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

Defendant Waste Management of Carolinas, Inc. ("WMC") files this memorandum of law in support of its Motion to Dismiss Certain Claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. WMC moves to dismiss two counts in the Plaintiff's Complaint: Count III, which purports to plead a cause of action for violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1 and 75-16, and Count V, which purports to plead a cause of action for "civil conspiracy conversion." Based on the allegations contained in the Complaint, Plaintiff cannot maintain either claim under North Carolina law, and both counts should be dismissed pursuant to Rule 12(b)(6).

FACTUAL ALLEGATIONS IN THE COMPLAINT

This is a contract case. It relates to a contract or contracts[1] between BHB Enterprises, Inc.

[1] The Complaint states that a copy of the contract is attached to the Complaint as Exhibit A (*see* Compl. ¶ 3), but no copy of any contract was attached to the service copy of the Complaint that WMC received or to the copy of the Complaint filed with the Superior Court of Mecklenburg County. Counsel for WMC pointed this out to Plaintiff's counsel weeks ago and requested a copy of the missing Exhibit A, but Plaintiff's counsel has yet to provide a copy.

d/b/a Vinnie's Sardine Gill and Raw Bar ("Plaintiff" or "BHB") and WMC for waste management and collection services. (*See* Compl. ¶¶ 1, 3.) BHB generally alleges that WMC "unilaterally increased" its charges "for purposes other than those permitted under the contract." (Compl. ¶ 1.)

Plaintiff concedes that WMC has the contractual right to increase its charges for many different reasons, including "any increase in disposal, fuel, or transportation costs, any change in the composition of the Waste Materials, or increase in the average weight per container of Waste Materials; increased costs due to uncontrollable circumstances including, without limitation, changes in local, state or federal laws or regulations, imposition of taxes, fees or surcharges and acts of God such as floods, fires, etc." (Compl. ¶ 4.) WMC "may also increase the charges to reflect increases in the Consumer Price Index for the municipal or regional area in which the Service Address is located." (*Id.*) Moreover, WMC may increase its charges for reasons other than those specifically enumerated in its contracts, with the customer's consent. (*Id.)*

Plaintiff generally alleges that WMC's price increases were "for reasons other than those permitted in the contract absent customer consent." (*Id.*) Plaintiff also alleges that WMC failed to give "adequate notice" of the reasons for price increases, (s*ee, e.g.*, Compl. ¶¶ 1, 5, 10-11), but it fails to cite to any contractual provision that requires such notice. (*See* Compl. ¶¶ 4, 9 (quoting paragraph 4 of a contract).)

Based on these allegations, the Complaint asserts a breach of contract claim (Count I) and other contract-related claims for "money had and received" (Count II), breach of the duty of good faith and fair dealing (Count IV), and declaratory relief (Count VI).

In addition to these contract claims, the Complaint attempts to state a claim for "civil conspiracy conversion" (Count V) and for a violation of the North Carolina Unfair and Deceptive Trade Practices Act (Count III). For the reasons set forth in detail below, however, each of these

claims must fail. The Plaintiff cannot maintain a civil conspiracy claim against WMC and its parent company, Waste Management, Inc. ("WMI"), under North Carolina law because the intracorporate immunity doctrine bars such a claim. The Plaintiff cannot maintain its unfair and deceptive trade practice claim because its allegations constitute nothing more than a purported breach of contract and do not rise to the level of an unfair or deceptive act. Moreover, certain of the allegations involve nothing more than purported wrongs that *may* occur to someone but have never been alleged to occur to this Plaintiff. All of these reasons call for the claims to be dismissed pursuant to Rule 12(b)(6).

BHB pleads its claims on behalf of itself and a purported class of "[a]ll persons statewide who entered into a collection service agreement with Defendant and had their monthly service charges increased by Defendants without adequate notice under the agreement of the reasons for the increase and for purposes not permitted by the agreements absent customer consent to the increased charges."[2] (Compl. ¶ 13.) BHB named as defendants WMC – the party to the contract at issue – and its parent company, WMI. (*See* Compl. ¶ 2.) WMI has separately moved to be dismissed from this action pursuant to Rule 12(b)(2) for lack of personal jurisdiction.

[2] The class definition demonstrates on its face that Plaintiff will be unable to satisfy the requirements of Rule 23 when it moves for class certification. For example, the Plaintiff fails to limit the class to any particular time period. Moreover, identifying the class members would require litigating each individual claim in order to determine (1) whether Waste Management of Carolinas increased its charges to each individual customer, (2) if so, what the reasons were for any increase in charges with respect to that individual customer, (3) whether the terms of that customer's particular contract required consent in light of the reasons for the increase, and (4) whether the customer consented. Thus, Plaintiff's own class definition shows that this case involves highly individualized fact and legal issues as to each customer – issues that will preclude Plaintiff from satisfying the requirements of class certification. *See, e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 337-44, 352 (4th Cir. 1998) (reversing district court's order certifying class action where the contract claims raised individualized issues, and stating that the district court's ruling failed to observe "the most primary principles of procedure and the most settled precepts of commercial law").

ARGUMENT

I. Standard of Review

"A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint." *Raritan River Steel v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). A claim should be dismissed under Rule 12(b)(6) if it is clearly without merit. "[T]his want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." *Sutton v. Duke*, 277 N.C. 94, 102–03, 176 S.E.2d 161, 166 (1970); *see also Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993). Conclusory allegations to support a necessary element of a claim are insufficient to withstand a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Farrell v. Transylvania County Bd. of Educ.*, 175 N.C. App. 689, 696, 625 S.E.2d 128, 134 (2006).

II. Plaintiff Fails to State a Claim for Civil Conspiracy Because a Parent Company and Its Subsidiary Cannot Conspire as a Matter of Law.

The crux of Plaintiff's "civil conspiracy conversion" claim (Count V) is Plaintiff's allegation that WMC engaged in a conspiracy with its parent company, WMI, to "secure the unlawful charges from Plaintiff." (Compl. ¶ 46.) Plaintiff names no participants in the alleged conspiracy other than WMC and its parent company, WMI. (*Id.* ¶ 46 (conspiracy allegations), ¶ 2 (stating that WMI is the parent company of WMC).) These allegations do not state a civil conspiracy claim under North Carolina law because, under the doctrine of intracorporate immunity, a subsidiary and its parent cannot conspire with each other. *See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 625, 646 S.E. 2d 790, 799 (2007).

To state a claim for civil conspiracy, a plaintiff must allege "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a

common scheme." *Id.* at 624-25, 646 S.E. 2d at 799. With respect to the first element, "[t]he doctrine of incorporate immunity holds that, since at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself." *Id.* at 625, 646 S.E.2d at 799 (citing *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985)).

This Court applied the intracorporate immunity doctrine to dismiss a civil conspiracy claim pursuant to Rule 12(b)(6) where the plaintiff alleged that a limited liability company and its sole owner had conspired with each other. *Garlock v. Hilliard*, 2000 NCBC 11 ¶¶ 2, 25. The owner of the limited liability company in *Garlock* was an individual, but the result is the same when the alleged co-conspirators are a parent corporation and its subsidiary, as in this case. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984) (applying the intra-enterprise conspiracy doctrine under federal antitrust law to hold that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise"); *State ex rel. Cooper v. McClure*, 2004 NCBC 8 ¶ 74 (citing *Copperweld* with approval and stating 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"); *see also Maurer v. Slickedit, Inc.*, 2005 NCBC 1 ¶ 61 (granting Rule 12(b)(6) motion to dismiss civil conspiracy claim where alleged conspiracy was between officers and directors of corporate defendant).

Because a parent and subsidiary corporation must be viewed as a single entity for purposes of a civil conspiracy claim under North Carolina law, Plaintiff has not alleged "an agreement between two or more individuals," and its claim for "civil conspiracy conversion" (Count V) therefore should be dismissed.

III. Plaintiff Fails to State a Claim For Violation of the North Carolina Unfair and Deceptive Trade Practices Act Because Its Allegations Constitute Nothing More than a Purported Breach of Contract and Are Speculative in Any Event.

Plaintiff's allegations fail to state a claim under the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, because the facts alleged do not rise to the level of an unfair or deceptive trade practice. Moreover, certain of the allegations relate to purported wrongs which *may* occur, but are not alleged to have occurred to this Plaintiff.

Plaintiff's most specific allegations in support of its claim for violation of Section 75-1.1 are contained in paragraph 34 of the Complaint, which states:

> By engaging in the above described conduct, Waste Management Carolinas committed an unfair and deceptive trade practice that was material in that Waste Management Carolinas made false promises deceptively and unfairly by obtaining monies from Plaintiff and Class Members for increases requiring the consent of the customers, without providing adequate notice of the reasons for the increased service charges and without obtaining consent for such increases misleading Plaintiff and Class Members to believe the increases were those the Waste Management Carolinas could increase unilaterally under the Terms of the Agreement all as part of an unfair, deceptive, and unlawful scheme and practice.

(Compl. ¶ 34.) The "above described conduct" referenced in paragraph 34 appears to refer to Plaintiff's general allegations that WMC increased its charges to BHB for reasons "other than those permitted under the contract" without meeting a contractual requirement to obtain the consent of BHB or provide "adequate notice" of the reasons for the increases. (*See, e.g.*, Compl. ¶¶ 1, 4-6, 10-11.)

Nowhere in the Complaint does Plaintiff allege a single affirmative untrue, deceptive, or fraudulent statement or any other specific unfair or deceptive act by WMC with respect to the BHB contract, the increased charges, or any other matter.

To state a claim for a violation of Section 75-1.1, a plaintiff must allege that (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; (3) that injured plaintiff. N.C. Gen. Stat. § 75-1.1; *see*, *e.g.*, *Esposito v. Talbert & Bright*, 641

S.E.2d 695, 697 (2007). In order to adequately plead "an unfair or deceptive act or practice," the plaintiff must allege "some type of egregious or aggravating circumstances." *Dalton v. Camp*, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (1999). A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under Section 75-1.1. *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992).

In *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), the Fourth Circuit held that the federal district court had erred in allowing a plaintiff's claim for violation of Section 75-1.1 to go forward in a case where "the crux of this matter is and always has been a contract dispute." *Broussard*, 155 F.3d at 346-47. Recognizing that a count for violation of the unfair trade practice statute "constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina," *id.* at 347 (quoting *Allied Distributors, Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993), the court endorsed judicial efforts to "correct this tendency . . . and to keep control of the extraordinary damages authorized by the UDTP" by requiring plaintiffs to plead and prove "substantial aggravating circumstances." *Id.* The court explained that allegations constituting a mere breach of contract do not suffice to allege an unfair and deceptive trade practice, because "[i]n a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted." *Id.* (quoting *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1981)).

The *Broussard* court concluded that "[g]iven the contractual center of this dispute, plaintiffs' UTDP claims are out of place." The same conclusion must be reached in this case. Plaintiff attempts to dress its allegations in the language of Section 75-1.1, but in fact they constitute nothing more than an allegation that WMC breached its contracts with BHB.

Although BHB states the boilerplate language alleging an unfair or deceptive act, it does not allege any specific facts to support this conclusory allegation. Conclusory allegations are not sufficient to state a claim under North Carolina law. *See, e.g.*, *Farrell*, 175 N.C. App. at 696, 625 S.E.2d at 134 (holding conclusory allegations of willful and wanton conduct insufficient to withstand a Rule 12(b)(6) motion to dismiss).

Moreover, certain of Plaintiff's allegations of unfair and deceptive trade practices are nothing more than speculation of wrongs that may occur. Plaintiff alleges, for example, that "Defendants *may* threaten to discontinue all waste collection services" when a customer complains about increased charges, and then asks the Court to enjoin Defendants from "threatening to discontinue services if increased charges are not paid." (Compl. ¶ 1 (emphasis added), Prayer for Relief ¶ E.) Yet Plaintiff stops far short of alleging that WMC actually made such a threat to BHB or to any other putative class member. This speculative allegation cannot constitute either an unfair or deceptive act or actual injury from such an act, and thus cannot support a claim for violation of Section 75-1.1.

Because Plaintiff has failed to plead any conduct that would constitute anything more than a purported breach of contract, the Court should dismiss Plaintiff's unfair and deceptive trade practice claim pursuant to Rule 12(b)(6).

CONCLUSION

For these reasons, Waste Management of Carolinas, Inc. respectfully moves for the 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 6th day of August 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 6th day of August 2008.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **MEMORANDUM IN 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:
_____X____	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:
_____X_____	Sending a copy hereof to the attorney for each said party by e-mail as follows:

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