NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 27739

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS HEALTHCARE SYSTEM,

Plaintiff,

v.

WACHOVIA BANK, NATIONAL ASSOCIATION d/b/a WACHOVIA GLOBAL SECURITIES LENDING and METROPOLITAN WEST SECURITIES, L.L.C. d/b/a WACHOVIA GLOBAL SECURITIES LENDING,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on motion of Defendants Wachovia Bank, N.A. and Metropolitan West Securities, L.L.C., both doing business as "Wachovia Global Securities Lending" (collectively, "Wachovia") to dismiss counts II through VI of the Amended Complaint. Pursuant to BCR 15.2, Plaintiff, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System ("CHS"), submits the following response.

INTRODUCTION

Although this case arises in the context of securities lending, at its core, this case is about Wachovia's failure to provide competent investment advice and, indeed, its provision of false and misleading investment information, to CHS. As alleged in the Amended Complaint, Wachovia knowingly made reckless investment decisions with CHS's money. Moreover, Wachovia failed to disclose and/or hid material information relating to its investment decisions and negligently failed to follow the instructions of its customer, CHS. Based on this conduct, CHS instituted this action against Wachovia, stating claims for breach of contract, negligence, breach of fiduciary duty, unfair and deceptive trade practices, and violations of the North Carolina Securities Act and the North Carolina Investment Advisors Act.

In response to these allegations, Wachovia has moved to dismiss all the claims asserted against it other than the breach of contract claim, arguing that it had absolutely no duty to CHS other than to fulfill the objective requirements of the contract by which it was retained as CHS's agent and investment advisor. In other words, Wachovia has taken the position that in providing investment advice to its customers, it has no independent duty of care, loyalty, or good faith to act competently and in the best interests of its customers. Moreover, Wachovia has taken the position that it does not have any fiduciary obligation to its customers, despite the fact that it has been entrusted with broad discretion to make multi-million-dollar investment decisions on their behalf.

As shown below, Wachovia's position is wrong, both in law and fact. Wachovia knowingly undertook an agency relationship with CHS. Specifically, Wachovia was retained by CHS to provide it with competent and professional investment advice and to

actively manage its investment portfolio. This relationship, as a matter of law, gave rise to independent duties of care, loyalty, and good faith that go well beyond the mere objective parameters of the parties' contract. Moreover, Wachovia did not seek to limit these duties in its contract with CHS and, indeed, expressly acknowledged to CHS its potential liability in tort. As a result, CHS's negligence claim is proper and not subject to dismissal.

Furthermore, by virtue of the agency relationship established between Wachovia and CHS, and the broad discretion Wachovia was given to select multi-million-dollar investments for CHS, Wachovia plainly undertook a fiduciary relationship with CHS. Indeed, agents like Wachovia, as a matter of law, owe a fiduciary duty to their principals. To suggest otherwise in this context is contrary to law and public policy. CHS's breach of fiduciary duty claim is therefore proper.

With respect to CHS's claim for unfair and deceptive trade practices, Wachovia ignores significant portions of CHS's Amended Complaint. Among other things, CHS has alleged that Wachovia made material misrepresentations about the operation of, and risks associated with, its securities lending program. CHS has further alleged that Wachovia engaged in deceptive conduct to mislead CHS as to the character and liquidity of its investments. Such improper conduct is independent of, and well outside of, any breach of contract claim and, indeed, is unfair and deceptive *per se*. Moreover, such misrepresentations were independent of the underlying securities transaction and therefore not excluded from Chapter 75. Accordingly, CHS's unfair and deceptive trade practices claim is not subject to dismissal.

Finally, contrary to Wachovia's motion, CHS's claims for violations of the North Carolina Securities Act and the North Carolina Investment Advisors Act are pleaded with more than the requisite particularity to survive a motion to dismiss. As set forth in CHS's Amended Complaint, Wachovia misrepresented, among other things, the value and liquidity of the Sigma Finance bonds it purchased on CHS's behalf. CHS's Amended Complaint alleges when these misrepresentations were made, how they were made, and who made them. Given the relationship between the parties and Wachovia's control of much of the relevant information, such allegations are more than sufficient at the pleading stage and CHS's statutory claims are not subject to dismissal.

