STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 3707
VITAFORM, INC. d/b/a BODY AFTER BABY, Plaintiff, v. AEROFLOW, INC. and MOTIF MEDICAL, LLC, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION FOR ATTORNEYS' FEES**

1. **THIS MATTER** is before the Court on Defendants' Motion for Attorneys' Fees (the "Motion"),[1] filed on 19 May 2023 in the above-captioned case.

> *Smith DeVoss, PLLC, by Jeffrey J. Smith and John R. DeVoss, Wimer Snider, P.C., by Jake A. Snider, and Caulk Legal, PLLC, by Taylor Caulk, for Plaintiff Vitaform, Inc. d/b/a Body After Baby.*
>
> *Ward and Smith, P.A., by Joseph A. Schouten, Hayley R. Wells, and Jordan M. Spanner, for Defendants Aeroflow, Inc. and Motif Medical, LLC.*

Bledsoe, Chief Judge.

2. This action has been hotly contested since its inception four years ago. Prior to the parties' mutual dismissals without prejudice this past spring, the parties had engaged in extensive discovery and active motions practice, including filing and defending multiple motions to dismiss, motions for summary judgment, motions for sanctions, and motions in limine. Although Plaintiff's claims were initially quite

[1] (Defs.' Mot. Att'ys' Fees, ECF No. 194.)

broad in scope, Defendants succeeded in substantially narrowing the claims and evidence remaining for trial at the time the dismissals were filed.

3. Plaintiff made it clear after filing its dismissal without prejudice under Rule 41 of the North Carolina Rules of Civil Procedure (the "Rule(s)") that it intends to refile the litigation.[2] In response, Defendants have moved to recover nearly $1,000,000 in attorneys' fees and costs under four separate statutes, contending that Plaintiff proceeded with certain claims in bad faith and knew or should have known that many of its claims lacked merit due to a lack of evidentiary support.

4. Having considered the Motion, the parties' briefs, affidavits, and exhibits in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court, in the exercise of its discretion, **GRANTS in part** and **DENIES in part** the Motion as set forth below.

I.

INTRODUCTION

5. Defendants seek attorneys' fees and costs under N.C.G.S. §§ 6-21.5, 66-154(d), 75-16.1, and 15 U.S.C. § 1117(a) on grounds that Plaintiff initiated and maintained various claims when it knew or should have known they were meritless. In awarding attorneys' fees under these statutory provisions, a court is required to make findings of fact and conclusions of law. *See, e.g.*, *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257 (1991) (N.C.G.S. § 6-21.5); *Barker Indus. v. Gould*, 146 N.C. App. 561, 567 (2001) (N.C.G.S. § 66-154(d)); *Barbee v. Atlantic Marine Sales &*

[2] (*See* Pl.'s Resp. Defs.' Mot. Att'ys' Fees 1, ECF No. 200.)

Serv. Inc., 115 N.C. App. 641, 648 (1994) (N.C.G.S. § 75-16.1); *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 66 (5th Cir. 1992) (15 U.S.C. § 1117(a)).

6. Conversely, "when the trial court in its discretion *denies* a motion for attorneys' fees, it need not make statutory findings required to support a fee award." *E. Brooks Wilkins Family Med., P.A. v. WakeMed*, 244 N.C. App. 567, 580–81 (2016) (emphasis in original).

7. Nevertheless, "it is always a better practice to make such findings as the findings may shed light on how the trial court made its decision and assist in [ ] appellate review." *Carter v. St. Augustine's Univ.*, 262 N.C. App. 507 (2018) (internal citations omitted). The Court therefore sets forth the following findings of fact and conclusions of law to support its resolution of Defendants' request for attorneys' fees and costs.

II.

FINDINGS OF FACT[3]

8. Plaintiff Vitaform, Inc. d/b/a Body After Baby ("BAB") is a California corporation that is wholly owned by Don Francisco ("Francisco"), its president and founder.[4] Through BAB, Francisco used his experience in the durable medical

[3] Any Finding of Fact that is more appropriately deemed a Conclusion of Law, and any Conclusion of Law that is more appropriately deemed a Finding of Fact, shall be so deemed and incorporated by reference as a Finding of Fact or Conclusion of Law, as appropriate.

[4] (*See* First Am. Compl. ¶ 1 [hereinafter "FAC"], ECF No. 40; Defs.' Mem. Law Supp. Mot. Summ. J. Ex. A Dep. Donald H. Francisco, dated May 12, 2021, at 30:10–12, 46:17–19 [hereinafter "Francisco Dep."], ECF No. 123.2.)

equipment ("DME") industry to market "maternity compression wear that would include the application of an insurance payment model."[5]

9. After consulting with medical professionals, Francisco devised and developed three garments designed to provide support during pregnancy or to address specific medical conditions associated with pregnancy (the "Garments").[6] BAB worked with a vendor named West Coast Medical Billing to perfect its insurance reimbursement model, and according to Francisco, the Garments were the first such products that qualified for insurance reimbursement.[7]

10. BAB began selling its Garments sometime between 2012 and 2013. It associated with 1 Natural Way ("1NW"), a regional DME subcontractor for Defendant Aeroflow, Inc. ("Aeroflow"), for this purpose in 2017. Aeroflow is a nationwide DME provider and distributor.[8]

11. After Garment sales proved successful on a regional basis,[9] Evan Israel ("Israel"), Aeroflow's director of emerging markets, placed a telephone call to

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[5] (Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. B Aff. Don Francisco, dated Sept. 30, 2019, at ¶¶ 7, 9, ECF No. 126.3.)

[6] (*See* Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. C 2d Aff. Don Francisco, dated Sept. 30, 2019, at ¶ 3 [hereinafter "2d Francisco Aff.], ECF No. 126.4; Francisco Dep. 48:15–21, 56:9–18.)

[7] (*See* Francisco Dep. 84:3–11, 91:16–92:1, 118:13–19; 2d Francisco Aff. ¶¶ 4, 7, 9; FAC ¶ 35.)

[8] (FAC ¶¶ 38–40; *see* Defs.' Am. Answer to FAC and Countercls. ¶ 1 [hereinafter "Countercls."], ECF No. 96.) Pinpoint citations to "Countercls." will be to the statements contained in the "Counterclaims" section of Defendants' Amended Answer to First Amended Complaint and Counterclaims.

[9] (Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. D 3d Aff. Don Francisco, dated Sept. 30, 2019, at ¶ 3 [hereinafter "3d Francisco Aff."], ECF No. 126.5.)

Francisco on 19 July 2018 (the "July 19 Call") after receiving Francisco's contact information from 1NW.[10] During the July 19 Call, Francisco pitched BAB and its products to Israel, explaining that he had designed the Garments to qualify for health insurance coverage as DME.[11] According to Francisco, he and Israel came to an oral agreement during the July 19 Call whereby BAB would provide Aeroflow with its products, marketing material, and insurance coding information and, in exchange, Aeroflow would market the Garments through its national distribution channels, process the associated insurance claims, and pay BAB for shipments received.[12] Francisco also contends that he and Israel specifically agreed that Aeroflow would maintain the confidentiality of BAB's comprehensive business plan.[13] Israel denies that he made these agreements with BAB on the July 19 Call.

12. Soon thereafter, BAB and Aeroflow began doing business together but never entered into a written, long-term contract for the ordering and shipment of BAB's products.[14] In late July 2018, BAB completed its first drop shipment order for

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[10] (*See* Francisco Dep. 191:10–14; Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. V at AEROFLOW_0000765 [hereinafter "Disc. Docs."], ECF No. 126.24.)

[11] (*See* Francisco Dep. 192:9–17; Defs.' Mem. Law Supp. Mot. Summ. J. Ex. C Dep. Evan Israel, dated May 11, 2021, at 11:17–12:4, 23:14–21 [hereinafter "Israel Dep."], ECF No. 123.4.)

[12] (*See* Francisco Dep. 208:25–10:7, 245:5–47:16; 3d Francisco Aff. ¶¶ 23–27, 31; Israel Dep. 37:19–38:13, 51:6–52:3; Aff. Evan Israel, dated Oct. 18, 2019, at ¶ 32 [hereinafter "Israel Aff."], ECF No. 22; Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. E Aff. Don Francisco, dated Nov. 5, 2019, at ¶¶ 18, 56 [hereinafter "5th Francisco Aff."], ECF No. 126.6.)

[13] (Francisco Dep. 207:13–23, 217:14–18:23, 223:10–20; 3d Francisco Aff. ¶¶ 25, 28–29.)

[14] (*See* Francisco Dep. 215:6–14; Israel Aff. ¶ 36.)

Aeroflow,[15] and over the next few weeks, BAB provided Aeroflow with additional materials to support the sale of the Garments.[16] At the end of August 2018, Francisco led on-site training to educate Aeroflow employees on BAB's products.[17] However, as early as September 2018, the demand for BAB's products began to outpace its ability to fulfill orders.[18]

13. During this same time, Defendant Motif Medical, LLC ("Motif"), a wholly owned subsidiary of Aeroflow, was developing its own line of post-partum compression garments.[19] Motif ordered BAB's Garments through Amazon,[20] located BAB's Chinese manufacturer after searching public records,[21] and ultimately entered into a contract with the same manufacturer to produce its own post-partum compression garments.[22]

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[15] (*See* 5th Francisco Aff. ¶ 58.)

[16] (*See* Israel Dep. 38:23–39:5; 3d Francisco Aff. ¶ 27; 5th Francisco Aff. ¶¶ 57, 59, 62, 69.)

[17] (*See* Israel Dep. 33:23–34:19; 3d Francisco Aff. ¶ 16; 5th Francisco Aff. ¶ 68.)

[18] (*See* Aff. Jennifer Jordan, dated Oct. 18, 2019, at ¶¶ 7–9 [hereinafter "Jordan Aff."], ECF No. 23; Jordan Aff. Ex. C, ECF No. 23.3; Disc. Docs. at AEROFLOW_0000834; *see also* Defs.' Mem. Law Supp. Mot. Summ. J. Ex. B, Aff. Ryan D. Wright, dated Aug. 4, 2021, at ¶¶ 16–22 ECF No. 123.3.)

[19] (*See* Countercls. ¶ 4; Disc. Docs. at AEROFLOW_000609, 2482, MOTIF_0000174–92, 861–63, 1703.)

[20] (*See* Aff. Brandon Fonville, dated Oct. 18, 2019, at ¶ 6 [hereinafter "Fonville Aff."], ECF No. 24; Disc. Docs. at AEROFLOW_0000588–90.)

[21] (*See* Disc. Docs. at AEROFLOW_0000609.)

[22] (*See* Disc. Docs. at MOTIF_0000891–93, AEROFLOW_0002440; Fonville Aff. ¶ 9.)

14. Aeroflow began to sell Motif's post-partum compression garments in January 2019[23] and stopped ordering BAB's products in March 2019.[24] Aeroflow sold both BAB's and Motif's post-partum compression garments without identifying the specific brand customers would receive until Aeroflow's inventory of BAB products was depleted in 2020. Thereafter, Aeroflow sold only Motif's products.[25]

15. BAB filed the Complaint initiating this action against Defendants on 23 August 2019 (the "Original Complaint"), in response to which Defendants moved to dismiss all claims.[26] The Court convened a hearing on this motion on 20 November 2019,[27] and shortly thereafter, on 20 December 2019, Plaintiff filed a First Amended Complaint (the "Amended Complaint"), mooting Defendants' still pending motion to dismiss.[28]

16. BAB's Amended Complaint raised seven claims: (i) fraud and fraudulent concealment, (ii) unfair and deceptive trade practices, including violations of both the North Carolina Unfair and Deceptive Trade Practices Act (the "UDTPA")[29] and the

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[23] (*See* Fonville Aff. ¶ 9; *see also* Disc. Docs. at AEROFLOW_0000809, 822, 824.)

[24] (*See* Defs.' Mem. Law Supp. Mot. Summ. J. Ex. D Dep. Jennifer Jordan, dated May 10, 2021, at 53:4–54:7 [hereinafter "Jordan Dep."], ECF No. 123.5.)

[25] (*See* Jordan Dep. 74:3–17; 5th Francisco Aff. ¶¶ 38–39; Disc. Docs. at MOTIF_0000494; Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. S at VF004802, ECF No. 126.21.)

[26] (Compl. [hereinafter "Original Compl."], ECF No. 3; Defs.' Mot. Dismiss Under Rule 12(b)(6), ECF No. 27.)

[27] (Scheduling Order and Notice Video Conference, ECF No. 37.)

