

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

LIFEBRITE HOSPITAL GROUP OF)
STOKES, LLC,)

Plaintiff,)

v.)

BLUE CROSS AND BLUE SHIELD OF)
NC,)

Defendant,)

BLUE CROSS AND BLUE SHIELD OF)
NORTH CAROLINA,)

Counterclaim Plaintiff,)

v.)

LIFEBRITE HOSPITAL GROUP OF)
STOKES, LLC; LIFEBRITE)
HOSPITAL GROUP, LLC;)
LIFEBRITE LABORATORIES, LLC;)
CHRISTIAN FLETCHER; AMBER)
FLETCHER,)

Counterclaim)
Defendants.)

No. 1:18-cv-00293-WO-LPA

**LIFEBRITE HOSPITAL GROUP OF STOKES, LLC AND LIFEBRITE
LABORATORIES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO
STRIKE OR IN THE ALTERNATIVE MOTION TO DISMISS COUNTS II
AND III OF LIFEBRITE HOSPITAL GROUP OF STOKES, LLC'S AND
LIFEBRITE LABORATORIES, LLC'S SECOND AMENDED COMPLAINT**

LifeBrite Hospital Group of Stokes, LLC ("LifeBrite
Hospital"), and LifeBrite Laboratories, LLC ("LifeBrite

Labs") (collectively, the "LifeBrite Parties" or "LifeBrite") submit this Opposition to Blue Cross and Blue Shield of North Carolina's ("Blue Cross NC") Motion to Strike ("Motion to Strike") or in the Alternative Motion to Dismiss Counts II and III ("Motion to Dismiss") (collectively, the "Motions") of the Second Amended Complaint ("SAC").

INTRODUCTION

[REDACTED]

[REDACTED].” Second Amended Complaint, Exhibit 19.¹ That was Blue Cross NC’s conclusion from 2019 regarding the LifeBrite Parties’ conduct. Now, however, in an ongoing attempt to avoid its contractual obligation to pay LifeBrite, Blue Cross NC continues its campaign against the LifeBrite Parties through myriad filings with this Court. Blue Cross NC hopes it can persuade this Court to endorse the same alleged “fraud” narrative that the U.S. Government also unsuccessfully pursued against LifeBrite’s CEO, Christian Fletcher, in a

¹ All exhibit references are to the Second Amended Complaint unless otherwise noted.

2023 trial - at the conclusion of which he was acquitted of all charges.²

In other words, despite knowing for six years (or longer) that LifeBrite "[REDACTED]
[REDACTED]
[REDACTED]," (see Exhibit 19), Blue Cross NC instead misled federal and state law enforcement, government agencies, Blue Cross Blue Shield affiliates, other insurers, and additional third parties in the healthcare industry that LifeBrite Hospital and LifeBrite Labs engaged in fraud and other bad behavior. Simply put: Blue Cross NC chose to defame the LifeBrite Parties and engage in deceptive and unfair practices when faced with a commercial threat.

As the Middle District of Florida recently said, with respect to false accusations of healthcare fraud by private

² Mr. Fletcher, now a cross-claim defendant in this civil action, was acquitted of all charges in connection with the U.S. Government's action against him related to LifeBrite Laboratories' reference laboratory work. See e.g., <https://www.prnewswire.com/news-releases/lifebrite-laboratories-ceo-christian-fletcher-exonerated-of-all-charges-301794943.html>.

insurers, "the courts certainly do not need the citizenry to make up allegations of fraud where none exists. In those very, very rare cases where it is shown that one side has brought false criminal charges against another, this and any Court should impose penalties that are swift, severe, and unforgettable." See Order, Durall et al. v. Blue Cross and Blue Shield of Florida, Inc. et al., Case No. 23-61557-CIV-SINGHAL (S.D. Fla. June 26, 2024) (attached hereto as Exhibit A). Blue Cross NC's conduct presents that exact case here.

While Blue Cross NC contends that "the walls [are] closing in [on LifeBrite]," ECF No. 257 at 2 (Blue Cross NC's Memorandum in Support of its Motion to Strike and/or Motion to Dismiss), Blue Cross NC purposely ignores the inconvenient facts that have emerged in the past two years. First, Christian Fletcher was acquitted of any criminal wrongdoing by a jury. Second, hard-fought discovery that Blue Cross NC withheld until 2025 has uncovered even more defamatory, unfair, and deceptive acts directed by Blue Cross NC to other parties. Third, discovery has reaffirmed what Blue Cross NC would have learned had they simply accepted LifeBrite Hospital's invitation in 2018 to visit Danbury, NC to

understand precisely how LifeBrite was performing tests: LifeBrite Hospital ran drug screen tests and referenced confirmation tests to LifeBrite Labs. Rather than simply take the time to visit or inspect LifeBrite Hospital or LifeBrite Labs, Blue Cross NC instead elected to wage a reputational crusade against the LifeBrite Parties in hopes of evading its contractual obligations. See Excerpt of Deposition Transcript of Christian Fletcher, attached hereto as Exhibit B.³ All of these facts support the LifeBrite Parties' well-pled tort claims, no matter how badly Blue Cross NC hopes to convince this Court to prematurely deny the LifeBrite Parties the opportunity to present their claims to the trier of fact.

Blue Cross NC's procedural arguments for dismissal fare no better. First, the Second Amended Complaint was timely because it was filed by the amended pleading deadline in the Court's Scheduling Order, which was set for March 12, 2025. ECF No. 234. Second, Blue Cross NC is wrong that the LifeBrite

³ Q: So you saw these tests be performed? A: I saw the final report that was sent out to the providers, yes, an indication that the lab tests were performed. And in some instances, yeah, I actually saw the tests be performed and I invited Blue Cross out to witness it themselves, in which they declined. Fletcher Dep. Tr., 176:20-177:1.

Parties' use of exhibits from the First Amended Complaint constitutes re-assertion of the "same theories and documents the Court has already dismissed." The Court previously dismissed the LifeBrite Parties' claim for violation of North Carolina's Unfair and Deceptive Trade Practices Act *without prejudice*. LifeBrite adds new Exhibits 19-23 to replead that claim. Although the LifeBrite Parties' allegations must be taken as true for purposes of Blue Cross NC's Motions, the evidence adduced to date (including the new exhibits) further supports LifeBrite's allegations and claims for UDTA violations (Count III) and its expanded libel *per quod* claim (Count II). Nothing in the Court's prior dismissal order prohibits LifeBrite from repleading those claims with additional evidence, which LifeBrite only recently received because of Blue Cross NC's persistent failure to timely produce relevant documents.

As discussed in further detail below, for these reasons, the LifeBrite Parties request the Court deny Blue Cross NC's Motions.

STATEMENT OF RELEVANT FACTS

The LifeBrite Parties filed their First Amended Complaint on December 22, 2023. ECF No. 183. Blue Cross NC filed its motion to dismiss the First Amended Complaint on March 6, 2024, which the court heard on April 30, 2024. ECF No. 188 and April 30, 2024 minute entry. During the pendency of LifeBrite's motion to dismiss, Blue Cross NC objected to providing any tort-related discovery, citing the Court's February 27, 2024 minute entry that "the Court extends the discovery period through 4/30/2024 as to all issues presently identified in the Rule 26(f) reports and extensions." Discovery on other claims, defenses, and counterclaims continued. On January 13, 2025, the Court ruled from the bench on the motion to dismiss:

- Dismissing without prejudice LifeBrite Hospital's unjust enrichment claim;
- Dismissing without prejudice the LifeBrite Parties' Violations of the UDTPA claim;
- Dismissing LifeBrite Hospital's libel *per se* claim;
- Dismissing LifeBrite Hospital's libel *per quod* claim as to other exhibits, excluding Exhibits 11 and 16, which were allowed to proceed.

See ECF No. 230.

The Court instructed the parties to submit a scheduling order. The Parties submitted their own scheduling orders – both of which included a deadline by which all parties could file amended pleadings. On March 12, 2025, the LifeBrite Parties filed a Second Amended Complaint, expanding on the Hospital's libel *per quod* claim, adding additional details in relation to the Hospital's breach of contract claim, and asserting a violation of the UDTPA, based on additional documents that Blue Cross NC failed to produce until after the filing of the First Amended Complaint and, therefore, were not previously known to LifeBrite.

RELEVANT LEGAL STANDARD

As a threshold matter, LifeBrite's Second Amended Complaint was timely filed in accordance with the Court's amended pleading deadline. See ECF No. 234. But even if it were not, leave to amend is to be freely given when justice so requires, unless the amendment would be futile, or reward undue or intended delay. Fed. R. Civ. P. 15(a). Accepting "as true all of the factual allegations" in the complaint, Trustees of Purdue Univ. v. Wolfsped, Inc., 620 F. Supp. 3d

393, 397 (M.D.N.C. 2022) (quoting Ray v. Roane, 948 F.3d 222, 226 (4th Cir. 2020)), Rule 12(b)(6) dismissal is generally appropriate only if no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 328-29 (4th Cir. 1996). The issue is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence supporting the claim. Revene v. Charles Cnty. Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989). "A plaintiff need not plead detailed evidentiary facts, and a complaint is sufficient if it will give a defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Simmons v. Stubbs, No. 1:11CV291, 2011 WL 3665027, at *2 (M.D.N.C. Aug. 19, 2011) (quotation omitted).

ARGUMENT

I. THE LIFEBSITE PARTIES AMENDED THEIR COMPLAINT PURSUANT TO THE COURT'S ORDER AND INSTRUCTION.

The LifeBrite Parties timely filed their Second Amended Complaint by March 12, 2025, as required by this Court's Scheduling Order. ECF No. 234. The Order makes no mention of requiring the parties to seek leave if the amended pleading

is filed prior to that deadline. The LifeBrite Parties understood the Court's Order to mean that the Court had already given the LifeBrite Parties leave to file amended pleadings by this date, as the Court stated: "The time permitted for any amended pleadings by either party will be very short. After the specified date, the court will consider, inter alia, whether the granting of leave to amend would delay trial." Id. (emphasis added). Accordingly, the amendment was timely and proper without further leave.

There is another, common-sense reason why this amendment is proper. The Court dismissed the UDTPA claim and certain libel per quod claims without prejudice, necessarily leaving open the possibility of repleading, which the LifeBrite Parties have now timely done. In short, there is no procedural basis for dismissing the Second Amended Complaint.

II. THE LIFEBSITE PARTIES ADEQUATELY ALLEGE UNFAIR AND DECEPTIVE ACTS UNDER THE UDTPA.

The LifeBrite Parties' UDTPA claim sufficiently identifies Blue Cross NC'S unfair and deceptive acts. To prove an unfair or deceptive trade practice claim under North Carolina's UDTPA, "a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice

(2) that was in or affecting commerce and (3) proximately caused injury." Stack v. Abbott Lab'ys, Inc., 979 F. Supp. 2d 658, 666-67 (M.D.N.C. 2013). Further, "[a]n act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and is deceptive if it has the capacity or tendency to deceive." Id. at 667. Under North Carolina law, libel in a business setting is an unfair or deceptive act in or affecting commerce in violation of the UDTPA. Ellis v. N. Star Co., 326 N.C. 219, 225 (1990); see also King v. Chaffin, No. 3:24-CV-719-MOC-DCK, 2024 WL 5131778, at *7 (W.D.N.C. Dec. 16, 2024) (allowing a defamation claim to act as the sole basis for a UDTPA claim). Accordingly, while an underlying tort is not required to state a UDTPA claim, a libel claim, such as LifeBrite Hospital's claim, can act as the basis for a UDTPA claim.

A. The LifeBrite Parties do not need to show their reliance on Blue Cross NC's Statements, as the UDTPA Claim is based on an independent tort and unfair acts in competition.

Blue Cross NC's focus on reliance is irrelevant, as Blue Cross NC misconstrues the nature of the LifeBrite Parties' UDTPA claim. Blue Cross NC attempts to cast this claim as one that arises from a consumer relying on misrepresentations by

a business, when instead, the LifeBrite Parties' UDTPA claim arises from a business seeking to harm another through its speech and conduct. In the latter scenario, reliance does not play a part.

North Carolina recognizes a distinct UDPTA claim based on underlying conduct not dependent on a defendant's misrepresentations, which therefore do not require a showing of reliance on any misrepresentation. See CPI Sec. Sys., Inc. v. Vivant Smart Home, Inc., 710 F. Supp. 3d 438, 452-53 (W.D.N.C. 2024) (upholding verdict for plaintiff on UDTPA claim because "unfair competition or tortious interference may serve as a viable and independent basis for [plaintiff's] UDTPA claim without proof of [plaintiff's] own reliance.") The Western District of North Carolina has explained this exact distinction between misrepresentation-based and other UDPTA claims in CPI which supports LifeBrite's argument. In denying summary judgment for a UDTPA claim, that Court explained:

the Bite Busters Court appears to have clarified that a viable, distinct cause of action that has been recognized as, or may constitute, an unfair or deceptive trade practice and is not solely reliant on a defendant's misrepresentations, such as tortious interference, misappropriation of trade

secrets, and breach of contract, may serve as the basis for a UDTPA claim without requiring [that] the plaintiff show plaintiff's reliance on a misrepresentation to establish proximate cause.

CPI Sec. Sys., Inc. v. Vivint Smart Home, Inc., No. 3:20-CV-00504-FDW-DSC, 2021 WL 5225634, at *4 (W.D.N.C. Nov. 9, 2021).

Notably, after a jury trial regarding this same claim, the CPI court once again rejected the argument that a plaintiff must rely on the misrepresentations (the "first party reliance" requirement) for the UDTPA claim to succeed, ruling that "[w]here, as here, another established tort independently establishes a UDTPA violation, and the alleged misrepresentations merely form part of a broader claim that the defendant engaged in multiple unfair and deceptive behaviors, first-party reliance is not required" CPI Sec. Sys., Inc. v. Vivant Smart Home, Inc., 710 F. Supp. 3d 438, 453 (W.D.N.C. 2024). Further, the Fourth Circuit has been clear: "[UDTPA] claims require neither intent of the actor nor actual reliance of the victim." Foodbuy, LLC v. Gregory Packaging, Inc., 987 F.3d 102, 122 (4th Cir. 2021) (quoting CBP Res., Inc. v. SGS Control Servs., Inc., 394 F. Supp. 2d 733, 740 (M.D.N.C. 2005)).

D.C. Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc., on which Blue Cross NC heavily relies, is inapplicable to this matter. In D.C. Custom Freight, the misrepresentation was made by an insurer to a third party who was renting trucks to the plaintiff, and the misrepresentation was regarding the plaintiff's insurance coverage. 848 S.E.2d 552, 563 (N.C. Ct. App. 2020). Subsequently, the plaintiff damaged the truck, and since no coverage applied, the rental agency sought recovery from the plaintiff. The plaintiff sued the defendant, an insurer, asserting a UDTPA claim based on misrepresentations made to that third party. The Court determined the UDTPA claim failed as the misrepresentation to the third party regarding the coverage did not cause the damage, as reliance by the plaintiff regarding coverage was not shown. The plaintiff could not show reliance, as the plaintiff never received a copy of the policy to rely upon. Thus, it could not be shown that the plaintiff "affirmatively incorporated the alleged misrepresentation into his or her decision-making process," and the plaintiff's subsequent decision resulted in damages. Id. This fact pattern is entirely unrelated to the one before this Court.

Further, the court in D.C. Custom Freight even recognized the distinction between UDTPA claims based on misrepresentation *to a party*, and UDTPA claims based on misrepresentations *to a third party* aimed at hurting a party:

This case is also factually distinguishable from Ellis. In Ellis, the defendant made a misrepresentation to a potential client that caused them to purchase its product over the plaintiff's...The unfair and deceptive practice at issue in Ellis was a misrepresentation that directly interfered with the plaintiff's business opportunity and caused the plaintiff harm.

Id. (citing Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 272 (1980)). This matter's UDTPA claim is in line with Ellis and CPI, in that Blue Cross NC's conduct at issue involves deceptive and unfair acts, as well as a UDTPA claim based in libel.

B. The LifeBrite Parties Allege Actionable Conduct for the UDTPA Claim.

This Court previously considered LifeBrite's First Amended Complaint's UDTPA claim, ruling on January 13, 2025 that it was a "close case", but, under Rule 9(b), there were not enough allegations, taken altogether, to sufficiently state a claim. January 13, 2025 Transcript at 18. However, Blue Cross NC did not produce additional documents showing

the full extent of its unfair and deceptive acts until November 5, 2024 and February 28, 2025 - well *after* the Parties argued the Motion to Dismiss, and for the latter production, after the Court had ruled on the Motion. See Declaration of James V. Earl at ¶¶ 3-4. Additionally, Blue Cross NC improperly urges the Court to look at each exhibit to the Second Amended Complaint in a vacuum in arguing the UDTPA claim should be dismissed. These new exhibits, taken together with the First Amended Complaint's exhibits, show that Blue Cross NC knew the LifeBrite Parties were not committing fraud or abuse. Yet, Blue Cross NC told third parties that the LifeBrite Parties were committing fraud in an effort to alienate the LifeBrite Parties from the healthcare industry and cut off their revenue streams. Once again, Blue Cross NC hid the evidence, produced it long after it was due, and now tries to use its own delay as a weapon against such claims.

On February 1, 2019, David Angevine, Blue Cross NC's team lead of the SIU's data analytics and legal auditing team, concluded in an email that LifeBrite Hospital "[REDACTED]"

[REDACTED]

[REDACTED].” See Ex 19 to FAC.

Rather, Mr. Angevine concluded LifeBrite Hospital was billing

“ [REDACTED]

[REDACTED].”

Id. In sum, Blue Cross NC knew LifeBrite Hospital and LifeBrite Labs were not committing fraud, abuse or committing the fraud type of “overbilling,” LifeBrite Hospital was simply utilizing its contractual right to reimbursement under its contract with Blue Cross NC, which had beneficial terms for LifeBrite Hospital.

This e-mail provides further context to Blue Cross NC’s subsequent acts and communications, evidencing that Blue Cross NC’s statements to third parties were false and support a UDTPA claim. Importantly, Blue Cross NC could have sought to amend LifeBrite Hospital’s contract to change the payment terms, or immediately exercised its right to terminate the contract. Instead, Blue Cross NC proceeded to tell third parties that LifeBrite Hospital and LifeBrite Labs were engaging in fraud, breaching the contract with Blue Cross NC, and committing abuse and fraud in the form of “overbilling.”

This is despite that Blue Cross NC knew LifeBrite Hospital was not even "[REDACTED]." Id.

For example, as shown in Blue Cross NC's reports, detailed in Exhibits 11 and 16, Blue Cross NC reported that the LifeBrite Parties were engaging in improper business practices – i.e. a scheme of fraud, abuse, and the fraud type of overbilling or excessive billing. See Exhibit 11 at BCBSA_000999; Exhibit 16 at BCBSA_001310. These reports were viewed by Blue Cross Blue Shield Affiliates, state and federal government agencies and law enforcement, and others.⁴ After February 2019, Blue Cross NC continued to update these reports and even resubmitted them in April 2022, despite knowing its reports were directly contradicted by its own internal conclusions. See Ex. 19. Further, exhibits 17 and 18 to the SAC show Blue Cross NC sent reports to the North Carolina State Health Plan, identifying the LifeBrite Parties as the subject of Blue Cross NC's fraud unit, who have come under investigation for the fraud types of "overbilling," "service not provided," and accusing them of billing "improperly for

⁴ Blue Cross NC has largely redacted the list of viewers, but it appears to have included over 1,358 views as of 2023. [Blue Cross NC's production had hundreds more views.]

lab services.” Ex. 17 at 1-2. These are factual assertions—Blue Cross NC’s attempt to distinguish them as merely the “basis for Blue Cross NC’s continued investigation” does not lessen the blow of telling third parties Blue Cross NC believes the LifeBrite Parties are engaging in fraud or other improper business purposes. This is especially true when Blue Cross NC has internally concluded in 2017 that LifeBrite’s lab billing is allowed under the contract at issue (see Exhibit 5), and concluded in 2019 that no such fraud or improper business purpose had occurred.

The Court has allowed the libel claim to proceed based on Exhibits 11 and 16. Exhibit 19 provides evidence of Blue Cross NC’s knowingly false, defamatory statements to third parties. It also provides further context for the exhibits supporting the UDTPA claim. For these reasons, the LifeBrite Parties’ UDTPA claim should be allowed to proceed.

C. The LifeBrite Parties have sufficiently pled an Unfair Act under the UDTPA.

The LifeBrite Parties have also asserted a UDTPA claim based on Blue Cross NC’s conduct, which constituted unfair practices and unfair competition. “A practice is properly

deemed unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.... [or] amounts to an inequitable assertion of ... power or position." Capital Res., LLC v. Chelda, Inc., 223 N.C. App. 227, 239 (2012) (internal quotations omitted). Further, "[t]o prove deception, while it is not necessary to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, a plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 196 (2014). Under the UDTPA, "commerce" includes all business activities. N.C.G.S. § 75-1.1.

The LifeBrite Parties have based their unfair competition component of the UDTPA claim on Blue Cross NC's actions, at a minimum, by: 1) disparaging the LifeBrite parties in an effort to cut off their revenue and destroy their business; and 2) threatening any healthcare providers who do business with the LifeBrite Parties. As described in the Second Amended Complaint, Blue Cross NC's disparagement to third parties led

to a decrease in the LifeBrite Parties' revenue. See Second Amended Complaint at ¶¶ 5, 65, 90.

1. Blue Cross NC Committed unfair, deceptive acts that involve commerce.

Blue Cross NC disparaged the LifeBrite Parties by telling third parties they were engaged in fraud, breach of contract, and a "scheme." All the while, Blue Cross NC knew LifeBrite Hospital was not breaching its contract, and LifeBrite Hospital's lab billing was allowed under the Contract. See Second Amended Complaint, Ex. 5. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Asby v. Medtronic, Inc., 673 F. Supp. 3d 787, 797 (E.D.N.C. 2023). Further, a practice is deceptive if it has the capacity or tendency to deceive, but "it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, but plaintiff must show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." Id. (quoting Gress

v. Rowboat Co., 190 N.C. App. 773, 776, 661 S.E.2d 278, 281 (2008)).

These communications, on their face, possess the tendency or capacity to mislead or create the likelihood of deception, and are unfair. Statements that impeach an entity's trade or profession are unfair and even deemed libelous per se, and sufficient for a UDTPA claim. King v. Chaffin, No. 3:24-CV-719-MOC-DCK, 2024 WL 5131778, at *7 (W.D.N.C. Dec. 16, 2024) (holding a UDTPA claim may proceed, upon a defamation claim based on the impeachment of one's trade or profession); Eli Research, Inc. v. United Commc'ns Grp., LLC, 312 F. Supp. 2d 748, 758 (M.D.N.C. 2004) (allowing a UDTPA claim to proceed based on misrepresentations and libel regarding one's business). In a business setting, a libel claim is an unfair and deceptive act in or affecting commerce in violation of North Carolina's UDTPA. See Eli Research, Inc. v. United Commc'ns Grp., LLC, 312 F. Supp. 2d 748, 758 (M.D.N.C. 2004) (holding the same); HSG, LLC v. Edge-Works Mfg. Co., No. 15 CVS 309, 2015 WL 5824453, at *11 (N.C. Super. Oct. 5, 2015) (holding a claim of libel that defames a party in its business activities may be the basis of a claim for

unfair and deceptive trade practices “in or affecting commerce). Thus, Blue Cross NC’s disparagement of the LifeBrite Parties to other insurers and members of the healthcare industry both have a tendency to deceive and are unfair and would affect commerce.

2. The UDTPA claim is not time-barred.

Incredibly, Blue Cross NC attempts to argue that the UDTPA claim, which is based on documents Blue Cross NC withheld from production until *after* the court dismissed that claim without prejudice, is time-barred. In fact, the statute of limitations for that claim is tolled. Exhibits 17 through 19, and 20 through 23 to the Second Amended Complaint present new UDTPA theories. Exhibit 19 was not produced until November 5, 2024, and Exhibits 20-22 were not produced until February 28, 2025. See Earl Decl., ¶¶ 3-4. A UDTPA claim has a four-year statute of limitations and tolls such claims in light of the discovery rule. See Dreamstreet Investments, Inc. v. MidCountry Bank, 842 F.3d 825, 830 (4th Cir. 2016). Accordingly, Exhibits 12, 15, 17-19, 20-23 also support UDTPA claims, which have been tolled due to Blue Cross NC’s delayed productions in November 2024 and February 2025.

Further, while certain statements defaming the LifeBrite Parties may be time barred under the statute of limitations for libel, the limitations period of four years allows a UDTPA claim based on the libelous statements to proceed if the statements themselves support a libel claim and a UDTPA claim. HSG, LLC v. Edge-Works Mfg. Co., No. 15 CVS 309, 2015 WL 5824453, at *11 (N.C. Super. Oct. 5, 2015) ("the Court dismissed Higdon's counterclaims for libel based on the statute of limitations, and not on the basis that the facts underlying the alleged libel did not occur or that the alleged defamatory statements were not libelous....Therefore...the Court cannot conclude that Higdon cannot proceed with the G.S. § 75-1.1 claim based on the statements in the letter, even if Higdon is barred from recovering for those statements under a libel claim.").

Based on the UDTPA claim's four-year limitations period, this would revive the libel claims that the Court recognized as time-barred. This includes SAC Exhibits 12, 15, 17-19, and 20-23. Further, this would also expand the relevant time period of the currently pending libel claims, as to FAC Exhibits 11 and 16. Given the inclusion of Exhibit 19, which

clarifies Blue Cross NC's knowledge of the falsity of its defamation, along with the case law detailing how disparaging one's trade or profession supports a UDTPA claim, the LifeBrite Parties' UDTPA claim should proceed.

3. Exhibits 20-23 evidence Blue Cross NC's other unfair acts utilized to damage providers like LifeBrite Labs.

Exhibits 20 through 23 detail Blue Cross NC's other unfair methodology for preventing the LifeBrite Parties from doing business with healthcare providers. In 2017, Blue Cross NC began what it describes as a "redirection" campaign, which involved sending threatening letters to healthcare providers who ordered labwork from hospitals and labs that were not approved by Blue Cross NC. The letters would threaten Blue Cross NC seeking financial recovery from the provider, impacts to reimbursement rates for providers claims submitted to Blue Cross NC, threaten to brand the provider as having taken kickbacks, and even termination from the Blue Cross NC network. See Exhibit 21 at BCBSCLB-00121248; Exhibit 22 at BCBSNCLB-00124907. LifeBrite alleges these letters were sent to providers who ordered tests from LifeBrite Hospital and

LifeBrite Labs, directing the provider to only utilize Blue Cross NC's approved laboratories. See Second Amended Complaint, ¶¶ 57-60, 95-96.

Notably, Blue Cross NC does not outright state it did not send such letters to providers who utilized such services—instead, Blue Cross NC argues they were template letters, and offers alternative arguments, arguing such conduct is not actionable. But these factual issues and inferences have no place in the motion to dismiss analysis. Blue Cross NC also tries to argue that it had no control over the sending of these letters, but these letters, on their face, are signed by Blue Cross NC employees: Troy Page, Director of Corporate Provider Contracts, and Susan Menendez, Director of Strategic Provider Relationships.⁵ Exhibit 21 at BCBSNCLB-00121247. While Exhibit 22 is on Avalon Healthcare Solutions' ("Avalon") letterhead, Exhibit 23 shows Blue Cross NC was leading and instructing Avalon as to the use of these letters and their implementation. See Exhibit 23.

⁵ <https://www.linkedin.com/in/susan-menendez-4b8a5423/> ;
<https://www.linkedin.com/in/troy-page-01b62341/>

Most importantly, Blue Cross NC does not address the fact that these letters include an instruction to the provider to only use an approved laboratory and provides a list of labs. See Exhibit 21 at BCBSNCLB-00121249 through BCBSNCLB-00121250 (" [REDACTED] [REDACTED] [REDACTED]."); Exhibit 22 at BCBSNCLB-00124908. This directly instructs providers to order labwork for their patients not from an in-network laboratory such as LifeBrite Hospital.

Blue Cross NC's argument that a UDTA claim cannot be based on Blue Cross NC's threat to exert its contractual rights with the healthcare providers is inapplicable. The holding in Pro Consulting Grp. addresses how a UDTA claim cannot follow when a defendant terminates its contract with the plaintiff. Champion Pro Consulting Grp., LLC v. Impact Sports Football, LLC, 116 F. Supp. 3d 644, 660 (M.D.N.C. 2015), aff'd sub nom. Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC, 845 F.3d 104 (4th Cir. 2016). That is not the scenario here. Rather, Blue Cross NC threatened to terminate its contract with a healthcare provider, *a third party*, in an effort to curtail the LifeBrite

Parties' business and to benefit Blue Cross NC's revenue. If the healthcare provider ordering labwork from LifeBrite Hospital being threatened was the plaintiff, Blue Cross NC's argument may have merit. But that simply isn't the case here. Further, given that LifeBrite Hospital was in network, this threat was both baseless and malicious, in that it would be within a provider's rights to order labwork from the in-network LifeBrite Hospital.

The unfairness of Blue Cross NC's threats to third parties is evident in that Blue Cross NC was attempting to control the provider's rightful exertion of its rights under its contract with Blue Cross NC, in an unethical, unscrupulous, and oppressive manner, which likely affected consumers in that it narrowed the available options for labs performing a patient's labwork.

The LifeBrite Parties have also alleged their damages due to this unfair conduct. The LifeBrite Parties have explained that providers who sent samples and ordered tests from the LifeBrite Parties were threatened with termination and those threats worked: the test orders stopped coming, as did the revenue associated with the lab tests. SAC at 60, 95-

96. Further, a UDTA claim does not automatically require the application of Rule 9(b), as this part of the UDTA claim does not “sound in fraud.” CBP Res., Inc. v. SGS Control Servs., Inc., 394 F. Supp. 2d 733, 739 (M.D.N.C. 2005) (declining to extend Rule 9(b)’s coverage to UDTA claims); Topshelf Mgmt., Inc. v. Campbell-Ewald Co., 117 F. Supp. 3d 722, 731 (M.D.N.C. 2015) (applying Rule 9(b) requirements to UDTA claims alleging detrimental reliance on false or deceptive representations.). The UDTA claim here does not involve detrimental reliance nor deceptive representations, but unfair acts. See infra, Section II.A. Accordingly, Blue Cross NC’s Rule 9(b) argument fails.

III. THE LIFEBRITE PARTIES ARE NOT LIMITED TO CONTRACTUAL REMEDIES, AND MAY ASSERT A UDTA CLAIM.

Blue Cross NC argues the UDTA claim related to the “redirection” campaign, and is therefore barred because it is merely an extension of its breach of contract claim. This is legally and factually inaccurate. First, an aggravated breach of contract that involves deception constitutes a violation of the UDTA under North Carolina law. DENC, LLC v. Philadelphia Indem. Ins. Co., 32 F.4th 38, 52-53 (4th Cir.

2022) ("when the 'same course of conduct' supports both breach of contract and a UDTPA violation, a plaintiff has a right to treble damages.") (citing Garlock v. Henson, 112 N.C.App. 243, 435 S.E.2d 114, 116 (1993) and Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530, 535 (4th Cir. 1989)). The Court of Appeals of North Carolina's decision in Johnson v. Colonial Life & ACC. Ins. Co. addressed this very scenario, finding sufficient evidence for a UDTPA claim, in addition to a breach of contract claim, because in addition to breaching an employment contract, the defendant: did not adequately investigate the allegation of the submission of a false or fraudulent claim before submitting a fraud report to the North Carolina Department of Justice; submitted, without knowing or having reasonable cause to believe, a report to the North Carolina department of Insurance concerning the Plaintiff; and wrongfully used the accusation of a false claim as a pretext for terminating the plaintiff, when there was otherwise no cause, as defined in the contracts at issue. Johnson v. Colonial Life & Acc. Ins. Co., 173 N.C. App. 365, 371 (2005). The facts present in Johnson almost mirror the facts in this matter: Blue Cross NC not only breached its

Contract with LifeBrite Hospital, but also used a vindictive investigation, the filing of reports to federal and state agencies, and its communications with third parties, to aggravate the harm caused by Blue Cross NC's breach.

The new exhibits show Blue Cross NC's deception that accompanied its breaches, aggravating them. Namely, Blue Cross NC denied and underpaid its reimbursements to LifeBrite Hospital for its services, in violation of the Contract, while knowing the Contract allowed LifeBrite Hospital's billing. Despite that knowledge, Blue Cross NC told third parties that LifeBrite Hospital was engaged in forms of fraud and breaches of the Contract. See Second Amended Complaint at ¶¶ 36-41. Second, the UDTPA claim is not merely an extension of the breach of contract claim because LifeBrite seeks different remedies for each. The damages sought for the breach of contract claim are compensatory for the unpaid and underpaid claims. Id. at ¶¶ 69-70. In comparison, the UDTPA claim arises not only from Blue Cross NC's aggravated breach, but from Blue Cross NC's unfair acts involving third parties that damaged LifeBrite Hospital's revenue, as the third parties no longer ordered tests to be performed by LifeBrite Hospital.

See Second Amended Complaint at ¶¶ 89-96. These claims are independent of one another.

IV. BLUE CROSS NC IMPROPERLY TRIES TO RELITIGATE THIS COURT'S FINDINGS REGARDING FAC Exhibits 11 and 16.

Blue Cross NC argues that limitations bars LifeBrite Hospital's libel *per quod* claim, which the Court has already determined is not time-barred. Yet again, Blue Cross NC is trying to re-litigate an issue that it caused in avoiding its discovery obligations. The LifeBrite Parties incorporate their arguments responding to Blue Cross NC's Motion to Dismiss the LifeBrite Parties' First Amended Complaint and refer the Court to its ruling from the bench and subsequent order.

The Court has already rejected Blue Cross NC's argument that the LifeBrite Parties have failed to state a claim for defamation as to Exhibits 11 and 16 and should reject Blue Cross NC's latest attempt to re-open that issue.

CONCLUSION

Blue Cross NC's Motion to Strike and Alternative Motion to Dismiss Counts II and III of the Second Amended Complaint should be denied because the LifeBrite Parties have amended

their complaint pursuant to the Court's rulings, and the LifeBrite Parties have stated cognizable claims and are entitled to their day in court to prove the allegations.

DATED: May 7, 2025 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response contains 5,790 words, excluding the case caption, the signature block, any required certificates, any table of contents, any table of authorities, and any attachments, exhibits, affidavits, and other addenda. The foregoing word count is calculated by the word processing system used to prepare this brief, and thereby complies with Local Civil Rule 7.2(f)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

This 7th day of May, 2025.

/s/ James V. Earl

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