In sum, CHS has properly pleaded each claim alleged in this action, and each claim, as a matter of law, states a viable claim for relief. Defendants' Motion to Dismiss, therefore, should be denied in its entirety.

PERTINENT FACTS ALLEGED IN THE COMPLAINT

CHS is a public body and not-for-profit corporation operating healthcare and hospital facilities throughout North and South Carolina. (Am. Comp. ¶ 1.) CHS has historically maintained multiple investment accounts at Wachovia. (Am. Comp. ¶ 9.) As Wachovia knows, CHS has always employed a conservative investment strategy with its investments (Am. Comp. ¶¶ 9-11.)

Beginning in late 2003, Wachovia began soliciting CHS to participate in a program known as "securities lending." (Am. Comp. ¶ 12.) In a typical securities lending program, securities held in an investor's portfolio are lent out to a securities borrower, and cash is received from the security borrower as collateral. (Am. Comp. ¶ 13.) This cash collateral is then invested by the security lender's agent, typically an

investment bank, such as Wachovia. (Am. Comp. ¶ 13.) A portion of the proceeds are returned to the security borrower, and the remaining profit, if any, is divided between the security lender and its agent, the investment bank. (Am. Comp. ¶ 13.)

When initially approached about securities lending, CHS told Wachovia that this program did not seem compatible with CHS's conservative investment approach and that it was concerned about how the cash collateral would be invested. (Am. Comp. ¶ 14.) In response, Wachovia told CHS that the securities lending program was very low-risk and that the cash collateral would only be invested in very safe, conservative instruments that would protect principal and provide for constant liquidity, such that the cash collateral could easily and quickly be obtained if necessary. (Am. Comp. ¶¶ 14-15.)

Relying on Wachovia's assurances, on February 9, 2005, Wachovia and CHS entered into a Securities Lending Agency Agreement (the "SLAA" or "Agreement"). (Am. Comp. ¶ 17.) In the course of inducing CHS to enter into the SLAA, Wachovia repeatedly represented that the SLAA provided a low-risk way for CHS to earn additional income, as investments made during the securities lending program (the "Program") would be made only in high-quality, extremely low risk instruments. (Am. Comp. ¶¶ 12, 15, 18.) A copy of the SLAA is attached hereto as Exhibit A and incorporated by reference into CHS's Amended Complaint. (Am. Comp. ¶ 17.)

The SLAA expressly created an agency relationship between Wachovia and CHS. (SLAA, p. 1.) It appointed Wachovia as CHS's agent for administering the Program. (SLAA, p. 1.) Importantly, it further entrusted Wachovia to provide investment advice to CHS and contemplated that Wachovia would actively manage CHS's securities lending portfolio. As part of the SLAA, Wachovia also explicitly agreed to be liable to CHS for

any losses "occasioned by [Wachovia's] negligence or willful misconduct." (SLAA, p. 7, ¶ 12.2 (emphasis added)).

Pursuant to the SLAA, Wachovia and CHS agreed to share profits generated under the program. (Am. Comp. ¶ 22.) In particular Wachovia was entitled to keep 35% of any gains generated from the investments. (Am. Comp. ¶ 22.)

In addition to hiring Wachovia as an agent to manage CHS's collateral portfolio, the SLAA also contains certain objective guidelines stated as "Securities Lending Investment Guidelines." (the "Investment Guidelines") (*See* SLAA, Attachment B.) The Investment Guidelines provide:

> There are three objectives to managing the collateral portfolio. The primary objective is to provide safety of principal while earning a positive spread to the rebate rate on securities lent. The second objective is to provide adequate daily liquidity for the collateral portfolio, and the third objective is to obtain the highest yield possible within the parameters of these guidelines.

(SLAA p. 1.) These Investment Guidelines provide minimum criteria for each particular type of investment made. (*See* SLAA. pp. 1-3.)

Obviously, however, the Investment Guidelines leave tremendous discretion with Wachovia, as the investment manager of CHS's money, to select investments. The proper exercise of this discretion was of the utmost importance to CHS, as CHS bore the risk of any decline in value of an investment made by Wachovia. (Am. Comp. ¶¶ 21-22.) In short, Wachovia was retained to actively manage the account knowing that CHS bore all the risk of a loss, but that Wachovia shared in any gain. (Am. Comp. ¶¶ 23-24.)

