

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 11310

JEFFREY A. and LISA S. HILL,)
individually and on behalf of all)
others similarly situated,)
)
Plaintiffs,)
)
v.)
)
StubHub, Inc. d/b/a “StubHub!”)
and/or “stubhub.com”, “John Doe)
Seller 1”, and “John Doe Sellers 2, et)
al.”)
)
Defendants.)

**ORDER AND OPINION ON MOTION
TO DISMISS**

This matter is before the Court on Defendant StubHub, Inc.’s (“StubHub”) Motion to Dismiss the Amended Complaint of April 18, 2008, and Plaintiffs’ Motion for Expedited Discovery of June 18, 2008. The Court heard oral arguments on the motions on June 26, 2008. For the below reasons, the Court GRANTS IN PART and DENIES IN PART StubHub’s Motion to Dismiss the Amended Complaint and GRANTS Plaintiffs’ Motion for Expedited Discovery.

Law Offices of Jeffrey K. Peraldo, PA by Kara W. Edmunds and Jeffrey K. Peraldo; Brooks, Pierce, McLendon, Humphrey & Leonard, LLP by Jeffrey E. Oleynik, Charles E. Coble, and Benjamin R. Norman for Plaintiffs.

K&L Gates, formerly Kennedy Covington Lobdell & Hickman, LLP, by John H. Culver III; Cooley Godward Kronish LLP by Michael J. Klisch, Joshua M. Siegel, and Michael G. Rhodes for Defendant StubHub, Inc.

Tennille, Judge.

There are five causes of action alleged in the Complaint: (1) Violation of North Carolina General Statute § 14-344 (the “Criminal Statute”), (2) Civil Conspiracy to Violate the Criminal Statute, (3) Tortious Action in Concert, (4)

Violations of North Carolina General Statute § 75-1.1 (the Unfair and Deceptive Trade Practices Act (“UDTP”)), and (5) Punitive Damages. Plaintiffs seek to represent other similarly situated ticket holders.¹ In this case, StubHub seeks dismissal of all claims on the ground that the Communications Decency Act gives StubHub full immunity from Plaintiffs’ claims. (Def.’s Br. Supp. Mot. Dismiss Am. Compl. (“Def.’s Br. Dismiss”) 1.) That part of the motion is denied. StubHub separately seeks dismissal on the grounds that the Criminal Statute provides for no private right of action. (Def.’s Br. Dismiss 1.) That part of the motion is granted. StubHub seeks dismissal of all claims other than the UDTP claim for failure to state a claim upon which relief may be granted. (Def.’s Br. Dismiss 1.) That part of the motion is granted.

I.

LEGAL STANDARD

The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the pleading against which the motion is directed. *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 163 (1970). This Court has summarized the 12(b)(6) standard as follows:

When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine “whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted.” In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. The court must construe the complaint liberally and must not dismiss the complaint 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. When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. When the complaint fails to allege the substantive elements of some legally cognizable claim, or

¹ No class certification issues are before the Court. Mr. Peraldo’s wife has a separate suit pending in Guilford County against a different seller of tickets for the same concert. That is an individual action, not a class action. *See Peraldo v. TNOW Entm’t Group, Inc.* No. 07-CVS-10950 (Guilford Co. N.C. Super. Ct. 2007).

where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).

Branch Banking & Trust Co. v. Lighthouse Fin. Corp., 2005 NCBC 3 ¶ 8 (N.C. Super. Ct. July 13, 2005), <http://www.ncbusinesscourt.net/opinions/2005%20NCBC%203.htm> (citations omitted).

Furthermore, the Court may not consider “extraneous matter” outside the complaint, or else the Rule 12(b)(6) motion will be converted into a Rule 56 motion for summary judgment. *See, e.g., Fowler v. Williamson*, 39 N.C. App. 715, 717, 251 S.E.2d 889, 890–91 (1979). However, the Court may consider documents the moving party attaches to a 12(b)(6) motion which are the subject of the challenged pleading and are specifically referred to in that pleading, even though they are presented to the Court by the moving party. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60–61, 554 S.E.2d 840, 847 (2001) (considering a contract on a 12(b)(6) motion even though the contract was presented by the movant). The Court is not required to accept as true “any conclusions of law or unwarranted deductions of fact.” *Id.* at 56, 554 S.E.2d at 844. Thus the Court can reject allegations that are contradicted by the supplementary documents presented to it. *See E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P’ship*, 213 F.3d 175, 180 (4th Cir. 2000) (stating that the court “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments”).

The Amended Complaint refers to StubHub’s website throughout. (*See, e.g.,* Am. Compl. ¶¶ 5, 10, 13.) StubHub requests that the Court take into consideration the User Agreement and StubHub’s website in its deliberation on the motion to dismiss. (Def.’s Reply Br. 1.) The User Agreement has not been attached to the Complaint or Amended Complaint. StubHub’s website cannot be attached to the Complaint or Amended Complaint. The User Agreement and StubHub’s website are not part of the pleadings. The Court would have to go outside of the pleadings, i.e., access the website itself, to consider the User Agreement and StubHub’s website. Accordingly, the User Agreement and StubHub’s website have not been considered by the Court in this Order.

II.
ANALYSIS

A.

TICKET PURCHASE BY THE HILLS

The Court will be using certain terms in its analysis of the motion to dismiss. The following terms are defined to clarify the Court’s analysis:

1. Face Value: The face value of a ticket is the price printed on the ticket. The face value does not include a service charge or taxes.
2. Market Value: The market value of a ticket is the price a willing buyer and willing seller would agree upon in an arms length transaction. The price for which a ticket sells on StubHub is a reliable indicator of market value.
3. Hot Acts: Events in which the demand for tickets is greater than the number of tickets available for sale at the box office.²

Plaintiff Lisa Hill (“Ms. Hill”) attempted to purchase via the Greensboro Coliseum website four tickets for the Miley Cyrus as Hannah Montana concert that was held at the Greensboro Coliseum on November 25, 2007. (Am. Compl. ¶ 9.) Although Ms. Hill was on the ticket purchasing website when the tickets first went on sale, she was unable to purchase any tickets because the event was already sold out. (Am. Compl. ¶ 9.) Ms. Hill then searched online ticket vendors and was able to find four tickets on StubHub’s website for \$149.00 each. (Am. Compl. ¶ 9.) Ms. Hill paid for the tickets using Plaintiff Jeffrey Hill’s (“Mr. Hill”) credit card that was issued in her name. (Am. Compl. ¶ 9.) The Hill’s credit card was charged a total of \$667.55, which included the price of the tickets (\$149.00 x 4), commission (\$59.60), and a shipping and handling fee (\$11.95). (Am. Compl. ¶ 9.) The Hill’s credit card was charged the \$667.55 by StubHub. (Am. Compl. ¶¶ 9–10.) The face value of each ticket was \$56.00. (Am. Compl. ¶ 9.) The sale for \$149.00 of a ticket whose face value is \$56.00 is a violation of the Criminal Statute. *See* N.C. Gen. Stat. § 14-

² The term “hot acts” has been borrowed from StubHub spokesperson Sean Pate, quoted by Plaintiffs as saying people like Plaintiffs “don’t realize it’s nearly impossible to buy tickets for these *hot acts* anywhere but from resellers.” (Pls.’ Br. Resp. Def.’s Mot. Dismiss (“Pls.’ Br. Opp’n”) 3 n.1; Am. Compl. ¶ 11 (emphasis added).)

344 (stating that the resale of a ticket “shall not be . . . greater than the combined face value of the ticket, tax, and the authorized service fee” where the service fee “may not exceed three dollars (\$ 3.00) for each ticket”). Ms. Hill alleges that she was unaware of the face value of the tickets until she received the tickets in the mail and was able to read the face value on the ticket itself. (Am. Compl. ¶ 9.) Plaintiffs were unable to ascertain who was selling these four tickets to them. (Am. Compl. ¶ 3.)

B.

THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act (the “CDA”) was enacted by Congress in 1996 to “promote the continued development of the Internet and other interactive computer services.” 47 U.S.C.S. § 230(b)(1) (LEXIS through 2007 legislation). Congress decided that one way to support this policy was to differentiate the potential liabilities of “interactive computer service” providers from “information content providers” on the Internet. *See id.* § 230(c), (f). An “interactive computer service” or an “interactive service provider” refers to “any information service, system, or access software provider . . . including specifically a service or system that provides access to the Internet.” *Id.* § 230(f)(2). An “information content provider” is the party that is “responsible, in whole or in part, for the creation or development of information provided through the Internet.” *Id.* § 230(f)(3). It is important to note that these categories, interactive service provider (“ISP”) and information content provider (“ICP”), are not mutually exclusive—an ISP can also be an ICP if it acted as the publisher of information that it created or developed. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003). If an ISP is “responsible, in whole or in part,” for creating information, it is an ICP and “may be immune for some of the content it displays but be subject to liability for other content.” *Fair Hous. Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008) [hereinafter *Roommates.com*].

In this developing area of law, the question of how far the immunity found in the CDA extends is still being debated. The seminal CDA case, *Zeran v. America*

Online, Inc., 129 F.3d 327 (4th Cir. 1997), has been questioned in several courts. See *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 690–93 (N.D. Ill. 2006) [hereinafter *Chi. Lawyers*] (disagreeing with the analysis and holding in *Zeran* and citing the court in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), which questioned the holding in *Zeran*). In *Zeran*, the court found that the CDA “creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran*, 129 F.3d at 330 (emphasis added). In *Chicago Lawyers*, the court held that the holding in *Zeran* is not as broad as other courts have found. *Chi. Lawyers*, 461 F. Supp. 2d at 693. The court based its holding on an analysis of the CDA that distinguished between section 230(c)(1), which states that an ISP shall not be treated as a publisher, and section 230(c)(2), which creates immunity for actions taken or not taken by the ISP. *Id.* The differences between the two sections led the court to find that immunity under the CDA is limited to only “those causes of action that would require treating an [ISP] as a *publisher* of third-party content.” *Id.* (emphasis added). However, the holding in *Chicago Lawyers* flies in the face of the majority of federal case law. *Id.* at 689–90 & nn.6–7 (“Virtually all subsequent courts that have construed Section 230(c)(1) have followed *Zeran*, and several have concluded that Section 230(c)(1) offers [ISPs] a ‘broad,’ ‘robust’ immunity.”). This Court will not discuss the merits of allowing broad immunity for ISPs at this juncture and will instead focus on what has been alleged at this time in this lawsuit.

In *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004), the court found that immunity was appropriate even though the ISP “may have encouraged third parties to use [the service] and provided tools to assist them” because the third parties “ultimately decided what information to put on [their] sites.” *Id.* at 1118. However, “there is . . . some point at which the existing immunity would no longer apply.” *Stoner v. eBay, Inc.*, 2000 Extra LEXIS 156, at *14, 56 U.S.P.Q.2d (BNA) 1852 (Cal. Super. Ct. Nov. 7, 2000). The court in *Stoner* contemplated that “any limitation placed on the immunity presumably would begin

at the point at which providing otherwise lawful goods or services with knowledge that they are being put to an illegal use becomes the commission, or the aiding and abetting, of a crime.” *Id.* Generally, however, when there is a close case, the issue “must be resolved in favor of immunity.” *Roommates.com*, 521 F.3d at 1174.

The issue of whether StubHub qualifies for immunity under the CDA comes to the Court through a motion to dismiss. As stated above, a motion to dismiss questions the sufficiency of the pleadings. The Court must accept as true all factual allegations by the Plaintiff when considering a motion to dismiss. Plaintiffs have alleged that StubHub was an ICP as well as an ISP. (Am. Compl. ¶ 11; Pls.’ Br. Opp’n 4, 6, 11, 16.) There was no answer to the Court’s question at the hearing as to whether StubHub actually did or did not sell the tickets in question or if it sold its own tickets to the concert. (Mot. Dismiss Hr’g Tr. Jun. 26, 2008 (“Tr.”) 4–8.) There are allegations that StubHub controls the events for which these tickets are being offered. (Am. Compl. ¶ 11.) Plaintiffs alleged that StubHub only offers to sell tickets for hot acts, thereby guaranteeing high commissions and ticket re-sale prices above the statutory limit. (Am. Compl. ¶¶ 11–12.) While StubHub argues that the prices on the website reflect the market value for the tickets, there are allegations that the market value is created by StubHub either through its association with multi-ticket holders or through its own sales. (Am. Compl. ¶ 12; Pls.’ Br. Opp’n 5, 8.) There are also questions over the movement of the tickets and money through or by StubHub. (Am. Compl. ¶ 9; Pls.’ Br. Opp’n 8.) These allegations amount to an allegation of control over the tickets and prices that is sufficient to defeat a motion to dismiss. *See Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148–49 (D. Ariz. 2005) (finding that allegations that an ISP created the alleged wrongful content was enough to deny a motion to dismiss based on the ISP’s immunity under the CDA “at this stage of the case”). The questions and allegations outlined above may be resolved after a period of discovery. Once discovery has been completed, the Court can determine if StubHub had sufficient control to affect ticket prices, was actually selling tickets, or if this is a close question in which immunity

should be favored. The Court may also be in a better position to discuss the “brick and mortar” test Plaintiffs proposed. (*See* Pls.’ Br. Opp’n 2, 25.)

The Court hereby DENIES Defendant StubHub’s motion to dismiss based on StubHub’s alleged immunity as an ISP under the CDA. The Court acknowledges the potential immunity and the requirement to recognize it in a close case. The allegations of the Amended Complaint sufficiently assert that StubHub acts as both an ISP and an ICP. Discovery will determine if that is accurate and whether the immunity provided by the CDA is applicable to all of StubHub’s conduct.

C.

THE CRIMINAL STATUTE

North Carolina General Statute section 14-344 states that

[a]ny person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person, firm, or corporation which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket, tax, and the authorized service fee. This service fee may not exceed three dollars (\$ 3.00) for each ticket except that a promoter or operator of the property where the event is to be held and a ticket sales agency may agree in writing on a reasonable service fee greater than three dollars (\$ 3.00) for the first sale of tickets by the ticket sales agent. . . . Any person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by this section shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-344 (2007). This is a criminal statute.³ StubHub argues that this statute in and of itself does not give rise to a private cause of action. (Def.’s Br. Dismiss 20–21.) Plaintiffs argue that violation of the Criminal Statute gives rise to a private cause of action under Plaintiffs’ claims for violation of the statute, civil

³ There is currently a bill before the North Carolina General Assembly that would change the status of this statute. Senate Bill 1407 would allow the resale of tickets via the Internet “at a price greater than the” face value if certain conditions are met. S. 1407, 2007–2008 Gen. Assem. (N.C. 2007). The Senate version was introduced on March 21, 2007. There have been other attempts at allowing the resale of tickets via the Internet. North Carolina is currently one of only a few states that have anti-scalping statutes.

conspiracy, tortious action in concert, and unfair and deceptive trade practices (Claims 1, 2, 3, and 4). (Pls.' Br. Opp'n 12.)

Private causes of action arise when so delineated by the Legislature. *See e.g., Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 714 (1998) (finding that because Chapter 95 of the North Carolina General Statutes did not contain a private cause of action, none existed). Chapter 14 of the North Carolina General Statutes also does not contain a private cause of action for violations of the crimes contained within the chapter. N.C. Gen. Stat. §§ 14-1 to -461. Therefore, violation of the Criminal Statute does not give rise to a private cause of action for violation of *that* statute.⁴

StubHub has raised the question of whether violation of the Criminal Statute can give rise to the other claims—civil conspiracy and tortious action in concert—if there is no private cause of action for violation of the Criminal Statute. (Def.'s Reply Br. 4; Tr. 14–16.) StubHub concedes that the UDTP claim should not be dismissed under the argument that there is no private cause of action under the Criminal Statute. (Tr. 16 (“Count 4 does not go out on the private cause of action.”).) However, StubHub argues that the civil conspiracy and tortious action in concert claims are based on tortious conduct, not criminal conduct, and therefore must fail when Claim 1 fails. (Tr. 16.) Plaintiffs assert that the very elements of civil conspiracy and tortious action in concert allow for criminal conduct to be the basis of these private actions. (Pls.' Br. Opp'n 12.) The Court disagrees.

Tortious action in concert is based on a tortious act. *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 19, 598 S.E.2d 570, 583 (2004) (citing Restatement (Second) of Torts § 876 (1979)) (listing the elements of tortious action in concert). The Court notes that *Stetser* does not establish a cause of action for “tortious action

⁴ There are reasons why the Legislature declined to create a private right of action. The most obvious reason is that the purchaser of a scalped ticket may have voluntarily paid the market price and thus may have aided and abetted in the commission of the crime. It seems illogical to create a private right of action on behalf of a purchaser who knowingly made the crime possible by purchasing the ticket at the scalper's price. The statute does give the Attorney General the right to enforce the statute, and he has done so. *See State ex rel. Roy Cooper v. Encore Tickets & Tours, Inc.*, No. 02-CVS-7390 (Wake Co. N.C. Super. Ct. 2002).

in concert.” *Id.* Instead, the court in *Stetser* remanded the aiding and abetting claim, which was also referred to as the tortious action in concert claim, to the trial court, while noting that the North Carolina Supreme Court has not adopted the entirety of section 876 of the Restatement (Second) of Torts. *See Sompo Japan Ins. Inc. v. Deloitte & Touche, LLP*, 2005 NCBC 2 ¶¶ 8–9 (N.C. Super. Ct. Jun. 10, 2005), <http://www.ncbusinesscourt.net/opinions/2005%20NCBC%202.htm> (discussing the portion of *Stetser* related to the aiding and abetting and tortious action in concert claims). No case since *Stetser* has referred to a “tortious action in concert” claim.

This claim can not be based upon a violation of a criminal statute that does not provide for a private cause of action. The very basis of a “tortious action in concert” claim is a tortious act. The act Plaintiffs accuse StubHub of committing is a criminal act. (Am. Compl. ¶¶ 21–23.) A criminal act is not a tort per se. *See* 21 Am. Jur. 2d Criminal Law § 2.

Civil conspiracy is based on an unlawful act or a lawful act done in an unlawful way. *See, e.g., State v. Ridegway Brands Mfg., LLC*, 184 N.C. App. 613, 624–25, 646 S.E.2d 790, 799 (N.C. App. 2007) (listing the elements of civil conspiracy). However, a conspiracy to commit a crime is a *criminal* conspiracy, not a civil conspiracy. *See State v. Brewer*, 258 N.C. 533, 538, 129 S.E.2d 262, 266 (1963) (“In this jurisdiction a conspiracy to commit a misdemeanor is a misdemeanor.”). Violation of the Criminal Statute is a misdemeanor. N.C. Gen. Stat. § 14-344. A conspiracy to violate the Criminal Statute would therefore constitute a criminal conspiracy, not a civil conspiracy.

The question of Claim 4 under North Carolina General Statute section 75-1.1 requires a different analysis.⁵ The elements of a UDTP claim are “(1) defendant[] committed an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) plaintiff was injured as a result.” *Phelps-Dickson Builders, LLC v. Amerimann*

⁵ As the Court has noted before, StubHub has conceded that Claim 4 should not be dismissed based on the private cause of action argument. (*See* Tr. 16.) The Court, however, carries out the following analysis to give guidance for future causes of action.

Partners, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005) (citing *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 923 (1998)). A UDTP claim is a “creation of statute” and is therefore “neither wholly tortious nor wholly contractual in nature.” *Stetser*, 165 N.C. App. at 15, 598 S.E.2d at 580 (citing *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (1984)). The purpose of the UDTP is to “provide civil legal means to maintain[] ethical standards of dealings” and “establish a private cause of action” for consumers who would not otherwise have an effective remedy. *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (quoting N.C. Gen. Stat. § 75-1.1 and *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981)). The UDTP “applies to dealings between buyers and sellers at all levels of commerce.” *Id.* at 245, 400 S.E.2d at 443–44 (quoting *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986)). North Carolina courts have upheld UDTP claims based on statutes that would not otherwise have created a private cause of action. *See Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995) (stating that “the violation of a statute designed to protect the consuming public may constitute an unfair and deceptive practice, even where the statute itself does not provide for a private right of action”); *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 196, 439 S.E.2d 599, 604 (1993) (citing *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980)) (noting that even though the Commissioner of Insurance has jurisdiction over unfair and deceptive trade practices and methods of competition in the field of insurance, there is still a private cause of action under the UDTP); *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) (stating that “the violation of regulatory statutes which govern business activities may also be a violation” of the UDTP). (*See Pls.’ Br. Opp’n 13.*) More applicable to this case, the Court of Appeals has found a violation of a criminal statute found in Chapter 14 of the North Carolina General Statutes to constitute an UDTP claim. *Kewaunee Scientific Corp. v. Pegram*, 130 N.C. App. 576, 581, 503 S.E.2d 417, 420 (1998). In *Kewaunee Scientific*, the court found that violation of the commercial bribery statute, a crime, satisfied the first element for

an UDTP claim. *Id.* at 580, 503 S.E.2d at 420. In this case, Plaintiffs allege that StubHub has violated the Criminal Statute which regulates the sale of tickets to consumers. Violation of a statute regulating business constitutes an unfair and deceptive trade practice. The activity being regulated undoubtedly falls within the broad definition of “commerce” under the UDTP. As to the third element, Plaintiffs have alleged that they were injured by StubHub’s actions. Plaintiffs have therefore alleged the elements of an UDTP claim.

The Court hereby GRANTS Defendant StubHub’s motion to dismiss Claims 1, 2, and 3 and DENIES Defendant StubHub’s motion to dismiss Claim 4.

D.

PUNITIVE DAMAGES

The last claim before the Court is Claim 5 for Punitive Damages. Punitive damages are awarded when there has been a tort committed “willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff’s rights.” *United Lab. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993). “[A] party may not recover punitive damages for tortious conduct and treble damages for a violation of Chapter 75 based on that same conduct.” *Id.* However, “a party may plead alternative theories of recovery based on the same conduct or transaction and then make an election of remedies.” *Stanley*, 339 N.C. at 724, 454 S.E.2d at 229. Nevertheless, if the punitive damages and the treble damages under an UDTP claim serve different purposes and “are not based on the same conduct,” a party does not have to make an election of remedies. *United Labs.*, 335 N.C. at 193, 437 S.E.2d at 380. In this case, there is no tortious claim left for a claim for punitive damages to be based upon. The UDTP claim has been based upon the violation of the Criminal Statute.

The Court hereby GRANTS Defendant StubHub’s motion to dismiss Claim 5.

III.

MOTION FOR EXPEDITED DISCOVERY

Plaintiffs' Motion for Expedited Discovery merely calls for identification of the sellers of the tickets to the Hills. StubHub's counsel told the Court that such information is readily available. (Tr. 50.) Those sellers may be joined. If so, such joinder should take place at the earliest time possible. At the very least, the sellers have relevant information about how the "content" of their posting on StubHub's website was developed. For those reasons, the Court hereby GRANTS Plaintiffs' Motion for Expedited Discovery.

IV.

CONCLUSION

The Court notes that the discovery contemplated in Part II.B. of this Order will also illuminate the commission structure StubHub has created. Plaintiffs allege that StubHub charges the buyer a 10% commission on the total purchase price and the sellers 15% on the total sale price. (Am. Compl. ¶ 10.) StubHub has admitted that it has knowledge of North Carolina's anti-scalping statute and is able to identify which tickets are being sold for North Carolina events. (*See* Def.'s Br. Dismiss 3 (outlining the procedure where a seller attempting to sell tickets to a North Carolina venue is shown North Carolina General Statute section 14-344, including the portion of that section referring to service fees, and asked to acknowledge that s/he understands the law before proceeding with the sale).) The Court anticipates that the relation of StubHub's commission structure to the Criminal Statute will be explored during discovery.

Based on the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. Defendant StubHub's motion to dismiss Claim 1 is hereby GRANTED;
2. Defendant StubHub's motion to dismiss Claim 2 is hereby GRANTED;
3. Defendant StubHub's motion to dismiss Claim 3 is hereby GRANTED;
4. Defendant StubHub's motion to dismiss Claim 4 is hereby DENIED;
5. Defendant StubHub's motion to dismiss Claim 5 is hereby GRANTED;

6. Plaintiffs' motion for expedited discovery is hereby GRANTED.

This the 14th day of July, 2008.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases