UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. 3:12-cv-510

Clark Material Handling Company, Plaintiff, v. Toyota Material Handling U.S.A., Inc., Defendant.	)	**REPLY IN SUPPORT OF MOTION FOR TREBLE DAMAGES, ATTORNEYS' FEES, AND INTEREST**

Even Toyota concedes that Clark's North Carolina Unfair and Deceptive Trade Practices ("UDTPA") claim should rise or fall with the tortious interference counts.[1] That acknowledgment should be the end of the matter. Because there is ample evidence to support the jury's verdict on Clark's tortious interference claims, Clark's damages should be trebled.

But in a desperate move, Toyota's response claims for the first time that N.C. Gen. Stat. § 75-1.1 is unconstitutionally vague because it provided Toyota insufficient notice that its coercion, threats and tortious interference would constitute "unfair" misconduct. The Court should quickly reject this baseless argument.

It is "well settled" that a civil statute enacted by the General Assembly is presumed constitutional, and any doubts must be resolved in favor of constitutionality. *Wayne County Citizens v. Board of Comm'rs*, 328 N.C. 24, 29, 399 S.E. 2d 311, 314-315 (1991). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt

[1] Toyota's Brief in Support of Rule 50 and Rule 59 Motions (ECF 234), page 16, citing *Vesture Corp. v. Thermal Solutions, Inc.*, 284 F.Supp.2d 290 (M.D.N.C. 2003, *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 561 S.E.2d 276 (2002); and *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001).

can arise, or the statute cannot be upheld on any reasonable ground." *Id.* (citing *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)).

Applying this standard, North Carolina squarely addressed and rejected Toyota's constitutional argument nearly 30 years ago. *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 82 N.C. App. 1, 344 S.E.2d 82 (N.C. App. 1986), *rev'd in part and aff'd in part on other grounds*, 319 N.C. 534, 356 S.E.2d 578. In *Olivetti*, the plaintiff, who committed common law fraud, challenged the application of UDTPA and its concomitant treble damages as unconstitutionally vague. The court described its inquiry as whether the Act "adequately warn[s] people of conduct required or prohibited." *Id.* at 23-24. Finding that it did, the court observed that "impossible standards of statutory clarity are not required by the constitution." *Id.* at 95.[2] *Olivetti* settled the constitutionality of the UDTPA; since 1986, no appellate court has revisited the issue.

Indeed, the judicial decisions construing the UDTPA offer a settled body of case law that provides more than sufficient guidance on the misconduct that qualifies as "unfair" or "deceptive." As early as 1980, the North Carolina Supreme Court defined the concept of "unfairness," *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 242, 262-63, 66 S.E.2d 610, 620-21 (1980), and reiterated the standard a year later. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). And since *Olivetti* was issued in 1986, there have been hundreds, if not thousands, of cases further clarifying the contours of Chapter 75.[3] If the UDTPA was

[2] Similar "unfair trade practice" statutes have survived vagueness challenges. Closely mirroring North Carolina's UDTPA is the South Carolina Unfair Trade Practice Act, S.C. Code Ann. § 39-5-10 *et seq.*, which was held constitutional in *Inman v. Ken Hyatt Chrysler Plymouth*, 363 S.E.2d 691 (S.C. 1988). *See also, e.g., T & W Chevrolet v. Darvial*, 641 P.2d 1368 (Mont. 1982) (and the Washington, Florida and South Dakota cases cited therein); *Commonwealth v. Penn. APSCO Sys., Inc.*, 309 A.2d 184 (Pa. 1973); *Alaska v. O'Neill Investigations, Inc.* 609 P.2d 520 (Ark. 1980).

[3] That coercion, threats and abuses of position violate the UDTPA is evident in cases cited by Clark in its Motion for Treble Damages, including *Owens v. Pepsi Cola Bottling Co*, 330 N.C.

constitutional in 1986, it is surely constitutional today, as Toyota now enjoys the benefit of three decades of intervening jurisprudence demarcating the metes and bounds of the statute. It is little wonder that Toyota does not cite a single case finding the UDTPA or sister-state analogs unconstitutional.

The cases Toyota does cite are facially inapplicable. Most curious is *State v. Martin*, 7 N.C. App. 532, 173 S.E.2d 47 (1970), a criminal case involving a fisherman of questionable luck who found himself on the wrong end of a regulation prohibiting the "snagging" of fish. Importantly, the statutory construction of criminal statutes differs from the standard applicable here: "Criminal provisions must be strictly construed against the State and liberally construed in favor of a defendant with all conflicts resolved in favor of the defendant." *Id.* at 533, 173 S.E.2d at 48. A definitional defect, the court explained, meant that the regulation could not be enforced against the defendant. The case has nothing to say about a civil statute that has seen decades of application and definitional maturity. And it of course has nothing to say about the UDTPA. *Hammers v. Lowe's Cos., Inc.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980), another case on which Toyota relies, contains no declaration of unconstitutionality. Instead, the court found that the plaintiff's claims of tortious interference failed, thus removing any basis for a finding of unfairness.[4]

666, 412 S.E. 2d 636 (1992) (coercive conduct and inequitable assertions of power or position offend UDTPA); *Edmonson v. American Motorcycle Ass'n*, 7 F. App'x 136 (4th Cir. 2001) (threats to cancel contract to exclude competition a UDTPA violation); *United Labs. v. Kuykendall*, 322 N.D. 643, 370 S.E.2d 375 (1988) (tortious interference with contract may support UDTPA claim); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 174 N.C. App. 49, 620 S.E.2d. 222 (2005) (tortious interference with prospective business advantage states UDTPA claim); *Roane-Barker v. SE. Hospital Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990) (tortious interference with contract claim "subsumed" in UDTPA claim).

[4] Toyota also cites two non-North Carolina cases. *McBride v. General Motors*, 737 F. Supp. 1563 (M.D. Ga. 1990) challenged the Georgia Tort Reform Act primarily on equal protection grounds, while *Williams v. West Virginia Univ. Board of Governors*, 782 F. Supp. 2d 219 (N.D. W. Va.

Toyota's afterthought constitutional challenge is baseless. The case law makes readily apparent that (1) using one's dominance (2) to coerce a distributor (3) into discontinuing its existing and future contractual relations with a smaller competitor is "unfair" misconduct within the meaning of the UDTPA. Toyota may not think such misconduct warrants the bitter medicine of treble damages. But that is a policy argument best addressed to the North Carolina legislature, not a constitutional infirmity that warrants judicial intervention in the democratic process. On this record, the judgment must be trebled. Clark's motion should be granted.

CONCLUSION

Toyota's newly-asserted constitutional argument fails, as do its other arguments. For the reasons stated in this and prior briefing, Clark's motion for treble damages, attorneys' fees, and pre- and post-judgment interest on the jury's verdict should be granted.

2011) tested the use of a totally discretionary University "trespass notice." Neither has any applicability here.

Respectfully submitted this 18th day of March, 2015.

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