STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CVS000619-100
A DISTRIBUTION COMPANY LLC and GREEN FAMILY FARM INT., LLC, Plaintiffs, v. MOOD PRODUCT GROUP LLC, Defendant.	**ORDER AND OPINION ON DEFENDANT MOOD PRODUCT GROUP LLC'S MOTION TO DISMISS**

1. **THIS MATTER** is before the Court on the 5 July 2024 filing of Defendant Mood Product Group LLC's Motion to Dismiss (the "Motion"). (ECF No. 45 ["Mot."].) Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Defendant Mood Product Group LLC seeks dismissal of all claims alleged against it by Plaintiff Green Family Farm Int., LLC. (Mot. 1.)

2. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motion.

Caulk Legal, PLLC by Taylor Caulk, and Smith Law Firm by Jeffrey J. Smith, for Plaintiff Green Family Farm Int., LLC.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. by J. Mitchell Armbruster and Grace A. Gregson, and Much Shelist, P.C. by Edward D. Shapiro and Lorne T. Saeks, for Defendant Mood Product Group LLC.

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of a business arrangement whereby Plaintiff Green Family Farm Int., LLC ("GFF") grew and delivered hemp product to Plaintiff

A Distribution Company LLC ("ADC"), which ADC then supplied to Defendant Mood Product Group LLC ("Mood") pursuant to a contract between ADC and Mood. The products were intended to be sold by Mood on its e-commerce website. In connection with the transactions, GFF provided to ADC, and ADC provided to Mood, test results regarding the composition of its GFF grown hemp products.

4. Mood published the test results provided by GFF on its website. GFF alleges that Mood improperly altered the test reports prior to publication. The alleged alteration, and subsequent use of, these documents serve as the basis of GFF's claims against Mood which are the subject of this Motion.

II. FACTUAL BACKGROUND

5. The Court does not make findings of fact when ruling on a motion to dismiss pursuant to Rule 12(b)(6), and only recites those factual allegations relevant and necessary to the Court's determination of the Motion.

A. The Parties

6. ADC is a North Carolina limited liability company located in Asheville, North Carolina. (Verified Compl. ¶ 1, ECF No. 3 ["Compl."].) ADC is a distribution company "specializing in cannabis products derived from various source farms." (Compl. ¶ 10.)

7. GFF (along with ADC, "Plaintiffs") is a North Carolina limited liability company located in Browns Summit, North Carolina. (Compl. ¶ 2.) GFF is a hemp farming company. (Compl. ¶ 106.) GFF's founder and principal is Rocco Luciano Mocciola ("Mr. Mocciola"). (Compl. ¶ 106.)

8. Mood is a Wyoming limited liability company that is registered to do business as a foreign entity in Oklahoma. (Compl. ¶¶ 3–4.) Mood was formed on 25 May 2022, and its e-commerce website, Hellomood.co, launched on 27 June 2022. (Compl. ¶¶ 23, 26.) Mood focuses its business on the sale of lawful THC-based hemp products, meaning those that have a concentration of Delta-9 THC that is less than 0.3% of the dry weight of the product. (*See* Compl. ¶ 55.)

B. ADC's Contract with Mood

9. On 19 May 2023, ADC and Mood entered into the Distribution and Sale of Goods Agreement (the "Agreement"). (Compl. ¶ 38; *see* Compl. Ex. A.)[1] Pursuant to the Agreement, ADC agreed to supply Mood with hemp products to be sold on Hellomood.co. (Compl. ¶ 5.) GFF is not a party to the Agreement. (Compl. ¶ 5.)

10. The Agreement provides, in relevant part, as follows:

> 14. Compliance with Law. The Parties and the Goods shall comply with all applicable laws, regulations, and ordinances. ADC and MOOD, individually, shall maintain in effect all the licenses, permissions, authorizations, consents, and permits that it needs to carry out its obligations under this Agreement. In addition to the foregoing, any Goods subject to this Agreement shall be accompanied by validly issued certificates of analysis (COAs) that demonstrate the Goods' compliance with applicable local, state, and federal law.
>
> If any government authority determines that any Goods sold from ADC to MOOD are noncompliant with appliable laws, MOOD shall have the right to reject the Goods, and to the extent possible in compliance with this Section 14, ADC shall promptly replace any Goods or provide replacement[.]

