UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MILLENIUM LABORATORIES, INC.,
a California corporation,

Plaintiff,

v. **Case No. 8:11-cv-1757-T35-TBM**

UNIVERSAL ORAL FLUID LABORATORIES, LLC,
a Pennsylvania limited liability company;
UNIVERSAL ORAL FLUID LAB OF PA, LLC,
a Pennsylvania limited liability company;
VERRAMED, LLC, a Kentucky limited liability company; and RICHARD STIMMEL, d/ba/ RJM Consulting .

Defendants.
_____/

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff Millennium Laboratories, Inc.'s Second Amended Motion for Partial Summary Judgment on Liability (Dkt. 106), Defedant Universal Oral Fluid Lab of PA., LLC's Response in Opposition (Dkt. 117), Plaintiff's Reply in Support of its Second Amended Motion for Partial Summary Judgment (Dkt. 121), Defendants Universal Oral Fluid Laboratories, LLC and Universal Oral Fluid Lab of PA., LLC's Motion for Partial Summary Judgment (Dkt. 107), Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Dkt. 118), and Defendants' Reply in Support of their Motion for Partial Summary Judgment (Dkt. 120). Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **DENIES** Plaintiff's Second Amended Motion for Partial Summary

Judgment (Dkt. 106), and **DENIES** Defendants' Motion for Partial Summary Judgment (Dkt. 107), as described herein.

I. BACKGROUND

On October 21, 2011, Plaintiff filed a First Amended Complaint (Dkt. 19) against Defendants Universal Oral Fluid Laboratories, LLC ("UOFL") and Universal Oral Fluid Lab of PA, LLC ("UOFLPA") (collectively, "Universal") seeking monetary damages and permanent injunctive relief for the following: (1) unfair competition under Florida and Texas Common Law (Count I); (2) tortious interference with business relationship under Florida, Texas and Kentucky Law (Count II); (3) violation of State Deceptive and Unfair Trade Practice Statutes: Section 501.201 et seq., Florida Statutes; Tex. Bus. & Com. Code Ann. §§ 17.41 et seq. (Count III); (4) misleading advertising in violation of Section 817.41, Florida Statutes and Tex. Occ. Code § 102.001 (Count IV); (5) false advertising under the Lanham Act, 15 U.S.C. § 1125(a) (Count V); (6) common law conspiracy under Florida, Texas and Kentucky Law (Count VI); and (7) declaratory judgment under 47 U.S.C. § 2201 (Count VII).

Universal moved to Dismiss Plaintiff's First Amended Complaint in its entirety. (Dkt. 29; Dkt. 39) On April 25, 2012, this Court dismissed the Texas claims under Counts III and IV of Plaintiff's First Amended Complaint. The Court also dismissed Count VII of the First Amended Complaint. In dismissing Count VII of the First Amended Complaint, the Court found that Plaintiff could not seek a declaratory judgment that Universal's actions violated the Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), or the Stark Law, 42 U.S.C. § 1320a-7b(b) because Plaintiff does not have a private right of action to enforce those statutes. As to the remaining counts, the

Court found that Plaintiff's First Amended Complaint contained sufficient factual allegations to withstand Universal's motions to dismiss. (Dkt. 72) Currently before the Court are the parties' cross motions for summary judgment, which are ripe for adjudication before this Court.

Plaintiff seeks summary judgment on the following claims: (1) unfair and deceptive trade practices in violation of the Florida Deceptive and Unfair Trade Practices Act; (2) unfair competition under Florida Law; (3) false advertising under the federal Lanham Act; and (4) misleading advertising in violation of Florida law. Universal moves for summary judgment as to all of Plaintiff's remaining claims in this case, which are: (1) unfair competition under Florida and Texas Common Law; (2) tortious interference with business relationship under Florida, Texas and Kentucky Law; (3) violation of Florida's Deceptive and Unfair Trade Practices Act; (4) misleading advertising under Florida law; (5) false advertising under the Lanham Act, 15 U.S.C. § 1125(a); and (6) common law conspiracy under Florida, Texas and Kentucky Law

II. UNDISPUTED FACTS

Plaintiff Millennium is a national provider of clinical drug testing services. Universal, a competitor of Plaintiff, operates a laboratory that also provides clinical drug testing and drug screening services. (Dkt. 78-2, pp. 14, 16) Universal entered into certain "agreements" with physician-customers under which Universal accepts specimens for testing referred to it by physicians. (Dkt. 78-2, pp.103-104,108-109) Universal then bills third-party payers like Medicare, Medicaid, or private insurance companies for the tests of the specimens. (Id.) To the extent it receives, from the third-party payer, an amount greater than Universal's costs for the tests, or "profits,"

Universal remits the difference to the physicians. (Id.) Under the agreements, the physicians performed no function other than to send the specimens to Universal. (Id. at 108.) At least twelve physicians in Florida have entered into such agreements with Universal. (Dkt. 78-8)

Universal utilizes independent contractors, including Jeff Thomas, Richard Stimmel, Sam Shannon, and Mike Baja, to market and sell its services. (Dkt. 78-2, pp. 129, 178) In its marketing materials, Universal advertises the average reimbursement per third-party payer to be: (1) $425 per specimen from private insurers; (2) $372 from Medicare; (3) $300 from Medicaid; and (4) $260 from Worker's Compensation. (Dkt. 78-11, pg. 11) Universal informs physician-customers that they can earn hundreds of thousands of dollars per year under their agreements with Universal. (Dkt. 78-13, p. 9) At least two laboratories, through correspondence sent to Universal, raised concerns that Universal's agreements may be in violation of the Anti-Kickback Statute and the Stark Law. (Dkt. 78-19; Dkt. 78-20) One terminated its agreement with Universal and the other declined Universal's offer to enter into such arrangement. (Id.) Further, many physicians raised concerns about the legality of the agreements and advised Universal that their attorneys informed them that the agreements might be in violation of federal anti-kickback laws. (Dkt. 78-121; Dkt. 78-22; Dkt. 78-23; Dkt. 78-24)

Notwithstanding the complaints and concerns raised as to the legality of the agreements, Universal never sought the advice of legal counsel or a legal opinion concerning the legality of the agreements, and it continued to pursue these agreements with potential physician-customers, representing to these recruits that the arrangements are lawful. (Dkt. 78-2, p. 105; Dkt. 77-30; S-2, Exh. 45; S-2, Exh. 46)

Under such agreements, Defendant received millions of dollars in payments from the third-party payers as of November 30, 2011. (Dkt. 78-15) Of that total, Defendant paid hundreds of thousands of dollars to physician-customers under the agreements. (Id.; Dkt. 118-44)

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Evidence is reviewed in the light most favorable to the non-moving party. Fennell, 559 F.3d at 1216 (citing Welding Servs., Inc., 509 F.3d at 1356). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations

unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value.") If material issues of fact exist that would not allow the Court to resolve an issue as a matter of law, the Court must not decide them, but rather, must deny the motion and proceed to trial. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999).

IV. DISCUSSION

In its motion for summary judgment, Plaintiff argues that Universal engaged in deceptive and unfair trade practices because the agreements violate the federal Anti-Kickback Statute and the Stark Law, two statutes Plaintiff contends proscribe unfair, deceptive, or unconscionable acts or practices. (Dkt. 106, p. 13) Plaintiff also contends that Universal has been falsely advising its physician-customers that its business practices are legal. (Id., p. 21) Universal argues that all of Plaintiff's claims rely on allegations that the arrangements violate the Anti-Kickback Statute and the Stark Law, and Plaintiff does not have a private right of action under those Statutes. Universal contends that Plaintiff has not alleged any actionable conduct independent of the reference to the Anti-Kickback Statute and the Stark Law and that absent Plaintiff's allegations that their conduct violates the Anti-Kickback Statute and the Stark Law, Plaintiff would have no claims. Universal also argues that Plaintiff cannot prove that it suffered any damages that were caused by Universal's actions. Universal further argues that Plaintiff lacks prudential standing to bring its false advertising claim under the Lanham Act.

Universal does not dispute that it has entered into the agreements at issue in this case and that it has represented to potential physician-customers that the agreements

are legal. Universal also does not dispute that it provided payments to physicians in exchange for referral of specimens. In fact, Universal does not even contend that the agreements comply with the Anti-Kickback Statute or the Stark Law. As this Court stated in its previous order on Universal's motions to dismiss in this case, while Plaintiff could not seek declaratory relief under the Anti-Kickback Statute and the Stark Law because no private right of action exists under the statutes, (Dkt. 72, pp.7-9), case law provides that conduct violating the Anti-kickback Statute and the Stark Law may provide the basis for liability under recognized common law causes of action and other state statutory laws provided all the elements of the causes of action are met. (Id., pp. 11, 12.) As the Court also noted, case law provides that a defendant is not insulated from civil liability simply because its alleged fraudulent conduct also violates a criminal statute. (Id., p. 12.) Thus, Plaintiff is entitled to summary judgment in this case if it can establish that Universal's conduct, although in violation of the Anti-Kickback Statute and the Stark Law, also violates state statutory or common law.

A. The Anti-kickback Statute and the Stark Law

The Anti-Kickback Statute makes it a felony to knowingly and willfully solicit, receive, offer, or pay "any remuneration," including any kickback, bribe, or rebate, intended to induce the referral, purchase, or order of items or services reimbursed by a federal health care program. 42 U.S.C. § 1320a-7b(b)(1)-(2); U.S. ex rel. Osheroff v. Tenet Healthcare Corp., 2012 WL 2871264, at *8 (S.D. Fla. 2012) (under the Anti-Kickback Statute, it is illegal to (1) knowingly and willfully (2) offer or pay any remuneration (3) to induce such person to refer an individual for the furnishing or arranging of any item or service for which payment may be made in whole or in part

under a Federal health care program). To induce means to "influence an act or course of conduct." Tenet Healthcare Corp., 2012 WL 2871264, at *8. "Knowingly and willfully" means that Defendant acted with knowledge that its conduct was unlawful. Id.

The Stark Law prohibits physicians who have a "financial relationship" with a medical entity from making a referral to that entity for the furnishing of certain "designated health services," including clinical laboratory services, for which payment otherwise maybe made under the Medicare program. See 42 U.S.C. 1395nn(a)(1)(A); Tenet Healthcare Corp. at *7; see also U.S. ex rel Drakeford v. Tuoney Healthcare Sys., Inc., 675 F.3d 394, 397 (4th Cir. 2012). The statute also prevents an entity from presenting or causing to be presented a claim or bill to Medicaid or Medicare for designated health services furnished pursuant to a prohibited referral from a physician. 42 U.S.C. 1395nn(a)(1)(B). "A prohibited financial relationship means an ownership or investment interest in the entity or a compensation arrangement . . . between the physician and the entity." Tenet Healthcare at *7 (citing 42 U.S.C. § 1395nn(a)(2)) (internal quotations omitted). "Compensation arrangement is defined to mean any arrangement involving any remuneration between a physician and an entity." Id. (citing 42 U.S.C. § 1395nn(h)(1)(A)).

In this case, the undisputed evidence presented by Plaintiff is sufficient to satisfy the elements of the Anti-Kickback Statute and the Stark Law. The record shows that as of November 30, 2011, Universal has submitted numerous claims for reimbursement to third-party payers, including Medicare. (Dkt. 78-15.) The evidence also demonstrates that, under the agreements entered into with the physician-customers, Universal offers

to pay physicians cash remunerations for referring[1] specimens to Defendant for testing that will be billed to and reimbursed by Medicare and Medicaid. The physiscians do nothing except to send specimens to Universal for testing in exchange for the remuneration received from Defendant. William Hughes, the owner of Universal, testified that Universal pays physicians "just for giving [it] tests." (Dkt. 78-2, p.108.) This demonstrates that the purpose of the remuneration provided to physicians by Universal is to induce referrals. Further, Universal has received warnings from physicians and laboratories that its payments to physicians may be illegal. Despite these warnings, Universal never consulted with an attorney to obtain a legal opinion concerning the legality of its conduct.

Thus, Universal's conduct is, as a matter of law, in violation of both the Anti-Kickback Statute and the Stark law. As stated, Universal never argues that the evidence presented by Plaintiff is insufficient to prove that its conduct is illegal. Instead, as it did in its motions to dismiss, Universal continues to maintain the position that Plaintiff's common law and statutory causes of action must fail because they are reliant on allegations that Universal's conduct violated the Anti-Kickback Statute and the Stark Law, which do not provide for a private right of action. Defendant's position is flawed.

B. Prudential Standing Under the Lanham Act

[1] Although William Hughes, the owner of UOFLP testified that the physicians are compensated not for "referring" specimens, but rather, for "buying the test" from Defendant (Dkt. 78-2, p. 111), the evidence demonstrates that Defendant remits the "profits" to the physicians simply for sending specimens to Defendant for testing. The physicians were obligated to do nothing for those "profits." Thus, it appears from the description of the transactions between Defendant and the physicians that the physicians were in fact referring specimens to Defendant for testing in violation of the statutes. See U.S. v. Tapert, 625 F.2d 111,121 (6th Cir. 1980) ("consulting" arrangements between laboratory and physicians whereby laboratory paid physicians who agreed to send their patients' specimens to laboratory for testing which was then billed to Medicaid or Medicare violated the Anti-Kickback statute).

Universal initially argues that Plaintiff lacks prudential standing to pursue its false advertising claim under the Lanham Act. In the Eleventh Circuit, to determine whether a party has prudential standing to bring a false advertising claim under the Lanham Act, courts consider the following factors: (1) whether plaintiff's injury is a type that Congress sought to redress in providing a private remedy for violations of the Lanham Act; (2) the directness or indirectness of the asserted injury; (3) the proximity or remoteness of the party to the alleged injurious conduct; (4) the speculativeness of the damages claim; and (5) the risk of duplicative damages or complexity in apportioning damages. See Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1163-64 (11th Cir. 2007). As Universal concedes, none of the factors is determinative of the outcome of the court's analysis. See Phonenix of Broward, 489 F.3d at 1173 (findind no prudential standing even though two of five factors favored prudential standing).

The Court finds the factors weigh in favor of finding prudential standing in this case. Plaintiff's alleged injury is of the type the Lanham Act is designed to address. See Phoenix of Broward, Inc., 489 F.3d at 1167 (allegations that competitor experienced a decrease in sales and incurred counter-promotion costs in an effort to lure back customers who frequented competitor due to false advertisement amounted to an assertion by Plaintiff that its commercial interests were harmed by a competitor's false advertising, and this is the type of harm that the Lanham Act was intended to redress). Plaintiff has a direct interest in the amount of specimen referrals it receives from its physician clients. Plaintiff, which alleges it has had its commercial interests directly affected by Universal's alleged actions, is an appropriate party to challenge Universal's actions. See Medimport S.R.L. v. Cabreja, 2013 WL 1003625, at *7 (S.D.

Fla. 2013). Plaintiff claims it lost referrals from former clients as a result of Universal's conduct. Thus, Plaintiff has prudential standing to bring its false advertising claim under the Lanham Act.

C. Summary Judgment on FDUPTA, Unfair Competition, False Advertising under the Lanham Act, Misleading Advertising, Tortious Interference with Business Relationship, Common Law Civil Conspiracy

All of the claims at issue in this case require, as an element of the claim, that Plaintiff prove it suffered injury as a result of Universal's conduct. There are, however, disputed issues of material fact as to whether Plaintiff suffered injury and damages because of Universal's actions in this case. Accordingly, the cross motions for summary judgment should be denied.

"FDUPTA protects the consuming public and legitimate business enterprises from those who engage in unfair methods of competition or unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce." See Blair v. Wachovia Mortg. Corp., 2012 WL 868878, at *2 (M.D. Fla. 2012) (citation omitted). To succeed on a claim under FDUPTA, a party must prove (1) a deceptive or unfair practice; (2) causation; and (3) actual damages or aggrievement. See Third Party Verification, Inc. v. Signaturelink, Inc., 492 F.Supp.2d 1314, 1326 (M.D. Fla. 2007); Blair 2012 WL 868878, at *3).

For misleading advertising under Florida law, a plaintiff must prove reliance on the alleged misleading advertising, as well as each of the other elements of the common law tort of fraud in the inducement, including that (1) the representator made a misrepresentation of material fact; (2) the representator knew or should have known of the falsity of the statement; (3) the representator intended that the representation would

induce another to rely and act on it; and (4) the plaintiff suffered injury . See Third Party Verification, 492 F.Supp. 2d at 1322. When the party alleging misleading advertising is a competitor of the defendant, an allegation of competition is permitted to "stand-in" for the element of direct reliance that a consumer is obligated to plead. Id. For false advertising under the Lanham Act, the plaintiff must prove (1) the advertisements of the opposing party are false or misleading as to the party's own product or another's; (2) the advertisements actually deceived customers or had the tendency to deceive a substantial portion of the targeted audience; (3) the deception is material, meaning it is likely to influence purchasing decisions; (4) the plaintiff has been or is likely to be injured as a result of the false or misleading advertisements by casually related declining sales or loss of good will. See Id. at 1324.

Under Florida law, a cause of action for civil conspiracy requires; (1) an agreement between two or more parties; (2) to perform an unlawful act; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of acts done under the conspiracy. See United Tech Corp., v. Mazer, 556 F.3d 1260, 1271 (11th Cir. 2009). Under Texas law, the essential elements of a cause of action for civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) one or more unlawful, overt acts; and (4) damages as the proximate result. See Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 709 (5th Cir. 2009). Under Kentucky law, a claim for civil conspiracy requires an agreement to commit an unlawful act and some overt act done in furtherance of the conspiracy, and damages as a result of the conspiracy. Fastenal Co. v. Crawford, 609 F.Supp.2d 650, 663 (E.D.Ky. 2009).

The elements of a cause of action for intentional interference with a business relationship under Florida law are (1) the existence of a business relationship between the plaintiff and a third party; (2) the defendant's knowledge of that relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) consequent damage to the Plaintiff. See KMS Restaurant Corp., v. Wendy's Intern., Inc., 361 F.3d 1321, 1325 (11th Cir. 2004) (citing Seminole Tribe of Fla. v. Times Pub. Co., Inc., 780 So.2d 3130 (Fla. 4th DCA 2001)). Under Texas law, the elements of tortious interference with a business relationship are (1) a reasonable probability that the parties would have entered into a contract or relationship (2) an intentional tortious or unlawful act that prevented the relationship from occurring (3) lack of privilege or justification for the act and (4) the plaintiff suffered actual harm or damage as a result of the defendant's interference. See Ash v. Hack Branch Distributing Co., Inc., 54 S.W.3d 401, 414 (Tex. App. 2001). To recover under a cause of action for tortious interference with prospective advantage under Kentucky law, the plaintiff must plead and prove the existence of a valid business relationship or its expectancy; a defendant's knowledge thereof; and intentional act of interference; and improper motive; causation; and special damages. See CMI, Inc. v. Intoximeters, Inc., 918 F.Supp.1068, 1080 (W.D. Ky. 1995).

"The Florida common law of unfair competition is an umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters." Third Party Verfiication, 492 F.Supp.2d at 1325. For an unfair competition claim, the plaintiff must prove (1) deceptive or fraudulent conduct of a competitor and (2) likelihood of consumer confusion. Id. at 1325; Whitney Information Network, Inc., v. Gagnon, 353 F.Supp.2d

1208, 1212 (M.D. Fla. 2005). The plaintiff must also prove that it competes with its opponent for a common pool of customers. Id.

Unfair competition under Texas law "is the umbrella for all statutory and non-statutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters." See Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 486 (5th Cir. 2000) (citing American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, 14 (5th Cir. 1974). To state a claim for unfair competition under Texas law, the plaintiff must show an illegal act by the defendant which interfered with the plaintiff's ability to conduct its business. Id.

Thus, while the undisputed facts in this case demonstrate that Universal has engaged in illegal, unfair or deceptive conduct which could potentially subject it to liability in this case, material issues of fact exist as to whether Universal's conduct was the cause of any injury or damages to Plaintiff under the causes of action at issue.

Universal contends Plaintiff's motion for summary judgment should be denied and that it is entitled to summary judgment because Plaintiff cannot prove that it suffered damages as a result of Universal's conduct. Universal argues there is no evidence that its practice have caused any provider or physician to use its services instead of Plaintiff's services, or that its practice caused any provider or physician to cease using Plaintiff's services. Plaintiff argues Universal's actions have harmed the Plaintiff in the following ways: (1) Universal's false advertising about the legality of its kickback scheme has influenced physicians to refer specimens to Universal instead of Plaintiff; (2) Universal paid money in kickbacks to these physicians; (3) as a result of Universal's promotion of its scheme and kickback payments, Plaintiff has lost referrals from existing

and prospective customers, as well as suffered harm to its reputation and good will. Plaintiff argues it has shown that Universal targeted its customers and that Universal paid kickbacks to Plaintiff's customers to use Universal's services. Plaintiff contends this is enough to at least allow a reasonable jury to infer that it lost specimen referrals because of Universal's actions.

Plaintiff relies mainly on the affidavit and deposition testimony of Brandon Worley to support the contention that its clients have switched to Universal as a result of Universal's conduct. In his affidavit, Worley, Plaintiff's Regional Vice President, states that "to my understanding, Millenium has lost business from at least three major physician or physician practice clients to UOFLP since UOFLP began offering its "joint venture" or kickback agreements. Of those clients, I am personally familiar with Allied Pain Treatment Center, which was a client of mine." (Dkt. 78-1) Worley avers that "I have developed this belief due to conversations either I had, or my sales representatives had, with [Allied Pain] employees . . . [.]" (Id.) Worley's assertions that he learned this information from conversations he or his sales representatives had with Allied Pain employees is inadmissible hearsay that cannot be reduced to admissible evidence at trial. See Macuba v. Deboer, 193 F.3d 1316, 1323 (11th Cir. 1999) (district court may consider hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial).

According to a "Provider Account Summary"[2] submitted by the Plaintiff, Allied Pain received over $100,000.00 from Universal for specimen referrals. (S-2, Exh. 44) However, Allied Pain's representative, Tammy Ralston, testified that Allied Pain and its

[2] Hughes, the owner of Universal, testified that the Provider Account Summary is a record that Universal maintains in the ordinary course of business. See (Dkt. 78-3, p. 166). He testified that the report is generated monthly by Universal's billing department. (Id. p. 167)

physicians received no payments in kickbacks from Universal and that there were no written agreements between Allied Pain and its physicians with Universal. (Dkt. 107-6 at 44) Ralston also testified that they switched from Plaintiff to Universal because of Plaintiff's bullying them about their decision to consider using Universal for their lab testing. (Id. at 38-41) She further testified that the physicians at Alled Pain liked Universal's oral swab tests better because swab collection is quicker, less messy and less invasive than collection of urine samples. (Id. at 30)

In his deposition testimony, Worley identified numerous other physician practices he claimed relied on Universal's business model and misleading statements and which switched from Millenium to Universal as a result of receiving kickbacks from Universal. However, like his assertion regarding Allied World, all of Worley's assertions are based on statements allegedly made by persons at those practices to Plaintiff's employees other than Worley. For example, Worley testified that he learned "through a subordinate" that a certain doctor stated to the subordinate that he would switch to Universal if Plaintiff could not pay him for his lab referrals. (S-3, Exh. 12, p. 45) He testified that he learned from a sales representative, Melissa Gambin, that two other physicians stated to Ms. Gambin that they were switching to Universal due to the payment scheme. (Id., p. 50-54). The deposition testimony of Worley regarding what physicians told his subordinates is inadmissible hearsay and cannot be considered by this Court in deciding the instant summary judgment motions.

Plaintiff is correct in its contention that it has presented evidence that Universal provided payments to certain clients of Plaintiff who began using Universal's lab testing services. See (S-131, Exh. G) However, as discussed, aside from the hearsay

testimony of Worley,Universal has not presented any evidence that any of its clients left to join Universal because of the kickback payments, or that any of its clients ceased using its services because of the kickback payments. All the evidence on the record shows is that Plaintiff's clients split their referrals between Plaintiff and Universal, (S-2, Exh. 47, Exh. 50); there is no admissible evidence on the record before this Court that they did so as a result of kickback payments provided to them by Universal. In fact, at least one client listed by Plaintiff contradicts the assertion that it began using Universal only after it had already started doing business with Plaintiff. According to the affidavit of Joh Jhonson, the Medial Director at Central PA Pain Management, one of the clients Plaintiff claims began using Universal's services, Central PA began using Universal's services before it started referring specimens to Plaintiff. Dr. Jhonson averred that Central PA sent most of its specimens to Universal because "[Universal's oral fluid screening is more effective and appropriate for certain patients and is hygienic non-biohazardous and non-invasive." He also averred that "despite the efforts of Millenium sales representatives, Central PA has never, and never will send all of its tests to Millenium because Central PA prefers to use multiple laboratories." (S-5, Exh. 3)

Thus, based on the evidence before this Court, the Court finds that material issues of fact exist concerning whether Universal's actions caused Plaintiff's injuries and damages in this case. Accordingly, the parties' cross motions for summary judgment are **DENIED**.

DONE and **ORDERED** in Tampa, Florida, this 16th day of August 2013.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Parties