[28] (FAC.)

[29] N.C.G.S. § 75-1–49.

federal Lanham Act,[30] (iii) joint venture and breach of the duty of good faith and fair dealing, (iv) constructive fraud, (vi) misappropriation of trade secrets under the North Carolina Trade Secrets Protection Act ("TSPA"),[31] and (vii) unjust enrichment.

17. Defendants moved to dismiss each of these claims on 9 January 2020 and, after full briefing and hearing, the Court dismissed Plaintiff's claims for: (i) constructive fraud; (ii) joint venture; (iii) fraud and fraudulent concealment, except to the extent those claims were based on the July 19 Call; (iv) common law unfair competition and violation of the UDTPA, except to the extent those claims were based on the July 19 Call; and (v) common law unfair competition and violations of the UDTPA and the Lanham Act, except to the extent those claims were based on BAB's allegations that Defendants sold BAB's products as if they were Defendants' own. *See Vitaform, Inc. v. Aeroflow, Inc.*, 2020 NCBC LEXIS 132, at *37–38, *46–47 (N.C. Super. Ct. Nov. 4, 2020).

18. Defendants answered on 14 December 2020[32] and, after receiving leave of the Court, filed an Amended Answer to First Amended Complaint and Counterclaims on 16 September 2021, asserting counterclaims for defamation per se, tortious interference with prospective economic advantage, and violation of the UDTPA ("Defendants' Counterclaims").[33]

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[30] 15 U.S.C. § 1125(a).

[31] N.C.G.S. § 66-152–62.

[32] (Defs.' Answer FAC, ECF No. 65.)

[33] (*See* Countercls. ¶¶ 49–66.)

19. BAB filed what it termed its Answer to Counterclaims, Defenses, and Further Counterclaims on 2 November 2021 (the "Further Counterclaims").[34] Plaintiff's purported Further Counterclaims asserted claims for tortious interference with prospective economic advantage, violation of the UDTPA, and defamation. Defendants moved to dismiss these new claims, and after full briefing but before the hearing on the motion to dismiss, BAB dismissed the Further Counterclaims without prejudice.[35] Defendants dismissed their counterclaims for tortious interference and for violation of the UDTPA without prejudice shortly thereafter.[36]

20. Defendants moved for summary judgment on BAB's remaining claims on 7 February 2022.[37] After full briefing and hearing, the Court granted partial summary judgment for Defendants, dismissing BAB's claims for (i) trade secret misappropriation; (ii) breach of the duty of good faith and fair dealing; and (iii) common law unfair competition and violations of the UDTPA and the Lanham Act based on BAB's allegations that Defendants sold BAB's products as their own.[38] The Court denied Defendants' motion as to BAB's claims for (i) fraudulent

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[34] (Pl.'s Answer to Countercls., Defenses, & Further Countercls. [hereinafter "Further Counterclaims"], ECF No. 106.) Pinpoint citations to Plaintiff's "Further Counterclaims" will be to the statements contained in the "Further Counterclaims" section of ECF No. 106.

[35] (*See* Defs.' Mots. Dismiss and Strike Pl.'s Further Countercls., ECF No. 108; Notice Dismissal All Further Countercls. Without Prejudice, ECF No. 118.)

[36] (*See* Notice Partial Dismissal Countercls. Without Prejudice, ECF No. 121.)

[37] (Defs.' Mot. Summ J., ECF No. 122.)

[38] (Order and Op. Defs.' Mot. Summ. J. ¶ 107(a)–(c), (e) [hereinafter "Summ. J. Order"], ECF No. 138.)

misrepresentation to the extent that claim was based on an alleged promise made by Aeroflow during the July 19 Call to maintain the confidentiality of BAB's comprehensive business plan; (ii) fraudulent concealment based on BAB's allegations in connection with and arising from the July 19 Call; (iii) common law unfair competition and violations of the UDTPA to the extent those claims were based on Aeroflow's alleged promise during the July 19 Call to maintain the confidentiality of BAB's comprehensive business plan and Aeroflow's alleged fraudulent concealment in connection with and arising from the July 19 Call; and (iv) unjust enrichment (the "Remaining Claims").[39]

21. Following summary judgment, the Court scheduled the Remaining Claims for trial by jury to commence in Buncombe County on 17 April 2023.[40] The Court ordered pretrial evidentiary motions to be filed in two phases.[41] The first phase required the parties to file motions they reasonably believed to have a significant impact on the presentation of evidence at trial, including *Daubert*/Rule 702 challenges to exclude expert testimony, no later than 11 January 2023. The second phase required all other pretrial motions to be filed no later than 20 March 2023.[42]

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[39] (Summ. J. Order ¶ 107.)

[40] (Notice Jury Trial, ECF No. 142.)

[41] (Pretrial Scheduling Order ¶¶ 9–10, ECF No. 143.)

[42] (Pretrial Scheduling Order ¶¶ 9–10.)

22. The parties each submitted a motion to exclude the opposing party's expert witness by the first phase deadline,[43] and, after full briefing and hearing, the Court issued an order on 10 March 2023 excluding both sides' experts.[44] The Court also excluded any other evidence of actual damages Plaintiff might seek to advance since it had not been disclosed in discovery. The Court subsequently amended its order on 13 March 2023 to make clear that the exclusion of Plaintiff's expert testimony was without prejudice to Plaintiff's right to seek, and Defendants' right to oppose, an award of either nominal or punitive damages at trial.

23. The parties submitted several other pretrial motions in the second phase. The Court resolved these motions in an omnibus Order on Motions in Limine on 6 April 2023.[45] In the same order, the Court reiterated that Plaintiff would be unable to present any damages evidence at trial other than as it may relate to nominal or punitive damages.

24. On 10 April 2023, a week before trial was to commence, Plaintiff voluntarily dismissed its remaining claims without prejudice.[46] Defendants thereafter voluntarily dismissed their remaining counterclaim—for defamation—on 12 April 2023.[47]

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[43] (Defs.' Mot. Exclude Expert Report Scott Barnes and Limit Pl.'s Evid. Damages, ECF No. 149; Pl.'s Mot. Exclude Defs.' Expert Witness, ECF No. 152.)

[44] (Order and Op. Cross-Mots. Exclude Experts, ECF No. 164).

[45] (Order Mots. Lim., ECF No. 187.)

[46] (Notice Voluntary Dismissal Without Prejudice, ECF No. 188.)

[47] (Defs.' Voluntary Dismissal Without Prejudice, ECF No. 191.)

25. Defendants filed the current Motion five weeks later on 19 May 2023.[48] Defendants contend that they are entitled to their attorneys' fees and costs under the TSPA,[49] the UDTPA,[50] the Lanham Act,[51] and under N.C.G.S. § 6-21.5 (collectively, the "Statutory Grounds"). After full briefing, the Court convened a hearing on the Motion on 17 August 2023, at which all parties were represented by counsel (the "Hearing"). The Motion is now ripe for resolution.

III.

CONCLUSIONS OF LAW

26. Our Supreme Court has long recognized that "[i]n North Carolina, a trial court may award attorney's fees only as authorized by statute."[52] *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 729 (2020). "Statutes that award attorney's fees to the prevailing party are in derogation of the common law and as a result, must be strictly construed." *Barris v. Town of Long Beach*, 208 N.C. App. 718, 722 (2010); *see also Sunamerica Fin. Corp.*, 328 N.C. at 257. "Whether to award or deny attorneys'

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[48] (Defs.' Mot. Att'ys' Fees 1.)

[49] N.C.G.S. § 66-154(d).

[50] N.C.G.S. § 75-16.1(2).

[51] 15 U.S.C. § 1117(a).

[52] The Court notes that a North Carolina trial court also has "authority to impose a sanction of attorneys' fees against an attorney who violates the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct" and may exercise its "inherent authority" to sanction attorneys for "unprofessional conduct . . . [including] misconduct, malpractice, or deficiency in character, and dereliction of duty except mere negligence or mismanagement." *See, e.g.*, *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 612 (2002) (cleaned up). However, Defendants have not invoked the Court's inherent authority, and the Court elects not to exercise it here.

fees is within the sound discretion of the trial judge," but "[o]nce the trial court decides to award attorneys' fees [ ] it must award a reasonable fee." *Custom Molders v. American Yard Prods.*, 342 N.C. 133, 141–42 (1995).

27. The Court will consider each of Defendants' Statutory Grounds in turn.

A. N.C.G.S. § 66-154(d) – North Carolina Trade Secrets Protection Act

28. Defendants first argue that they are entitled to their reasonable attorneys' fees under N.C.G.S. § 66-154(d) because Plaintiff's claim for misappropriation of trade secrets under the TSPA was made in bad faith. *See* N.C.G.S. § 66-154(d) ("If a claim of misappropriation is made in bad faith . . . , the court may award reasonable attorneys' fees to the prevailing party."). Defendants also seek to recover their costs as the prevailing party on Plaintiff's TSPA claim under N.C.G.S. § 6-21(12).

29. "The term 'bad faith' is not expressly defined under [N.C.G.S. § 66-154(d)], but decisions from this Court have held that an objective standard should be applied in determining whether a claim of misappropriation is made in bad faith under the TSPA." *Bldg. Ctr. v. Carter Lumber of the South, Inc.*, 2018 NCBC LEXIS 214, *4–5 (N.C. Super. Ct. Jan. 10, 2018) (citing Business Court cases). That said, our Supreme Court long ago observed that "[b]ad faith cannot be defined with mathematical precision." *Bundy v. Comm. Credit Co.*, 202 N.C. 604, 606 (1932). Indeed:

> The ultimate definition of the term would depend upon the facts and circumstances of a given controversy. Certainly, it implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack.

Id.

30. Here, Defendants contend that Plaintiff pursued its trade secret misappropriation claim in bad faith by "changing its legal theory and its supporting facts to avoid dismissal, and continuing to prosecute the claim long after it knew it was meritless."[53] In particular, Defendants assert that:

a. Plaintiff originally argued that it had seven separate alleged trade secrets but, upon confronting Defendants' Motion to Dismiss this claim, amended its claims to assert that BAB's entire business plan constituted its trade secret;[54]

b. Plaintiff removed allegations from its Original Complaint relating to vendor trials conducted with West Coast Medical Billing that Defendants had argued in their Motion to Dismiss permitted reverse engineering of Plaintiff's alleged trade secrets, allegations that Defendants contend were fatal to Plaintiff's trade secret claim;[55]

c. Plaintiff changed its original allegation that Francisco made a "product presentation" to Aeroflow's "entire division,"[56] which Defendants argued on their Motion to Dismiss showed that Plaintiff did not engage in reasonable efforts to maintain the secrecy of its alleged trade secret, to

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[53] (Defs.' Mem. Law Supp. Mot. Att'ys' Fees 11–12 [hereinafter Defs.' Br., ECF No. 195.)

[54] (Defs.' Br. 13.)

[55] (Defs.' Br. 13) (noting deletion from the FAC of Original Compl. ¶ 13—the allegation that BAB's vendor "undertook trials to prove that the coding and billing concept rendered BAB products payable under health insurance").

[56] (Original Compl. ¶ 34.)

state instead that Francisco trained only "department heads" and instructed them to keep the information "in-house"[57]—a purported statement of fact Francisco contradicted through later affidavit testimony[58] averring that he "gave thorough presentations to the employees and customer service representatives;[59]

d. Plaintiff submitted an alleged "sham affidavit" from Francisco stating that Defendants had stolen BAB's Garment designs, thereby directly contradicting his deposition testimony that Defendants had copied BAB's design measurements, in an unsuccessful effort to create a genuine issue of material fact to avoid summary judgment;[60] and

e. BAB had made its purported trade secret business plan publicly available before filing its lawsuit by disclosing it to potential distribution partners on a non-confidential basis.[61]

31. Plaintiff responds by contending that it proceeded in good faith, that it did not act with false motive or purpose, and that the Court's dismissal of its trade secret claim through dispositive motions practice does not justify a fee award against it.[62]

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[57] (FAC. ¶ 74.)

[58] (3d Francisco Aff. ¶ 16.)

[59] (*See generally* Defs.' Br. 13.)

[60] (Defs.' Br. 14; *compare* Pl.'s Resp. Br. Defs.' Mot. Summ. J. Ex. G 7th Aff. Don Francisco, dated Mar. 9, 2022, at ¶¶ 36, 63, ECF No. 126.8, *with* Francisco Dep. 165:8–65:13). The Court noted this contradiction in its summary judgment order. (*See* Summ. J. Order ¶¶ 33–35.)