(Compl. Ex. A at 5.)

[1] All exhibits to the Verified Complaint were filed as one combined document, rather than as separate exhibits with individual ECF Nos. (*See* Compl.) Therefore, for ease of reference, the Court does not re-cite the same ECF No. when referencing an exhibit for the first time and instead cites to each exhibit as follows: (Compl. Ex. [ ] at [ ].)

11. The Agreement "requires ADC to submit and pay for post-harvest testing for the products it sells to Mood (unless required otherwise by state-specific and/or federal regulation)." (Compl. ¶ 65.)

C. The Creation and Role of GFF

12. In 2019, Mr. Mocciola invested $1,000,000.00 to establish indoor hemp farms in Guilford County and begin operations under North Carolina's pilot program for hemp production. (Compl. ¶ 114.)

13. In late September or early October 2023, Mood began selling GFF's THCA flower online. (Compl. ¶ 123.)

14. For a period of time, "GFF was the exclusive grower of all THCA flower (eight strains) provided to Mood (through ADC) and sold on Hellomood.co until late November 2023." (Compl. ¶ 120.)

D. Crop Testing and Certificates of Analysis

15. GFF causes hemp crop it grows to be tested at two stages: pre-harvest, pursuant to requirements under federal law, and post-harvest, through an unmandated process that is an established business practice of GFF and ADC. (Compl. ¶¶ 118–19.)

16. As of 31 December 2022, "all hemp growers in North Carolina are required to hold USDA licenses." (Compl. ¶ 69.)

17. The USDA mandates and conducts pre-harvest testing for all hemp crops grown in North Carolina. (Compl. ¶ 68.) Before a hemp crop is harvested, a USDA-licensed sampler must visit the farm, clip a sample from a plant, and submit the

sample for pre-harvest testing. (Compl. ¶ 70.) The grower must harvest the crop within thirty days of the sampling date. (Compl. ¶ 70.)

18. A Certificate of Analysis ("COA") "shows the content of THC, THCA, cannabinoid, and other chemicals from a laboratory-tested plant in any single harvest[,]" ensuring all hemp products sold to consumers contain THC in an amount compliant with federal law. (Compl. ¶ 64.) Federal law defines the compliance limit for hemp as a concentration of Delta-9 THC that is less than 0.3% of the dry weight of the product. (Compl. ¶ 55.) North Carolina uses the same measurement to define hemp. (Compl. ¶ 55.)

19. In North Carolina, COAs are issued as a result of pre-harvest testing. (Compl. ¶ 67.)

20. "Once the crop is harvested, only USDA-licensed North Carolina growers can submit their crops directly to a DEA-licensed lab for post-harvest testing and pay the required testing fees." (Compl. ¶ 72.) Post-harvest testing is not mandated under North Carolina law, but "is an established part of ADC and GFF's business practices to ensure the products they provide are compliant with federal law." (Compl. ¶ 73.) The Agreement also required ADC to submit and pay for post-harvest testing for the products it sold to Mood. (Compl. ¶ 65.)

21. Post-harvest COAs are required to be displayed on Mood's website in order for Mood to process and receive credit card payments from customers. (Compl. ¶ 74 (alleged upon information and belief).)

22. "Post-harvest COAs contain QR codes that allow members of the consuming public to verify the source and legitimacy of the purchased product." (Compl. ¶ 134.) The QR codes, also found on product packaging, link directly to post-harvest COAs for the product. (Compl. ¶ 134.)

23. In practice, "GFF submits its crops for post-harvest testing at DEA-licensed labs in North Carolina (or DEA-licensed labs in Florida as an alternative option) on a weekly basis." (Compl. ¶ 119.) GFF incurs monthly expenses upwards of $5,000.00 in complying with its pre-harvest and post-harvest testing obligations. (Compl. ¶ 118.)