Following the execution of the SLAA, Wachovia began performing its duties as CHS's agent, administering CHS's securities lending program, and making discretionary determinations about investments to purchase for the program. (Am. Comp. ¶¶ 16-18.)

In doing so, Wachovia presumably exercised the discretion vested in it by virtue of its agency relationship with CHS. Among other things, Wachovia exercised this discretion in placing $15 million of CHS's funds into bonds issued by a structured investment vehicle known as Sigma Finance, Inc. (the "Sigma Finance Bonds"). (Am. Comp. ¶ 29.)

Under the SLAA, CHS could ask Wachovia to terminate any outstanding loan at any time and require all outstanding securities loaned to be returned within 5 days. (Am. Comp. ¶¶ 25-26.) On September 4, 2008, given concerns about the unstable market conditions, CHS elected to end the program, and gave Wachovia notice of this decision on September 5, 2008, requesting immediate return of all loaned securities, or a schedule of dates of return if an immediate return was not possible. (Am. Comp. ¶¶ 27-28.) Wachovia failed to comply with this request. (Am. Comp. ¶ 29.) Additionally, in doing so, Wachovia provided CHS with inaccurate and misleading information about the Sigma Finance Bonds. (Am. Comp. ¶¶ 30-35.)

When CHS requested termination of the Program, Wachovia was reporting to CHS that the investment in Sigma Finance Bonds was worth $14.25 million. (Am. Comp. ¶ 30.) Nonetheless, Wachovia took no immediate action to sell the Sigma Finance Bonds. Instead, Wachovia continued to hold the bonds until after October 1, 2008, at which time Sigma Finance announced that it would stop trading and be placed in receivership.[1] Although Wachovia had not raised any liquidity or value issues with this investment and, indeed, continued to represent to CHS that this investment was appropriate for the Program, on October 6, 2008, Wachovia suddenly reduced the market

[1] Sigma Finance Plans to Stop Trading, Making Payments, http://www.bloomberg.com/apps/news?pid=20601014&sid=aDwkEanREric (last visited May 27, 2009).

value of the Sigma Finance Bonds to $1.8 million, and subsequently has reduced the market value to approximately $750,000. (Am. Comp. ¶¶ 31-35.) Most recently, Wachovia has informed CHS that it does not know the value of the Sigma Finance Bonds, and cannot predict their worth. (Am. Comp. ¶ 36.)

The Sigma Finance Bonds were issued by a structured investment vehicle, and Wachovia knew or should have known that these Bonds were not a safe or liquid.[2] (Am. Comp. ¶ 40.) Wachovia misrepresented the value of the Sigma Finance Bonds to CHS, making it impossible for CHS to assess their true value, and deceptively hid material information from CHS about the Sigma Bonds until after CHS asked to end the Program. (Am. Comp. ¶¶ 41-42.)

CHS filed its Amended Complaint on April 7, 2009. Defendants filed their Answer to Amended Complaint and Motion to Dismiss on May 7, 2009.

LEGAL STANDARD

Wachovia correctly states that a motion to dismiss should be allowed only "[w]hen the [c]ourt's consideration reveals that there is no set of facts on which the plaintiff could prevail." (Defendants' Memorandum pp. 6-7, *citing Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 300 (1976).) Indeed, "[a] claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts

[2] Upon information and belief, Wachovia was or should have been well aware of the instability of Sigma Finance well before September 5, 2008. Although Wachovia repeatedly makes the unsupported suggestion in its Memorandum that Sigma Finance was a reputable and strong investment, it is anticipated that discovery in this matter will show that Wachovia, along with certain other investment banks, well knew that the tightening credit markets in the spring of 2008 made Sigma Finance a particularly risky investment, unsuitable for inclusion in CHS's portfolio. Wachovia, however, failed as a competent investment advisor and fiduciary to provide this highly material information to CHS or otherwise competently discuss or manage this investment in CHS's portfolio.

in support of his claim that would entitle him to relief." *Harrold v. Dowd*, 149 N.C. App. 777, 780, 561 S.E.2d 914, 917 (2002).

In the context of this particular motion, it is also important to note that North Carolina is a "notice pleading" jurisdiction. In other words, "a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.'" *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970).

It is true that some claims, such as fraud, must be pled with an enhanced standard of particularity. This enhanced "requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation, and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). Importantly, this standard is particular to fraud claims, and should be interpreted and applied reasonably in the context of the actual claim and facts. For example, where a relationship of trust exists between the parties, such as between a customer and a financial advisor, less particularity is required *Id.* at 85, 678-679. *See, e.g., Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186-187 (2007) (allegations of fiduciary relationship, forgery, and deception sufficient particularity to maintain action for constructive fraud). In any event, "[i]t is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constituted facts." *Carver v. Roberts,* 78 N.C. App. 511, 513, 337 S.E.2d 126, 127 (1985) (quoting *Brooks Equip. & Mfg. Co. v. Taylor,* 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949)).

ARGUMENT

I. CHS HAS PROPERLY ASSERTED A CLAIM FOR NEGLIGENCE AGAINST WACHOVIA IN THAT CHS HAS ALLEGED THAT WACHOVIA BREACHED INDEPENDANT DUTIES OF CARE OWED TO CHS, SEPERATE AND APPART FROM ITS CONTRACTUAL OBLIGATIONS.

Wachovia argues in its motion to dismiss that because it was appointed to make investment decisions pursuant to a contract, any claims in tort relating to its investment advice are barred. In essence, Wachovia argues that no matter what it did, or did not do, with respect to investing CHS's money, it can never be liable for negligence. Taken to its logical conclusion, Wachovia is arguing that it is insulated from tort liability for its investment advice to any customer with which it has a contract appointing it as an investment advisor. As shown below, this expansive interpretation of the law is not correct.

While it is true that under certain circumstances the parties to a contract can limit their relationship to performance of the contract, where the contract establishes an agency relationship, the performing party undertakes duties that go well beyond mere performance of the contract. Indeed, it is well recognized that "[t]he law imposes on every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence...[t]he duty to exercise due care may arise out of contractual relations." *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584 (1979). Simply put, parties can enter into a contractual relationship that creates a duty between them, requiring the exercise of due care. *Dixie Fire & Casualty Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 129, 143 S.E.2d 279, 285 (1965), *citing* 38 AM.

JUR. *Negligence* § 20. As aptly stated by the North Carolina Supreme Court, "[t]he sound rule appears to be that where there is a general duty, even though it arises from the relation created by, or from the terms of, a contract, and that duty is violated, either by negligent performance or negligent nonperformance, the breach of the duty may constitute actionable negligence." *Id.* "The contract creates a relationship. The relationship so created, in some instances, imposes a legal duty. It is the breach of the legal duty thus imposed, and not the breach of the contract, that gives rise to an action in tort for negligence." *Livingston v. Essex Inv. Co.*, 219 N.C. 416, 14 S.E.2d 489, 496. (1941) (Barnhill, J., dissenting) (recognizing that an agency relationship, although created by contract, imposes duties beyond contract).

Here, there is no doubt that the relationship contemplated by the SLAA contemplated duties that went well beyond mere contract. Perhaps most importantly, the SLAA itself (as drafted by Wachovia) explicitly recognizes that Wachovia is not absolved from tort liability. In defining the scope of Wachovia's liabilities for losses under SLAA, the SLAA explicitly recognizes that Wachovia is liable for claims arising from a "loss occasioned by [Wachovia's] negligence or willful conduct. (SLAA, p. 7, ¶ 12.2 (emphasis added).) Had Wachovia not undertaken a duty of care under the SLAA, certainly it would not have included such language. Indeed, by including such language, Wachovia arguably necessitated that any performance-based claim include a negligence claim.

Moreover, Wachovia's assertion that CHS's breach of contract claim and negligence claim are merely duplicative of one another misses the mark. Here, it is undeniable that Wachovia was retained by CHS to act as its agent and to exercise broad

discretion in providing CHS with competent and truthful investment advice. *See Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005) ("An agent is one who, with another's authority, undertakes the transaction of some business or the management of some affairs on behalf of such other, and to render an account of it."). While the SLAA sets forth certain objective parameters for Wachovia to follow, Wachovia also undertook a duty to actively advise and manage CHS's investments on a daily basis. In doing so, Wachovia undertook a duty of due care and competence. It is the breach of these duties that form the basis of CHS's negligence claims.

Specifically, while there is some similarity of claims at the initial pleading stage, CHS has alleged that Wachovia failed to represent to it the true nature of the Program and to exercise reasonable care in the selection of investments, even if those investments fell within the Investment Guidelines. Moreover, CHS has alleged that Wachovia failed to keep it apprised of risks and changes in its investments, even if those risks and changes were beyond what was required to be reported under the SLAA. CHS has further alleged that Wachovia provided false and misleading information about its investments, which is prohibited by common law. Finally, CHS has alleged that Wachovia failed to provide it with competent and truthful advice as to the sale of the Sigma Investment, an obligation stemming from common law. (Am. Comp. ¶ 55.)

Accordingly, Wachovia's argument that this is a mere breach of contract case is simply wrong. (*See* Defendants' Memorandum pp. 6-7, *citing Spillman v. American Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 742 (1992) ("a tort action does not lie against a party to a contract who simply fails to properly perform the

terms of the contract.").) Rather, as recognized by the very cased cited by Wachovia, this is a case in which the plaintiff has alleged a duty owed to it by the defendants in addition to any duty owed under a contract. *Id.* at p. 6, *citing US LEC Communications, Inc. v. Qwest Communications Corp.*, No. 3:05-CV-00011, 2006 WL 1367383, at *2 (W.D.N.C. May 15, 2006). As such, CHS's negligence claims are proper and not subject to dismissal.

II. CHS HAS PROPERLY ASSERTED A CLAIM FOR BREACH OF FIDUCIARY DUTY IN THAT IT HAS ALLEGED THAT WACHOVIA UNDERTOOK A FIDUCIARY RELATIONSHIP WITH CHS BY AGREEING TO MANAGE ITS INVESTMENT ACCOUNTS.

The SLAA created a special relationship between Wachovia and CHS – a principal/agent relationship and, by virtue of that relationship, a fiduciary relationship. The SLAA sets forth parameters for the relationship, and reposes a relationship of trust by CHS – the principal – in the agent – Wachovia. CHS granted Wachovia authority to act for it, and CHS exercised some control over Wachovia's actions by providing parameters in the Investment Guidelines, and trusting Wachovia to adhere to those guidelines, and to also use its best discretion and due care. *See Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990) (authority and control essential elements of principal/agent relationship); *see also Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397 (1987); *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005) ("An agent is one who, with another's authority, undertakes the transaction of some business or the management of some affairs on behalf of such other, and to render an account of it."). Simply put, Wachovia was made CHS's agent, with all the obligations appurtenant thereto.

Because of this principal/agent relationship, Wachovia owed CHS a fiduciary duty. While it is true that "parties to a contract do not thereby become each others' fiduciaries," *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992), a fiduciary relationship exists "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence[.]" *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990), *quoting Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Indeed, courts have routinely and typically held that in a principal/agent relationship, the agent owes a fiduciary duty to the principal. *See, e.g., S.N.R. Management Corp. v. Danube Partners 141, LLC*, ___ N.C. App. ___, 659 S.E.2d 442, 451 (2008) (noting fiduciary duty arising from "legal relationships" such as principal/agent); *In re Sechrest*, 140 N.C. App. 464, 470, 537 S.E.2d 511, 517 (2000) (principal/agent relationship can be fiduciary relationship).

"A claim for breach of fiduciary duty is essentially a negligence or professional malpractice claim," *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 892 (1986) (internal punctuation omitted), and courts routinely analyze breaches of fiduciary duty as negligence matters. CHS's claim for fiduciary duty against Wachovia is for Wachovia's breach of its duties as CHS's agent – principally, for failing to use due care and competence in investing CHS's money. (Am. Comp. ¶ 51(b).) The claim is not simply that Wachovia breached the terms of the SLAA; rather, as discussed above, the claim is that Wachovia breached a duty arising from the relationship created by the SLAA. This claim is distinct, from

CHS's breach of contract claim against Wachovia. As such, the claim is not a claim for breach of contract couched as a breach of fiduciary duty action, as Wachovia claims. The claim is a separate claim for breach of a duty imposed by the agency relationship created by the SLAA.

Finally, the breadth of the proposition being argued by Wachovia is worth noting again. In essence, Wachovia is asserting, both in respect to CHS's fiduciary duty claim and negligence claim, that financial institutions conducting business in North Carolina do not owe any duties to their customers beyond mere contractual terms. Through this argument, they are asking this Court to absolve them of any common law duty of care or fiduciary obligation in managing their customers money. This is not, and should not be, the law of this State.

III. CHS HAS PROPERLY ALLEGED CONDUCT THAT COULD GIVE RISE TO A CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES.

Wachovia seeks to dismiss CHS's claims for unfair and deceptive trade practices arguing that "securities transactions" are outside the scope of the North Carolina's Unfair and Deceptive Trade Practices Act (the "UDTPA"). (Defendants' Memorandum p. 9.) While Wachovia is correct that the UDTPA does not apply specifically to "securities transactions," the UDTPA does apply to unfair and deceptive conduct attendant to investment advice and the investor/investment advisor relationship. Because CHS has alleged such conduct, its UDTPA claim is not subject to dismissal.

Although CHS's claims arise in the context of the purchase of a particular security (i.e. the purchase of the Sigma Finance Bonds), CHS's claims go well beyond improprieties at the time of purchase. Among other things, CHS's claims explicitly seek redress for alleged misrepresentations made by Wachovia relating generally to its

securities lending program; Wachovia's knowing failure to report material information to CHS relating to its securities lending program; Wachovia's failure to actively manage CHS's portfolio; and Wachovia's abdication of its fiduciary responsibilities. (Am. Comp. ¶ 58.)

Simply put, CHS has alleged conduct that goes well beyond the one securities transaction at issue. In fact, CHS has alleged conduct that regularly gives rise to UDTPA liability, such as misrepresentation and breach of fiduciary duty in the general termination of the relationship with Wachovia as well as Wachovia's deceptive conduct in carrying out its duties. *See Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367, 533 S.E.2d 827, 832 (2000) (noting breach of fiduciary duty gives rise to claim under UDTPA). Indeed, some courts have held that the purchase of investment advice is not, in and of itself, part of a "securities transaction." *See Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F. Supp. 171, 175-177 (N.D. Cal. 1977) (purchase of investment advice through investment service not actionable under 10(b)(5)). Accordingly, misrepresentations made to induce CHS's participation in the securities lending program or to prevent it from quitting the program are properly pleaded as unfair trade practices.

As stated above, Wachovia is entitled to dismissal only if "there is no set of facts on which the plaintiff could prevail." *Newton*, 291 N.C. at 111, 229 S.E.2d at 300. Because CHS could recover damages under the UDTPA for causes of action unrelated to the actual "securities transactions," Wachovia is not entitled to dismissal of this claim.

IV. CHS HAS PLEADED ITS CLAIM FOR VIOLATION OF THE NORTH CAROLINA SECURITIES ACT WITH THE NECESSARY PARTICULARITY.

Wachovia claims that the heightened pleading standard of North Carolina Rule of Civil Procedure 9(b) applies to claims asserted under the North Carolina Securities Act, and that CHS is required to identify, for each violation of the act by Wachovia, the requisite facts with "particularity." As show below, however, CHS has pleaded all the requisite elements of its claim with the necessary particularity.

CHS has, in fact, adequately pleaded the elements of a fraud, which more than satisfy the requirements of a claim under the North Carolina Securities Act, *see* N.C. GEN. STAT. § 78A-56(2) (2007). In order to adequately allege fraud, a complaint should allege "time, place and content of the fraudulent representations, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). *See also Payne v. North Carolina Farm Bureau Mutual Ins. Co.*, 67 N.C. App. 692, 695-696, 313 S.E.2d 912, 914-915 (1984) (overturning trial court's dismissal of fraud claim when alleged with requisite particularity); *Dickinson v. Pastor*, 149 N.C. App. 232, 2002 WL 372861 *3, No. COA01-372 (N.C. Ct. App. March 5, 2002).

Among other things, CHS has pleaded that Wachovia presented CHS with monthly statements that were false – namely, misrepresenting the value of the Sigma Finance Bonds as nearly par, when in fact the bonds were illiquid and had a market value far below par, if they could be sold at all. (*See* Am. Comp. ¶¶ 29, 30, 35.)

The time of the fraudulent representation by Wachovia was contemporaneous with its provision of monthly statements, including its statement on September 5, 2008. (Am. Comp. ¶¶ 28, 30.)

The fraudulent representation was made by Wachovia to CHS. (Am. Comp. ¶ 35.)

The content of a fraudulent representation made by Wachovia to CHS was that the Sigma Finance Bonds were still worth near their par value, $15 million, when in fact Wachovia knew that the Sigma Finance Bonds were severely impaired and illiquid. (Am. Comp. ¶¶ 29, 30, 32, 35, 42.)

The identity of the particular Wachovia employee preparing the statements is unknown to CHS, and is, in any event, immaterial to CHS's claims.

Wachovia hoped to induce CHS to hold the Sigma Finance Bonds and continue the Program through the false representations, as Wachovia could continue to share in the profits, but not losses or market risk, under the program. (Am. Comp. ¶¶ 13, 21, 23, 24, 68.)

Finally, CHS has alleged that the Sigma Finance Bond was a security (*see* Am. Comp. ¶¶ 29, 40), and that Wachovia did not provide it with accurate information regarding the value of the Sigma Finance Bonds (*see* Am. Comp. ¶¶ 31-33) – thus preventing CHS from protecting itself.

As shown above, CHS has pleaded the required elements for a claim under the North Carolina Securities Act with the particularity demanded by North Carolina Rule of Civil Procedure 9(b). As such, Wachovia's motion to dismiss CHS's claims under the North Carolina Securities Act should be denied.

V. CHS HAS PLEADED ITS CLAIM FOR VIOLATION OF THE NORTH CAROLINA INVESTMENT ADVISORS ACT WITH SUFFICIENT PARTICULARITY.

Wachovia repeats its argument regarding the North Carolina Securities Act with regard to CHS's allegations under the North Carolina Investment Advisors Act. Wachovia claims that for a claim under the North Carolina Investment Advisors Act to avoid dismissal, a plaintiff must plead the requisite elements with the particularity required by Rule 9(b).

CHS has pleaded the required elements with sufficient particularity. As Wachovia correctly notes, this claim is based on the same facts as CHS's North Carolina Securities Act claim. As discussed above, CHS, in its Amended Complaint, alleged "time, place and content of the fraudulent representations, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry,* 302 N.C. at 85, 273 S.E.2d at 678. Therefore, just as CHS's claim under the North Carolina Securities Act should not be dismissed, neither should its claim, based upon identical well-pleaded facts, under the North Carolina Investment Advisors Act.

CONCLUSION

CHS has pleaded facts giving rise to claims for negligence, breach of fiduciary duty, and unfair and deceptive trade practices. Moreover, CHS has pleaded its claims under the North Carolina Securities Act and the North Carolina Investment Advisors Act with the requisite level of specificity. As such, CHS's Amended Complaint states six valid claims for relief against Defendants, and Defendants' Motion to Dismiss should be denied.

In the alternative, should this Court determine that any of CHS's claims are subject to dismissal, CHS respectfully requests that it be permitted to amend its pleadings, as liberally permitted by North Carolina Rule of Civil Procedure 15, as such amendment would be without prejudice to Defendants and would further the ends of justice.

Respectfully submitted, this the 27th day of May, 2009.

/s/ Robert R. Marcus
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** complies with the requirements of BCR 15.8.

This 27th day of May, 2009.

/s/ Robert R. Marcus
Robert R. Marcus

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was served on counsel for Defendants through the Court's electronic filing system, and by depositing a copy thereof in the United States Mail, First Class postage prepaid, addressed as follows:

Cory Hohnbaum
KING & SPALDING LLP
227 West Trade Street, Suite 600
Charlotte, NC 28202

Mary J. Hackett
K. Issac deVyver
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435 Sixth Avenue
Pittsburgh, PA 15219

This 27th day of May, 2009.

/s/ Robert R. Marcus
Robert R. Marcus