[61] (Defs.' Br. 14–15.)

[62] (Pl.'s Resp. Defs.' Mot. Att'ys' Fees 6–9.)

Upon a careful review of Defendants' concerns, the Court agrees with Plaintiff, but for different reasons.

32. First, the Court cannot conclude that BAB's modification of its purported trade secret from seven individual trade secrets into a single trade secret business plan evinces Plaintiff's false motive or purpose. Rather, it appears at least as likely, if not probable, that Plaintiff simply reconsidered the best way to identify its trade secret for pleading purposes—not that Plaintiff invented a new trade secret where one did not exist. Indeed, while the Court dismissed Plaintiff's misappropriation claim at summary judgment, the Court nonetheless found that Plaintiff had met its burden to identify its alleged trade secret with the particularity our courts require. *See Vitaform, Inc. v. Aeroflow, Inc.*, 2022 NCBC LEXIS 128, *14 (N.C. Super. Ct. Oct. 27, 2022).

33. Similarly, the Court cannot conclude that Plaintiff's omission of previous allegations—in particular, its allegation concerning its vendor's trials—implies false purpose or false motive because Plaintiff offers evidence that these trials were conducted using confidential information provided by Francisco. As such, it is at least arguable that the trials could not be replicated by others without Francisco's consent, which Defendants have not shown that he gave.[63]

34. Next, the Court concludes that Plaintiff's allegations about Francisco's presentation, and, in particular, the new allegation that Francisco instructed his

[63] It is also worth noting that Plaintiff did not delete the entirety of this allegation in the Amended Complaint, which still describes how BAB perfected its insurance reimbursement model with the vendor. (*See* FAC ¶ 35.)

department head audience to keep his presentation "in-house," can be reasonably read as an expansion, rather than a repudiation, of Plaintiff's allegations about this meeting in the original Complaint. While the Court is concerned that Francisco appears to have changed his description of his audience more than once, the Court is not prepared to conclude that his changing description reflects false motive or purpose rather than imprecision or inconsistent memory.

35. The Court views the "sham affidavit" in a somewhat similar light. While troubling and properly excluded at summary judgment,[64] the affidavit sought to offer modified testimony that would not have rescued Plaintiff's claim and is as likely to reflect Francisco's imprecise recollections four years after the events at issue as it is to show his intentional misrepresentations.

36. Finally, while the Court dismissed Plaintiff's misappropriation claim because "the undisputed evidence show[ed] that BAB's entire business model was publicly in use and known to Defendants prior to the July 19 Call" and "BAB's efforts were not reasonable under the circumstances to maintain the secrecy of its alleged trade secret," the Court is not prepared to conclude, based on a review of the entire evidentiary record, that Plaintiff filed and prosecuted its misappropriation claim in bad faith. While it appears to the Court that Plaintiff struggled to identify its trade secret throughout the litigation, it ultimately succeeded. And while the Court rejected Plaintiff's contentions that its business plan was maintained in secrecy and not available for public inspection, Plaintiff nonetheless made arguments sufficiently

[64] (Summ. J. Order ¶ 35.)

grounded in fact and law in support of that proposition to preclude a finding that it proceeded in bad faith, under either an objective or subjective standard. For each of these reasons, the Court will deny Defendants' Motion for attorneys' fees under N.C.G.S. § 66-154(d) and, in the exercise of its discretion, deny Defendants' request for costs under N.C.G.S. § 6-21(12).

B. The Lanham Act

37. The Lanham Act provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."[65] Relying on the United States Supreme Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014), which analyzed the Federal Patent Act's identical provision awarding attorneys' fees in "exceptional cases," the Fourth Circuit has held that a trial court:

> may find a case "exceptional" and therefore award attorneys' fees to the prevailing party under § 1117(a) when it determines, in light of the totality of the circumstances, that (1) there is an unusual discrepancy in the merits of the positions taken by the parties, based on the non-prevailing party's position as either frivolous or objectively unreasonable, (2) the non-prevailing party has litigated the case in an unreasonable manner, or (3) there is otherwise the need in particular circumstances to advance considerations of compensation and deterrence.

Georgia-Pacific Consumer Prods., LP v. Von Drehle Corp., 781 F.3d 710, 721 (4th Cir. 2015) (cleaned up). Since the standard is framed in the disjunctive, only one of the identified factors must be met. *Dewberry Eng'rs Inc. v. Dewberry Grp., Inc.*, 77 F.4th 265, 294 (4th Cir. 2023) (noting that the standard "does not require a prevailing party

[65] 15 U.S.C. § 1117(a).

to demonstrate the presence of *all three* circumstances" (emphasis in original)). In addition, whether a case is "exceptional" must be proven by a preponderance of the evidence, *Verisign, Inc. v. XYZ.COM, LLC*, 891 F.3d 481, 484 (4th Cit. 2018), and a showing of misconduct or bad faith is not required. *Citi Trends, Inc. v. Coach, Inc.*, 780 Fed. App'x. 74, 80 (4th Cir. 2019).

38. Defendants argue that Plaintiff's litigation conduct makes this case an exceptional one under the Lanham Act, and the Court agrees. Here, BAB based its Lanham Act claim on the critical factual allegation that Motif copied BAB's Garments and passed them off as Motif's. The discovery record, however, failed to show any evidence to support this contention. The Court explained this total failure of proof in its summary judgment ruling:

> 91. Nonetheless, even if the Court were to consider this testimony, and, in particular, Francisco's testimony that "[b]y March 6, 2019, . . . my products were being marketed under the name 'Motif Medical[,]' " which is BAB's critical factual assertion for its Reverse Passing Off claim, the Court notes that in the same affidavit, Francisco directly contradicted this testimony, admitting, as Defendants contend, that "Aeroflow sold a nameless brand."
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> 92. The documentary evidence on which BAB relies likewise shows that Defendants sold BAB and Motif products in a "brand agnostic" manner. For example, BAB relies on screenshots of a 2 April 2019 press release from PRWeb announcing Aeroflow's addition of a "*selection* of Maternity Support Bands," as well as screenshots of an overview of the benefits of maternity compression garments on Aeroflow's website dated 23 December 2018 and several undated screenshots of Aeroflow's product pages for the various compression garments it sold.
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> 93. Despite Francisco's assertion that, at some point, BAB's products "were being marketed under the name 'Motif Medical[ ]' " and that the "models shown wore products with the Motif brand name on them[,]" none of the product images include brand labels, and the only mention of a specific brand name appears on the product page for the "Postpartum

> Compression Garment" underneath the "Description" label, where it states that "Motif Postpartum Recovery Support Garments were designed by medical professionals" without suggesting which brand a customer would receive upon purchase. In fact, the only evidence in the record that reflects Aeroflow's representations to its customers about which brand of compression garment a customer would receive upon purchase supports Defendants' position: "The brand you will receive is either [BAB] or [Motif]." Moreover, BAB has proffered no evidence that a customer ever received a BAB product in a Motif package and, as counsel for BAB acknowledged at the Hearing, when BAB itself purchased a Motif product, BAB received a Motif garment in a Motif package.
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> * * *
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> 97. BAB has failed to offer evidence from which a jury could conclude that Aeroflow's marketing caused consumer confusion. As discussed above, the undisputed evidence shows that Aeroflow did not market a particular brand of maternity compression garments. When asked which brand Aeroflow sold, the evidence shows that Aeroflow responded that customers would receive either a BAB product or a Motif product. Moreover, the branding on the products and their packaging is distinct, there are no allegations of mislabeling, and BAB has not offered evidence suggesting that customers ever received BAB products in Motif packaging or Motif products in BAB packaging.

Vitaform, Inc., 2022 NCBC LEXIS 128, at *48–50.

39. While Plaintiff may have had reasonable suspicions of a Lanham Act violation when it filed this claim in its Amended Complaint, Plaintiff did not have any supporting evidence, and Plaintiff surely knew by the close of discovery that it had not discovered any evidence to support its Lanham Act claim. As a result, Plaintiff should have dismissed its Lanham Act claim at that time and not required Defendants to seek summary judgment on what had clearly been shown to Plaintiff to be a meritless claim. The Court therefore concludes that Plaintiff's continued litigation of this claim after the close of discovery was objectively unreasonable, that Plaintiff litigated this claim in an unreasonable manner by persisting in advancing

the claim when it knew it had no evidence in support, and that, in these circumstances, considerations of compensation and deterrence warrant an award of attorneys' fees to Defendants.

40. Based on the above, the Court therefore concludes that, for each of these reasons, this is an "exceptional case" under 15 U.S.C. § 1117(a), entitling Defendants to an award of attorneys' fees. *See, e.g., Design Rsch., Inc. v. Leather Indus. of Am.*, No. 1:10-CV-157, 2016 U.S. Dist. LEXIS 134319, at *5–17 (M.D.N.C. Sept. 29, 2016) (finding an exceptional case and awarding attorneys' fees because plaintiff's continued prosecution of its Lanham Act claim through summary judgment was objectively unreasonable since "the evidence gleaned in discovery failed to reveal any evidence" of a Lanham Act violation and noting in support of its award "the importance of deterring litigants from pursuing their claims even when the claim has fallen apart following discovery due to a lack of supporting evidence"); *LendingTree, LLC v. Zillow, Inc.*, 54 F. Supp. 3d 444, 463 (W.D.N.C. 2014) (finding an exceptional case under the Patent Act and granting attorneys' fees where plaintiff "should have realized the strength of [defendant's] defenses at summary judgment."); *Phonometrics, Inc. v. ITT Sheraton Corp.*, 64 Fed. App'x. 219, 221 (Fed. Cir. 2003) (affirming district court's conclusion that a case was exceptional because plaintiff "continued to litigate the case even after it knew that it could not prevail on the merits.").

41. In considering the scope of an appropriate award of attorneys' fees under 15 U.S.C. § 1117(a), the Court recognizes that it is difficult to divide the hours

expended in seeking summary judgment on Plaintiff's Lanham Act claim from the hours expended in seeking summary judgment on Plaintiff's other claims.[66] Federal courts have held in such circumstances that apportionment between time spent on an unsuccessful Lanham Act claim and other unsuccessful claims is unnecessary if "the court finds the claims are so inextricably intertwined that even an estimated adjustment would be meaningless." *Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir. 2000); *Eschert v. City of Charlotte*, 2017 U.S. Dist. LEXIS 141902, at *11–12 (W.D.N.C. Sept. 1, 2017). "To determine whether claims are related, the Court considers whether and to what degree there was a common nucleus of operative fact with other claims that do not have a fee-shifting provision." *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 563–64 (M.D.N.C. 2020); *see, e.g.*, *Eschert*, 2017 U.S. Dist. LEXIS 141902, at *11–12 (finding apportionment of fee award unnecessary where all claims were based on a single, intertwined nucleus of operative fact and the work of plaintiff's attorneys related to the litigation as whole).

42. Applying these considerations here, the Court concludes after thorough and careful review that Defendants' efforts in successfully obtaining summary judgment on Plaintiff's Lanham Act claim focused on the litigation as a whole and that all claims in the litigation were inextricably interwoven and arose from a

[66] While Defendants' counsel acknowledged at the Hearing that the time spent litigating the Lanham Act claim could be apportioned from the time spent litigating Plaintiff's other claims, counsel made no such representation specific to summary judgment briefing and argument, which, by its nature, involves synthesizing a party's arguments on all claims into a persuasive whole.

common nucleus of operative fact.[67] As a result, the Court will, in the exercise of its discretion, require Plaintiff to pay all of Defendants' attorneys' fees incurred in connection with prosecuting Defendants' Motion for Summary Judgment.

C. N.C.G.S. 75-16.1 – UDTPA

43. Under N.C.G.S. § 75-16.1, the Court may award a defendant its attorneys' fees as part of the court costs incurred in defending a claim for unfair and deceptive trade practices under N.C.G.S. § 75-1.1 only upon the Court's finding that "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." N.C.G.S. § 75-16.1(2). A claim is "frivolous" under the UDTPA "if a proponent can present no rational argument based upon the evidence or law in support of [it]. A claim is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will." *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 199 (2013) (alteration in original) (quoting *Blyth v. McCrary*, 184 N.C. App. 654, 663, n. 5 (2007)). "Maliciousness can develop during the course of litigation if a

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[67] The United States Supreme Court long ago recognized the propriety of a fully compensatory fee award in the face of interwoven claims, noting in the context of a claim under 42 U.S.C. § 1988, that:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. . . . The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). The Court notes that these same considerations apply equally to the prosecution of Defendants' Motion for Summary Judgment here.

party persists after discovering that his claim is meritless." *Laschkewitsch v. Legal & Gen. Am., Inc.*, No. 5:15-CV-251, 2017 U.S. Dist. LEXIS 180972, at *5 (E.D.N.C. Nov. 1, 2017), *aff'd*, 725 Fed. App'x. 252 (4th Cir. 2018).

44. Plaintiff's UDPTA claim largely overlapped its TSPA and Lanham Act claims. Defendants have therefore, in substantial part, based their request for fees under the UDTPA on the same grounds they advanced in support of their requests for fees under those two statutes. Defendants also argue that they are entitled to fees because part of Plaintiff's UDTPA claim was "based on allegations of fraud that BAB could not adequately plead after two attempts."[68]

45. As an initial matter, the Court rejects Defendants' argument for fees based on Plaintiff's unsuccessful fraud claim; indeed, Plaintiff succeeded in advancing through dispositive motion practice a narrowed claim for fraud based on the July 19 Call, and the Court is not persuaded that the unsuccessful aspects of Plaintiff's fraud claim were asserted frivolously or maliciously.

46. The Court also rejects Defendants' claim for fees under the UDTPA based on the TSPA claim for the same reasons it will deny Defendants relief under N.C.G.S. §§ 66-154(d) and 6-21(12).

47. In contrast, however, the Court will grant Defendants' Motion under the UDTPA to the extent it is based on the Lanham Act claim. As explained above, the evidence shows that Plaintiff knew that its Lanham Act claim was wholly without merit when BAB could not discover any supporting evidence by the close of the

[68] (Defs.' Br. 18.)

discovery period. At that point, Plaintiff could not, and did not at summary judgment, advance a rational argument based upon the evidence or law in support of its Lanham Act-based UDPTA claim. As a result, the Court concludes that Plaintiff's opposition to Defendants' Motion for Summary Judgment on this claim was frivolous under N.C.G.S. § 75-16.1(2).

48. Under North Carolina law, "where all of plaintiff's claims arise from the same nucleus of operative fact[ ] and each claim was 'inextricably interwoven' with the other claims, apportionment of fees is unnecessary." *Whiteside Estates, Inc. v. Highlands Cove, LLC*, 146 N.C. App. 449, 467 (2001). In determining whether claims are "inextricably interwoven," courts apply "the reasonable relation test: reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys' fees statutes in awarding fees for attorney activity[.]" *Id.* (cleaned up).

49. Applying that test here, and after thorough and careful review, the Court concludes, in the exercise of its discretion, that Defendants' efforts in successfully obtaining summary judgment on Plaintiff's Lanham Act and Lanham Act-based UDTPA claims were based on a common nucleus of operative fact and thus were inextricably interwoven. *See, e.g.*, *Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC*, 747 F. Supp. 2d 568, 591 (M.D.N.C. 2010) (determining Lanham Act and UDTPA claims were "necessarily intertwined").

50. As a result, the Court will, in the exercise of its discretion, award Defendants their attorneys' fees under N.C.G.S. § 75-16.1(2) to the same extent the

Court will award fees under 15 U.S.C. § 1117(a). *See, e.g.*, *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2018 NCBC LEXIS 69, at *12 (N.C. Super. Ct. July 6, 2018) (finding that plaintiff was entitled to attorneys' fees on all claims where "the time spent on all of these claims overlapped with [plaintiff's] recoverable claim and request for relief and arose from a common nucleus of law or fact shared with [plaintiff's] recoverable claim and request for relief"); *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 595 (2000) (recognizing that determining whether claims are inextricably interwoven is in the trial court's discretion). Defendants, however, shall have only a single recovery of their attorneys' fees under these two statutes.

D. N.C.G.S. § 6-21.5

51. Under N.C.G.S. § 6-21.5:

> [i]n any civil action, . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings [under Rule 12], a motion to dismiss pursuant to [Rule 12(b)(6)], a motion for a directed verdict pursuant to [Rule 50], or a motion for summary judgment pursuant to [Rule 56], is not in itself a sufficient reason for the court to award attorney[s'] fees, but may be evidence to support the court's decision to make such an award."[69]

52. "The relevant inquiry under . . . N.C.G.S. § 6-21.5 is whether a justiciable issue is present. If there is, the moving party's motion must fail. If not, the court must then examine whether the non-moving party knew or should have known the

[69] N.C.G.S. § 6-21.5.

claim was not justiciable." *Willard v. Barger*, 2021 NCBC LEXIS 7, at *9 (N.C. Super. Ct. Jan. 22, 2021). A "complete absence of a justiciable issue" exists where the plaintiff either (1) was reasonably aware when the complaint was filed that the pleading did not contain a justiciable issue or (2) persisted in litigating the case after it reasonably should have become aware that the pleading no longer contained a justiciable issue. *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655 (2010). For an award of attorneys' fees under N.C.G.S. § 6-21.5 to obtain, "it must conclusively appear that [justiciable] issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss." *Sunamerica Fin. Corp.*, 328 N.C. at 257 (citation omitted).

53. Defendants first move under N.C.G.S. § 6–21.5 to recover the attorneys' fees they incurred in defending against BAB's TSPA, Lanham Act, and UDTPA claims. As an initial matter, the Court's rulings above establish that Plaintiff's TSPA claim was justiciable. As a result, the Court will deny Defendants' Motion to the extent it seeks relief under N.C.G.S. § 6-21.5 based on Plaintiff's TSPA claim.

54. At the same time, the Court's conclusion that Plaintiff persisted in litigating its Lanham Act and Lanham Act-based UDTPA claims after it knew it had no evidence to support them establishes that those claims were nonjusticiable or became nonjusticiable during the course of litigation. Accordingly, the Court will grant Defendants relief under N.C.G.S. § 6-21.5 to the same extent and in the same amount as the Court will award relief under 15 U.S.C. § 1117(a) and N.C.G.S. § 75-16.1.

55. Defendants also request recovery of their attorneys' fees under N.C.G.S. § 6-21.5 for successfully defeating (i) BAB's purported Further Counterclaims and (ii) BAB's effort to present damages evidence disallowed by the Court and damages theories that were not disclosed during discovery.[70]

56. The Court will deny Defendants' Motion as to Plaintiff's effort to present improper damages evidence and theories because N.C.G.S. § 6-21.5 only prohibits taking nonjusticiable positions in pleadings, not in motions practice.

57. The Court, however, will grant Defendants' Motion as to Plaintiff's filing of its Further Counterclaims. Those claims—for defamation, tortious interference with prospective economic advantage, and violation of the UDTPA—were filed after Defendants filed the same claims against Plaintiff some weeks before. After Defendants moved to dismiss these claims and shortly before the hearing on Defendants' motion, Plaintiff voluntarily dismissed its claims.

58. Even a cursory review reveals that none of these claims was well-grounded in law or fact. Plaintiff's Further Counterclaims alleged that Defendants submitted an affidavit by third-party witness Scott Owen ("Owen") that was "riddled with falsehoods,"[71] and further that Owen's falsehoods could only have resulted through

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[70] Defendants also originally sought their fees under N.C.G.S. § 6-21.5 for defeating BAB's opposition to Defendants' motion to amend to add counterclaims, (*see* ECF Nos. 82–83, 89, 91, 95), and BAB's motion in limine seeking to exclude the *de bene esse* deposition of Scott Owen. Defendants subsequently withdrew these grounds for relief, the former in Defendants' Reply in Support of Motion for Attorneys' Fees, and the latter at the Hearing. (*See* Defs.' Reply Supp. Mot. Att'ys' Fees 11 n.3, ECF No. 201.)

[71] (Further Countercls. ¶ 30.)

Defendants' defamatory statements to Owen about Francisco.[72] Plaintiff also alleged that Defendants provided Francisco's deposition transcript to Owen and thereby "formed the basis for the defamation of Plaintiff's business reputation."[73]

59. Not only were Plaintiff's "Further Counterclaims" procedurally improper—Plaintiff asserted additional claims against Defendants as if by right without properly seeking leave of court under Rule 15 to amend its Amended Complaint to assert new claims—but they were also barred by the absolute privilege afforded to "statements made in an affidavit which are pertinent to matters involved in a judicial proceeding," *Jarman v. Offutt*, 239 N.C. 468, 472 (1954), as well as to communications between counsel and witnesses or potential witnesses in a judicial proceeding, *see Jones v. Coward*, 193 N.C. App. 231, 235 (2008) (holding that "an attorney's statement or question to a potential witness regarding a suit in which that attorney is involved, whether preliminary to trial, or at trial, is privileged"). Since each of the Further Counterclaims was based on the same allegedly defamatory statements, all of these purported "counterclaims" were barred by the judicial proceeding privilege. *See Jones*, 193 N.C. App. at 235 (dismissing claims for intentional infliction of emotional distress and negligence that were based upon the allegedly defamatory statements because to dismiss only the defamation claim would "eviscerate" the privilege).

60. Moreover, Plaintiff's "Further Counterclaims" were fatally deficient on the merits. Indeed, the premise of Plaintiff's claims—that Defendants communicated

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[72] (Further Countercls. ¶¶ 32, 35, 38.)

[73] (Further Countercls. ¶¶ 3, 5, 49, 59, 68).

false information to Owen about Francisco's dealings with Owen himself[74]—makes little sense, especially given the lack of context or supporting information surrounding the allegations. Owen, not Defendants, was a party to his conversations with Francisco, so it cannot bear scrutiny that Owen somehow relied upon Defendants' false information concerning his own conversations with Francisco. And, of course, Plaintiff alleges that Defendants prompted false responses from Owen by providing Francisco's deposition transcript to Owen—i.e., testimony from Francisco himself, not Defendants—which Defendants were entitled to do. The Further Counterclaims relied entirely on speculation and unsupported assumptions, yet Defendants were forced to incur time and expense in moving to dismiss these purported counterclaims only for Plaintiff to voluntarily dismiss them shortly before the hearing on the motion was to be held. The Court thus finds that these Further Counterclaims were nonjusticiable, and that attorneys' fees are therefore warranted under N.C.G.S. § 6-21.5.

61. Accordingly, based on the above, the Court, in the exercise of its discretion, will grant Defendants' Motion under N.C.G.S. § 6-21.5 to the extent it is based on Plaintiff's filing of the Further Counterclaims and order Plaintiff to pay Defendants their attorneys' fees incurred in defending against and moving to dismiss those claims.

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[74] (Further Countercls. ¶¶ 36–37, 39.)

E. N.C.G.S. § 6-20.

62. The Court may award costs in its discretion under N.C.G.S. § 6-20. Under North Carolina law, those costs are limited to those enumerated in N.C.G.S. § 7A-305(d).[75] Based on the findings above, the Court concludes, in the exercise of its discretion, that it is appropriate and in the interests of justice to award Defendants their costs incurred in connection with prosecuting Defendants' Motion for Summary Judgment and in defending against and moving to dismiss Plaintiff's Further Counterclaims.

IV.

CONCLUSION

63. **WHEREFORE**, this Court, in the exercise of its discretion, hereby **ORDERS** as follows:

a. Defendants' Motion is hereby **GRANTED in part,** and Defendants shall be awarded their attorneys' fees incurred in connection with (i) prosecuting their Motion for Summary Judgment, under 15 U.S.C. § 1117(a), N.C.G.S. § 75-16.1 to the extent Plaintiff's UDTPA claim was based on the Lanham Act, and N.C.G.S. § 6-21.5 and (ii) defending against Plaintiff's Further Counterclaims, under N.C.G.S. § 6-21.5. Defendants shall also be awarded their incurred costs to this same

[75] "The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to N.C.G.S. § 6-20." N.C.G.S. § 7A-305(d).

extent under N.C.G.S. § 6-20, subject to the limitations imposed by N.C.G.S. § 7A-305(d).

b. Defendants' Motion is otherwise **DENIED**.

c. Defendants shall have through and including 27 November 2023 to submit supplemental briefing and supporting documentation detailing their fees and costs incurred in (i) prosecuting their Motion for Summary Judgment and (ii) defending against Plaintiff's Further Counterclaims.

d. Plaintiff shall have through and including 11 December 2023 to file its response.

e. Defendants shall have through and including 21 December 2023 to file any reply.

f. All briefing shall comply with BCR 7.

g. The Court will determine whether to hold a hearing on Defendants' supplemental briefing on their request for attorneys' fees and costs at a later date.

SO ORDERED, this the 9th day of November, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge