSION – INTEREST

A. Post-Judgment Interest Does Not Get Addressed At This Stage

Clark's motion asks for post-judgment interest pursuant to 28 U.S.C. § 1961(a). [ECF 230, ¶ 17] This is premature, however, as there is not yet a judgment. *See* Section 1961(a) ("Interest shall be allowed on any money judgment . . ."). Moreover, an appeal is likely if judgment is entered. *See, e.g.*, *Tomita Techs. USA, LLC v. Nintendo Co., Ltd.*, 2013 U.S. Dist. LEXIS 116486 *28 (S.D.N.Y. Aug. 13, 2013) ("Tomita requests that the Court enter an award of post-judgment interest under 28 U.S.C. § 1961. However, the amount of such an award is yet to be determined, not only because the amount of the judgment is uncertain, but also because an appeal by Nintendo is likely. Thus, while an award of post-judgment interest would be appropriate if the Court's judgment were to be upheld on appeal, such an award would be premature at this time"), *affirmed in part, reversed in part, vacated in part all on other grounds*, 2014 U.S. App. LEXIS 23235 (Fed. Cir. 2014); *Hasham v. California State Bd. Of Equalization*, 1998 U.S. Dist. LEXIS 12078 (N.D. Ill. July 30, 1998) ("given the fact that postjudgment interest cannot

be calculated until the date of payment of the award, plaintiff's request for an award of postjudgmetn interest is premature"); *Blayde v. Harrah's Tunica Corp*., 2011 U.S. Dist. LEXIS 127723 *4 (W.D. Tenn. Sept. 28, 2011) ("the Court finds that while Plaintiff may ultimately be entitled to post-judgment interest as prescribed by the applicable statutes, a request for a court order awarding such post-judgment interest during the pendency of an appeal is inappropriate").

B. Pre-Judgment Interest Should Not Be Awarded

Clark argues that the Court should award pre-judgment interest in this case to compensate "the injured party for the loss of use of money he would otherwise have had." [Brief at 10, ECF 231] But the multi-million dollar award necessarily includes loss projected future lost profits, as requested by Clark, and interest rates in the relevant time period of 2012-present have been near zero. Indeed, the Federal Reserve's interest rate publications referenced off of the U.S. Court's website confirm this, showing the current Federal Funds rate at only .12%, with one-year Treasury Bills at .19%. *See* http://www.federalreserve.gov/releases/h15/current/ In this future lost profits setting and this interest-rate environment, Clark's argument about "loss of use of money" does not stand.

C. If Pre-Judgment Interest Were Awarded, It Would Only Be As To Compensatory Damages

In the event that the Court were to award pre-judgment interest, Clark properly only seeks pre-judgment interest on compensatory damages, not any possible trebled damages. [Brief at 10-11, ECF 231] Indeed, only any "portion of a money judgment designated by the fact finder as compensatory damages" is available for pre-judgment interest. N.C. Gen. Stat. § 24-5. Here, the jury – the factfinder – found compensatory damages. If trebles are also awarded, that is a legal ruling for the Court. *See Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc*., No. 1:01CV182, 2003

WL 21650004 (M.D.N.C. July 10, 2003) (pre-judgment interest awarded only on compensatory damages, not treble damages).

V. CONCLUSION

Clark's motion for fees and interest are premature and, if reached, should be denied. Clarks' motion for treble damages should be denied.

Respectfully submitted this 13th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 13th day of March, 2015.

/s/ John R. Maley