

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 9285

FOUNDATION BUILDING
MATERIALS, LLC,

Plaintiff / Counterclaim
Defendant,

v.

CONKING & CALABRESE, CO., INC.;
CONKING & CALABRESE SE, INC.;
JEREMY CHAVIS; DOUGLAS
CALABRESE; CHRISTOPHER
CIROCCO; RON GREENE; MAY
ZAMBRANO; and COREY BELL,

Defendants / Counterclaimants /
Third-Party Plaintiffs,

v.

ROBERT HENSHAW, Individually,

Third-Party Defendant.

**ORDER AND OPINION ON MOTION
TO DISMISS DEFENDANTS'
AMENDED COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT**

1. **THIS MATTER** is before the Court on Plaintiff / Counterclaim Defendant Foundation Building Materials, LLC and Third-Party Defendant Robert Henshaw’s Motion to Dismiss Defendants Conking & Calabrese Co., Inc. and Conking & Calabrese, SE’s Amended Counterclaims and Third-Party Complaint, (the “Motion”), filed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s)”), (ECF No. 88).

2. The Court, having considered the Motion, the briefs supporting and opposing the Motion, and the parties' arguments at a hearing held 19 December 2023, concludes for the reasons stated below that the Motion should be **GRANTED**.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by J. Allen Thomas, Haseeb Fatmi, and Savannah Trimmer for Plaintiff Foundation Building Materials, LLC, and Third-Party Defendant Robert Henshaw.

Richard L. Robertson & Associates, P.A., by Ryan T. Vince; and McDermott IP Law, by Richard Michael McDermott, for Defendants Conking & Calabrese, Co., Inc., and Conking & Calabrese SE, Inc.

Earp, J.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact when ruling on a motion to dismiss. It recites below the factual allegations in the Amended Counterclaims and Amended Third-Party Complaint that are relevant to the Motion before the Court.

4. Conking & Calabrese Co., Inc. ("Conking NY") was formed in or around 1975 in the State of New York. (Defs.' Mot. to Dismiss, Answer, and Aff. Defs. to Pl.'s First Am. Ver. Compl., and Countercls., and Third-Party Compl. ["Am. Countercls. / Am. Third-Party Compl."], ¶ 4, ECF No. 86.)

5. Conking NY is a drywall and building material distributor that distributes construction materials for commercial and residential projects, primarily those in or around the State of New York. (Am. Countercls. ¶¶ 4-6; Am. Third-Party Compl. ¶¶ 4-6.)

6. Conking & Calabrese, SE ("Conking SE," together with Conking NY, "Conking") was formed in the State of New York on or about 27 January 2023. On or

about 9 March 2023, Conking SE was formed in the State of North Carolina. (Am. Countercls. ¶¶ 9-10; Am. Third-Party Compl. ¶¶ 9-10.)

7. Conking purchases building materials from manufacturers and then sells and furnishes the materials to customers. (Am. Countercls. ¶ 6; Am. Third-Party Compl. ¶ 6.) Conking and Foundation Building Materials, LLC (“FBM”) are competitors in this industry. (Am. Countercls. ¶ 19; Am. Third-Party Compl. ¶ 21.) Robert Henshaw (“Henshaw”) is a Regional Vice President for FBM. (Am. Third-Party Compl. ¶ 14.)

8. Defendants contend that FBM and Henshaw know “information, facts, and circumstances associated” (1) “with Conking’s previous or historical, and in some cases, valid and existing (or ongoing), business relations and/or contractual relations with various manufacturers and customers in the industry” and (2) “with Conking’s prospective entry into business relations and/or contractual relations with various manufacturers and customers in the industry.” (Am. Countercls. ¶¶ 20-21; Am. Third-Party Compl. ¶¶ 22-23.)

9. Defendants allege that beginning as early as May 2023, FBM and Henshaw have “induced and attempted to induce, or otherwise pressured and attempted to pressure, various manufacturers and customers in the industry from continuing, or to otherwise end valid and existing (or ongoing), contractual relations with Conking, and/or to cease doing business with Conking[.]” (Am. Countercls. ¶ 22; Am. Third-Party Compl. ¶ 24.) Furthermore, Defendants allege that FBM and Henshaw have “induced and attempted to induce, or otherwise pressured and

attempted to pressure, various manufacturers and customers in the industry from entering into contractual relations and/or prospective contractual relations with Conking, and/or to refrain from doing business with Conking now and/or in the future[.]” (Am. Countercls. ¶ 23; Am. Third-Party Compl. ¶ 25.)

10. In addition, Defendants contend such inducements to manufacturers and/or customers by FBM and Henshaw “include, but may not be limited to, directing or pressuring certain parties to discontinue or otherwise end valid and existing (or ongoing) business or contractual relations with Conking, directing or pressuring certain parties not to engage or contract or otherwise do business with Conking, as well as placing or threatening to place certain parties on nationwide ‘holds’ directly with FBM, should such parties fail or refuse to comply with FBM’s pressures or demands.” (Am. Countercls. ¶ 24; Am. Third-Party Compl. ¶ 26 (emphasis omitted).)

11. With respect to the material supply industry, a “hold” is “commonly understood to mean a decision by one party in the industry . . . to pause, discontinue, or otherwise refrain from doing business with another party in the industry . . . typically, but not always, on a temporary basis.” (Am. Countercls. ¶ 25; Am. Third-Party Compl. ¶ 27.)

12. On 15 June 2023, MBA Building Supplies, Inc. (“MBA”) placed a business “hold” on Conking. (Am. Countercls. ¶ 30; Am. Third-Party Compl. ¶ 32.) MBA informed Conking that it received communications from FBM/Henshaw to cease doing business with Conking. (Am. Countercls. ¶ 29; Am. Third-Party Compl. ¶ 31.) At some point, MBA reversed this hold; however, the “hold” was put

back in place in August 2023. (Am. Countercls. ¶¶ 31-32; Am. Third-Party Compl. ¶¶ 33-34.) Defendants contend the second “hold” “was a direct result of continued demands, pressure, and efforts from FBM/Henshaw for it to not do [sic] business with, to cease doing business with or otherwise end contractual relations with Conking, and to otherwise not do business with Conking in the future.” (Am. Countercls. ¶ 32; Am. Third-Party Compl. ¶ 34.) FBM’s influence is made possible due to its “respective size and nationwide presence[.]” (Am. Countercls. ¶ 26; Am. Third-Party Compl. ¶ 28.)

13. Defendants allege that other manufacturers and/or customers in the industry (in addition to MBA) have placed similar “hold(s)” on or with Conking, or have been engaging in “slow openings”¹ with respect to Conking. (Am. Countercls. ¶ 36; Am. Third-Party Compl. ¶ 38.)

14. FBM filed its Verified Complaint and Motion for Temporary, Preliminary, and Permanent Injunction on 26 May 2023. The Verified Complaint purports to allege claims for misappropriation of trade secrets, tortious interference with prospective business relations, unjust enrichment, breach of fiduciary duty, constructive fraud, fraud, violation of the North Carolina Unfair and Deceptive Trade Practices Act, and common law unfair competition. (*See generally* Ver. Compl. [“Compl.”], ECF No. 3.)

¹ A “slow open” is commonly understood to mean a decision by one party in the industry to slowly do business with another party. “[F]or example, a manufacturer agreeing to sell and deliver material to a material supplier such as Conking, but at or on a delayed or prolonged schedule,” would be engaging in a slow open. (Am. Countercls. ¶ 37; Am. Third-Party Compl. ¶ 39.)

15. The case was designated as a complex business case on 30 May 2023 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

16. On 10 July 2023, Defendants filed a Motion to Dismiss, Answer, and Affirmative Defenses to Plaintiff's Verified Complaint.² Included in their pleading were Conking's counterclaims against FBM, as well as a third-party complaint against Henshaw, individually. (*See generally* ECF No. 32.)

17. On 15 September 2023, FBM filed a Motion to Dismiss Defendants' Counterclaims and Third-Party Complaint (the "Motion to Dismiss"), (ECF No. 46). On 14 November 2023, FBM filed its First Amended Verified Complaint, adding new Defendants and claims. (*See generally* Am. Ver. Compl., ECF No. 82.) On 14 December 2023, Defendants filed their Answer to the Amended Complaint. At the same time, Defendants amended their Counterclaims and Third-Party Complaint.

18. Defendants' Amended Counterclaims include tortious interference with business relations or prospective contract, unfair and deceptive trade practices, and common law unfair competition. The same claims are asserted in the Amended Third-Party Complaint, almost verbatim, against Henshaw.

19. The Court held a hearing on the Motion to Dismiss on 19 December 2023. (*See* Not. of Hrg., ECF No. 85.) At the hearing, Defendants' counsel argued

²Although Defendants' pleading is captioned as Motion to Dismiss and includes a Motion to Dismiss as its First Defense, pursuant to Business Court Rule 7.2, "[e]ach motion must be set out in a separate document." Furthermore, "a Rule 12(b) motion to dismiss for failure to state a claim must be filed *prior* to [the filing of] an answer, not contemporaneously with or minutes after." *BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 142, at **5-6 (N.C. Super. Ct. Nov. 13, 2023) (quoting *Johnston v. Johnston Props., Inc.*, 2018 NCBC LEXIS 119, at **14 (N.C. Super. Ct. Nov. 15, 2018)) (emphasis in original).

that the filing of the Amended Counterclaims and Amended Third-Party Complaint mooted the original Motion to Dismiss, which was directed to Defendants' original counterclaims and third-party complaint. Accordingly, on 11 January 2024, with the Court's permission, Plaintiff refiled the Motion and incorporated its earlier brief. Plaintiff contends that Defendants' amended filing did not change anything, and that Conking's amended claims "do not address or correct the fundamental failing of [its] claims."³ (Motion ¶ 5, ECF No. 88.)

20. The Motion is now ripe for disposition.

II. LEGAL STANDARD

21. Pursuant to Rule 12(b)(6), dismissal of a claim is proper if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018). Otherwise, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

22. When deciding a motion to dismiss, the Court construes the complaint liberally and accepts all allegations as true. *See Laster v. Francis*, 199 N.C. App. 572, 577 (2009). Nevertheless, the Court is not required "to accept as true allegations that

³ Counsel presented their arguments with respect to dismissal of the amended claims at the hearing on 19 December 2023. The Court determines that a second hearing on the (refiled) Motion to Dismiss would not assist it in its determination. *See* BCR 7.4.

are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

III. ANALYSIS

A. Wrongful or Tortious Interference with Business Relations or Prospective Contract

23. Both Defendants’ first Counterclaim and their first Third-Party Claim are for wrongful or tortious interference with business relations or prospective contract.

24. “A claim for tortious interference with ‘business relations’ embraces claims for interference with both existing contracts and prospective future contracts.” *E-Ntech Indep. Testing Servs. v. Air Masters, Inc.*, 2017 NCBC LEXIS 2, at **14 (N.C. Super. Ct. Jan. 5, 2017). “[A] claim for tortious interference with existing contracts requires the plaintiff to allege that a valid contract existed between plaintiff and a third person who was induced by defendant not to perform without justification.” *Id.*; *see also United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 661 (1988). “In contrast, a claim for tortious interference with future contracts or prospective economic advantage requires the plaintiff to allege that defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference.” *Id.* (citation and internal quotation marks omitted).

25. FBM and Henshaw contend that the amended claims filed by Conking should be dismissed because the pleadings do not allege that FBM or Henshaw acted without justification or for an improper purpose. (See Motion ¶ 5.) The Court agrees.

26. FBM and Conking are competitors in the material supply industry, (Am. Countercls. ¶ 19; Am. Third-Party Compl. ¶ 21). “Generally speaking, interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant . . . are competitors.” *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498 (1992); see also *Daniel Grp., Inc. v. Am. Sales & Mktg.*, 2016 NCBC LEXIS 112, at *31-32 (N.C. Super. Ct. Dec. 15, 2016) (“In light of the allegations that Defendants were competitors . . . Plaintiff has not alleged a claim for tortious interference.”); *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 371 (2001) (holding that one’s desire to “establish a competing business” was a justification for interference).

27. The privilege to interfere, however, “is lost if exercised for a wrong purpose.” *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 220 (1988) (internal quotation marks and citation omitted). “In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved.” *Id.* (emphasis in original). If the defendant is motivated by “a malicious wish to injure the plaintiff, his actions are not justified.” *Id.* at 221.

28. Conking alleges that FBM/Henshaw acted “without justification or an otherwise legitimate purpose,” and that their actions were not committed “solely

because FBM and Conking are competitors.” (Am. Countercls. ¶ 38; Am. Third-Party Compl. ¶ 40.) Conking also alleges that FBM/Henshaw “willfully, intentionally, and maliciously, or otherwise wrongfully” engaged in the purported interference. (Am. Countercls. ¶ 40; Am. Third-Party Compl. ¶ 42.)

29. These however, are conclusory allegations, and “general allegations of malice are insufficient as a matter of pleading.” *Lendingtree, LLC v. Intercontinental Capital Grp., Inc.*, 2017 NCBC LEXIS 54, at **14 (N.C. Super. Ct. June 23, 2017) (quoting *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 605 (2007)); *see also Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 80, at **42-43 (N.C. Super. Ct. Oct. 21, 2016) (allegation that defendant “maliciously intended to interfere with [] contracts” is insufficient to allege tortious interference absent supporting facts).

30. Except for its conclusory allegations, Conking does not allege any *facts* showing that FBM/Henshaw acted without justification. *See Med1 NC Servs., LLC v. Med1 Plus, LLC*, 2020 NCBC LEXIS 24, at *29 (N.C. Super. Ct. Feb. 26, 2020) (stating that the plaintiff must “allege facts showing that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them, which contract would have ensued but for the interference” (cleaned up)); *Walker v. Sloan*, 137 N.C. App. 387, 393 (2000) (holding that to state a claim for wrongful interference with prospective advantage, the plaintiff must allege facts to show that the defendants acted without justification); *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 285 (2019) (holding that tortious interference claim must

be dismissed where plaintiff alleged defendants acted “without justification” but did not “plead facts supporting a claim” that defendants acted “for any improper purpose”); *Daniel Grp., Inc.*, 2016 NCBC LEXIS 112, at *31 (holding plaintiff failed to state a claim for tortious interference because plaintiff did not plead facts demonstrating that defendants’ actions were not prompted by legitimate business purposes and explaining that the court was “not compelled to accept” legal conclusions that defendants acted for a “reason not reasonably related to the protection of a legitimate business interest”).

31. Accordingly, FBM/Henshaw’s Motion to Dismiss as to Conking’s claims for tortious interference is **GRANTED**, and the claims are **DISMISSED** without prejudice.⁴

B. Unfair and Deceptive Trade Practices

32. Defendants’ second Counterclaim and their second Third-Party Claim are for unfair and deceptive trade practices. The claims are premised on three grounds. First, Defendants contend that FBM’s alleged tortious interference is an unfair trade practice under N.C.G.S. § 75-1.1. Second, Defendants contend that FBM’s use of “holds” constitutes an unfair trade practice. Third, Defendants contend that the commencement and prosecution of this Action in and of itself constitutes an unfair and deceptive trade practice. (See Am. Countercls. ¶ 45; Am. Third-Party Compl. ¶ 47.)

⁴ “The decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]” *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013).

33. “A violation of unfair and deceptive trade practices under [N.C.]G.S. § 75-1.1 occurs when ‘(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.’” *Salon Blu, Inc. v. Salon Lofts Grp., LLC*, 2018 NCBC LEXIS 72, at *18-19 (N.C. Super. Ct. July 16, 2018) (quoting *Dalton v. Camp*, 353 N.C. 647, 656 (2001)). “An act is unfair when a party ‘engages in conduct which amounts to an inequitable assertion of its power or position,’ and an act is unfair or deceptive if it is ‘immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers.’” *Id.* at *19 (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 607 (2008)). “The facts surrounding the transaction and the impact on the marketplace determine whether a particular act is unfair or deceptive, and this determination is a question of law for the court.” *Noble v. Hooters of Greenville, LLC*, 199 N.C. App. 163, 167 (2009).

34. To the extent that Conking’s unfair and deceptive trade practices claims are based on their failed tortious interference claims, these claims also fail. *See Charah, LLC v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 52, at *19 (N.C. Super. Ct. Apr. 17, 2020) (“[W]hen the UDTP claim rests solely upon other claims, such as a claim for tortious interference with contract, which the court determines should be dismissed, the UDTP claim must fail as well.”); *see also Combs*, 147 N.C. App. at 374 (“[P]laintiff’s claim that defendants engaged in unfair and deceptive trade practices rests with its claims for misappropriation of trade secrets, tortious interference with contracts and civil conspiracy. Having determined that the trial court properly

granted summary judgment on each of these claims, we likewise conclude that no claim for unfair and deceptive trade practices exists.”); *Amerigas Propane, L.P. v. Coffey*, 2015 NCBC LEXIS 98, at **40-41 (N.C. Super Ct. Oct. 15, 2015) (dismissing claim under UDTPA where court had already dismissed underlying claims).

35. Moving to Conking’s allegation that FBM exploited its market power and attempted to stifle Conking’s ability to compete in the North Carolina market by convincing manufacturers (such as MBA) and customers to place Conking on holds or slow opens, the Court concludes that Conking has again failed to allege a violation of the UDTPA. To the extent Conking’s complaint is that FBM has used its market power inequitably, the conduct alleged does not amount to a violation of Chapter 75. North Carolina courts have rejected similar arguments based on the principle that, “[i]n the absence of conspiracy or monopoly, one may deal with whom he pleases.” *Tel. Servs., Inc. v. General Tel. Co. of South*, 92 N.C. App. 90, 93 (1988) (quoting *United Artists Records, Inc. v. E. Tape Corp.*, 19 N.C. App. 207, 214 (1973)).

36. Conking has not alleged that either a conspiracy or a monopoly exists. “To state a claim for civil conspiracy, a plaintiff must allege: ‘(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.’” *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 104, at **18-19 (N.C. Super. Ct. Oct. 9, 2018) (quoting *Piraino Bros., LLC v. Atlantic Fin. Grp., Inc.*, 211 N.C. App. 343, 350 (2011)). Moreover, “[c]ivil conspiracy is not an independent cause of action in North

Carolina. Rather, liability for civil conspiracy must be alleged in conjunction with an underlying claim for unlawful conduct.” *Id.* at **18 (citing *Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002)). These allegations are absent from the Amended Counterclaims and Amended Third-Party Complaint.

37. In addition, the amended claims lack the essential elements of an antitrust claim, including an allegation regarding FBM’s “possession of monopoly power in the relevant market” and its “willful acquisition or maintenance” of that power. *Maxwell Foods, LLC v. Smithfield Foods, Inc.*, 2021 NCBC LEXIS 71, at **19-20 (N.C. Super. Ct. Aug. 26, 2021) (citing *Sykes v. Health Network Sols., Inc.*, 2017 NCBC LEXIS 73, at *60 (N.C. Super. Ct. Aug. 18, 2017) (quoting *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991)), *aff’d*, 372 N.C. 326 (2019)). “When a plaintiff alleges monopolistic misconduct as the basis for overlapping antitrust and section 75-1.1 claims, the failure of the antitrust claim also defeats liability under section 75-1.1.” *Maxwell Foods, LLC*, 2021 NCBC LEXIS 71, at **20 (citing *SiteLink Software, LLC v. Red Nova Labs, Inc.*, 2016 NCBC LEXIS 45, at *32 (N.C. Super. Ct. June 14, 2016) (dismissing section 75-1.1 claim based on deficient antitrust allegations)); *Drs. Making Housecalls-Internal Med., P.A. v. Onsite Care, PLLC*, 2019 NCBC LEXIS 6, at *20 (N.C. Super. Ct. Jan. 16, 2019) (same); *R. J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002) (same), *aff’d per curiam*, 67 F. App’x 810 (4th Cir. 2003).

38. Accordingly, to the extent Conking seeks to bring a UDTPA claim against FBM for the alleged improper exertion of its market power, the claim shall be dismissed.

39. As for Conking's contention that the lawsuit itself is an unfair and deceptive trade practice, the *Noerr-Pennington* doctrine⁵ provides that "a party who seeks redress by filing a lawsuit is immune from claims that are based solely on the pursuit of that lawsuit." *Velocity Solutions, Inc. v. BSG Fin., LLC*, 2016 NCBC LEXIS 19, at **15 (N.C. Super. Ct. Feb. 22, 2016).

40. The immunity can be lost, however, if the lawsuit is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Lowder Constr. Inc. v. Phillips*, 2020 NCBC LEXIS 1, at *11 (N.C. Super. Ct. Jan. 8, 2020). This "sham litigation" exception applies "when 1) the claim asserted is 'objectively meritless' and 2) the court finds 'the litigant's subjective motivation' was an unlawful intent to 'interfere directly with the business relationships of a competitor.'" *Id.* (quoting *Lorillard Tobacco Co. v. R.J. Reynolds Tobacco Co.*, 2011 NCBC LEXIS 31, at **15-16 (N.C. Super. Ct. Aug. 8, 2011). Indeed, "[p]roving that the filing of a lawsuit is a mere sham carries an extremely high burden[.]" *Lowder Constr., Inc.*, 2020 NCBC LEXIS 1, at *11.

41. "A plaintiff who files an 'objectively reasonable' lawsuit cannot be held liable for an unfair trade practice under [N.C.G.S.] § 75-1.1 regardless of the

⁵ The *Noerr-Pennington* doctrine originated in and derived its name from the U.S. Supreme Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

plaintiff's subjective intent and even if the suit was instituted for 'no legitimate purpose.' ” *Lorillard Tobacco Co.*, 2011 NCBC LEXIS 31, at **1 (quoting *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 157 (2001)). “A lawsuit is objectively reasonable if an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome.” *Reichhold Chems., Inc.*, 146 N.C. App. at 157 (cleaned up).

42. In this case, Conking does not present factual allegations that would support a conclusion that FBM's claims are not objectively reasonable. Furthermore, this Court has already granted in part FBM's Motion for Preliminary Injunction, thereby determining that Plaintiff has a reasonable likelihood of success on the merits of its claims. (See Order and Opinion on Pl.'s Mot. for Prelim. Inj., ECF No. 34.) Thus, Defendants' attempt to base its UDTPA claims on Plaintiff's filing of this lawsuit lacks merit, and its claims on this basis shall be dismissed.

43. Accordingly, FBM/Henshaw's Motion to Dismiss Conking's UDTPA claims is **GRANTED**, and the claims are **DISMISSED** without prejudice.

C. Common Law Unfair Competition

44. Next, Defendants assert both a Counterclaim and a Third-Party Claim for common law unfair competition.

45. As this Court has observed, “[t]he standard which a plaintiff must meet to recover on an unfair competition claim under the common law is not appreciably different from a claim for unfair or deceptive trade practices [pursuant to Chapter 75].” *Se. Anesthesiology Consultants, PLLC v. Charlotte-Mecklenburg Hosp. Auth.*,

2019 NCBC LEXIS 107, at *21-22 (N.C. Super. Ct. Dec. 13, 2019) (quoting *Global Textile Alliance, Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 104, at *23 (N.C. Super. Ct. Oct. 9, 2018)) (alteration in original); *see also BellSouth Corp. v. White Directory Publr., Inc.*, 42 F. Supp. 2d 598, 615 (M.D.N.C. 1999); *Cty. of Wake PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 103, at *26-27 (N.C. Super. Ct. Sept. 9, 2020).

46. As discussed above, Conking has failed to state a claim for unfair or deceptive trade practices. Therefore, its claims for common law unfair competition premised on the same allegations also fail.

47. Accordingly, FBM/Henshaw's Motion to Dismiss as to Conking's claims for common law unfair competition is **GRANTED**, and the claims are **DISMISSED** without prejudice.

IV. CONCLUSION

48. **WHEREFORE**, Plaintiff's Motion to Dismiss Defendants Conking & Calabrese, Co., Inc and Conking and Calabrese SE, Inc.'s Amended Counterclaims and Third-Party Complaint Pursuant to Rule 12(b)(6), ECF No. 88, is **GRANTED**. Defendants' Counterclaims and Third-Party Complaint are **DISMISSED** without prejudice.

IT IS SO ORDERED, this the 4th day of March, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases