

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
COUNTY OF MECKLENBURG		SUPERIOR COURT DIVISION
		08-CVS-9784
BHB ENTERPRISES, INC., d/b/a Vinnie's Sardine Grill and Raw Bar and on behalf of all others similarly situated,)	REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION BY DEFENDANT WASTE MANAGEMENT OF CAROLINAS, INC. TO DISMISS CERTAIN CLAIMS
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Plaintiff,)	
)	
v.)	
)	
WASTE MANAGEMENT OF CAROLINAS, INC. and WASTE MANAGEMENT, INC.,)	
Defendants.)	

Defendant Waste Management of Carolinas, Inc. (“WMC”) files this reply memorandum in further support of its Motion to Dismiss Certain Claims (the “Motion”). In the Motion, WMC moved to dismiss two counts of Plaintiff’s Complaint: (a) a claim predicated on an alleged violation of the North Carolina Unfair and Deceptive Trade Practices Act (the “UDTPA”), N.C. Gen. Stat. §§ 75-1.1 and 75-16; and (b) a claim for “civil conspiracy conversion” based on an alleged conspiracy between WMC and Waste Management, Inc., its parent company and ultimate shareholder. As demonstrated below, by seizing on inapplicable authorities, inventing a fiduciary relationship, and arguing on the basis of “facts” nowhere alleged in its Complaint, Plaintiff’s Response serves to confirm that Counts III and V of its Complaint should be dismissed.

I. Plaintiff Fails to Allege an Unfair or Deceptive Act as a Matter of Law.

WMC demonstrated in its Motion that Plaintiff’s UDTPA claim is predicated entirely on allegations of an intentional breach of contract between commercial entities. In that regard,

Plaintiff had alleged in its Complaint that: (a) both Plaintiff (“BHB”) and WMC are commercial entities that had entered into written contracts for waste collection services; (b) the WMC contracts expressly provide for price increases over their terms, some requiring consent of the customer, and (c) WMC breached the contracts by failing to obtain BHB’s consent to the price increases. Under well established North Carolina law, Plaintiff’s breach of contract claim cannot constitute a claim under North Carolina’s UDTPA in the absence of substantial aggravating circumstances. Because Plaintiff failed to make any such allegations, its UDTPA claim should be dismissed.

Now, in an effort to disguise the “want of merit” to its UDTPA claim, Plaintiff’s Response Brief argues facts that are unsupported by its Complaint and ignores North Carolina’s clear and abundant body of decisional law on unfair trade practices. Plaintiff’s efforts to “replead” its Complaint allegations in its Response to better invoke inapplicable legal authorities is futile. *See Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E.2d 161, 166 (1970) (holding that a claim should be dismissed under Rule 12(b)(6) for “want of merit,” where there is “an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim”).

In particular, Plaintiff’s Response seeks to portray its UDPTA claim as something more than a breach of contract by incorporating facts and theories outside the scope of the Complaint. For example, contrary to its Complaint allegations, Plaintiff now asserts or implies the existence of affirmative misrepresentations by WMC (Pl. Resp. Br. at 1), and inequitable assertions of power and position over consumers held “captive” by their waste collection contracts (Pl. Resp. Br. at 1-3, 5-6), as part of some nationwide scheme of deception to obtain price increases from waste collection customers. It then cites to legal authorities, mostly from outside this

jurisdiction, finding that factors such as affirmative misrepresentations and abuse of a fiduciary relationship can support claims for unfair and deceptive trade practices.

As demonstrated below, however, Plaintiff's Complaint, stripped of rhetoric and adjectives, alleges simply that BHB is a commercial enterprise that negotiated and executed collection services agreements with WMC, dealt with WMC at arm's length over the years during the performance of these contracts, and now disputes whether WMC is contractually entitled to increase its prices. In particular, Plaintiff acknowledges that its collection service agreements allow price increases with consent of the customer, but disputes whether that consent was given. As shown in WMC's Motion, these allegations constitute, at most, a claim for breach of contract, not an UDTP claim under North Carolina law.

A. Plaintiff's Affirmative Misrepresentation Theory Is Inapposite

In support of its UDTPA claim, Plaintiff relies principally on *Orkin Exterminating Company, Inc. v. Federal Trade Commission*, 849 F.2d 1354 (11th Cir. 1988), in which the Eleventh Circuit reviewed a Federal Trade Commission ("FTC") order under Section 5 of the FTC Act. Plaintiff's reliance on *Orkin* is misplaced.

First, unlike the facts alleged in this case, *Orkin* involved affirmative misrepresentations made to customers about the reasons for increases in their annual renewal fees. *See Orkin*, 849 F.2d at 1358-59. No similar allegations exist in this case. Indeed, Plaintiff's Complaint does not allege a single affirmative misrepresentation by WMC. At most, Plaintiff alleges that its contracts with WMC required its consent to certain price increases, and that WMC breached the contracts by failing to obtain that consent before increasing its prices.

Second, the court in *Orkin* expressly noted that most states, including North Carolina, required "something more" than a "mere breach of contract" to support a claim of unfair or

deceptive conduct. *Id.* at 1363. The federal court refused to follow those state court decisions when interpreting the FTC Act, finding that the FTC Act, contrary to state statutes such as N.C.G.S. § 75-1.1, does not require such additional pleadings or facts. By declining to follow North Carolina law on this critical point, the *Orkin* case does not support Plaintiff's claim asserted under North Carolina's UDPTA statute. *See State ex rel. Edmisten v. J.C. Penney Co., Inc.* 292 N.C. 311, 315-16, 233 S.E.2d 895, 898 (1977) (although decisions interpreting the FTC Act may "furnish some guidance to the meaning of G.S. § 75-1.1," they "are not controlling in construing the North Carolina Act."); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 243, 259 S.E.2d 1, 10 (1979).

Third, the *Orkin* court applied a standard of review under which it "owe[d] 'some deference' to the Commission's judgment,," and its review was limited to the question of "whether the Commission [had] exceeded its authority." *Id.* at 1364 By contrast, in this case, the Court must make its own determination pursuant to Rule 12(b)(6) as to whether Plaintiff's allegations are sufficient to state a claim under the North Carolina statute based on allegations of a contract breach between commercial entities.

Plaintiff's citations to North Carolina authorities highlight the distinction between allegations sufficient to state a claim under UDPTA and the allegations challenged by WMC's Motion. For example, *Sampson-Bladen Oil Co., Inc. v. Walters* involved an oil company affirmatively misrepresenting the amount of oil it supplied to a customer and overcharging the customer based on this misrepresentation. 86 N.C. App. 173, 174, 356 S.E.2d 805, 806 (1987). *Walters* actually supports WMC's motion to dismiss, because it illustrates the difference between allegations that constitute a breach of contract and those that constitute an unfair or deceptive trade practice because they involve intentional misrepresentation of material facts. The other

cases relied on by Plaintiff similarly involve affirmative, intentional misrepresentations that are not present in this case. *See, e.g., Baldine v. Furniture Comfort Corp.*, 956 F.Supp. 580, 587-589 (M.D.N.C. 1996).

Plaintiff attempts to portray its allegations as similar to those accepted in *Orkin* and *Walters* by arguing that WMC “overcharged Plaintiff and Class Members for price increases that it was not entitled to under the terms of the contract, deceptively masking the fact that each such price increase required consumer consent.” (Pl. Resp. Br. at 4.) Plaintiff’s allegations boil down to three core questions: (1) whether and when the contracts entitled WMC to impose price increases; (2) whether the contracts required WMC to obtain Plaintiff’s (and each putative class member’s) consent to some or all of those increases, and, (3) if so, whether that consent was provided by Plaintiff (and each putative class member). This ultimate inquiry, whether or not WMC increased its prices, as expressly allowed by its contract, in a manner consistent with the terms of that contract, is nothing more than a pure breach of contract inquiry.

B. Plaintiff’s “Position of Power” Argument is Without Merit

Plaintiff also seeks to distinguish its allegations from a routine breach of contract claim by asserting that “Defendants were in a position of power over Plaintiff and Class Members and their inequitable assertion of the same causes them to be guilty of unfair acts and practices.” (Pl.’s Resp. Br. at 5.) Although the Complaint makes conclusory allegations regarding this theory (Complaint ¶¶1, 35), it asserts no facts to support a contention that Defendant, as a commercial waste collector, held any such position of power over Plaintiff or its other customers. The closest Plaintiff comes to such an allegation is in ¶1, where it states: “And if customers complain about the unilateral price increases, Defendants **may** threaten to discontinue all waste collection services.” (emphasis added.) As noted in WMC’s Motion, however, Plaintiff stops

well short of alleging that Defendant ever actually threatened to discontinue Plaintiff BHB's waste collection service (or that of any other member of the putative class).

Plaintiff's Response Brief in essence urges this Court to treat WMC as a fiduciary of BHB (and each of its other waste collection customers). Not surprisingly, Plaintiff's argument finds no support in the facts alleged or in North Carolina law governing arms-length commercial relationships. That well settled law provides that "parties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract and the duties set forth in the U.C.C." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992); *see also Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990) (holding that a fiduciary relationship did not exist between independent businesses). Thus, Plaintiff's bare argument that WMC was "in a position of power over Plaintiff" is insufficient to support a UDTP claim under North Carolina law. *See Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997) (holding that a conclusory allegation is insufficient to withstand a Rule 12(b)(6) motion to dismiss).

The Court of Appeals' recent decision in *S.N.R. Mgmt. Corp. v. Danube Partners*, is instructive. 659 S.E. 2d 442, 448 (2008). There, the Court affirmed dismissal of a plaintiff's UDTPA claim despite specific allegations that defendants had obtained proprietary information from plaintiff under false pretenses and encouraged a third party to breach or terminate their contracts with plaintiff without justification. Noting the "business relationship" between the defendant and plaintiff, the court held that the allegations "did not show any defendant engaged in 'conduct which amounts to an inequitable assertion' of their power over plaintiff," nor "sufficient facts to show any defendant engaged in conduct that was so egregious in nature to result in 'immoral, unethical, oppressive' behavior." __ N.C. App. at __, 659 S.E.2d at 448-49

(internal citations omitted). By contrast, Plaintiff relies only on North Carolina authorities that address conduct readily distinguishable from the allegations in this Complaint. *See, e.g., Lake Mary Limited Partnership v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546 (2001) (defendant deceived third parties into misdirecting payments owed to the plaintiff by wrongfully and deceptively using another entity's letterhead to further the diversion of funds); *Eley v. Mid/East Acceptance Corporation of N.C.*, 171 N.C. App. 368, 370-71, 614 S.E.2d 555, 558 (2005) (claim based on conversion of the plaintiff's property separate and apart from any contractual relationship).

Notwithstanding Plaintiff's conclusory and unsupported allegations that WMC's conduct was unfair, deceptive, and oppressive, this Court must examine and rule on the facts actually alleged. Plaintiff cannot transform a breach of contract into a violation of § 75-1.1 simply by describing the breach as intentional, unfair, or deceptive. Despite Plaintiff's attempts to cloak its allegations in the language of the UDTPA, the allegations of its Complaint boil down to a claim that WMC increased prices to its customers "without obtaining consent required by their agreements." (Pl.'s Resp. Br. at 3.) These facts, even if proven, do not support a claim under § 75-1.1 as a matter of law, and thus, Count III should be dismissed.

II. Plaintiff's Conspiracy Claim Fails Under the Doctrine of Intracorporate Immunity.

WMC also has moved to dismiss Plaintiff's claim for "civil conspiracy conversion," on the ground that the doctrine of intracorporate immunity adopted by the North Carolina courts precludes such claim where the only conspiracy alleged is between a parent corporation and its wholly-owned subsidiary. *See* WMC's Memorandum in Support of Motion to Dismiss Certain Claims ("WMC's Memorandum") at 4-5.

Plaintiff responds by arguing that “there is no Court of Appeals’ [sic] case finding that the doctrine of intracorporate immunity applies to a parent and its subsidiary corporation.” (Pl.’s Resp. Br. at 6.) Plaintiff’s argument ignores the significance of pertinent cases decided by the North Carolina Business Court and cited by WMC. (See WMC’s Memorandum at 5.) Plaintiff attempts to dismiss these decisions by characterizing them as “three unpublished cases from the Superior Court of North Carolina.” (Pl.’s Resp. Br. at 7.) As the General Rules of Practice for the Superior and District Courts adopted by the North Carolina Supreme Court show, however, the Business Court was established in part because of the “desirability of a state having a substantial body of corporate law that provides predictability for business decision making.” *See* Comment to Rule 2.2 of the General Rules of Practice for the Superior and District Courts; *see also* Rule 27.2 of the General Rules of Practice and Procedure for the North Carolina Business Court (the “Business Court Rules”) (addressing citation of Business Court decisions). Thus, contrary to Plaintiff’s opinion, these cases constitute significant authority in this Court.

In addition, Plaintiff materially mischaracterizes the Business Court’s decision in *Garlock v. Hilliard*, 2000 NCBC 11, claiming that it only involved an alleged conspiracy between “a corporation’s agents’ officers and employees.” (Pl.’s Resp. Br. at 7.) Contrary to Plaintiff’s assertion, the *Garlock* decision makes clear that the conspiracy alleged in that case was between a limited liability company (SEG & P, LLC) and its owner (Aubrey Hilliard). *See Garlock v. Hilliard*, 2000 NCBC 11 ¶ 2 (“SEG & P, LLC is owned entirely by Hilliard”), ¶ 25 (“Plaintiffs alleged that Hilliard and SEG & P conspired”). The circumstances addressed in *Garlock*, therefore, are precisely the same as in this case: Plaintiff alleges a conspiracy between WMC and its ultimate owner, WMI. (*See* Compl. ¶ 2.) Thus, the *Garlock* decision, as well as the other North Carolina cases addressing intracorporate immunity, requires this Court to dismiss

Plaintiff's conspiracy claim in these circumstances. *See State ex rel. Cooper v. McClure*, 2004 NCBC 8 ¶ 74 (noting that “[t]he intracorporate immunity doctrine holds that a corporation, its subsidiaries, officers and employees do not provide a sufficient number of actors to carry out an antitrust conspiracy.”)

Finally, Plaintiff's citation to law review articles and to decisions dating back to 1962 by random courts outside of this jurisdiction to support its civil conspiracy conversion claim under North Carolina law is futile. (*See* Pl. Resp. Br. at 8-9). These authorities are not on point and do not involve the application of North Carolina's intracorporate immunity doctrine to a civil conspiracy claim. Accordingly, Count V of the Complaint should be dismissed.

III. Plaintiff Has Not Properly Moved to Amend the Complaint.

Plaintiff concludes its Response Brief by requesting that if the Court were to grant WMC's motion to dismiss Counts III or V, Plaintiff be granted “leave to amend the dismissed count(s).” (Pl.'s Resp. Br. at 9.) Plaintiff's request to amend is not proper and does not comply with the North Carolina Rules of Civil Procedure or the Business Court Rules. In contravention of N.C.R. Civ. P. 15, Plaintiff has not identified how it would propose amending the Complaint, nor has it attached a copy of the amended pleading.¹ Plaintiff's request for leave to amend essentially asks this Court to give it a second bite at the apple -- to re-plead its claims after it has tried once and failed. Such a request is improper and not supported by the rules, particularly when Plaintiff does not point to a single fact that it could add to an amended complaint that would save its claims. Thus, Plaintiff's request for leave to amend the Complaint should be denied.

¹ Plaintiff's attempt to imbed a motion to amend in its Response Brief does not comply with Rule 15.2 of this Court's local rules, which requires that “each motion . . . be set out in a separate paper.”

For the reasons set forth above and in Defendant's opening Memorandum, Waste Management of Carolinas, Inc. respectfully moves for dismissal of Counts III and V of the Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

This the 29th day of September 2008.

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CERTIFICATE OF COMPLIANCE WITH NCBC RULE 15.8

The undersigned hereby certifies that the foregoing brief complies with the requirements stated in Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 29th day of September 2008.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION BY DEFENDANT WASTE MANAGEMENT OF CAROLINAS, INC. TO DISMISS CERTAIN CLAIMS** has been served on all parties to this cause by:

_____	Hand delivering a copy hereof to the attorney for each said party addressed as follows:
<u> X </u>	Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:
_____	Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:
_____	Sending a copy hereof to the attorney for each said party by e-mail as follows:
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This the 29th day of September 2008.

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