E. Mood's Alteration and Use of the COAs

24. Pursuant to the Agreement, ADC sent PDF-formatted copies of pre-harvest and post-harvest COAs to Mood by email for the strains of flower sold to Mood that were grown and harvested by GFF. (Compl. ¶¶ 81, 121.) Of particular importance to this litigation are the pre-harvest and post-harvest COAs provided to Mood via email on 27 October 2023. (Compl. ¶¶ 132–33.)

25. "[A]t some point between October 27, 2023 and December 2023 . . . Mood altered GFF's post-harvest COAs, for the eight strains of THCA flower cultivated at GFF's farm, by replacing GFF's name and address with" Mood's own name. (Compl. ¶ 136.)

26. With respect to two strains, "gushers" and "purple punch," Mood altered the post-harvest COAs by changing the "client name" from GFF to Mood, while retaining GFF's license number on the altered version of the COA. (*See* Compl. Ex. B at 5–6;

Compl. Ex. F at 5–6.) Other COAs were altered by changing the "client name" from GFF to Mood, with neither the original nor the altered COA listing GFF's license number. (*See* Compl. Ex. C at 5–6; Compl. Ex. D at 5–6; Compl. Ex. E at 5–6; Compl. Ex. G at 5–6.)

27. Since 17 November 2023, "GFF has not filled a single order for THCA flower destined for Mood, through ADC or otherwise." (Compl. ¶ 125.) Nevertheless, Mood continued to sell the same strains of THCA flower previously grown and supplied by GFF, "despite . . . no longer having the ADC procured products grown by GFF in inventory." (Compl. ¶ 126.)

28. "Mood is currently selling the strains previously supplied by GFF with GFF's respective COAs altered in such a manner as to identify Mood Product Group as the client/grower[.]" (Compl. ¶ 128.) Mood uses the altered versions of GFF's post-harvest COAs to sell THCA flower grown and procured from unknown third parties. (Compl. ¶ 129.)

III. PROCEDURAL BACKGROUND

29. The Court sets forth here only those portions of the procedural history relevant to its determination of the Motion.

30. Plaintiffs initiated this action on 9 February 2024 upon the filing of their Verified Complaint. (*See* ECF No. 3.)

31. On 19 March 2024, Mood filed its Motion to Compel Arbitration. (*See* ECF No. 23.) On 21 May 2024, the Court ordered that all claims pending in this action between ADC and Mood proceed to arbitration pursuant to the terms of the

Agreement but denied Mood's request that the claims brought by GFF similarly be arbitrated. (*See* ECF No. 40.) As a result, only the claims of GFF remain for determination in this action.

32. On 5 July 2024, Mood filed the Motion. After full briefing, the Court held a hearing on the Motion on 9 September 2024 (the "Hearing"), where all parties were represented by counsel. (*See* ECF No. 50.)

33. The Motion is ripe for resolution.

IV. LEGAL STANDARD

34. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Complaint in the light most favorable to the plaintiff. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987). The Court accepts all well-pleaded factual allegations in the relevant pleadings as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is therefore not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health and Hum. Servs.*, 174 N.C. App. 266, 274 (2005) (quotation marks and citation omitted).

35. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016)

(citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation and quotations omitted).

36. Our Supreme Court has observed that "[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(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. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (citations omitted). This standard of review for Rule 12(b)(6) motions is the standard our Supreme Court "routinely uses . . . in assessing the sufficiency of complaints in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

V. ANALYSIS

37. Mood moves to dismiss all of GFF's claims against Mood, which include: (1) common law unfair competition (Compl. ¶¶ 203–22), ("Count One"); (2) violation of the Lanham Act and N.C. unfair competition law (Compl. ¶¶ 223–48), ("Count Two"); (3) unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1 *et seq.* (Compl. ¶¶ 249–62), ("Count Three"); (4) conversion (Compl. ¶¶ 263–68), ("Count Four"); (5) unjust enrichment (Compl. ¶¶ 269–76), ("Count Five"); (6) punitive damages, (Compl. ¶¶ 277–80) ("Count Six"); and (7) attorney fees (Compl. ¶¶ 281–83), ("Count Seven").

38. The Court first addresses whether GFF has standing to bring these claims, and thereafter addresses each claim in turn.

A. GFF's Standing

39. As a preliminary matter, in its briefing on the Motion, Mood raises the issue of whether GFF has standing to bring the claims asserted against Mood. (Def.'s Br. Supp. Mot. 12, 20, ECF No. 46 ["Br. Supp."]; Def.'s Reply Br. Supp. Mot. 2–4, ECF No. 49 ["Reply"].) Specifically, Mood claims Mr. Mocciola is the holder of the USDA license in his individual capacity, and as a result, if GFF has not alleged that Mr. Mocciola has assigned the license and his potential claims to GFF, GFF has no standing to bring claims related to the license or the COAs. (Br. Supp. 12, 20)

40. "A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted. Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Street v. Smart Corp.*, 157 N.C. App. 303, 305 (2003) (quoting *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337 (2000)) (quotations omitted).

41. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626 (2002) (citations omitted). Standing requires "that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action." *Bruggeman v. Meditrust Co.*, 165 N.C. App. 790, 795 (2004) (citations and quotations omitted).

42. Under North Carolina law, a party has standing if he is the real party in interest. *Energy Investors*, 351 N.C. at 337. "A real party in interest is one who benefits from or is harmed by the outcome of the case and by substantive law has the legal right to enforce the claim in question." *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824 (2005) (citation omitted). GFF, as the party invoking the Court's jurisdiction, has the burden of establishing standing. *Cherry v. Wiesner*, 245 N.C. App. 339, 345 (2016).

43. Throughout the Verified Complaint, GFF refers to the USDA license as "GFF's (through Mocciola)," alleging that GFF is the holder of the license with Mr. Mocciola listed as a "key participant" on behalf of the entity. (Compl. ¶¶ 217, 219–20, 232.)

44. At the Hearing, GFF presented to the Court and Mood's counsel what it purports to be the official USDA hemp producer license. However, this document is not properly before the Court at the Rule 12(b)(6) stage and will not be considered.

45. Nevertheless, the Court determines that the allegations in the Verified Complaint that the license is "GFF's (through Mocciola)[,]" along with arguments of counsel at the Hearing, are sufficient to satisfy GFF's burden of demonstrating standing to bring its claims. Thus, the Court will address the sufficiency of GFF's allegations in the Verified Complaint.

B. <u>Count One: Common Law Unfair Competition</u>

46. GFF alleges Mood has violated unfair competition principles by fraudulently doctoring the authentic post-harvest COAs to reflect Mood as the

client/grower and leveraging GFF's license and the altered COAs to sell product not produced by GFF to "fool the consumer into believing the product it has for sale has been properly tested in conformity with the state and federal regulatory structure and passed those tests necessary to be sold as hemp, as opposed to marijuana." (Compl. ¶¶ 216–21.) GFF further alleges these are "practices that deceive and endanger the consuming public, a central aspect of unfair competition law." (Compl. ¶ 217.)

47. The crux of Mood's argument is that GFF's common law unfair competition claim fails because there is no allegation in the Verified Complaint that GFF and Mood are commercial competitors, which Mood asserts is an essential element of this claim. (Br. Supp. 7–8.) Mood argues the parties are not competitors because GFF is a grower and Mood is a seller. (Br. Supp. 8.)

48. "Traditionally at common law, including that of North Carolina, the tort of unfair competition consisted of acts or practices by a competitor which are likely to deceive the consuming public." *Stearns v. Genrad, Inc.*, 564 F. Supp. 1309, 1320 (M.D.N.C. 1983), *aff'd*, 752 F.2d 942 (4th Cir. 1984) (citation omitted). "The gravamen of unfair competition is the protection of a business from misappropriation of its commercial advantage earned through organization, skill, labor, and money." *Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 749 (1997) (citations omitted). "Unfair competition has been found to encompass a range of behaviors 'such as trademark infringement, imitation of a competitor's product or its appearance, interference with a competitor's contractual relations, [and] disparagement of a

competitor's product or business methods, and misappropriation of a competitor's intangible property rights such as advertising devices or business systems.' " *Gateway Mgmt. Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *19–20 (N.C. Super. Ct. May 9, 2018) (quoting *Stearns*, 564 F. Supp. at 1320).

49. "Courts have recognized that a claim for common law unfair competition is analyzed the same way as a claim for unfair or deceptive trade practices under [N.C.]G.S. § 75-1.1." *Cnty. of Wake PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 103, at *26 (N.C. Super. Ct. Sept. 9, 2020) (citations omitted); *see also Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 104, at **23 (N.C. Super. Ct. Oct. 9, 2018) ("The 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." (cleaned up) (quoting *BellSouth Corp. v. White Directory Publishers, Inc.*, 42 F. Supp. 2d 598, 615 (M.D.N.C. 1999))).

50. Further, the Court notes the key distinction between common law unfair competition and claims for unfair and deceptive trade practices "is that common law unfair competition claims are limited to claims between business competitors, whereas a UDTP claim may be maintained by a consumer or a business competitor." *Gateway*, 2018 NCBC LEXIS 45, at *18; *see also Triage Logic Mgmt. & Consulting, LLC v. Innovative Triage Servs., LLC*, 2020 NCBC LEXIS 94, at **29–30 (N.C. Super. Ct. Aug. 11, 2020) (dismissing a common law unfair competition claim where the complaint did not include an allegation that the defendant was a competitor of the plaintiff); *Innovare, Ltd. v. Sciteck Diagnostics, Inc.*, 2023 NCBC LEXIS 8, at **33

(N.C. Super. Ct. Jan. 19, 2023) (dismissing a common law unfair competition claim where counterclaims alleged the parties' relationship was that of a manufacturer and distributor and thus lacked allegations that the parties were engaged in a competitive relationship).

51. Upon review of the Verified Complaint in this case, the Court finds no allegations that GFF and Mood are business competitors. Rather, the allegations are that GFF grows hemp product that is distributed to Mood through ADC, to then be sold on Mood's e-commerce marketplace. As such, GFF has not sufficiently alleged that Mood is GFF's competitor.

52. The Court therefore **GRANTS** in part the Motion, and Count One for common law unfair competition is dismissed with prejudice.

C. <u>Count Two: Lanham Act & N.C. Unfair Competition</u>

53. GFF alleges Mood has violated the Lanham Act and North Carolina unfair competition law in committing both "reverse passing off" and "passing off." (Compl. ¶ 228.) GFF alleges Mood has committed reverse passing off in various ways, including: (1) by reverse passing off the USDA license as Mood's own; (2) by reverse passing off GFF's authentic COAs as Mood's own; and (3) by Mood holding itself out as the "client/grower" of the product. (Compl. ¶¶ 230, 232, 235.)

54. GFF also alleges "Mood is engaged in regular passing off, where the use of [ ] GFF's COAs leaves the impression that it is selling GFF harvested flower, instead of what is actually Mood's, which upon information and belief was procured by some other supplier/grower." (Compl. ¶ 239.)

55. Mood argues "there are no allegations that either GFF (or Mood) ever sold goods with any mark or other trade dress to support a passing off claim" because the GFF goods were marked in a "brand agnostic way." (Br. Supp. 11–12.) Mood also contends GFF failed to allege a likelihood of consumer confusion and damages, specifically arguing an alleged potential future licensure issue is outside the scope of the Lanham Act. (Br. Supp. 13–14.)[2]

56. The Lanham Act provides, in relevant part, as follows:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

57. "Passing off under the Lanham Act 'occurs when a producer misrepresents his own goods or services as someone else's.' " *Vitaform, Inc. v. Aeroflow, Inc.*, 2020 NCBC LEXIS 132, at **40 (N.C. Super. Ct. Nov. 4, 2020) (quoting *Dastar Corp. v.*

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[2] In its reply brief, Mood contends that "to the extent any Lanham Act claim survives, it must be limited to the time period before November 2023." (Reply 10.) Pursuant to Business Court Rule 7.7, the Court will not consider this argument as it was raised for the first time in Mood's reply brief.

Twentieth Century Fox Film Corp., 539 U.S. 23, 27 n.1 (2003)). "Reverse passing off occurs when the producer misrepresents someone else's goods or services as his own." *Vitaform*, 2020 NCBC LEXIS 132, at **40. A reverse passing off claim requires the plaintiff to prove "(1) that the work at issue originated with [the plaintiff]; (2) that origin of the work was falsely designated by [a defendant]; (3) that the false designation of origin was likely to cause consumer confusion; and (4) that [the plaintiff was] harmed [or likely to be harmed] by [a defendant's] false designation of origin." *Id.* at **40–41 (citation omitted).

58. North Carolina courts have held that passing off and reverse passing off constitute unfair competition under North Carolina law. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 404 (1978); *see also Vitaform*, 2020 NCBC LEXIS 132, at **40 ("[T]he Supreme Court of North Carolina, if confronted with the issue, would likely conclude that reverse passing off likewise constitutes unlawful competition under North Carolina law.").

59. GFF does not allege that Mood ever represented that any of the goods Mood was selling were Mood's own goods, whether grown or produced by Mood. Thus, the allegations in the Verified Complaint do not support a claim for reverse passing off.

60. However, GFF does sufficiently allege facts that state a claim for passing off under the Lanham Act. Two of the altered post-harvest COAs posted on Mood's website reflect Mood as the "client name," while displaying GFF's license number as that of the "grower/processer" for the strains. (Compl. ¶ 139; *see* Compl. Ex. B at 6; Compl. Ex. F at 6.) Furthermore, those altered COAs include QR codes that link the

consumer back to GFF's original post-harvest COAs, which reflect GFF as both the client and the license holder. (Compl. ¶ 134.)

61. Mood argues, in part, that GFF's passing off claims are deficient because "Mood is not alleged to be a grower or producer of hemp products." (Reply 5.)

62. However, the Court finds no case law supporting Mood's argument that *only* a producer may commit passing off. The language of the Lanham Act is in fact much broader, applying to "*[a]ny* person . . . in connection with *any* goods or services. . .[.]" 15 U.S.C. § 1125(a)(1) (emphasis added).

63. The allegations, taken in the light most favorable to GFF, illustrate that Mood sold third-party product on its website while representing, through the altered COAs, that the product was coming from GFF when it allegedly was not. Further, the Verified Complaint contains allegations of actual consumer confusion and a likelihood that GFF will be harmed by Mood's conduct. (Compl. ¶¶ 235, 239, 242, 245.) Thus, GFF's allegations are sufficient to state a claim for passing off under the Lanham Act.

64. Therefore, the Court **DENIES** in part the Motion as to Count Two for passing off under the Lanham Act and North Carolina unfair competition law.

65. However, the Court **GRANTS** in part the Motion as to Count Two to the extent it seeks relief for reverse passing off under the Lanham Act and North Carolina unfair competition law, and Count Two is dismissed with prejudice to that extent.

D. Count Three: Unfair and Deceptive Trade Practices

66. GFF also alleges "the passing off and reverse passing off claim pursuant to the common law and the Lanham Act violations are unfair or deceptive trade practice[s]." (Compl. ¶ 258.)

67. "To prevail on a claim of unfair and deceptive trade practices a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460–61 (1991) (citing *Marshall v. Miller*, 302 N.C. 539 (1981)).

68. The North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") provides, in pertinent part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a). Further, the UDTPA defines "commerce" to include "all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b).

69. "North Carolina courts have previously concluded that when the UDTP[A] claim rests solely upon other claims . . . which the court determines should be dismissed, the UDTP[A] claim must fail as well." *Chara, LLC v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 52, at *19 (N.C. Super. Ct. Apr. 17, 2020). Further, the UDTPA has been found to prohibit the same type of activity that the Lanham Act prohibits. *Camco Mfg. v. Jones Stephens Corp.*, 391 F. Supp. 3d 515, 528 (M.D.N.C. 2019)

(holding a UDTPA claim survived the motion to dismiss where the Lanham Act claim also survived).

70. Because the Court has concluded that GFF's allegations are sufficient to state a claim for passing off under the Lanham Act and North Carolina unfair competition law, the allegations are likewise sufficient to state a UDTPA claim as to that same conduct.

71. The Court therefore **DENIES** in part the Motion as to Count Three to the extent it is based on Count Two as it relates to passing off under the Lanham Act and North Carolina unfair competition law. Except as herein denied, the Motion is **GRANTED** in part as to Count Three to the extent it is based on GFF's reverse passing off claim.

E. Count Four: Conversion

72. GFF claims Mood has "asserted ownership of the GFF original COAs by fraudulently altering them to show Mood as the owner of the pre-harvest and post-harvest testing results for GFF's hemp and applied the COAs (with the chemical makeup unaltered) to products of unknown origin and chemical composition." (Compl. ¶ 267.)

73. Mood contends GFF's conversion claim fails for three reasons: (1) the COAs are intangible property consisting of information or data that cannot be converted; (2) no ownership right was infringed by Mood taking possession of the COAs because the COAs were provided to Mood pursuant to the Agreement; and (3) GFF did not allege that it demanded a return of the COAs. (Br. Supp. 17.)

74. Under North Carolina law, the two essential elements necessary in a claim for conversion are: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Steele v. Bowden*, 238 N.C. App. 566, 574 (2014). "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . ." *Bartlett Milling Co. v. Walnut Grove Auction Realty Co.*, 192 N.C. App. 74, 86 (2008) (quotation marks and citation omitted). Further, in cases where the defendant comes into possession of the plaintiff's property lawfully, the plaintiff must show that it made a demand for the return of the property that was refused by the defendant. *Hoch v. Young*, 63 N.C. App. 480, 483 (1983).

75. A claim for conversion applies only to goods or personal property and does not extend to real or intangible property. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 414 (2000); *Strategic Mgmt. Decisions, LLC v. Sales Performance Int'l, LLC*, 2017 NCBC LEXIS 69, at *6 (N.C. Super. Ct. Aug. 7, 2017).

76. The Court has recognized that the weight of authority "treats electronic documents as personal property subject to a claim for conversion." *Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 51, at *16 (N.C. Super. Ct. June 9, 2017) (noting "[i]t would make little sense to foreclose recovery for the wrongful deprivation of electronic information when taking the same information printed into hard copy form would be sufficient." (quotation marks and citation omitted)).

77. Notwithstanding the Court's determination in *Addison Whitney* that electronic documents may be the subject of a conversion claim, "retention by a wrongdoer of an electronic copy in a manner that does not deprive the original owner

of access to the same . . . cannot constitute conversion under current North Carolina law." *Duo-Fast Carolinas, Inc. v. Scott's Hill Hardware & Supply Co.*, 2018 NCBC LEXIS 2, at *36 (N.C. Super. Ct. Jan. 2, 2018); *see also Addison Whitney*, 2017 NCBC LEXIS 51, at *19–20 (dismissing a claim for conversion where the allegations related to electronic copies of documents the plaintiff still had in its possession).

78. GFF alleges the COAs were transmitted from ADC to Mood through email and were sent as PDF-formatted copies. (Compl. ¶¶ 81, 121.) While conversion claims do not generally extend to intangible property, the PDF copies of the COAs are "electronic documents" that constitute personal property subject to a claim for conversion. *See Addison Whitney*, 2017 NCBC LEXIS 51, at *16.

79. GFF's claim for conversion nevertheless fails for two reasons. First, Mood came into possession of the COAs lawfully when ADC emailed the COAs to Mood pursuant to terms of the Agreement, and GFF has not alleged that it demanded a return of the COAs but was denied by Mood, as is required in North Carolina to state a claim for conversion under these circumstances. *See Hoch*, 63 N.C. App. at 483.

80. Second, GFF has not alleged that it no longer retains access to the original COAs, which were sent as PDF-formatted copies to Mood. Thus, GFF has not shown that it was wrongfully deprived of access to the COAs. *See Duo-Fast Carolinas*, 2018 NCBC LEXIS 2, at *36.

81. Accordingly, the Court **GRANTS** in part the Motion, and the conversion claim in Count Four is dismissed with prejudice.

F. Count Five: Unjust Enrichment

82. GFF alleges "[a] benefit has been conferred on Mood by its fraudulent use of GFF's COAs," which Mood associates with hemp flower of unknown origin "to feign compliance with federal and state laws regulating hemp commerce for the purpose of generating revenue." (Compl. ¶¶ 273–74.)

83. Mood argues the unjust enrichment claim fails because GFF does not allege that it conferred any benefit to Mood without an express contract to pay. (Br. Supp. 19.)

84. "In North Carolina, to recover on a claim of unjust enrichment, Plaintiff must prove: (1) that it conferred a benefit on another party; (2) that the other party consciously accepted the benefit; and (3) that the benefit was not conferred gratuitously or by an interference in the affairs of the other party." *Jacobsen*, 2020 NCBC LEXIS 103, at *29 (citing *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002)). The benefit must be measurable. *Krawiec*, 370 N.C. at 615.

85. "A claim for unjust enrichment 'is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law.' " *Jacobsen*, 2020 NCBC LEXIS 103, at *28 (quoting *Booe v. Shadrick*, 322 N.C. 567, 570 (1988)). " 'The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor.' " *Krawiec*, 370 N.C. at 615 (quoting *Atlantic C. L. R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95–96 (1966) (citation omitted)).

86. GFF alleges that the benefit conferred on Mood was its fraudulent use of the altered COAs. (Compl. ¶¶ 273–74.) However, the allegations in the Verified Complaint illustrate that any benefit Mood obtained through using the altered COAs was *taken* by Mood through its alteration of the COAs, not *conferred* upon Mood by GFF. *See KNC Techs., LLC v. Tutton*, 2019 NCBC LEXIS 72, at *37 (N.C. Super. Ct. Oct. 9, 2019) (dismissing unjust enrichment claim where the plaintiff only alleged the defendants took some benefit for themselves for which plaintiff believed it should be awarded damages); *Am. Cirs., Inc. v. Bayatronics, LLC*, 2023 NCBC LEXIS 165, at **39–40 (N.C. Super. Ct. Dec. 8, 2023) (holding the alleged wrongful taking and dissemination of information in violation of a confidentiality agreement did not support a claim for unjust enrichment because no benefit had been conferred).

87. The Court therefore **GRANTS** in part the Motion, and Count Five for unjust enrichment is dismissed with prejudice.

G. Counts Six & Seven: Punitive Damages & Attorneys' Fees

88. "North Carolina courts have repeatedly held that 'a claim for punitive damages is not a stand-alone claim.' " *Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *146 (N.C. Super. Ct. Dec. 31, 2019) (quoting *Funderburk v. JP Morgan Chase Bank, N.A.*, 241 NC. App. 415, 425 (2015)).

89. Additionally, GFF "does not dispute that attorney[s'] fees and punitive damages are remedies rather than standalone claims." (Pl.'s Br. Opp. Mot. 30, ECF No. 47.)

90. Accordingly, the Court hereby **GRANTS** in part the Motion, and Counts Six and Seven for punitive damages and attorneys' fees are dismissed without prejudice to GFF's ability to seek these remedies at a later time if warranted by the relevant facts and law.

VI. CONCLUSION

91. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motion as follows:

a. The Court **GRANTS** the Motion in part as to Count One for common law unfair competition, and that claim is **DISMISSED** with prejudice;

b. The Court **GRANTS** the Motion in part as to Count Two for reverse passing off under the Lanham Act and North Carolina unfair competition law, and that claim is **DISMISSED** with prejudice to that limited extent;

c. The Court **GRANTS** the Motion in part as to Count Three, to the extent it is related to GFF's reverse passing off claim, and that claim is **DISMISSED** with prejudice to that limited extent;

d. The Court **GRANTS** the Motion in part as to Count Four for conversion, and that claim is **DISMISSED** with prejudice;

e. The Court **GRANTS** the Motion in part as to Count Five for unjust enrichment, and that claim is **DISMISSED** with prejudice; and

f. The Court **GRANTS** the Motion in part as to Counts Six and Seven for punitive damages and attorney fees, and those claims are **DISMISSED** without prejudice; and

g. Except as herein granted, the Motion is hereby **DENIED**.

SO ORDERED, this the 26th of September, 2024.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases